U.S. Citizenship and Immigration Services

Policy Manual

Current as of November 3, 2025

The USCIS Policy Manual is the agency's centralized online repository for USCIS' immigration policies. The USCIS Policy Manual will ultimately replace the Adjudicator's Field Manual (AFM), the USCIS Immigration Policy Memoranda site, and other policy repositories.

About the Policy Manual

The USCIS Policy Manual is the agency's centralized online repository for USCIS' immigration policies. The Policy Manual is replacing the Adjudicator's Field Manual (AFM), the USCIS Immigration Policy Memoranda site, and other USCIS policy repositories. The Policy Manual contains separate volumes pertaining to different areas of immigration benefits administered by the agency, such as citizenship and naturalization, adjustment of status, and nonimmigrants. The content is organized into different volumes, parts, and chapters.

The Policy Manual provides transparency of immigration policies and furthers consistency, quality, and efficiency consistent with the USCIS mission. The Policy Manual provides all the latest policy updates; an expanded table of contents; keyword search function; and links to the Immigration and Nationality Act and Code of Federal Regulations, as well as public use forms. The Policy Manual contains tables and charts to facilitate understanding of complex topics. The Policy Manual also contains all historical policy updates.

The Policy Manual contains the official policies of USCIS and assists immigration officers in rendering decisions. The Policy Manual is to be followed by all USCIS officers in the performance of their duties but it does not remove their discretion in making adjudicatory decisions. The Policy Manual does not create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

How to use the USCIS Policy Manual website.

Adjudicator's Field Manual Transition

USCIS is retiring its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures. We are working to update and incorporate all AFM content into the USCIS Policy Manual. Until then, we have moved any remaining AFM content in PDF format to its corresponding Policy Manual Part. To the extent that a provision in the Policy Manual conflicts with remaining AFM content or Policy Memoranda, the updated information in the Policy Manual prevails. If you have questions or concerns about any discrepancies among these resources, contact PolicyFeedback@uscis.dhs.gov.

To find remaining AFM content, see the crosswalk (PDF, 304.67 KB) between the AFM and the Policy Manual.

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Current as of November 03, 2025

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Updates(326)

POLICY ALERT - Admission for Adjustment of Status under INA 245(a)

November 03, 2025

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to reflect the conclusion by the U.S. Supreme Court in *Sanchez v. Mayorkas*, 141 S.Ct. 1809 (2021) that a grant of U nonimmigrant status to an alien who is in the United States is not an “admission” for purposes of adjustment of status under section 245(a) of the Immigration and Nationality Act (INA).

Read More

Affected Sections

7 USCIS-PM B.2 - Chapter 2 - Eligibility Requirements

Technical Update - Transition to Electronic Payments

October 28, 2025

This technical update incorporates the policy guidance that U.S. Citizenship and Immigration Services (USCIS) announced August 29, 2025, on the transition from accepting paper-based forms of payment to requiring electronic payment. This update involves the publication of two new forms, the Authorization for ACH Transactions (Form G-1650) and Exemption for Paper Fee Payment (Form G-1651). This guidance became effective October 28, 2025.

Affected Sections

1 USCIS-PM B.3 - Chapter 3 - Fees

POLICY ALERT - Revising Guidance on Naturalization Civics Educational Requirement

October 20, 2025

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to implement the 2020 Naturalization Civics Test with some modifications (“2025 Naturalization Civics Test”), which helps ensure proper assimilation of lawful immigrants into the United States and promote a unified American identity and attachment to the Constitution, laws, and founding principles of the United States. This update also provides clarification on the requirements an alien must demonstrate to sufficiently establish knowledge and understanding of civics as required under section 312 of the Immigration and Nationality Act (INA).

Read More

Affected Sections

12 USCIS-PM E.1 - Chapter 1 - Purpose and Background

12 USCIS-PM E.2 - Chapter 2 - English and Civics Testing

POLICY ALERT - Family-Based Immigration: Spousal Petitions

October 17, 2025

U.S. Citizenship and Immigration Services (USCIS) is issuing guidance in the USCIS Policy Manual on qualifying spousal relationships for purposes of family-based immigrant visa petitions under the Immigration and Nationality Act (INA).

Read More

Affected Sections

6 USCIS-PM B.6 - Chapter 6 - Spouses

POLICY ALERT - Naturalization Guidance for Alien Service Members

September 26, 2025

U.S. Citizenship and Immigration Services (USCIS) is issuing guidance in the USCIS Policy Manual to explain why uncharacterized discharges no longer meet the requirement of a separation “under honorable conditions” for former alien service members to naturalize under Sections 328 and 329 of the Immigration and Nationality Act (INA), and to explain changes in process for former alien service members who had been receiving naturalization interviews and oath ceremony services at land ports of entry.

Read More

Affected Sections

12 USCIS-PM I.1 - Chapter 1 - Purpose and Background

12 USCIS-PM I.2 - Chapter 2 - One Year of Military Service during Peacetime (INA 328)

12 USCIS-PM I.3 - Chapter 3 - Military Service during Hostilities (INA 329)

12 USCIS-PM I.5 - Chapter 5 - Application and Filing for Service Members (INA 328 and 329)

POLICY ALERT - Voter Registration at Administrative Naturalization Ceremonies

August 29, 2025

U.S. Citizenship and Immigration Services (USCIS) is revising policy guidance in the USCIS Policy Manual emphasizing the non-partisan nature of voter registration services offered to new citizens at administrative naturalization ceremonies.

Read More

Affected Sections

12 USCIS-PM J.1 - Chapter 1 - Purpose and Background

12 USCIS-PM J.5 - Chapter 5 - Administrative Naturalization Ceremonies

POLICY ALERT - Good Moral Character, Unlawful Voting, and False Claim to U.S. Citizenship in the Naturalization Context

August 29, 2025

U.S. Citizenship and Immigration Services (USCIS) is revising policy guidance in the USCIS Policy Manual on false claims to U.S. citizenship (including those made during the voter registration process), unlawful registration to vote, and unlawful voting in the naturalization context as part of USCIS' implementation of recent executive orders.

Read More

Affected Sections

12 USCIS-PM F.1 - Chapter 1 - Purpose and Background

12 USCIS-PM F.5 - Chapter 5 - Conditional Bars for Acts in Statutory Period

POLICY ALERT - Transition to Electronic Payments

August 29, 2025

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual on the transition from accepting paper-based forms of payment to accepting only credit or debit cards and the new Authorization for ACH Transactions (Form G-1650). This guidance becomes effective October 28, 2025.

Read More

Affected Sections

1 USCIS-PM B.3 - Chapter 3 - Fees

POLICY ALERT - Reconciliation Bill (H.R.-1) and Submission of Fees

August 21, 2025

U.S. Citizenship and Immigration Services (USCIS) is updating the policy guidance in the USCIS Policy Manual to address fees not eligible for fee waivers in accordance with the One Big Beautiful Bill Act (H.R.-1), and applicable dates for determining the proper fees and filing deadlines for benefit requests.

Read More

Affected Sections

1 USCIS-PM B.4 - Chapter 4 - Fee Waivers and Fee Exemptions

1 USCIS-PM B.6 - Chapter 6 - Submitting Requests

POLICY ALERT - False Claim to U.S. Citizenship

August 20, 2025

U.S. Citizenship and Immigration Services (USCIS) is revising policy guidance in the USCIS Policy Manual regarding the false claim to U.S. citizenship ground of inadmissibility.

Read More

Affected Sections

8 USCIS-PM K.2 - Chapter 2 - Determining False Claim to U.S. Citizenship

8 USCIS-PM K.4 - Chapter 4 - Exemptions, Exceptions, and Waivers

POLICY ALERT - Clarifying Discretionary Factors in Certain Immigration Benefit Requests

August 19, 2025

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual regarding the factors that officers may consider in certain benefit requests where an exercise of discretion is required, including factors relating to aliens' past requests for parole and any involvement in anti-American or terrorist organizations.

Read More

Affected Sections

1 USCIS-PM E.8 - Chapter 8 - Discretionary Analysis

2 USCIS-PM A.4 - Chapter 4 - Extension of Stay, Change of Status, and Extension of Petition Validity

2 USCIS-PM F.8 - Chapter 8 - Change of Status, Extension of Stay, and Length of Stay

7 USCIS-PM A.10 - Chapter 10 - Legal Analysis and Use of Discretion

10 USCIS-PM A.4 - Chapter 4 - Adjudication

POLICY ALERT - Revising Age Calculation Under the Child Status Protection Act

August 08, 2025

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to clarify when an immigrant visa becomes available for the purpose of calculating Child Status Protection Act (CSPA) age in certain situations. This guidance becomes effective August 15, 2025.

Read More

Affected Sections

7 USCIS-PM A.7 - Chapter 7 - Child Status Protection Act

POLICY ALERT - Revising Guidance for Pertinent Visa Categories to Keep Men Out of Women's Sports

August 04, 2025

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to support and align with Executive Order (EO) 14201, Keeping Men Out of Women's Sports. EO 14201 directs the Secretary of Homeland Security to develop policies to prevent the entry of male athletes seeking to compete in women's sports.

Read More

Affected Sections

2 USCIS-PM M.4 - Chapter 4 - O-1 Beneficiaries

6 USCIS-PM F.2 - Chapter 2 - Extraordinary Ability

6 USCIS-PM F.5 - Chapter 5 - Advanced Degree or Exceptional Ability

POLICY ALERT - Refugee and Asylee Adjustment of Status Interview Criteria

August 01, 2025

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to provide clarification on the interview criteria for aliens who are asylees or refugees and applying for adjustment of status.

Read More

Affected Sections

7 USCIS-PM L.5 - Chapter 5 - Adjudication Procedures

7 USCIS-PM M.5 - Chapter 5 - Adjudication Procedures

POLICY ALERT - Family-Based Immigrants

August 01, 2025

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to explain requirements associated with the screening, vetting, and adjudication of family-based immigrant visa petitions to include eligibility criteria, filing, interviews, and decisions.

Read More

Affected Sections

6 USCIS-PM B.1 - Chapter 1 - Purpose and Background

6 USCIS-PM B.2 - Chapter 2 - General Eligibility Requirements

6 USCIS-PM B.3 - Chapter 3 - Filing

6 USCIS-PM B.4 - Chapter 4 - Documentation and Evidence

6 USCIS-PM B.5 - Chapter 5 - Adjudication of Family-Based Petitions

POLICY ALERT - Clarifying Refugee and Asylee Marriage Validity

June 24, 2025

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to update agency guidance on when a valid marriage between a principal asylee or principal refugee and a derivative spouse has taken place.

Read More

Affected Sections

4 USCIS-PM C.2 - Chapter 2 - Eligibility Requirements

4 USCIS-PM C.4 - Chapter 4 - Documentation and Evidence

POLICY ALERT - Revised Guidance for Form N-648 Submission and Review Process

June 13, 2025

USCIS is changing how the Medical Certification for Disability Exceptions (Form N-648) is processed by focusing greater attention on the veracity of medical certifications and identification of fraud, thereby enhancing the integrity of the process.

Read More

Affected Sections

12 USCIS-PM E.3 - Chapter 3 - Medical Disability Exception (Form N-648)

12 USCIS-PM H.2 - Chapter 2 - Definition of Child and Residence for Citizenship and Naturalization

POLICY ALERT - Derogatory Information Unknown to the Benefit Requestor

June 12, 2025

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address how and when USCIS may or may not disclose derogatory information before issuing an adverse decision to benefit requestors. This update provides USCIS officers with clear guidance on disclosure procedures and ensures that benefit requestors have the opportunity to rebut derogatory information in an adverse decision.

Read More

Affected Sections

1 USCIS-PM E.6 - Chapter 6 - Evidence

Technical Update - Updating References to Notice to Appear Memorandum

June 12, 2025

This technical update revises references in the Policy Manual to refer to the memorandum *Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens*, issued on February 28, 2025.

Affected Sections

1 USCIS-PM E.8 - Chapter 8 - Discretionary Analysis

7 USCIS-PM A.10 - Chapter 10 - Legal Analysis and Use of Discretion

7 USCIS-PM B.7 - Chapter 7 - Other Barred Adjustment Applicants

7 USCIS-PM Q.2 - Chapter 2 - Eligibility

7 USCIS-PM Q.3 - Chapter 3 - Rescission Process

7 USCIS-PM Q.5 - Chapter 5 - Adjudication Procedures

12 USCIS-PM D.2 - Chapter 2 - Lawful Permanent Resident Admission for Naturalization

POLICY ALERT - Validity of Report of Immigration Medical Examination and Vaccination Record (Form I-693)

June 11, 2025

U.S. Citizenship and Immigration Services (USCIS) is making a necessary change to its policy to reflect that the Report of Immigration Medical Examination and Vaccination Record (Form I-693) is generally valid only for the immigration benefit application for which it was submitted, such as the Application to Register Permanent Residence or Adjust Status (Form I-485). Current policy jeopardizes public health by allowing the submission of a Form I-693 tied to any previous immigration benefit application or request, which could include instances where the medical examination results are outdated or where aliens failed to follow up on necessary or recommended medical treatment for tuberculosis.

Read More

Affected Sections

8 USCIS-PM B.4 - Chapter 4 - Review of Medical Examination Documentation

POLICY ALERT - Special Immigrant Juvenile Classification and Deferred Action

June 06, 2025

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to eliminate automatic consideration of deferred action (and related employment authorization) for aliens classified as Special Immigrant Juveniles (SIJs) who are ineligible to apply for adjustment of status to lawful permanent resident (LPR) status due to visa unavailability.

Read More

Affected Sections

6 USCIS-PM J.4 - Chapter 4 - Adjudication

POLICY ALERT - Rescission of the USCIS Statelessness Policy

June 05, 2025

U.S. Citizenship and Immigration Services (USCIS) is rescinding policy guidance in the USCIS Policy Manual regarding stateless aliens present in the United States.

Read More

Affected Sections

3 USCIS-PM K - Part K - Reserved

POLICY ALERT - Professionals under the United States-Mexico-Canada Agreement (USMCA)

June 04, 2025

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual regarding certain eligibility requirements, including filing, petitions for classification, and change of status relating to the “TN” nonimmigrant visa classification under the United States-Mexico-Canada Agreement (USMCA), formerly known as the North

American Free Trade Agreement (NAFTA).

Read More

Affected Sections

2 USCIS-PM P - Part P - USMCA Professionals (TN)

Technical Update - Removal of COVID-19 Vaccine Requirement

May 13, 2025

This technical update to Volume 8, Admissibility, removes the COVID-19 vaccination requirement to align with the U.S. Centers for Disease Control and Prevention (CDC) Technical Instructions and makes other minor technical changes.

Affected Sections

8 USCIS-PM B.3 - Chapter 3 - Applicability of Medical Examination and Vaccination Requirement

8 USCIS-PM B.9 - Chapter 9 - Vaccination Requirement

POLICY ALERT - Recognizing Male and Female Sexes in USCIS Benefit Requests Review and Document Issuance

April 02, 2025

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual to clarify that USCIS recognizes the two biological sexes, male or female, for purposes of reviewing benefit requests and USCIS-issued documents.

Read More

Affected Sections

1 USCIS-PM E.5 - Chapter 5 - Verification of Identifying Information

11 USCIS-PM A.2 - Chapter 2 - USCIS-Issued Secure Identity Documents

12 USCIS-PM G.2 - Chapter 2 - Marriage and Marital Union for Naturalization

12 USCIS-PM H.2 - Chapter 2 - Definition of Child and Residence for Citizenship and Naturalization

12 USCIS-PM K.2 - Chapter 2 - Certificate of Citizenship

12 USCIS-PM K.3 - Chapter 3 - Certificate of Naturalization

12 USCIS-PM K.4 - Chapter 4 - Application for Replacement of Naturalization/Citizenship Document

Technical Update - Removing Obsolete Alert Box and Other Updates

March 06, 2025

This technical update makes minor changes to the Policy Manual to remove an obsolete alert box and to conform with changes to the USCIS website.

Affected Sections

1 USCIS-PM A.1 - Chapter 1 - Purpose and Background

1 USCIS-PM A.8 - Chapter 8 - Conduct in USCIS Facilities

1 USCIS-PM A.9 - Chapter 9 - Feedback, Complaints, Misconduct, and Discrimination

4 USCIS-PM - Volume 4 - Refugees and Asylees

Technical Update - Replacing the Term "Noncitizen"

February 26, 2025

This technical update replaces all instances of the term “noncitizen” with “alien” or other appropriate terms throughout the Policy Manual where possible, as used to refer to a person who meets the definition provided in INA 101(a)(3) [“any person not a citizen or national of the United States”], and makes other technical and conforming changes.

Affected Sections

1 USCIS-PM - Volume 1 - General Policies and Procedures

2 USCIS-PM - Volume 2 - Nonimmigrants

3 USCIS-PM - Volume 3 - Humanitarian Protection and Parole

4 USCIS-PM - Volume 4 - Refugees and Asylees

5 USCIS-PM - Volume 5 - Adoptions

6 USCIS-PM - Volume 6 - Immigrants

7 USCIS-PM - Volume 7 - Adjustment of Status

8 USCIS-PM - Volume 8 - Admissibility

9 USCIS-PM - Volume 9 - Waivers and Other Forms of Relief

10 USCIS-PM - Volume 10 - Employment Authorization

11 USCIS-PM - Volume 11 - Travel and Identity Documents

12 USCIS-PM - Volume 12 - Citizenship and Naturalization

POLICY ALERT - Second Preference Eligibility for National Interest Waiver Petitions

January 15, 2025

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address how USCIS evaluates eligibility for second preference classification for national interest waiver petitions, for which the U.S. Department of Labor (DOL) does not certify the job offer requirements.

Read More

Affected Sections

6 USCIS-PM F.5 - Chapter 5 - Advanced Degree or Exceptional Ability

Technical Update - Job Portability for National Interest Waivers

January 10, 2025

This technical update to Volume 7 more precisely aligns the guidance with the statutory language at INA 204(j) by clarifying that adjustment applicants whose immigrant petitions are based on a national interest waiver are eligible for portability under the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). However, because their immigrant visas are not tied to a specific job offer, such applicants do not need to file a Confirmation of Valid Job Offer or Request for Job Portability Under INA Section 204(j) (Form I-485, Supplement J) if they change jobs.

Affected Sections

7 USCIS-PM E.5 - Chapter 5 - Job Portability after Adjustment Filing and Other AC21 Provisions

POLICY ALERT - Evidentiary Requirements for O-1 Nonimmigrants

January 08, 2025

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to clarify how USCIS evaluates evidence to determine eligibility for O-1A nonimmigrants of extraordinary ability, including adding examples of evidence for individuals in critical and emerging technologies.

Read More

Affected Sections

2 USCIS-PM M.3 - Chapter 3 - Petitioners

2 USCIS-PM M.4 - Chapter 4 - O-1 Beneficiaries

2 USCIS-PM M.9 - Chapter 9 - Admission, Extension of Stay, Change of Status, and Change of Employer

POLICY ALERT - Customer Contact Options for Certain Asylum-Related and Other Protected Populations

January 07, 2025

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual to clarify customer service options available to certain noncitizens whose applications or processes are subject to confidentiality protections. Such noncitizens include applicants of the Application for Asylum and for Withholding of Removal (Form I-589); applicants of the Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Section 203 of Public Law 105-100 (NACARA)) (Form I-881); and noncitizens in the credible fear, reasonable fear, and Safe Third Country Agreement screening processes.

Read More

Affected Sections

1 USCIS-PM A.7 - Chapter 7 - Privacy and Confidentiality

POLICY ALERT - Refugee and Asylee Relative Petitions

December 20, 2024

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address the eligibility, filing, and adjudication requirements for the Refugee/Asylee Relative Petition (Form I-730).

Read More

Affected Sections

4 USCIS-PM C.1 - Chapter 1 - Purpose and Background

4 USCIS-PM C.2 - Chapter 2 - Eligibility Requirements

4 USCIS-PM C.3 - Chapter 3 - Admissibility and Waiver Requirements

4 USCIS-PM C.4 - Chapter 4 - Documentation and Evidence

4 USCIS-PM C.5 - Chapter 5 - Adjudication

POLICY ALERT - Emergencies or Unforeseen Circumstances

December 19, 2024

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to provide comprehensive guidance on certain flexibilities USCIS may exercise during and after emergencies or unforeseen circumstances.

Read More

Affected Sections

1 USCIS-PM H.1 - Chapter 1 - Purpose and Background

1 USCIS-PM H.2 - Chapter 2 - Emergencies or Unforeseen Circumstances-Related Flexibilities

1 USCIS-PM H.3 - Chapter 3 - Operational Responses

POLICY ALERT - Case Assistance and Feedback

December 18, 2024

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual to align with current case assistance and feedback avenues.

Read More

Affected Sections

1 USCIS-PM A.1 - Chapter 1 - Purpose and Background

1 USCIS-PM A.2 - Chapter 2 - Web-Based Information

1 USCIS-PM A.3 - Chapter 3 - Types of Assistance

1 USCIS-PM A.4 - Chapter 4 - Service Request Management Tool

1 USCIS-PM A.7 - Chapter 7 - Privacy and Confidentiality

1 USCIS-PM A.9 - Chapter 9 - Feedback, Complaints, Misconduct, and Discrimination

1 USCIS-PM A.10 - Chapter 10 - Changes of Address

Technical Update - Form I-485 Revision Updates

December 17, 2024

This technical update incorporates changes consistent with the newest form editions of the Application to Register Permanent Residence or Adjust Status (Form I-485) and Confirmation of Valid Offer or Request for Job Portability Under INA Section 204(j) (Form I-485 Supplement J), published on December 10, 2024. This update removes certain references to the Request for Exemption for Intending Immigrant's Affidavit of Support (Form I-864W), directs applicants how to request an exemption from the Form I-864 requirement when filing their adjustment of status application, and updates references to the newly retitled Form I-485, Supplement J.

Affected Sections

7 USCIS-PM E.5 - Chapter 5 - Job Portability after Adjustment Filing and Other AC21 Provisions

8 USCIS-PM G.6 - Chapter 6 - Affidavit of Support Under Section 213A of the INA

8 USCIS-PM G.9 - Chapter 9 - Adjudicating Public Charge Inadmissibility for Adjustment of Status Applications

POLICY ALERT - Post-Adjustment Jurisdiction for INA 246 Proceedings

December 13, 2024

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to clarify guidance regarding jurisdiction over rescission of lawful permanent resident (LPR) status.

Read More

Affected Sections

7 USCIS-PM Q.3 - Chapter 3 - Rescission Process

POLICY ALERT - Supporting Evidence for International Entrepreneur Parole

December 12, 2024

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual regarding the types of evidence that may support an application for a discretionary grant of international entrepreneur parole.

Read More

Affected Sections

3 USCIS-PM G.3 - Chapter 3 - Documentation and Evidence

Technical Update - Study Abroad Programs for F-1 Students

November 26, 2024

This technical update to Volume 2, Nonimmigrants, directs readers to the DHS Study in the States webpage for more information about requirements for F-1 student participation in study abroad programs and makes other minor technical corrections, including to regulatory citations.

Affected Sections

2 USCIS-PM F.7 - Chapter 7 - Absences From the United States

POLICY ALERT - Adjustment of Status for Victims of Severe Forms of Trafficking in Persons

November 21, 2024

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address adjustment of status for victims of severe forms of trafficking in persons (T nonimmigrants).

Read More

Affected Sections

7 USCIS-PM J.1 - Chapter 1 - Purpose and Background

7 USCIS-PM J.2 - Chapter 2 - Eligibility Requirements

7 USCIS-PM J.3 - Chapter 3 - Documentation and Evidence

7 USCIS-PM J.4 - Chapter 4 - Filing

7 USCIS-PM J.5 - Chapter 5 - Adjudication

POLICY ALERT - Custody in Acquisition of Citizenship Context

November 19, 2024

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual regarding the legal and physical custody requirements for purposes of acquisition of U.S. citizenship under Section 320 and naturalization under Section 322 of the Immigration and Nationality Act (INA). USCIS is also expanding guidance on derivation of citizenship before the Child Citizenship Act (CCA), under former INA 321.

Read More

Affected Sections

12 USCIS-PM H.1 - Chapter 1 - Purpose and Background

12 USCIS-PM H.2 - Chapter 2 - Definition of Child and Residence for Citizenship and Naturalization

12 USCIS-PM H.4 - Chapter 4 - Automatic Acquisition of Citizenship after Birth (INA 320)

12 USCIS-PM H.5 - Chapter 5 - Child Residing Outside the United States (INA 322)

12 USCIS-PM H.7 - Chapter 7 - Deriving Citizenship Before the Child Citizenship Act of 2000 (Former INA 321 and 320)

POLICY ALERT - Lawful Admission for Permanent Residence Requirement for Naturalization

November 14, 2024

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to clarify that a naturalization applicant’s burden to demonstrate they have been lawfully admitted for permanent residence applies only to the applicant’s initial admission as a lawful permanent resident (LPR) or adjustment to LPR status.

Read More

Affected Sections

12 USCIS-PM D.2 - Chapter 2 - Lawful Permanent Resident Admission for Naturalization

POLICY ALERT - Immigration Medical Examinations for Certain Afghan Nationals Who Arrived in the United States During Operation Allies Welcome

November 13, 2024

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual regarding immigration medical examinations completed by certain Afghan nationals who arrived in the United States during Operation Allies Welcome (OAW).

Read More

Affected Sections

8 USCIS-PM B.3 - Chapter 3 - Applicability of Medical Examination and Vaccination Requirement

8 USCIS-PM B.4 - Chapter 4 - Review of Medical Examination Documentation

Technical Update - Updating Name of Form I-131

October 30, 2024

This technical update to Volumes 1, 3, 7, 11 and 12 of the Policy Manual updates the name of Form I-131 to align with the current edition of the form.

Affected Sections

1 USCIS-PM A.5 - Chapter 5 - Expedite Requests

1 USCIS-PM A.7 - Chapter 7 - Privacy and Confidentiality

1 USCIS-PM B.1 - Chapter 1 - Purpose and Background

1 USCIS-PM B.3 - Chapter 3 - Fees

1 USCIS-PM B.4 - Chapter 4 - Fee Waivers and Fee Exemptions

1 USCIS-PM E.8 - Chapter 8 - Discretionary Analysis

3 USCIS-PM B.12 - Chapter 12 - Travel Outside the United States

3 USCIS-PM G.6 - Chapter 6 - Family Members

7 USCIS-PM B.2 - Chapter 2 - Eligibility Requirements

11 USCIS-PM A.3 - Chapter 3 - Reissuance of Secure Identity Documents

12 USCIS-PM I.3 - Chapter 3 - Military Service during Hostilities (INA 329)

POLICY ALERT - T Nonimmigrant Status for Victims of Severe Forms of Trafficking in Persons

October 23, 2024

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to incorporate changes from the Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status Final Rule (T Final Rule), including updated citations, new definitions, and clarifications.

Read More

Affected Sections

3 USCIS-PM B.1 - Chapter 1 - Purpose and Background

3 USCIS-PM B.2 - Chapter 2 - Eligibility Requirements

3 USCIS-PM B.3 - Chapter 3 - Documentation and Evidence for Principal Applicants

3 USCIS-PM B.4 - Chapter 4 - Family Members

3 USCIS-PM B.5 - Chapter 5 - Documentation and Evidence for Family Members

3 USCIS-PM B.6 - Chapter 6 - Bona Fide Determinations

3 USCIS-PM B.7 - Chapter 7 - Adjudication

3 USCIS-PM B.8 - Chapter 8 - Annual Cap and Waiting List

3 USCIS-PM B.9 - Chapter 9 - Applicants in Removal Proceedings

3 USCIS-PM B.10 - Chapter 10 - Duration and Extensions of Status

3 USCIS-PM B.11 - Chapter 11 - Federal Benefits and Work Authorization

3 USCIS-PM B.12 - Chapter 12 - Travel Outside the United States

3 USCIS-PM B.13 - Chapter 13 - Revocation of Status

9 USCIS-PM O.2 - Chapter 2 - Waivers for Victims of Trafficking

9 USCIS-PM O.3 - Chapter 3 - INA 212(d)(13) Waivers

9 USCIS-PM O.5 - Chapter 5 - Waivers for T Nonimmigrants Applying for Adjustment of Status

9 USCIS-PM O.6 - Chapter 6 - Adjudication and Post-Adjudication Matters

POLICY ALERT - International Entrepreneur Parole Threshold Adjustments

October 10, 2024

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to reflect the recently published final rule to codify the automatic adjustment of the investment, award, grant, and revenue thresholds for international entrepreneur parole. The guidance also clarifies the process for submitting biometrics for applicants who reside outside the United States.

Read More

Affected Sections

3 USCIS-PM G.1 - Chapter 1 - Purpose and Background

3 USCIS-PM G.2 - Chapter 2 - Requirements for Consideration

3 USCIS-PM G.4 - Chapter 4 - Adjudication

3 USCIS-PM G.5 - Chapter 5 - Additional Periods of Parole

POLICY ALERT - Extraordinary Ability Criteria Clarification

October 02, 2024

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to further clarify how USCIS evaluates evidence to determine eligibility for immigrant classification as a person of extraordinary ability.

Read More

Affected Sections

6 USCIS-PM F.2 - Chapter 2 - Extraordinary Ability

POLICY ALERT - Age Calculation Under the Child Status Protection Act

September 25, 2024

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to clarify how to calculate the Child Status Protection Act (CSPA) age for a noncitizen who demonstrates extraordinary circumstances that may excuse the sought to acquire requirement under the CSPA.

Read More

Affected Sections

7 USCIS-PM A.7 - Chapter 7 - Child Status Protection Act

Technical Update - Extension Application Filing Period for Science, Technology, Engineering, and Mathematics Optional Practical Training

September 25, 2024

This technical update to Volume 2, Nonimmigrants, clarifies that an F-1 student may apply for a Science, Technology, Engineering, and Mathematics (STEM) Optional Practical Training (OPT) extension no later than 60 days after a designated school official's recommendation in the Student and Exchange Visitor Information System (SEVIS). This technical update aligns the guidance with the regulations.

Affected Sections

2 USCIS-PM F.5 - Chapter 5 - Practical Training

POLICY ALERT - Science, Technology, Engineering, and Mathematics Optional Practical Training

August 27, 2024

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual regarding when students may be eligible for optional practical training (OPT) for Science, Technology, Engineering, and Mathematics (STEM) fields; as well as clarifying guidance concerning online study, school transfers, the grace period, and study abroad.

Read More

Affected Sections

2 USCIS-PM F.3 - Chapter 3 - Courses and Enrollment, Full Course of Study, and Reduced Course Load

2 USCIS-PM F.4 - Chapter 4 - School Transfer

2 USCIS-PM F.5 - Chapter 5 - Practical Training

2 USCIS-PM F.7 - Chapter 7 - Absences From the United States

POLICY ALERT - Children's Acquisition of Citizenship Provisions

July 18, 2024

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual regarding provisions for children's acquisition of citizenship.

Read More

Affected Sections

12 USCIS-PM H.1 - Chapter 1 - Purpose and Background

12 USCIS-PM H.2 - Chapter 2 - Definition of Child and Residence for Citizenship and Naturalization

12 USCIS-PM H.3 - Chapter 3 - U.S. Citizens at Birth (INA 301 and 309)

12 USCIS-PM H.4 - Chapter 4 - Automatic Acquisition of Citizenship after Birth (INA 320)

12 USCIS-PM H.5 - Chapter 5 - Child Residing Outside the United States (INA 322)

12 USCIS-PM H.6 - Chapter 6 - Special Provisions for the Naturalization of Children

POLICY ALERT - EB-5 Regional Center Noncompliance and Sanctions

July 16, 2024

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address the new provisions added to the Immigration and Nationality Act (INA) by the EB-5 Reform and Integrity Act of 2022 (RIA) relating to the consequences to regional centers, new commercial enterprises, job creating entities, and investors for noncompliance in the EB-5 program.

Read More

Affected Sections

6 USCIS-PM G.3 - Chapter 3 - Immigrant Petition Adjudication

6 USCIS-PM G.4 - Chapter 4 - Regional Center Applications

6 USCIS-PM G.5 - Chapter 5 - Project Applications

6 USCIS-PM G.8 - Chapter 8 - Sanctions and Discretionary Determinations

POLICY ALERT - Determining a Benefit Requestor’s Legal Name

July 12, 2024

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual to address how officers determine a benefit requestor’s legal name.

Read More

Affected Sections

1 USCIS-PM E.5 - Chapter 5 - Verification of Identifying Information

11 USCIS-PM A.2 - Chapter 2 - USCIS-Issued Secure Identity Documents

12 USCIS-PM K.3 - Chapter 3 - Certificate of Naturalization

12 USCIS-PM K.4 - Chapter 4 - Application for Replacement of Naturalization/Citizenship Document

Technical Update - Customer Service and Interpretation of 8 U.S.C. 1367 Confidentiality Protections for U.S. Citizens

July 12, 2024

This technical update incorporates the policy guidance that U.S. Citizenship and Immigration Services (USCIS) announced June 12, 2024, that interprets the confidentiality protections under 8 U.S.C. 1367 as ending at naturalization. USCIS is making this change as the previous practice of maintaining 8 U.S.C. 1367 protections beyond naturalization created burdens for some naturalized U.S. citizens. This policy will result in naturalized citizens having full access to USCIS electronic benefit processing and critical customer service tools that are available to other U.S. citizens. This guidance became effective July 12, 2024.

Affected Sections

1 USCIS-PM A.7 - Chapter 7 - Privacy and Confidentiality

POLICY ALERT - Diversity Immigrant-Based Adjustment of Status

June 28, 2024

U.S. Citizenship and Immigration Services (USCIS) is issuing updated policy guidance in the USCIS Policy Manual addressing adjustment of status based on the Diversity Immigrant Visa. This policy update consolidates, updates, and supersedes Chapter 23.5(h) of the Adjudicator's Field Manual (AFM), related AFM appendices, and related policy memoranda. This update is not intended to change existing policy or create new policy.

Read More

Affected Sections

7 USCIS-PM G.1 - Chapter 1 - Purpose and Background

7 USCIS-PM G.2 - Chapter 2 - Eligibility Requirements

7 USCIS-PM G.3 - Chapter 3 - Documentation and Evidence

7 USCIS-PM G.4 - Chapter 4 - Adjudication

POLICY ALERT - Customer Service Options for Refugee/Asylee Relative Petition (Form I-730)

June 25, 2024

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to clarify the customer service options available to petitioners of Refugee/Asylee Relative Petition (Form I-730).

Read More

Affected Sections

1 USCIS-PM A.7 - Chapter 7 - Privacy and Confidentiality

POLICY ALERT - Hague Adoption Convention Petitions

June 14, 2024

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to clarify requirements for petitions to determine children's eligibility as Convention adoptees.

Read More

Affected Sections

5 USCIS-PM D.1 - Chapter 1 - Purpose and Background

5 USCIS-PM D.2 - Chapter 2 - Eligibility

5 USCIS-PM D.3 - Chapter 3 - Identity and Age

5 USCIS-PM D.4 - Chapter 4 - Eligibility Requirements Specific to Convention Adoptees

5 USCIS-PM D.5 - Chapter 5 - Qualifying Adoptive or Custodial Relationship

5 USCIS-PM D.6 - Chapter 6 - Additional Requirements

5 USCIS-PM D.7 - Chapter 7 - Required Order of Immigration and Adoption Steps

5 USCIS-PM D.8 - Chapter 8 - Documentation and Evidence

5 USCIS-PM D.9 - Chapter 9 - Adjudication

POLICY ALERT - Customer Service and Interpretation of 8 U.S.C. 1367 Confidentiality Protections for U.S. Citizens

June 12, 2024

U.S. Citizenship and Immigration Services (USCIS) is issuing guidance in the USCIS Policy Manual that interprets the confidentiality protections under 8 U.S.C. 1367 as ending at naturalization. USCIS is making this change as the previous practice of maintaining 8 U.S.C. 1367 protections beyond naturalization created burdens for some naturalized U.S. citizens. This policy will result in naturalized citizens having full access to USCIS electronic benefit processing and critical customer service tools that are available to other U.S. citizens. This guidance becomes effective July 12, 2024.

Read More

Affected Sections

1 USCIS-PM A.7 - Chapter 7 - Privacy and Confidentiality

POLICY ALERT - Special Immigrant Juvenile Classification and Limited In-Person Filing

June 06, 2024

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual to address how petitioners for special immigrant juvenile (SIJ) classification (or their representatives) may schedule an appointment with a USCIS field office to file a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) in person in limited circumstances.

Read More

Affected Sections

6 USCIS-PM J.2 - Chapter 2 - Eligibility Requirements

POLICY ALERT - Family-Based Immigrant Visa Petition Approvals

May 22, 2024

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual on family-based immigrant visa petitions, including explaining how USCIS handles correcting approval notice errors, requests for consular processing or adjustment of status, and routing procedures for approved petitions.

Read More

Affected Sections

6 USCIS-PM B.5 - Chapter 5 - Adjudication of Family-Based Petitions

POLICY ALERT - H-3 Nonimmigrants Participating in Training at an Academic or Vocational Institution

May 08, 2024

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to clarify the circumstances under which H-3 nonimmigrants may participate in training provided on the property of an academic or vocational institution.

Read More

Affected Sections

2 USCIS-PM J.1 - Chapter 1 - Purpose and Background

POLICY ALERT - Extension of the Temporary Need Exemption for Certain H-2B Workers on Guam and in the Commonwealth of the Northern Mariana Islands

April 11, 2024

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to reflect the extension of the current exemption from the temporary need requirement for petitions for temporary nonagricultural (H-2B) nonimmigrant workers on Guam and in the Commonwealth of the Northern Mariana Islands (CNMI), as provided in the National Defense Authorization Act for Fiscal Year 2024 (FY 2024 NDAA).

Read More

Affected Sections

2 USCIS-PM I.11 - Chapter 11 - Temporary Nonagricultural Worker (H-2B) Petitions Requiring Special Handling

POLICY ALERT - Clarifying the Term “Science or Art” for Schedule A, Group II Occupations

April 10, 2024

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to update the Schedule A, Group II definition of science or art to align with the U.S. Department of Labor (DOL) definition.

Read More

Affected Sections

6 USCIS-PM E.7 - Chapter 7 - Schedule A Designation Petitions

POLICY ALERT - Validity of Report of Immigration Medical Examination and Vaccination Record (Form I-693)

April 04, 2024

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual regarding the evidentiary value of the Report of Immigration Medical Examination and Vaccination Record (Form I-693).

Read More

Affected Sections

8 USCIS-PM B.4 - Chapter 4 - Review of Medical Examination Documentation

POLICY ALERT - Availability of Additional Gender Options for Certain Benefit Requests

April 01, 2024

U.S. Citizenship and Immigration Services (USCIS) is revising policy guidance in the USCIS Policy Manual to clarify the availability of an “X” gender marker option on certain USCIS forms and secure documents.

Read More

Affected Sections

1 USCIS-PM E.5 - Chapter 5 - Verification of Identifying Information

POLICY ALERT - Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements Final Rule

April 01, 2024

U.S. Citizenship and Immigration Services (USCIS) is revising its policy guidance in the USCIS Policy Manual to align with the Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements Final Rule, published in the Federal Register on January 31, 2024, and effective April 1, 2024.

Read More

Affected Sections

1 USCIS-PM B.1 - Chapter 1 - Purpose and Background

1 USCIS-PM B.3 - Chapter 3 - Fees

1 USCIS-PM B.4 - Chapter 4 - Fee Waivers and Fee Exemptions

1 USCIS-PM B.6 - Chapter 6 - Submitting Requests

2 USCIS-PM E.1 - Chapter 1 - Purpose and Background

2 USCIS-PM E.3 - Chapter 3 - Filing and Documentation

2 USCIS-PM J.7 - Chapter 7 - Admissions, Extensions of Stay, and Change of Status

2 USCIS-PM M.7 - Chapter 7 - Documentation and Evidence

2 USCIS-PM N.3 - Chapter 3 - Petitioners

5 USCIS-PM B.5 - Chapter 5 - Action on Pending or Approved Suitability Determinations

5 USCIS-PM C.7 - Chapter 7 - Documentation and Evidence

5 USCIS-PM C.8 - Chapter 8 - Adjudication

5 USCIS-PM D.4 - Chapter 4 - Eligibility Requirements Specific to Convention Adoptees

7 USCIS-PM A.3 - Chapter 3 - Filing Instructions

7 USCIS-PM A.7 - Chapter 7 - Child Status Protection Act

7 USCIS-PM A.8 - Chapter 8 - Transfer of Underlying Basis

POLICY ALERT - Customer Service Procedures for Persons Protected by 8 U.S.C. 1367

March 29, 2024

U.S. Citizenship and Immigration Services (USCIS) is updating the USCIS Policy Manual to provide guidance on customer service procedures for persons protected by the confidentiality provisions found at 8 U.S.C. 1367(a)(2).

Read More

Affected Sections

1 USCIS-PM A.7 - Chapter 7 - Privacy and Confidentiality

Technical Update - Safe Address and Special Procedures for Persons Protected by 8 U.S.C. 1367

March 29, 2024

This technical update incorporates the policy guidance that U.S. Citizenship and Immigration Services (USCIS) announced April 11, 2023, on mailing address and case handling procedures for persons protected under 8 U.S.C. 1367. This guidance became effective March 29, 2024.

Affected Sections

1 USCIS-PM A.7 - Chapter 7 - Privacy and Confidentiality

POLICY ALERT - Clarifying Expedite Requests

March 21, 2024

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual to clarify how USCIS considers expedite requests related to government interests and requests related to emergencies and urgent humanitarian situations. This update also clarifies how to make an expedite request and explains how USCIS processes expedite requests.

Read More

Affected Sections

1 USCIS-PM A.5 - Chapter 5 - Expedite Requests

POLICY ALERT - Anti-Discrimination Policy

March 15, 2024

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to further clarify its anti-discrimination policy pertaining to USCIS employees and contractors interacting directly or indirectly with members of the public.

Read More

Affected Sections

1 USCIS-PM A.6 - Chapter 6 - Disability Accommodation Requests

1 USCIS-PM A.8 - Chapter 8 - Conduct in USCIS Facilities

1 USCIS-PM A.9 - Chapter 9 - Feedback, Complaints, Misconduct, and Discrimination

POLICY ALERT - Mobile Biometrics Collection in Remote Locations

March 07, 2024

U.S. Citizenship and Immigration Services (USCIS) is updating guidance in the USCIS Policy Manual to further clarify existing policy on providing mobile biometrics collection services to benefit requestors residing in remote locations within the United States.

Read More

Affected Sections

1 USCIS-PM C.2 - Chapter 2 - Biometrics Collection

Technical Update - Addition of Citation to 2021 BIA Decision on Materiality of Misrepresentations Concerning Identity

February 28, 2024

This technical update to Volume 8, Part J, Chapter 3 adds a citation to the 2021 Board of Immigration Appeal's Decision, *Matter of O-R-E-*, which further explains when misrepresentations of identity are material, and makes conforming edits to the Policy Manual main text.

Affected Sections

8 USCIS-PM J.3 - Chapter 3 - Adjudicating Inadmissibility

POLICY ALERT - Untimely Filed Extensions of Stay and Change of Status Requests

January 24, 2024

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address when USCIS may, in its discretion, excuse untimely filed extensions of stay and change of status requests.

Read More

Affected Sections

2 USCIS-PM A.4 - Chapter 4 - Extension of Stay, Change of Status, and Extension of Petition Validity

POLICY ALERT - Establishing an Employer’s Ability to Pay the Proffered Wage for Certain Employment-Based Immigrant Visa Petitions

January 05, 2024

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address the analysis of an employer’s ability to pay the proffered wage for certain employment-based immigrant visa petition adjudications.

Read More

Affected Sections

6 USCIS-PM E.4 - Chapter 4 - Ability to Pay

POLICY ALERT - Nonimmigrant Student Classifications

December 20, 2023

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address the nonimmigrant student (F and M) classifications, including USCIS’ role in the adjudication of applications for employment authorization and change or reinstatement of status to F or M classifications.

Read More

Affected Sections

2 USCIS-PM F.1 - Chapter 1 - Purpose and Background

2 USCIS-PM F.2 - Chapter 2 - Eligibility Requirements

2 USCIS-PM F.3 - Chapter 3 - Courses and Enrollment, Full Course of Study, and Reduced Course Load

2 USCIS-PM F.4 - Chapter 4 - School Transfer

2 USCIS-PM F.5 - Chapter 5 - Practical Training

2 USCIS-PM F.6 - Chapter 6 - Employment

2 USCIS-PM F.7 - Chapter 7 - Absences From the United States

2 USCIS-PM F.8 - Chapter 8 - Change of Status, Extension of Stay, and Length of Stay

2 USCIS-PM F.9 - Chapter 9 - Dependents

POLICY ALERT - Family-Based Conditional Permanent Residents

December 12, 2023

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual regarding family-based conditional permanent residents (CPRs).

Read More

Affected Sections

6 USCIS-PM I.1 - Chapter 1 - Purpose and Background

6 USCIS-PM I.2 - Chapter 2 - Terms and Conditions of CPR Status

6 USCIS-PM I.3 - Chapter 3 - Petition to Remove Conditions on Residence

6 USCIS-PM I.4 - Chapter 4 - Joint Petitions and Individual Filing Requests

6 USCIS-PM I.5 - Chapter 5 - Waiver of Joint Filing Requirement

6 USCIS-PM I.6 - Chapter 6 - Decision and Post-Adjudication

6 USCIS-PM I.7 - Chapter 7 - Effect of Removal Proceedings

Technical Update - Country-Specific Adoption Processing

November 29, 2023

This technical update to Volume 5, Adoptions, incorporates information on USCIS country-specific adoption processing by adding a reference to the USCIS Country-Specific Processing webpage.

Affected Sections

5 USCIS-PM A.1 - Chapter 1 - Purpose and Background

POLICY ALERT - Special Immigrant Juvenile Classification Litigation Update on Tolling Provision

November 08, 2023

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual to align with *Casa Libre/Freedom House v. Mayorkas*. The district court in *Casa Libre* issued a Declaratory Judgment stating that the tolling provisions outlined in DHS regulations are not in accordance with the 180-day timeframe for the adjudication of a special immigrant juvenile (SIJ) petition as required by statute, to the extent that the regulations allow adjudication beyond the 180-day timeframe.

Read More

Affected Sections

6 USCIS-PM J.4 - Chapter 4 - Adjudication

Technical Update - Statelessness

October 30, 2023

This technical update incorporates the policy guidance that U.S. Citizenship and Immigration Services (USCIS) announced August 1, 2023, to address stateless noncitizens present in the United States. This guidance became effective October 30, 2023.

Affected Sections

3 USCIS-PM K - Part K - Reserved

POLICY ALERT - EB-5 Regional Center Program Reform

October 26, 2023

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual to continue to incorporate statutory reforms of the Regional Center Program as they relate to regional center designation and other requirements for immigrant investors.

Read More

Affected Sections

6 USCIS-PM G - Part G - Investors

POLICY ALERT - Foreign Residence Requirement for Nonimmigrant Exchange Visitors

October 24, 2023

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual regarding the 2-year foreign residence requirement for the nonimmigrant exchange visitor (J) visa classification.

Read More

Affected Sections

2 USCIS-PM D.3 - Chapter 3 - Terms and Conditions of J Exchange Visitor Status

2 USCIS-PM D.4 - Chapter 4 - Waiver of the Foreign Residence Requirement

2 USCIS-PM D.6 - Chapter 6 - Family Members of J-1 Exchange Visitor

POLICY ALERT - L-1 Petitions for Intracompany Transferees Filed by a Sole Proprietorship

October 20, 2023

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to clarify that a sole proprietorship may not file an L-1 petition on behalf of its owner because the sole proprietorship does not exist as a distinct legal entity separate and apart from the owner.

Read More

Affected Sections

2 USCIS-PM L.5 - Chapter 5 - Ownership and Control

2 USCIS-PM L.10 - Chapter 10 - Period of Stay

POLICY ALERT - Extension of the Temporary Need Exemption for Certain H-2B Workers on Guam and in the Commonwealth of the Northern Mariana Islands

October 04, 2023

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to reflect the extension of the current exemption from the temporary need requirement for petitions for temporary nonagricultural H-2B nonimmigrant workers on Guam and in the Commonwealth of the Northern Mariana Islands (CNMI), as provided in the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2023.

Read More

Affected Sections

2 USCIS-PM I.11 - Chapter 11 - Temporary Nonagricultural Worker (H-2B) Petitions Requiring Special Handling

POLICY ALERT - Employment Authorization Document Validity Period for Certain Categories

September 27, 2023

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual regarding maximum validity periods for Employment Authorization Documents (EADs, Form I-766) issued to refugees and asylees, noncitizens paroled as refugees, noncitizens granted withholding of removal, noncitizens with pending applications for asylum or withholding of removal, noncitizens with pending applications for adjustment of status under INA 245, and noncitizens seeking suspension of deportation or cancellation of removal. USCIS is also clarifying that the Arrival/Departure Record (Form I-94) may be used as evidence of both status and employment authorization for certain EAD categories that are employment authorized incident to status or parole.

Read More

Affected Sections

3 USCIS-PM F.1 - Chapter 1 - Purpose and Background

10 USCIS-PM A.2 - Chapter 2 - Eligibility Requirements

10 USCIS-PM A.4 - Chapter 4 - Adjudication

POLICY ALERT - Evaluating Eligibility for Extraordinary Ability and Outstanding Professor or Researcher Visa Classifications

September 12, 2023

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to clarify how USCIS evaluates evidence to determine eligibility for extraordinary ability and outstanding professor or researcher first preference employment-based immigrant visa classifications.

Read More

Affected Sections

6 USCIS-PM F.2 - Chapter 2 - Extraordinary Ability

6 USCIS-PM F.3 - Chapter 3 - Outstanding Professor or Researcher

POLICY ALERT - Access to Voter Registration Services during Naturalization Ceremonies

August 25, 2023

U.S. Citizenship and Immigration Services (USCIS) is issuing updated policy guidance in the USCIS Policy Manual regarding access to voter registration services during administrative naturalization ceremonies.

Read More

Affected Sections

12 USCIS-PM J.5 - Chapter 5 - Administrative Naturalization Ceremonies

POLICY ALERT - Sought to Acquire Requirement Under the Child Status Protection Act

August 24, 2023

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to clarify that USCIS considers the recent February 14, 2023, policy change to be an extraordinary circumstance that may excuse the “sought to acquire” requirement under the Child Status Protection Act (CSPA) in particular situations.

Read More

Affected Sections

7 USCIS-PM A.7 - Chapter 7 - Child Status Protection Act

POLICY ALERT - Physician National Interest Waivers

August 16, 2023

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to confirm the evidentiary requirements for physicians seeking a national interest waiver of the job offer requirement based on work in an underserved area or at a U.S. Department of Veterans Affairs facility.

Read More

Affected Sections

6 USCIS-PM F.6 - Chapter 6 - Physician

POLICY ALERT - Bona Fide Determination Process for Qualifying Family Members of U Nonimmigrant Victims of Qualifying Crimes

August 11, 2023

U.S. Citizenship and Immigration Services (USCIS) is updating the USCIS Policy Manual to provide that USCIS may review and determine if a qualifying family member’s petition for U nonimmigrant status is bona fide, and if already filed, adjudicate their Application for Employment Authorization (Form I-765), once the principal petitioner receives a Bona Fide Determination (BFD), even if the principal petitioner has not filed Form I-765.

Read More

Affected Sections

3 USCIS-PM C.5 - Chapter 5 - Bona Fide Determination Process

POLICY ALERT - Statelessness

August 01, 2023

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address stateless noncitizens present in the United States. This guidance becomes effective October 30, 2023.

Read More

Affected Sections

3 USCIS-PM K - Part K - Reserved

POLICY ALERT - Incorporating Guidance on Applicability of the Public Charge Ground of Inadmissibility

July 20, 2023

U.S. Citizenship and Immigration Services (USCIS) is updating the USCIS Policy Manual to help applicants for adjustment of status more easily identify whether they are subject to the public charge ground of inadmissibility under section 212(a)(4) of the Immigration and Nationality Act (INA).

Read More

Affected Sections

8 USCIS-PM G.3 - Chapter 3 - Applicability

POLICY ALERT - Application Support Center Reschedule Requests and Missed Appointments

July 06, 2023

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address procedures related to biometric services appointments at an Application Support Center (ASC).

Read More

Affected Sections

1 USCIS-PM C.2 - Chapter 2 - Biometrics Collection

POLICY ALERT - Employment Authorization Documents Based on Compelling Circumstances

June 14, 2023

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address eligibility criteria and standards for applications for employment authorization involving compelling circumstances.

Read More

Affected Sections

10 USCIS-PM B.2 - Chapter 2 - Employment Authorization for Certain H-4, E, and L Nonimmigrant Dependent Spouses

10 USCIS-PM B.3 - Chapter 3 - Certain Employment-Based Immigrants in Compelling Circumstances

POLICY ALERT - Nonimmigrant Exchange Visitor (J) Visa Classification

June 08, 2023

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual regarding the nonimmigrant exchange visitor (J) visa classification, including USCIS' role in the adjudication of waivers of the 2-year foreign residence requirement and change of status requests under the Immigration and Nationality Act (INA).

Read More

Affected Sections

2 USCIS-PM D - Part D - Exchange Visitors (J)

Technical Update - Removing Outdated Alert Box and Revising Part Title

May 31, 2023

This technical update to Volume 7 removes an alert box that was superseded by the Policy Manual update on October 6, 2022. This technical update also removes "EB-4" from the title of Volume 7, Part F and makes related conforming edits.

Affected Sections

7 USCIS-PM A.6 - Chapter 6 - Adjudicative Review

7 USCIS-PM F - Part F - Special Immigrant-Based Adjustment

POLICY ALERT - Removing Guidance Related to the 2020 Civics Test

May 04, 2023

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual to remove references to the 2020 version of the civics test.

Read More

Affected Sections

12 USCIS-PM E.2 - Chapter 2 - English and Civics Testing

POLICY ALERT - Citizenship for Adopted Children

April 21, 2023

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to clarify how citizenship and naturalization provisions apply to adopted children.

Read More

Affected Sections

5 USCIS-PM F - Part F - Citizenship for Adopted Children

12 USCIS-PM A.2 - Chapter 2 - Becoming a U.S. Citizen

12 USCIS-PM H.1 - Chapter 1 - Purpose and Background

12 USCIS-PM H.2 - Chapter 2 - Definition of Child and Residence for Citizenship and Naturalization

12 USCIS-PM H.4 - Chapter 4 - Automatic Acquisition of Citizenship after Birth (INA 320)

12 USCIS-PM H.5 - Chapter 5 - Child Residing Outside the United States (INA 322)

POLICY ALERT - Safe Address and Special Procedures for Persons Protected by 8 U.S.C. 1367

April 11, 2023

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual to provide guidance on mailing address and case handling procedures for persons protected under 8 U.S.C. 1367. This guidance becomes effective July 11, 2023. **Note: The effective date for this policy has changed to March 29, 2024.**

Read More

Affected Sections

1 USCIS-PM A.7 - Chapter 7 - Privacy and Confidentiality

POLICY ALERT - Venues for Administrative Naturalization Ceremonies

April 04, 2023

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to clarify the types of venues USCIS may use for administrative naturalization ceremonies and the considerations for accepting offers to donate use of facilities.

Read More

Affected Sections

12 USCIS-PM J.2 - Chapter 2 - The Oath of Allegiance

12 USCIS-PM J.5 - Chapter 5 - Administrative Naturalization Ceremonies

POLICY ALERT - Selecting Gender on USCIS Forms

March 31, 2023

U.S. Citizenship and Immigration Services (USCIS) is revising policy guidance in the USCIS Policy Manual to clarify that benefit requestors may select their gender on USCIS forms (or change a prior gender selection) without the need to provide supporting documentation. Documents issued by USCIS as a result of the benefit adjudication will reflect the gender selected by the benefit requestor.

Read More

Affected Sections

1 USCIS-PM E.5 - Chapter 5 - Verification of Identifying Information

11 USCIS-PM A.2 - Chapter 2 - USCIS-Issued Secure Identity Documents

12 USCIS-PM K.2 - Chapter 2 - Certificate of Citizenship

12 USCIS-PM K.3 - Chapter 3 - Certificate of Naturalization

12 USCIS-PM K.4 - Chapter 4 - Application for Replacement of Naturalization/Citizenship Document

POLICY ALERT - Removal of “60-Day Rule” for Report of Immigration Medical Examination and Vaccination Record (Form I-693)

March 31, 2023

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to remove the requirement that the civil surgeon’s signature on the Report of Immigration Medical Examination and Vaccination Record (Form I-693) be dated no more than 60 days before an applicant files the application for the underlying immigration benefit.

Read More

Affected Sections

8 USCIS-PM B.4 - Chapter 4 - Review of Medical Examination Documentation

POLICY ALERT - Filing Periods and Response Timeframes Ending on Saturdays, Sundays, or Federal Holidays

March 29, 2023

U.S. Citizenship and Immigration Services (USCIS) is updating guidance in the USCIS Policy Manual to address instances where the last day of filing a benefit request or response to a Request for Evidence or a Notice of Intent to Deny, Revoke, Rescind, or Terminate, falls on a Saturday, Sunday, or federal holiday.

Read More

Affected Sections

1 USCIS-PM B.6 - Chapter 6 - Submitting Requests

1 USCIS-PM E.6 - Chapter 6 - Evidence

1 USCIS-PM E.10 - Chapter 10 - Post-Decision Actions

5 USCIS-PM B.2 - Chapter 2 - Eligibility, Documentation, and Evidence (Orphan Process)

6 USCIS-PM B.3 - Chapter 3 - Filing

6 USCIS-PM E.6 - Chapter 6 - Permanent Labor Certification

POLICY ALERT - Revision of Request for Certification of Military or Naval Service (Form N-426)

March 22, 2023

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to provide that only applicants for naturalization under Section 328 or Section 329 of the Immigration and Nationality Act (INA) who are currently serving in the U.S. armed forces are required to file a Request for Certification of Military or Naval Service (Form N-426) along with their Application for Naturalization (Form N-400).

Read More

Affected Sections

12 USCIS-PM I.2 - Chapter 2 - One Year of Military Service during Peacetime (INA 328)

12 USCIS-PM I.3 - Chapter 3 - Military Service during Hostilities (INA 329)

12 USCIS-PM I.5 - Chapter 5 - Application and Filing for Service Members (INA 328 and 329)

POLICY ALERT - Certain Petitioning Employers’ Ability to Pay the Proffered Wage to Prospective Employee Beneficiaries

March 15, 2023

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address the analysis of an employer’s ability to pay the proffered wage for certain employment-based immigrant petition adjudications.

Read More

Affected Sections

6 USCIS-PM E.4 - Chapter 4 - Ability to Pay

6 USCIS-PM E.5 - Chapter 5 - Reserved

POLICY ALERT - International Entrepreneur Parole

March 10, 2023

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address international entrepreneur parole.

Read More

Affected Sections

3 USCIS-PM G - Part G - International Entrepreneur Parole

POLICY ALERT - Domestic Mobile Biometrics Collection and Remote Domestic Applicant Biometrics Collection

March 07, 2023

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address mobile biometrics collection and the biometrics collection of benefit requestors in remote locations.

Read More

Affected Sections

1 USCIS-PM C.2 - Chapter 2 - Biometrics Collection

POLICY ALERT - Evaluating Eligibility for O-1B Visa Classification

March 03, 2023

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to clarify how USCIS evaluates evidence to determine eligibility for the O-1B visa classification for nonimmigrants of extraordinary ability in the arts and nonimmigrants of extraordinary achievement in the motion picture or television (MPTV) industry.

Read More

Affected Sections

2 USCIS-PM M.4 - Chapter 4 - O-1 Beneficiaries

POLICY ALERT - On-Site Inspections for Religious Worker Petitions

March 02, 2023

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual regarding on-site inspections for special immigrant and nonimmigrant religious worker petitions.

Read More

Affected Sections

2 USCIS-PM O.1 - Chapter 1 - Purpose and Background

2 USCIS-PM O.3 - Chapter 3 - Petitioner Requirements

6 USCIS-PM H.2 - Chapter 2 - Religious Workers

POLICY ALERT - Special Student Relief for F-1 Nonimmigrant Students

February 22, 2023

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to clarify the validity period of employment authorization for F-1 students experiencing severe economic hardship due to emergent circumstances (also known as special student relief (SSR)).

Read More

Affected Sections

2 USCIS-PM F.6 - Chapter 6 - Employment

10 USCIS-PM A.4 - Chapter 4 - Adjudication

POLICY ALERT - Age Calculation under Child Status Protection Act

February 14, 2023

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to update when an immigrant visa “becomes available” for the purpose of calculating Child Status Protection Act (CSPA) age in certain situations.

Read More

Affected Sections

7 USCIS-PM A.7 - Chapter 7 - Child Status Protection Act

POLICY ALERT - Asylee and Refugee Adjustment 1-Year Physical Presence Requirement

February 02, 2023

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual to clarify the applicability of the 1-year physical presence requirement for refugees and asylees applying for adjustment of status.

Read More

Affected Sections

7 USCIS-PM L.2 - Chapter 2 - Eligibility Requirements

7 USCIS-PM L.3 - Chapter 3 - Admissibility and Waiver Requirements

7 USCIS-PM L.4 - Chapter 4 - Documentation and Evidence

7 USCIS-PM L.5 - Chapter 5 - Adjudication Procedures

7 USCIS-PM M.2 - Chapter 2 - Eligibility Requirements

7 USCIS-PM M.3 - Chapter 3 - Admissibility and Waiver Requirements

7 USCIS-PM M.4 - Chapter 4 - Documentation and Evidence

7 USCIS-PM M.5 - Chapter 5 - Adjudication Procedures

12 USCIS-PM D.2 - Chapter 2 - Lawful Permanent Resident Admission for Naturalization

Technical Update - Public Charge Ground of Inadmissibility Final Rule

January 25, 2023

This technical update incorporates into Volume 8 the policy guidance that U.S. Citizenship and Immigration Services (USCIS) announced December 19, 2022, addressing the public charge ground of inadmissibility under section 212(a)(4) of the Immigration and Nationality Act (INA), as implemented by the Public Charge Ground of Inadmissibility Final Rule, 87 FR 55472 (PDF) (Sep. 9, 2022).

This guidance became effective December 23, 2022, and applies to adjustment of status applications postmarked (or filed electronically, if applicable) on or after that date. For applications postmarked (or submitted electronically, if applicable) before December 23, 2022, USCIS will continue to apply the public charge ground of inadmissibility consistent with the statute and the 1999 Interim Field Guidance.

Affected Sections

8 USCIS-PM G - Part G - Public Charge Ground of Inadmissibility

Technical Update - Permanent Resident Card Replacement

January 25, 2023

This technical update to Volume 11 eliminates reference to the extension sticker for expired permanent resident cards (PRCs), which is no longer in use, and clarifies how lawful permanent residents (LPRs) can request documentation of their LPR status when their PRC is expired. This update also clarifies when a conditional permanent resident may file Application to Replace Permanent Resident Card (Form I-90).

Affected Sections

11 USCIS-PM B.2 - Chapter 2 - Replacement of Permanent Resident Card

POLICY ALERT - Public Charge Ground of Inadmissibility Final Rule

December 19, 2022

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address the public charge ground of inadmissibility under section 212(a)(4) of the Immigration and Nationality Act (INA), as implemented by the Public Charge Ground of Inadmissibility Final Rule, 87 FR 55472 (PDF) (Sep. 9, 2022).

The new final rule and policy guidance become effective December 23, 2022, and apply to adjustment of status applications postmarked (or filed electronically, if applicable) on or after that date. For applications postmarked (or submitted electronically, if applicable) before December 23, 2022, USCIS will continue to apply the public charge ground of inadmissibility consistent with the statute and the 1999 Interim Field Guidance.

Read More

Affected Sections

8 USCIS-PM G - Part G - Public Charge Ground of Inadmissibility

POLICY ALERT - Extension of Permanent Resident Card for Naturalization Applicants

December 09, 2022

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to provide that USCIS may automatically extend the validity of a Permanent Resident Card (PRC) (Form I-551) through an Application for Naturalization (Form N-400) receipt notice, without regard to whether the applicant has filed an Application to Replace Permanent Resident Card (Form I-90). This guidance becomes effective December 12, 2022.

Read More

Affected Sections

12 USCIS-PM D.2 - Chapter 2 - Lawful Permanent Resident Admission for Naturalization

POLICY ALERT - Revision of Medical Certification for Disability Exceptions (Form N-648)

October 19, 2022

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to clarify how medical professionals can properly complete the new version of the Medical Certification for Disability Exceptions (Form N-648) and request oath waivers based on a physical or developmental disability or mental impairment.

Read More

Affected Sections

12 USCIS-PM E.3 - Chapter 3 - Medical Disability Exception (Form N-648)

12 USCIS-PM J.2 - Chapter 2 - The Oath of Allegiance

12 USCIS-PM J.3 - Chapter 3 - Oath of Allegiance Modifications and Waivers

POLICY ALERT - Calixto Settlement Agreement and Military Accessions Vital to National Interest Naturalization Applicants

October 07, 2022

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to update guidance regarding certain Military Accessions Vital to National Interest (MAVNI) naturalization applicants based on a settlement agreement in *Calixto, et al., v. U.S. Dep't of the Army, et al.* (Calixto Agreement).

Read More

Affected Sections

12 USCIS-PM I.3 - Chapter 3 - Military Service during Hostilities (INA 329)

12 USCIS-PM I.5 - Chapter 5 - Application and Filing for Service Members (INA 328 and 329)

POLICY ALERT - EB-5 Reform and Integrity Act of 2022

October 06, 2022

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to incorporate changes resulting from the EB-5 Reform and Integrity Act of 2022.

Read More

Affected Sections

6 USCIS-PM G.1 - Chapter 1 - Purpose and Background

6 USCIS-PM G.2 - Chapter 2 - Immigrant Petition Eligibility Requirements

7 USCIS-PM A.3 - Chapter 3 - Filing Instructions

7 USCIS-PM A.6 - Chapter 6 - Adjudicative Review

7 USCIS-PM A.7 - Chapter 7 - Child Status Protection Act

7 USCIS-PM B.2 - Chapter 2 - Eligibility Requirements

7 USCIS-PM B.8 - Chapter 8 - Inapplicability of Bars to Adjustment

POLICY ALERT - Extension of Temporary Waiver of “60-Day Rule” for Report of Medical Examination and Vaccination Record (Form I-693)

September 29, 2022

U.S. Citizenship and Immigration Services (USCIS) is extending the temporary waiver of the requirement that the civil surgeon’s signature on the Report of Medical Examination and Vaccination Record (Form I-693) be dated no more than 60 days before an applicant files the application for the underlying immigration benefit.

Read More

Affected Sections

8 USCIS-PM B.4 - Chapter 4 - Review of Medical Examination Documentation

Technical Update - Public Charge Final Rule

September 08, 2022

This technical update to Volume 8 alerts readers to the September 9, 2022 publication of the Public Charge Ground of Inadmissibility Final Rule, 87 FR 55472 (PDF), and clarifies that USCIS will continue to apply the 1999 Interim Field Guidance until the final rule goes into effect on December 23, 2022. For more information about how USCIS is applying the public charge ground of inadmissibility, see the Public Charge Resources webpage.

Affected Sections

8 USCIS-PM G - Part G - Public Charge Ground of Inadmissibility

Technical Update - Refugee Adjudications: Policies and Procedures

August 31, 2022

In accordance with Section 4(m) of Executive Order 14013 of February 4, 2021, *Rebuilding and Enhancing Programs to Resettle Refugees and Planning for the Impact of Climate Change on Migration*, 86 FR 8839 (Feb. 9, 2021), and considering necessary safeguards for program integrity, USCIS published several current policies and procedures related to the U.S. Refugee Admissions Program on the Refugee Adjudications: Policy and Procedures webpage. This technical update adds an alert box with a link to this webpage in the Policy Manual.

Affected Sections

4 USCIS-PM - Volume 4 - Refugees and Asylees

Technical Update - Disability Accommodation Requests

August 31, 2022

This technical update to Volume 1, General Policies and Procedures provides that anyone, including asylum and NACARA 203 applicants, may submit a disability accommodation request online.

Affected Sections

1 USCIS-PM A.6 - Chapter 6 - Disability Accommodation Requests

POLICY ALERT - Guidance for Special Immigrant and Nonimmigrant Religious Workers

August 30, 2022

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to reorganize and expand on existing guidance related to special immigrant religious workers.

Read More

Affected Sections

2 USCIS-PM O.3 - Chapter 3 - Petitioner Requirements

6 USCIS-PM H.2 - Chapter 2 - Religious Workers

POLICY ALERT - L-1 Intracompany Transferees

August 16, 2022

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to clarify how USCIS determines eligibility for L-1 nonimmigrants seeking classification as managers or executives or specialized knowledge workers. **Note: This update consolidates and updates guidance that was previously contained in the Adjudicator's Field Manual (AFM) Chapter 32, as well as related AFM appendices and policy memoranda. This update is not intended to change existing policy or create new policy.**

Read More

Affected Sections

2 USCIS-PM L - Part L - Intracompany Transferees (L)

POLICY ALERT - Uncharacterized Military Discharges Eligible for Naturalization

August 02, 2022

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address eligibility of military service members with uncharacterized military discharges for purposes of naturalization under section 328 or section 329 of the Immigration and Nationality Act (INA).

Read More

Affected Sections

12 USCIS-PM I.2 - Chapter 2 - One Year of Military Service during Peacetime (INA 328)

12 USCIS-PM I.3 - Chapter 3 - Military Service during Hostilities (INA 329)

POLICY ALERT - O-1 Nonimmigrant Status for Persons of Extraordinary Ability

July 22, 2022

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual to further clarify how USCIS evaluates evidence to determine eligibility for O-1A nonimmigrants of extraordinary ability, with a focus on persons in science, technology, engineering, or mathematics (STEM) fields.

Read More

Affected Sections

2 USCIS-PM M.4 - Chapter 4 - O-1 Beneficiaries

POLICY ALERT - Legislative Changes and Transition Affecting Afghan and Iraqi Special Immigrant Visas

July 20, 2022

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual on the transition of the responsibility to adjudicate certain Afghan special immigrant visa (SIV) petitions to the U.S. Department of State (DOS) and to incorporate other changes to the Afghan and Iraqi SIV classifications resulting from the Emergency Security Supplemental Appropriations Act of 2021.

Read More

Affected Sections

6 USCIS-PM H.1 - Chapter 1 - Purpose and Background

6 USCIS-PM H.8 - Chapter 8 - Certain Iraqi Nationals

6 USCIS-PM H.9 - Chapter 9 - Certain Afghan Nationals

6 USCIS-PM H.10 - Chapter 10 - Certain Iraqi and Afghan Translators and Interpreters

7 USCIS-PM F.10 - Chapter 10 - Certain Afghan and Iraqi Nationals

Technical Update - Clarifications Addressing Passage of EB-5 Reform and Integrity Act of 2022

July 18, 2022

This technical update to Volume 6 clarifies the Policy Manual alert boxes published on April 27, 2022 relating to the recent EB-5 Reform and Integrity Act of 2022, which authorizes an EB-5 Immigrant Investor Regional Center Program and includes various implementation effective dates for the program. On June 24, 2022, the U.S. District Court for the Northern District of California in *Behring Regional Center LLC v. Mayorkas, et al*, 3:22-cv-02487, issued a preliminary injunction enjoining USCIS “from treating as deauthorized the previously designated regional centers.” The April 27, 2022 alert remains posted for historical purposes.

Affected Sections

6 USCIS-PM G.1 - Chapter 1 - Purpose and Background

6 USCIS-PM G.2 - Chapter 2 - Immigrant Petition Eligibility Requirements

6 USCIS-PM G.4 - Chapter 4 - Regional Center Applications

6 USCIS-PM G.5 - Chapter 5 - Project Applications

POLICY ALERT - Temporary Protected Status and Eligibility for Adjustment of Status under Section 245(a) of the Immigration and Nationality Act

July 01, 2022

U.S. Citizenship and Immigration Services (USCIS) is updating the USCIS Policy Manual to address the proper mechanism for authorizing travel by temporary protected status (TPS) beneficiaries, and how such travel may affect their eligibility for adjustment of status under section 245(a) of the Immigration and Nationality Act (INA). USCIS is also updating the USCIS Policy Manual to reflect the decision of the U.S. Supreme Court in *Sanchez v. Mayorkas*, 141 S.Ct. 1809 (2021).

Read More

Affected Sections

7 USCIS-PM A.3 - Chapter 3 - Filing Instructions

7 USCIS-PM B.2 - Chapter 2 - Eligibility Requirements

12 USCIS-PM D.2 - Chapter 2 - Lawful Permanent Resident Admission for Naturalization

POLICY ALERT - INA 212(a)(9)(B) Policy Manual Guidance

June 24, 2022

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual on inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act (INA), specifically, the effect of returning to the United States during the statutory 3-year or 10-year period after departure or removal (if applicable). Under this policy guidance, a noncitizen who again seeks admission more than 3 or 10 years after the relevant departure or removal, is not inadmissible under INA 212(a)(9)(B) even if the noncitizen returned to the United States, with or without authorization, during the statutory 3-year or 10-year period.

Read More

Affected Sections

8 USCIS-PM O.6 - Chapter 6 - Effect of Seeking Admission Following Accrual of Unlawful Presence

POLICY ALERT - Special Immigrant Juvenile Classification and Adjustment of Status

June 10, 2022

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual to incorporate changes from the Special Immigrant Juvenile Petitions Final Rule (SIJ Final Rule), including updated citations, new definitions, and clarifications.

Read More

Affected Sections

6 USCIS-PM J.1 - Chapter 1 - Purpose and Background

6 USCIS-PM J.2 - Chapter 2 - Eligibility Requirements

6 USCIS-PM J.3 - Chapter 3 - Documentation and Evidence

6 USCIS-PM J.4 - Chapter 4 - Adjudication

7 USCIS-PM F.7 - Chapter 7 - Special Immigrant Juveniles

Technical Update - Documentary Requirements for National Interest Waiver Petition

May 25, 2022

This technical update to Volume 6, Part F aligns language related to documentation required for submission with a national interest waiver petition with the Form I-140 instructions. Specifically, consistent with those instructions, this update removes reference in the Policy Manual to the requirement that a petitioner submit *two copies of* the employee-specific portions of a permanent labor certification (without DOL approval).

Affected Sections

6 USCIS-PM F.5 - Chapter 5 - Advanced Degree or Exceptional Ability

Technical Update - Health-Related Grounds of Inadmissibility

May 25, 2022

U.S. Citizenship and Immigration Services (USCIS) is updating existing guidance based on revised Centers for Disease Control and Prevention Technical Instructions regarding gonorrhea and syphilis.

Affected Sections

8 USCIS-PM B.6 - Chapter 6 - Communicable Diseases of Public Health Significance

Technical Update - Implementation of Special Immigrant Juvenile Classification and Deferred Action

May 06, 2022

This technical update incorporates the policy guidance that U.S. Citizenship and Immigration Services (USCIS) announced March 7, 2022, to consider deferred action (and related employment authorization) for noncitizens classified as Special Immigrant Juveniles (SIJs) who are ineligible to apply for adjustment of status to lawful permanent resident (LPR) status solely due to visa unavailability. This guidance became effective May 6, 2022.

Affected Sections

6 USCIS-PM J.4 - Chapter 4 - Adjudication

Technical Update - Passage of EB-5 Reform and Integrity Act of 2022

April 27, 2022

This technical update to Volume 6 alerts readers to the passage of the EB-5 Reform and Integrity Act of 2022, which authorizes an EB-5 Immigrant Investor Regional Center Program and includes various implementation effective dates for the program. The alert boxes refer readers to uscis.gov for the latest information on the implementation of that law. In addition, this update reserves and moves all of the content in Chapter 3 (Regional Center Designation, Reporting, Amendments, and Termination) to an appendix (Regional Center Program Prior to March 15, 2022) as Congress repealed that program.

Affected Sections

6 USCIS-PM G.1 - Chapter 1 - Purpose and Background

6 USCIS-PM G.2 - Chapter 2 - Immigrant Petition Eligibility Requirements

6 USCIS-PM G.3 - Chapter 3 - Immigrant Petition Adjudication

6 USCIS-PM G.4 - Chapter 4 - Regional Center Applications

6 USCIS-PM G.5 - Chapter 5 - Project Applications

POLICY ALERT - Interview Waiver Criteria for Family-Based Conditional Permanent Residents

April 07, 2022

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual on interview waiver criteria for family-based conditional permanent residents (CPRs) filing petitions to remove the conditions on permanent residence.

Read More

Affected Sections

6 USCIS-PM I.3 - Chapter 3 - Petition to Remove Conditions on Residence

POLICY ALERT - Qualifying Published Material and Scope of Leading or Critical Role in Extraordinary Ability and Outstanding Professor or Researcher Visa Classifications

March 23, 2022

U.S. Citizenship and Immigration Services (USCIS) is updating the USCIS Policy Manual to align existing guidance on certain first preference immigrants with a recent Policy Manual update relating to nonimmigrants of extraordinary ability.

Read More

Affected Sections

6 USCIS-PM F.2 - Chapter 2 - Extraordinary Ability

6 USCIS-PM F.3 - Chapter 3 - Outstanding Professor or Researcher

POLICY ALERT - Documentation of Employment Authorization for Certain E and L Nonimmigrant Dependent Spouses

March 18, 2022

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual to address the documentation that certain E and L spouses may use as evidence of employment authorization incident to their status.

Read More

Affected Sections

10 USCIS-PM A.2 - Chapter 2 - Eligibility Requirements

10 USCIS-PM B.2 - Chapter 2 - Employment Authorization for Certain H-4, E, and L Nonimmigrant Dependent Spouses

POLICY ALERT - Special Immigrant Juvenile Classification and Deferred Action

March 07, 2022

U.S. Citizenship and Immigration Services (USCIS) is updating the USCIS Policy Manual to consider deferred action (and related employment authorization) for noncitizens classified as Special Immigrant Juveniles (SIJs) who are ineligible to apply for adjustment of status to lawful permanent resident (LPR) status solely due to visa unavailability. This guidance becomes effective May 6, 2022.

Read More

Affected Sections

6 USCIS-PM J.4 - Chapter 4 - Adjudication

Technical Update - Updating USCIS Mission Statement

February 23, 2022

This technical update to Volume 1, Part A, incorporates the new USCIS mission statement: USCIS upholds America's promise as a nation of welcome and possibility with fairness, integrity, and respect for all we serve.

Affected Sections

1 USCIS-PM A.1 - Chapter 1 - Purpose and Background

Technical Update - Request to Transfer Underlying Basis

February 23, 2022

This technical update to Volume 7 removes specific information about where to submit requests to transfer the underlying basis of a pending adjustment application and instead points readers to the instructions for requesting a transfer of basis on the USCIS website.

Affected Sections

7 USCIS-PM A.8 - Chapter 8 - Transfer of Underlying Basis

Technical Update - Critical and Emerging Technologies in National Interest Waiver Context

February 23, 2022

This technical update to Volume 6 provides information in a footnote on the latest resources available to determine critical and emerging technologies.

Affected Sections

6 USCIS-PM F.5 - Chapter 5 - Advanced Degree or Exceptional Ability

Technical Update - Providing Link to Public Charge Resources Webpage

February 17, 2022

USCIS is administering the public charge inadmissibility statute (section 212(a)(4) of the Immigration and Nationality Act) consistent with the 1999 Interim Field Guidance to determine whether a noncitizen is inadmissible as likely at any time to become a public charge. The 1999 Interim Field Guidance is the policy that was in place before the 2019 Public Charge Final Rule was implemented. The 2019 Public Charge Final Rule is no longer in effect. For more information about how USCIS is applying the public charge ground of inadmissibility, see the Public Charge Resources webpage.

Affected Sections

8 USCIS-PM G - Part G - Public Charge Ground of Inadmissibility

POLICY ALERT - Violence Against Women Act Self-Petitions

February 10, 2022

U.S. Citizenship and Immigration Services (USCIS) is publishing policy guidance in the USCIS Policy Manual addressing Violence Against Women Act Self-Petitions.

Read More

Affected Sections

3 USCIS-PM D - Part D - Violence Against Women Act

POLICY ALERT - Clarifying the Temporary Need Exemption for Certain H-2B Workers on Guam and in the Commonwealth of the Northern Mariana Islands

February 08, 2022

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to clarify how a petitioner may demonstrate that it qualifies for an exemption from the temporary need requirement for a nonimmigrant visa petition for a temporary nonagricultural H-2B worker on Guam and in the Commonwealth of the Northern Mariana Islands (CNMI) that falls under the National Defense Authorization Act for Fiscal Year 2021 (FY 2021 NDAA).

Read More

Affected Sections

2 USCIS-PM I.11 - Chapter 11 - Temporary Nonagricultural Worker (H-2B) Petitions Requiring Special Handling

POLICY ALERT - Updating General Guidelines on Maximum Validity Periods for Employment Authorization Documents based on Certain Filing Categories

February 07, 2022

U.S. Citizenship and Immigration Services (USCIS) is updating guidelines in the USCIS Policy Manual regarding validity periods for Employment Authorization Documents (EADs) for asylees and refugees, noncitizens with withholding of deportation or removal, noncitizens with deferred action, parolees, and Violence Against Women Act (VAWA) self-petitioners.

Read More

Affected Sections

10 USCIS-PM A.4 - Chapter 4 - Adjudication

POLICY ALERT - Use of Medical Examination Completed Abroad for Afghan Nationals Applying for Adjustment of Status After Evacuation Under Operation Allies Welcome

February 01, 2022

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to allow certain Afghan nationals applying for adjustment of status after evacuation under Operation Allies Welcome (OAW) to use the report of an immigration medical examination completed abroad by a panel physician to satisfy the requirement normally demonstrated on a Report of Medical Examination and Vaccination Record (Form I-693) completed by a USCIS-designated civil surgeon, as long as certain conditions are met.

Read More

Affected Sections

8 USCIS-PM B.3 - Chapter 3 - Applicability of Medical Examination and Vaccination Requirement

Technical Update - Extension of Conditional Permanent Residence While Form I-829 is Pending

January 26, 2022

This technical update to Volume 6 removes references to the period of time for which the Petition by Investor to Remove Conditions on Permanent Resident Status (Form I-829) receipt notice shows proof of conditional permanent resident status.

Affected Sections

6 USCIS-PM G.5 - Chapter 5 - Project Applications

POLICY ALERT - Photographs and Signatures for Applications for Certificates of Citizenship

January 26, 2022

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual to specify that persons submitting an Application for Certificate of Citizenship (Form N-600) will generally now have their photographs taken at a biometrics appointment instead of submitting paper photographs and handwritten signatures, as applicable.

Read More

Affected Sections

12 USCIS-PM H.4 - Chapter 4 - Automatic Acquisition of Citizenship after Birth (INA 320)

POLICY ALERT - USCIS Expedite Criteria and Circumstances

January 25, 2022

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual regarding criteria used to determine whether a case warrants expedited treatment.

Read More

Affected Sections

1 USCIS-PM A.5 - Chapter 5 - Expedite Requests

POLICY ALERT - O-1 Nonimmigrant Status for Persons of Extraordinary Ability or Achievement

January 21, 2022

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to clarify how USCIS evaluates evidence to determine eligibility for O-1A nonimmigrants of extraordinary ability, with a focus on persons in science, technology, engineering, or mathematics (STEM) fields, as well as how USCIS determines whether an O-1 beneficiary's prospective work is within the beneficiary's area of extraordinary ability or achievement.

Read More

Affected Sections

2 USCIS-PM M.4 - Chapter 4 - O-1 Beneficiaries

POLICY ALERT - National Interest Waivers for Advanced Degree Professionals or Persons of Exceptional Ability

January 21, 2022

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual to address requests for national interest waivers for advanced degree professionals or persons of exceptional ability.

Read More

Affected Sections

6 USCIS-PM F.5 - Chapter 5 - Advanced Degree or Exceptional Ability

POLICY ALERT - Determining the Appropriate O-1B Classification for Persons of Extraordinary Ability in the Arts or Extraordinary Achievement in the Motion Picture or Television Industry

January 13, 2022

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to clarify how USCIS determines whether an O-1B beneficiary is evaluated as a person of extraordinary ability in the arts (O-1B Arts) or as a person of extraordinary achievement in the motion picture or television industry (O-1B MPTV).

Read More

Affected Sections

2 USCIS-PM M.4 - Chapter 4 - O-1 Beneficiaries

POLICY ALERT - Temporary Waiver of "60-Day Rule" for Report of Medical Examination and Vaccination Record (Form I-693)

December 09, 2021

U.S. Citizenship and Immigration Services (USCIS) is temporarily waiving the requirement that the civil surgeon's signature on the Report of Medical Examination and Vaccination Record (Form I-693) be dated no more than 60 days before an applicant files the application for the underlying immigration benefit.

Read More

Affected Sections

8 USCIS-PM B.4 - Chapter 4 - Review of Medical Examination Documentation

POLICY ALERT - General Adjudications

November 23, 2021

U.S. Citizenship and Immigration Services (USCIS) is incorporating and superseding existing guidance into the USCIS Policy Manual addressing topics in the context of general adjudications, including evidence, sworn statements, and adjudicative decisions.

Read More

Affected Sections

1 USCIS-PM E.1 - Chapter 1 - Purpose and Background

1 USCIS-PM E.6 - Chapter 6 - Evidence

1 USCIS-PM E.9 - Chapter 9 - Rendering a Decision

1 USCIS-PM E.10 - Chapter 10 - Post-Decision Actions

POLICY ALERT - Demonstrating Eligibility for Modification under Section 337 of the Immigration and Nationality Act

November 19, 2021

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual to clarify guidance related to requests for modifications to the Oath of Allegiance.

Read More

Affected Sections

12 USCIS-PM J.3 - Chapter 3 - Oath of Allegiance Modifications and Waivers

POLICY ALERT - Adoptions

November 19, 2021

U.S. Citizenship and Immigration Services (USCIS) is publishing a volume in the USCIS Policy Manual regarding adoptions. This guidance incorporates basic requirements for the submission of adoption-based applications and petitions to USCIS.

Read More

Affected Sections

5 USCIS-PM - Volume 5 - Adoptions

POLICY ALERT - Employment Authorization for Certain H-4, E, and L Nonimmigrant Dependent Spouses

November 12, 2021

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address automatic extension of employment authorization for certain H-4, E, and L nonimmigrant dependent spouses. USCIS is also rescinding the 2002 Legacy Immigration and Naturalization Service memorandum entitled, “Guidance on Employment Authorization for E and L Nonimmigrant Spouses, and for Determinations on the Requisite Employment Abroad for L Blanket Petition” (2002 INS memorandum).

Read More

Affected Sections

10 USCIS-PM B.1 - Chapter 1 - Purpose and Background

10 USCIS-PM B.2 - Chapter 2 - Employment Authorization for Certain H-4, E, and L Nonimmigrant Dependent Spouses

POLICY ALERT - Clarifying Guidance on Military Service Members and Naturalization

November 12, 2021

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to provide clarifications regarding certain naturalization applications filed by current or former members of the U.S. armed forces under sections 328 and 329 of the Immigration and Nationality Act (INA).

Read More

Affected Sections

12 USCIS-PM I.2 - Chapter 2 - One Year of Military Service during Peacetime (INA 328)

12 USCIS-PM I.3 - Chapter 3 - Military Service during Hostilities (INA 329)

12 USCIS-PM I.5 - Chapter 5 - Application and Filing for Service Members (INA 328 and 329)

12 USCIS-PM I.9 - Chapter 9 - Spouses, Children, and Surviving Family Benefits

POLICY ALERT - Evidence Supporting Liberian Refugee Immigration Fairness-Based Adjustment of Status Applications

October 29, 2021

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual to clarify what steps applicants must take if they are not able to submit primary evidence of Liberian nationality to support an application for adjustment of status under the Liberian Refugee Immigration Fairness (LRIF) law.

Read More

Affected Sections

7 USCIS-PM P.5 - Chapter 5 - Liberian Refugee Immigration Fairness

POLICY ALERT - T Nonimmigrant Status for Victims of Severe Forms of Trafficking in Persons

October 20, 2021

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual regarding the adjudication of applications for T nonimmigrant status for victims of severe forms of trafficking in persons.

Read More

Affected Sections

3 USCIS-PM B - Part B - Victims of Trafficking

9 USCIS-PM O - Part O - Victims of Trafficking

Technical Update - Implementation of COVID-19 Vaccination Requirement for Immigration Medical Examination

October 01, 2021

This technical update incorporates the policy guidance that U.S. Citizenship and Immigration Services (USCIS) announced September 14, 2021, regarding health-related grounds of inadmissibility in accordance with recently updated requirements issued by the Centers for Disease Control and Prevention (CDC). The updated guidance requires applicants subject to the immigration medical examination to submit COVID-19 vaccination records before completion of immigration medical examinations conducted in the United States and overseas. This guidance became effective October 1, 2021.

Affected Sections

8 USCIS-PM B.9 - Chapter 9 - Vaccination Requirement

9 USCIS-PM D.3 - Chapter 3 - Waiver of Immigrant Vaccination Requirement

Technical Update - End of Temporary Extension of Validity Period of Report of Medical Examination and Vaccination Record (Form I-693)

October 01, 2021

This technical update to Volume 8 removes the temporary extension of the validity period of the Report of Medical Examination and Vaccination Record (Form I-693) announced August 12, 2021. This temporary extension expires October 1, 2021.

Affected Sections

8 USCIS-PM B.4 - Chapter 4 - Review of Medical Examination Documentation

Technical Update - Incorporating Eleventh Circuit Case Law

October 01, 2021

This technical update to Volume 8 modifies several footnotes to note the divergence from the Board of Immigration Appeals (BIA)'s decision in *Matter of Richmond*, 26 I&N Dec. 779, 787 (BIA 2016) in the Eleventh Circuit. In *Patel v. U.S. Att'y Gen.*, 971 F.3d 1258, 1272 (11th Cir. 2020) (en banc), the Eleventh Circuit held that a false claim to U.S. citizenship does not have to be material in order to result in inadmissibility. This decision only applies to cases within the jurisdiction of the Eleventh Circuit, which covers Georgia, Alabama, and Florida. This update also removes redundant footnotes.

Affected Sections

8 USCIS-PM K.2 - Chapter 2 - Determining False Claim to U.S. Citizenship

POLICY ALERT - Refugee and Asylee Adjustment of Status Interview Criteria and Guidelines

September 16, 2021

U.S. Citizenship and Immigration Services (USCIS) is updating guidance in the USCIS Policy Manual regarding interview criteria for asylee and refugee adjustment of status applicants.

Read More

Affected Sections

7 USCIS-PM L.5 - Chapter 5 - Adjudication Procedures

7 USCIS-PM M.5 - Chapter 5 - Adjudication Procedures

POLICY ALERT - COVID-19 Vaccination Requirement for Immigration Medical Examination

September 14, 2021

U.S. Citizenship and Immigration Services (USCIS) is updating guidance in the USCIS Policy Manual regarding health-related grounds of inadmissibility in accordance with recently updated requirements issued by the Centers for Disease Control and Prevention (CDC). The updated guidance requires applicants subject to the immigration medical examination to submit COVID-19 vaccination records before completion of immigration medical examinations conducted in the United States and overseas. This guidance becomes effective October 1, 2021.

Read More

Affected Sections

8 USCIS-PM B.9 - Chapter 9 - Vaccination Requirement

9 USCIS-PM D.3 - Chapter 3 - Waiver of Immigrant Vaccination Requirement

POLICY ALERT - Temporary Extension of Validity Period of Report of Medical Examination and Vaccination Record (Form I-693)

August 12, 2021

U.S. Citizenship and Immigration Services (USCIS) is temporarily extending the validity period of the Report of Medical Examination and Vaccination Record (Form I-693). This temporary extension is effective through September 30, 2021.

Read More

Affected Sections

8 USCIS-PM B.4 - Chapter 4 - Review of Medical Examination Documentation

POLICY ALERT - Rescinding Guidance on Discretionary Employment Authorization for Parolees

August 12, 2021

U.S. Citizenship and Immigration Services (USCIS) is rescinding policy guidance in the USCIS Policy Manual on discretionary employment authorization for parolees.

Read More

Affected Sections

1 USCIS-PM C.1 - Chapter 1 - Purpose and Background

3 USCIS-PM F.1 - Chapter 1 - Purpose and Background

10 USCIS-PM B.2 - Chapter 2 - Employment Authorization for Certain H-4, E, and L Nonimmigrant Dependent Spouses

POLICY ALERT - Assisted Reproductive Technology and In-Wedlock Determinations for Immigration and Citizenship Purposes

August 05, 2021

U.S. Citizenship and Immigration Services (USCIS) is updating guidance in the USCIS Policy Manual regarding the determination of whether a child born outside the United States, including a child born through Assisted Reproductive Technology (ART), is considered born “in wedlock.”

Read More

Affected Sections

6 USCIS-PM B.7 - Chapter 7 - Children, Sons, and Daughters

12 USCIS-PM H.2 - Chapter 2 - Definition of Child and Residence for Citizenship and Naturalization

12 USCIS-PM H.3 - Chapter 3 - U.S. Citizens at Birth (INA 301 and 309)

12 USCIS-PM H.4 - Chapter 4 - Automatic Acquisition of Citizenship after Birth (INA 320)

12 USCIS-PM H.5 - Chapter 5 - Child Residing Outside the United States (INA 322)

POLICY ALERT - Extension of Blanket Civil Surgeon Designation for Certain Afghan Special Immigrant Visa Applicants

July 30, 2021

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address the urgent need for additional civil surgeons to conduct immigration medical examinations in support of Operation Allies Refuge. This guidance became effective July 26, 2021.

Read More

Affected Sections

8 USCIS-PM C.3 - Chapter 3 - Blanket Civil Surgeon Designation

Technical Update - Adding References to the EB-5 Visa Program in Child Status Protection Act Guidance

July 26, 2021

This technical update to Volume 7 includes references to the EB-5 visa program and Form I-526, Immigrant Petition by Alien Investor, and clarifications regarding the Child Status Protection Act eligibility of derivative applicants of the VAWA-based Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant.

Affected Sections

7 USCIS-PM A.7 - Chapter 7 - Child Status Protection Act

POLICY ALERT - Immigrant Investors and Investment of Loan Proceeds

July 22, 2021

U.S. Citizenship and Immigration Services (USCIS) is revising policy guidance in the USCIS Policy Manual to comply with a recent court order.

Read More

Affected Sections

6 USCIS-PM G.2 - Chapter 2 - Immigrant Petition Eligibility Requirements

POLICY ALERT - Change of Status to Nonimmigrant Student (F-1) Visa Classification

July 20, 2021

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual regarding applications for change of status (COS) to F-1 classification.

Read More

Affected Sections

2 USCIS-PM F.8 - Chapter 8 - Change of Status, Extension of Stay, and Length of Stay

Technical Update - Removing References to the U.S. Department of State’s 90-Day Rule

July 16, 2021

This technical update to Volume 8 removes all references to the U.S. Department of State’s 90-day rule.

Affected Sections

8 USCIS-PM J.3 - Chapter 3 - Adjudicating Inadmissibility

Technical Update - EB-5 Modernization Rule Vacatur

July 15, 2021

This technical update explains that on June 22, 2021, the U.S. District Court for the Northern District of California, in *Behring Regional Center LLC v. Wolf*, 20-cv-09263-JSC, vacated the EB-5 Immigrant Investor Program Modernization Final Rule (PDF). While USCIS considers this decision, USCIS will apply the EB-5 regulations and policies that were in effect before the rule was finalized on November 21, 2019.

Affected Sections

6 USCIS-PM G.1 - Chapter 1 - Purpose and Background

6 USCIS-PM G.2 - Chapter 2 - Immigrant Petition Eligibility Requirements

6 USCIS-PM G.3 - Chapter 3 - Immigrant Petition Adjudication

6 USCIS-PM G.4 - Chapter 4 - Regional Center Applications

6 USCIS-PM G.5 - Chapter 5 - Project Applications

7 USCIS-PM A.6 - Chapter 6 - Adjudicative Review

Technical Update - Liberian Refugee Immigration Fairness

June 17, 2021

This technical update to Volume 7 clarifies what evidence an applicant may submit to establish Liberian nationality when applying for adjustment of status under the Liberian Refugee Immigration Fairness (LRIF) law. It includes examples of secondary evidence that could support an applicant's claim of Liberian nationality, as part of the totality of the evidence.

Affected Sections

7 USCIS-PM P.5 - Chapter 5 - Liberian Refugee Immigration Fairness

POLICY ALERT - Bona Fide Determination Process for Victims of Qualifying Crimes, and Employment Authorization and Deferred Action for Certain Petitioners

June 14, 2021

U.S. Citizenship and Immigration Services (USCIS) is publishing guidance in the USCIS Policy Manual on employment authorization and deferred action for principal petitioners for U nonimmigrant status and qualifying family members with pending, bona fide petitions.

Read More

Affected Sections

3 USCIS-PM C - Part C - Victims of Crimes

POLICY ALERT - USCIS Expedite Criteria and Circumstances

June 09, 2021

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual regarding criteria used to determine whether a case warrants expedited treatment.

Read More

Affected Sections

1 USCIS-PM A.5 - Chapter 5 - Expedite Requests

POLICY ALERT - Requests for Evidence and Notices of Intent to Deny

June 09, 2021

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address the circumstances in which officers should issue Requests for Evidence (RFEs) and Notices of Intent to Deny (NOIDs).

Read More

Affected Sections

1 USCIS-PM E.6 - Chapter 6 - Evidence

1 USCIS-PM E.9 - Chapter 9 - Rendering a Decision

POLICY ALERT - Employment Authorization for Certain Adjustment Applicants

June 09, 2021

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual to increase the amount of time a grant of employment authorization is valid for applicants seeking adjustment of status under Section 245 of the Immigration and Nationality Act (INA).

Read More

Affected Sections

10 USCIS-PM B.4 - Chapter 4 - Reserved

POLICY ALERT - Veterans Residing Outside the United States and Naturalization

May 28, 2021

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to provide clarifications regarding certain naturalization applications filed by veterans of the U.S. armed forces under section 329 of the Immigration and Nationality Act (INA). These clarifications ensure eligible military veterans who served honorably during specifically designated periods of hostility and meet all other statutory requirements for naturalization are able to naturalize and become U.S. citizens in accordance with U.S. immigration laws.

Read More

Affected Sections

12 USCIS-PM I.3 - Chapter 3 - Military Service during Hostilities (INA 329)

12 USCIS-PM I.5 - Chapter 5 - Application and Filing for Service Members (INA 328 and 329)

POLICY ALERT - Naturalization Eligibility and Voter Registration Through a State's Benefit Application Process

May 27, 2021

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual regarding applicants' registration to vote through a state's department of motor vehicles or other state benefit application process and the effects on an applicant's good moral character (GMC).

Read More

Affected Sections

12 USCIS-PM F.5 - Chapter 5 - Conditional Bars for Acts in Statutory Period

POLICY ALERT - Preserving Continuous Residence and Physical Presence for Purposes of Naturalization while Engaged in Religious Duties Outside the United States

May 25, 2021

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual regarding preservation of continuous residence and physical presence for naturalization purposes for applicants engaged outside the United States in a qualifying religious vocation under section 317 of the Immigration and Nationality Act (INA).

Read More

Affected Sections

12 USCIS-PM D - Part D - General Naturalization Requirements

Technical Update - Incorporating New INA 320(c) Provision into Nationality Chart 3 - Derivative Citizenship of Children

May 24, 2021

This technical update to Volume 12 incorporates into Nationality Chart 3 the new INA 320(c) provision, as amended by Section 2 of the Citizenship for Children of Military Members and Civil Servants Act, regarding the automatic citizenship of a foreign-born child of a U.S. citizen employee of the U.S. government or member of the U.S. armed forces.

Affected Sections

12 USCIS-PM H.3 - Chapter 3 - U.S. Citizens at Birth (INA 301 and 309)

Technical Update - Incorporating Existing Guidance into the Policy Manual

May 20, 2021

This technical update is part of an initiative to move existing policy guidance from the Adjudicator's Field Manual (AFM) into the Policy Manual. This update does not make major substantive changes but consolidates and incorporates existing AFM guidance into the Policy Manual, streamlining USCIS' immigration policy while removing obsolete information. This guidance replaces Chapter 30.4 of the AFM, related appendices, and policy memoranda.

Affected Sections

11 USCIS-PM F - Part F - Arrival-Departure Records

Technical Update - Incorporating Existing Guidance into the Policy Manual

May 19, 2021

This technical update is part of an initiative to move existing policy guidance from the Adjudicator's Field Manual (AFM) into the Policy Manual. This update does not make major substantive changes but consolidates and incorporates existing AFM guidance into the Policy Manual, streamlining USCIS' immigration policy while removing obsolete information. This guidance replaces Chapter 21.7 of the AFM, related appendices, and policy memoranda.

Affected Sections

7 USCIS-PM P.9 - Chapter 9 - Amerasian Immigrants

Technical Update - Incorporating Existing Guidance into the Policy Manual

May 18, 2021

This technical update is part of an initiative to move existing policy guidance from the Adjudicator's Field Manual (AFM) into the Policy Manual. This update does not make major substantive changes but consolidates and incorporates existing AFM guidance into the Policy Manual, streamlining USCIS' immigration policy while removing obsolete information. This guidance replaces Chapters 22.1 and 22.2 of the AFM, related appendices, and policy memoranda.

Affected Sections

6 USCIS-PM E - Part E - Employment-Based Immigration

6 USCIS-PM F - Part F - Employment-Based Classifications

Technical Update - Program Extension and Visa Numbers for Special Immigrant Visas for Afghans Who Were Employed by or on Behalf of the U.S. Government

May 14, 2021

This technical update directs readers to visit the USCIS webpage for the latest information on Special Immigrant Visa (SIV) program extensions and visa numbers for Afghans who were employed by or on behalf of the U.S. Government.

Affected Sections

6 USCIS-PM H.1 - Chapter 1 - Purpose and Background

6 USCIS-PM H.9 - Chapter 9 - Certain Afghan Nationals

7 USCIS-PM F.10 - Chapter 10 - Certain Afghan and Iraqi Nationals

POLICY ALERT - Exemption to the Temporary Need Requirement for Certain H-2B Workers on Guam and in the Commonwealth of the Northern Mariana Islands under the National Defense Authorization Act for Fiscal Year 2021

May 13, 2021

U.S. Citizenship and Immigration Services (USCIS) is providing guidance in the USCIS Policy Manual regarding the filing and adjudication of temporary nonagricultural worker (H-2B) nonimmigrant visa petitions that fall under Section 9502 of the National Defense Authorization Act for Fiscal Year 2021 (FY 2021 NDAA).

Read More

Affected Sections

2 USCIS-PM I - Part I - Temporary Agricultural and Nonagricultural Workers (H-2)

Technical Update - Replacing the Term “Alien”

May 11, 2021

This technical update replaces all instances of the term “alien” with “noncitizen” or other appropriate terms throughout the Policy Manual where possible, as used to refer to a person who meets the definition provided in INA 101(a)(3) [“any person not a citizen or national of the United States”].

Affected Sections

1 USCIS-PM - Volume 1 - General Policies and Procedures

2 USCIS-PM - Volume 2 - Nonimmigrants

6 USCIS-PM - Volume 6 - Immigrants

7 USCIS-PM - Volume 7 - Adjustment of Status

8 USCIS-PM - Volume 8 - Admissibility

9 USCIS-PM - Volume 9 - Waivers and Other Forms of Relief

10 USCIS-PM - Volume 10 - Employment Authorization

11 USCIS-PM - Volume 11 - Travel and Identity Documents

12 USCIS-PM - Volume 12 - Citizenship and Naturalization

POLICY ALERT - Deference to Prior Determinations of Eligibility in Requests for Extensions of Petition Validity

April 27, 2021

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address the issue of deference to prior determinations of eligibility by an officer when adjudicating a request for an extension of petition validity.

Read More

Affected Sections

2 USCIS-PM A.4 - Chapter 4 - Extension of Stay, Change of Status, and Extension of Petition Validity

Technical Update - Temporary Proof of Lawful Permanent Resident Status

March 30, 2021

U.S. Citizenship and Immigration Services (USCIS) is updating guidance in the USCIS Policy Manual regarding the temporary proof of status USCIS provides to lawful permanent residents (LPRs) applying to replace an expiring Permanent Resident Card (PRC).

Affected Sections

11 USCIS-PM B.2 - Chapter 2 - Replacement of Permanent Resident Card

11 USCIS-PM B.3 - Chapter 3 - Expired Permanent Resident Cards

POLICY ALERT - Additional Guidance Relating to P-1A Internationally Recognized Athletes

March 26, 2021

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to update and clarify guidance for internationally recognized athletes (P-1A nonimmigrants).

Read More

Affected Sections

2 USCIS-PM N.2 - Chapter 2 - Eligibility Requirements

2 USCIS-PM N.4 - Chapter 4 - Documentation and Evidence

POLICY ALERT - Special Immigrant Juvenile Classification and Saravia v. Barr Settlement

March 18, 2021

U.S. Citizenship and Immigration Services (USCIS) is updating the USCIS Policy Manual regarding the special immigrant juvenile (SIJ) classification to incorporate changes agreed to in the settlement agreement resulting from the *Saravia v. Barr* class action lawsuit.

Read More

Affected Sections

6 USCIS-PM J - Part J - Special Immigrant Juveniles

Technical Update - Removing Guidance on Inadmissibility on Public Charge Grounds

March 10, 2021

This technical update removes the guidance in Volume 2, Part A, Chapter 4, Volume 8, Part G, and Volume 12, Part D, Chapter 2 relating to the administration of the public charge ground of inadmissibility under the *Inadmissibility on Public Charge Grounds* final rule, 84 FR 41292 (Aug. 14, 2019); as amended by *Inadmissibility on Public Charge Grounds; Correction*, 84 FR 52357 (Oct. 2, 2019) (“Public Charge Final Rule”), which was implemented on Feb. 24, 2020. On Nov. 2, 2020, the U.S. District Court for the Northern District of Illinois vacated the Public Charge Final Rule nationwide. On Nov. 3, 2020, the U.S. Court of Appeals for the Seventh Circuit issued an administrative stay and, on Nov. 19, 2020, a stay pending appeal of the U.S. District Court for the Northern District of Illinois’ Nov. 2, 2020 decision. On Mar. 9, 2021, the U.S. Court of Appeals for the Seventh Circuit lifted its stay and the U.S. District Court for the Northern District of Illinois’ order vacating the Public Charge Final Rule went into effect. USCIS immediately stopped applying the Public Charge Final Rule to all pending applications and petitions that would have been subject to the rule. For information on related litigation affecting implementation, see the Inadmissibility on Public Charge Grounds Final Rule: Litigation webpage.

Affected Sections

2 USCIS-PM A.4 - Chapter 4 - Extension of Stay, Change of Status, and Extension of Petition Validity

8 USCIS-PM G - Part G - Public Charge Ground of Inadmissibility

12 USCIS-PM D.2 - Chapter 2 - Lawful Permanent Resident Admission for Naturalization

Technical Update - Implementation of Revised Guidance on Naturalization Civics Educational Requirement

March 01, 2021

This technical update incorporates into Volume 12 the policy guidance that U.S. Citizenship and Immigration Services (USCIS) announced February 22, 2021, addressing educational requirements for naturalization to demonstrate a knowledge and understanding of the fundamentals of the history, and of the principles and form of government, of the United States (civics) under section 312 of the Immigration and Nationality Act (INA). Specifically, USCIS is reverting back to the 2008 version of the civics test, allowing a brief period during which USCIS may also offer the 2020 version of the test to applicants affected by the timing of this update. This guidance became effective March 1, 2021.

Affected Sections

12 USCIS-PM E.2 - Chapter 2 - English and Civics Testing

POLICY ALERT - Revising Guidance on Naturalization Civics Educational Requirement

February 22, 2021

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual regarding the educational requirements for naturalization to demonstrate a knowledge and understanding of the fundamentals of the history, and of the principles and form of government, of the United States (civics) under section 312 of the Immigration and Nationality Act (INA). Specifically, USCIS is reverting back to the 2008 version of the civics test, allowing a brief period during which USCIS may also offer the 2020 version of the test to applicants affected by the timing of this update. This guidance becomes effective March 1, 2021.

Read More

Affected Sections

12 USCIS-PM E.2 - Chapter 2 - English and Civics Testing

Technical Update - Updating Filing Deadline for Liberian Refugee Immigration Fairness Adjustment of Status Applications

February 10, 2021

This technical update to Volume 7 adjusts the filing deadline for Liberian Refugee Immigration Fairness (LRIF) adjustment of status applications to December 20, 2021, to reflect an extension by Congress.

Affected Sections

7 USCIS-PM P.5 - Chapter 5 - Liberian Refugee Immigration Fairness

POLICY ALERT - Applications for Discretionary Employment Authorization Involving Certain Adjustment Applications or Deferred Action

January 14, 2021

U.S. Citizenship and Immigration Services (USCIS) is providing policy guidance in the USCIS Policy Manual regarding applications for discretionary employment authorization based on 8 CFR 274a.12(c)(9) (pending application for adjustment of status under INA 245) or 8 CFR 274a.12(c)(14) (grant of deferred action). USCIS is also providing guidance outlining the categories of aliens eligible for discretionary employment authorization.

Read More

Affected Sections

10 USCIS-PM A - Part A - Employment Authorization Policies and Procedures

10 USCIS-PM B - Part B - Specific Categories

POLICY ALERT - Refugee and Asylee Adjustment of Status Interview Criteria and Guidelines

December 15, 2020

U.S. Citizenship and Immigration Services (USCIS) is updating guidance in the USCIS Policy Manual regarding adjustment of status interview waiver categories and expanding the interview criteria for asylee and refugee adjustment of status applicants.

Read More

Affected Sections

7 USCIS-PM A.5 - Chapter 5 - Interview Guidelines

7 USCIS-PM L.5 - Chapter 5 - Adjudication Procedures

7 USCIS-PM M.5 - Chapter 5 - Adjudication Procedures

Technical Update - Clarifying Acquisition of Citizenship Requirement in Nationality Chart 2 for Children Born Out of Wedlock Before May 24, 1934

December 08, 2020

This technical update to Volume 12 incorporates a clarification to Nationality Chart 2 to align with the provisions of the Immigration and Nationality Technical Corrections Act of 1994 (INTCA), which affected acquisition of citizenship for children born before May 24, 1934. Specifically, this technical update clarifies that an alien child born out of wedlock before May 24, 1934 acquires citizenship retroactively to the time of birth in cases where the child's mother resided in the United States at any time before the child's birth, regardless of whether the child was legitimated by the alien father.

Affected Sections

12 USCIS-PM H.3 - Chapter 3 - U.S. Citizens at Birth (INA 301 and 309)

Technical Update - Incorporating Existing Guidance into the Policy Manual

December 08, 2020

This technical update is part of an initiative to move existing policy guidance from the Adjudicator's Field Manual (AFM) into the Policy Manual. This update does not make major substantive changes but consolidates and incorporates existing AFM guidance into the Policy Manual, streamlining USCIS' immigration policy while removing obsolete information. This guidance replaces Chapter 23.5(c) of the AFM, related appendices, and policy memoranda.

Affected Sections

7 USCIS-PM C - Part C - 245(i) Adjustment

POLICY ALERT - Properly Completed Medical Certification For Disability Exception (N-648)

December 04, 2020

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to reflect changes made in the new version of the Medical Certification for Disability Exception (Form N-648).

Read More

Affected Sections

12 USCIS-PM E.3 - Chapter 3 - Medical Disability Exception (Form N-648)

POLICY ALERT - Schedule A Designation

December 02, 2020

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address Schedule A designations.

Read More

Affected Sections

6 USCIS-PM E.7 - Chapter 7 - Schedule A Designation Petitions

Technical Update - Implementation of Redesigned Civics Test for Educational Requirement for Naturalization

December 01, 2020

This technical update incorporates into Volume 12 the policy guidance that U.S. Citizenship and Immigration Services (USCIS) announced November 13, 2020, addressing the educational requirements for naturalization on the knowledge and understanding of the fundamentals of the history, and of the principles and form of government, of the United States (civics) under section 312 of the Immigration and Nationality Act. This guidance became effective December 1, 2020.

Affected Sections

12 USCIS-PM E.2 - Chapter 2 - English and Civics Testing

POLICY ALERT - Prerequisite of Lawful Admission for Permanent Residence under All Applicable Provisions for Purposes of Naturalization

November 18, 2020

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual to ensure consistency in the naturalization decision-making process and to clarify circumstances under which an applicant may be found ineligible for naturalization if the applicant was not lawfully admitted to the United States for permanent residence in accordance with all applicable provisions under the Immigration and Nationality Act (INA).

Read More

Affected Sections

12 USCIS-PM B.4 - Chapter 4 - Results of the Naturalization Examination

12 USCIS-PM D.2 - Chapter 2 - Lawful Permanent Resident Admission for Naturalization

12 USCIS-PM F.2 - Chapter 2 - Adjudicative Factors

POLICY ALERT - Use of Discretion for Adjustment of Status

November 17, 2020

U.S. Citizenship and Immigration Services (USCIS) is updating existing policy guidance in the USCIS Policy Manual regarding the discretionary factors to consider in adjudications of adjustment of status applications.

Read More

Affected Sections

7 USCIS-PM A.1 - Chapter 1 - Purpose and Background

7 USCIS-PM A.10 - Chapter 10 - Legal Analysis and Use of Discretion

POLICY ALERT - Job Portability after Filing Application to Adjust Status

November 17, 2020

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to consolidate and update guidance on the ability to change to a same or similar job, also known as portability, for certain beneficiaries of employment-based immigrant petitions after they have applied to adjust status.

Read More

Affected Sections

7 USCIS-PM E.5 - Chapter 5 - Job Portability after Adjustment Filing and Other AC21 Provisions

POLICY ALERT - Age and “Sought to Acquire” Requirement under Child Status Protection Act

November 13, 2020

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual regarding the Child Status Protection Act (CSPA), to include how USCIS calculates age under certain contexts and what actions satisfy the “sought to acquire” requirement.

Read More

Affected Sections

7 USCIS-PM A.7 - Chapter 7 - Child Status Protection Act

POLICY ALERT - Civics Educational Requirement for Purposes of Naturalization

November 13, 2020

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual regarding the educational requirements for naturalization on the knowledge and understanding of the fundamentals of the history, and of the principles and form of government, of the United States (civics) under section 312 of the Immigration and Nationality Act. This guidance becomes effective December 1, 2020.

Read More

Affected Sections

12 USCIS-PM E.2 - Chapter 2 - English and Civics Testing

POLICY ALERT - Nonimmigrant Cultural Visitor (Q) Visa Classification

October 15, 2020

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual regarding the nonimmigrant cultural visitor visa classification, commonly known as the “Q” visa category.

Read More

Affected Sections

2 USCIS-PM E - Part E - Cultural Visitors (Q)

POLICY ALERT - Temporary Protected Status and Eligibility for Adjustment of Status under Section 245(a) of the Immigration and Nationality Act

October 06, 2020

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual regarding whether temporary protected status (TPS) beneficiaries are eligible for adjustment of status under section 245(a) of the Immigration and Nationality Act (INA).

Read More

Affected Sections

7 USCIS-PM B.2 - Chapter 2 - Eligibility Requirements

POLICY ALERT - Inadmissibility Based on Membership in a Totalitarian Party

October 02, 2020

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address inadmissibility based on membership in or affiliation with the Communist or any other totalitarian party.

Read More

Affected Sections

8 USCIS-PM F.3 - Chapter 3 - Immigrant Membership in Totalitarian Party

Technical Update - Clarifying Requests for Relief Under INA 204(l)

September 22, 2020

This technical update clarifies how applicants and petitioners may request relief under INA 204(l).

Affected Sections

7 USCIS-PM A.9 - Chapter 9 - Death of Petitioner or Principal Beneficiary

POLICY ALERT - Residency Requirements for Children of Service Members and Government Employees Residing Outside of the United States for Purposes of Acquisition of Citizenship

September 18, 2020

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual regarding residency requirements under Section 320 of the Immigration and Nationality Act (INA), as amended by the Citizenship for Children of Military Members and Civil Servants Act.

Read More

Affected Sections

12 USCIS-PM H - Part H - Children of U.S. Citizens

12 USCIS-PM I - Part I - Military Members and their Families

POLICY ALERT - O Nonimmigrant Visa Classification

September 17, 2020

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to update and consolidate guidance related to O nonimmigrant classifications.

Read More

Affected Sections

2 USCIS-PM M - Part M - Nonimmigrants of Extraordinary Ability or Achievement (O)

Technical Update - Incorporating Existing Guidance into the Policy Manual

September 17, 2020

This technical update is part of an initiative to move existing policy guidance from the Adjudicator’s Field Manual (AFM) into the Policy Manual. This update does not make major substantive changes but consolidates and incorporates existing AFM guidance into the Policy Manual, streamlining USCIS’ immigration policy while removing obsolete information. This guidance replaces Chapter 33 of the AFM, related appendices, and policy memoranda.

Affected Sections

2 USCIS-PM N - Part N - Athletes and Entertainers (P)

Technical Update - Clarifying Dates of Absence for Continuous Residence

September 15, 2020

This technical update clarifies the examples provided to illustrate the impact of absences from the United States for purposes of the continuous residence requirement for naturalization, including the hypothetical dates used in the examples.

Affected Sections

12 USCIS-PM D.3 - Chapter 3 - Continuous Residence

POLICY ALERT - Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements Final Rule

September 02, 2020

U.S. Citizenship and Immigration Services (USCIS) is revising its policy guidance in the USCIS Policy Manual to align with the Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements Final Rule, published in the Federal Register on August 3, 2020. This guidance becomes effective October 2, 2020. For information regarding implementation, see Appendix: 2020 Fee Rule Litigation Summary.

Read More

Affected Sections

1 USCIS-PM A - Part A - Public Services

1 USCIS-PM B - Part B - Submission of Benefit Requests

2 USCIS-PM - Volume 2 - Nonimmigrants

7 USCIS-PM A - Part A - Adjustment of Status Policies and Procedures

7 USCIS-PM F - Part F - Special Immigrant-Based Adjustment

7 USCIS-PM M - Part M - Asylee Adjustment

11 USCIS-PM A - Part A - Secure Identity Documents Policies and Procedures

Technical Update - Removing Exemption from Discretion for Asylum Applicants Seeking Employment Authorization under 8 CFR 274a.12(c)(8)

August 27, 2020

This technical update removes the exemption from discretion for asylum applicants seeking employment authorization under 8 CFR 274a.12(c)(8). The Asylum Application, Interview, and Employment Authorization for Applicants Final Rule (Final Rule) (effective August 25, 2020) amended 8 CFR 274a.13(a)(1) to eliminate the exemption. Accordingly, asylum applicants who file applications for employment authorization on or after August 25, 2020 are subject to discretion like other applicants seeking employment authorization under 8 CFR 274a.12(c). **Note: On September 11, 2020, the U.S. District Court for the District of Maryland in *Casa de Maryland et al v. Chad Wolf* provided limited injunctive relief to members of two organizations, CASA de Maryland (CASA) and the Asylum Seeker Advocacy Project (ASAP), in the application of the Final Rule to Form I-589s and Form I-765s filed by asylum applicants who are also members of CASA or ASAP. Therefore, while the rule is preliminarily enjoined, we will continue to apply the prior regulatory language and exempt from discretion CASA and ASAP members who file a Form I-765 based on an asylum application.**

Affected Sections

10 USCIS-PM A.5 - Chapter 5 - Reserved

Technical Update - Braille-Related Accommodations for the Naturalization Test

August 27, 2020

This technical update incorporates references to Braille-related accommodations for the naturalization test.

Affected Sections

12 USCIS-PM C - Part C - Accommodations

POLICY ALERT - Clarifying Procedures for Terminating Asylum Status in Relation to Consideration of an Application for Adjustment of Status

August 21, 2020

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to update and clarify the procedures USCIS officers follow when termination of asylum status is considered in relation to adjudicating an asylum-based adjustment of status application.

Read More

Affected Sections

7 USCIS-PM M.6 - Chapter 6 - Termination of Status and Notice to Appear Considerations

Technical Update - Foreign Residency Requirement

August 06, 2020

This technical update provides clarification on the 2-year foreign residence requirement for certain exchange visitors subject to INA 212(e).

Affected Sections

7 USCIS-PM A.2 - Chapter 2 - Eligibility Requirements

Technical Update - Incorporating Existing Guidance into the Policy Manual

July 30, 2020

This technical update is part of an initiative to move existing policy guidance from the Adjudicator's Field Manual (AFM) into the Policy Manual. This update does not make major substantive changes but consolidates and incorporates existing AFM guidance into the Policy Manual, streamlining USCIS' immigration policy while removing obsolete information. This guidance replaces Chapters 22.3 and 26 of the AFM, related appendices, and policy memoranda.

Affected Sections

6 USCIS-PM H - Part H - Designated and Special Immigrants

7 USCIS-PM Q - Part Q - Rescission of Lawful Permanent Residence

POLICY ALERT - Clarifying Guidance for Deployment of Capital in Employment-Based Fifth Preference (EB-5) Category

July 24, 2020

U.S. Citizenship and Immigration Services (USCIS) is issuing clarifying policy guidance in the USCIS Policy Manual regarding deployment of investment capital, including further deployment after the job creation requirement is satisfied.

Read More

Affected Sections

6 USCIS-PM G.2 - Chapter 2 - Immigrant Petition Eligibility Requirements

6 USCIS-PM G.4 - Chapter 4 - Regional Center Applications

POLICY ALERT - Applying Discretion in USCIS Adjudications

July 15, 2020

U.S. Citizenship and Immigration Services (USCIS) is consolidating existing policy guidance in the USCIS Policy Manual regarding the discretionary analysis required in the adjudication of certain benefit requests, including certain applications for employment authorization.

Read More

Affected Sections

1 USCIS-PM E.8 - Chapter 8 - Discretionary Analysis

10 USCIS-PM A.5 - Chapter 5 - Reserved

Technical Update - Removing Obsolete Form I-508F

June 18, 2020

This technical update removes references to Form I-508F, Request for Waiver of Certain Rights, Privileges, Exemptions and Immunities. French nationals are covered by a special convention between France and the United States. Previously, French nationals were required to submit both Form I-508 and Form I-508F to USCIS. The 11/08/19 form edition combines information from both forms. Therefore, French nationals are now only required to submit Form I-508.

Affected Sections

7 USCIS-PM A.2 - Chapter 2 - Eligibility Requirements

7 USCIS-PM F.6 - Chapter 6 - Certain G-4 or NATO-6 Employees and their Family Members

7 USCIS-PM O.3 - Chapter 3 - Children Born in the United States to Accredited Diplomats

Technical Update - Removing WA Food Assistance Program from the List of Public Benefits Considered

June 16, 2020

This technical update removes the WA Food Assistance Program for Legal Immigrants from the list of examples of state, local, and tribal cash assistance programs that are considered income maintenance for purposes of the public charge inadmissibility determination.

Affected Sections

8 USCIS-PM G - Part G - Public Charge Ground of Inadmissibility

Technical Update - Moving the Adjudicator's Field Manual Content into the USCIS Policy Manual

May 21, 2020

U.S. Citizenship and Immigration Services (USCIS) is updating and incorporating relevant Adjudicator's Field Manual (AFM) content into the USCIS Policy Manual. As that process is ongoing, USCIS has moved any remaining AFM content to its corresponding USCIS Policy Manual Part, in PDF format, until relevant AFM content has been properly incorporated into the USCIS Policy Manual. To the extent that a provision in the USCIS Policy Manual conflicts with remaining AFM content or Policy Memoranda, the updated information in the USCIS Policy Manual prevails. To find remaining AFM content, see the crosswalk between the AFM and the Policy Manual.

Affected Sections

1 USCIS-PM - Volume 1 - General Policies and Procedures

2 USCIS-PM - Volume 2 - Nonimmigrants

3 USCIS-PM - Volume 3 - Humanitarian Protection and Parole

4 USCIS-PM - Volume 4 - Refugees and Asylees

5 USCIS-PM - Volume 5 - Adoptions

6 USCIS-PM - Volume 6 - Immigrants

7 USCIS-PM - Volume 7 - Adjustment of Status

8 USCIS-PM - Volume 8 - Admissibility

9 USCIS-PM - Volume 9 - Waivers and Other Forms of Relief

11 USCIS-PM - Volume 11 - Travel and Identity Documents

12 USCIS-PM - Volume 12 - Citizenship and Naturalization

Technical Update - National Interest Waiver Portability Provisions

May 20, 2020

This technical update clarifies guidance within the USCIS Policy Manual on portability for physicians with an approved immigrant petition based on a national interest waiver (NIW) applying for adjustment of status, and the applicability of the 2-year foreign residence requirement of INA 212(e) to certain NIW physicians.

Affected Sections

7 USCIS-PM A.8 - Chapter 8 - Transfer of Underlying Basis

Technical Update - Incorporating Existing Guidance into the Policy Manual

May 15, 2020

This technical update is part of an initiative to move existing policy guidance from the Adjudicator's Field Manual (AFM) into the Policy Manual. This update does not make major substantive changes but consolidates and incorporates existing AFM guidance into the Policy Manual, streamlining USCIS' immigration policy while removing obsolete information. This guidance replaces Chapters 1, 3.4, 10.2, 10.3(a), 10.3(c), 10.3(e), 10.3(i), 10.4, 10.22, 11.1(c), 13, 14, 17, 23.8, 31.7, 33.10, 34.5, 35, 41.6, 42, 44, 56.1, 56.3, 56.4, 62, 81, 82, 83.1, 83.2, and 83.3 of the AFM, related appendices, and policy memoranda.

Affected Sections

1 USCIS-PM E - Part E - Adjudications

2 USCIS-PM O - Part O - Religious Workers (R)

7 USCIS-PM O.5 - Chapter 5 - Other Special Laws

POLICY ALERT - False Claim to U.S. Citizenship Ground of Inadmissibility and Matter of Zhang

April 24, 2020

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual regarding the false claim to U.S. citizenship ground of inadmissibility.

Read More

Affected Sections

8 USCIS-PM K - Part K - False Claim to U.S. Citizenship

Technical Update - Removing Obsolete Form I-864W

April 16, 2020

This technical update removes references to Form I-864W, Request for Exemption for Intending Immigrant's Affidavit of Support, which was discontinued by the Inadmissibility on Public Charge Grounds Rule and is no longer used by U.S. Citizenship and Immigration Services.

Affected Sections

7 USCIS-PM A.4 - Chapter 4 - Documentation

7 USCIS-PM A.6 - Chapter 6 - Adjudicative Review

POLICY ALERT - Liberian Refugee Immigration Fairness

April 07, 2020

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual regarding eligibility requirements, filing, and adjudication of adjustment of status applications based on the Liberian Refugee Immigration Fairness law.

Read More

Affected Sections

7 USCIS-PM P.5 - Chapter 5 - Liberian Refugee Immigration Fairness

Technical Update - Replacing the Term "Entrepreneur"

March 19, 2020

This technical update replaces instances of the term "entrepreneur" with "investor" throughout the Policy Manual in accordance with the EB-5 Immigrant Investor Program Final Rule.

Affected Sections

7 USCIS-PM A.2 - Chapter 2 - Eligibility Requirements

7 USCIS-PM B.2 - Chapter 2 - Eligibility Requirements

12 USCIS-PM G.5 - Chapter 5 - Conditional Permanent Resident Spouses and Naturalization

Technical Update - Use of Photographs as Biometrics

March 11, 2020

U.S. Citizenship and Immigration Services (USCIS) is incorporating general information on USCIS' use of photographs as biometrics.

Affected Sections

1 USCIS-PM C - Part C - Biometrics Collection and Security Checks

POLICY ALERT - Submission of Benefit Requests

March 05, 2020

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual regarding submission of benefit requests to USCIS.

Read More

Affected Sections

1 USCIS-PM B - Part B - Submission of Benefit Requests

POLICY ALERT - Effect of Breaks in Continuity of Residence on Eligibility for Naturalization

February 26, 2020

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address naturalization applicants' absences from the United States of more than 6 months but less than 1 year during the statutorily required continuous residence period.

Read More

Affected Sections

12 USCIS-PM D.3 - Chapter 3 - Continuous Residence

POLICY ALERT - Implementation of Guidance on Inadmissibility on Public Charge Grounds

February 24, 2020

Note: On Nov. 2, 2020, the U.S. District Court for the Northern District of Illinois vacated the Public Charge Final Rule nationwide. The U.S. Court of Appeals for the Seventh Circuit later issued a stay of the U.S. District Court for the Northern District of Illinois' Nov. 2, 2020 decision. On Mar. 9, 2021, the U.S. Court of Appeals for the Seventh Circuit lifted the stay and the U.S. District Court for the Northern District of Illinois' order vacating the Public Charge Final Rule went into effect. USCIS immediately stopped applying the Public Charge Final Rule to all pending applications and petitions that would have been subject to the rule. For information on related litigation affecting implementation, see the Inadmissibility on Public Charge Grounds Final Rule: Litigation webpage. The alert text below and related guidance are no longer in effect.

This update incorporates into Volumes 2, 8, and 12 policy guidance that U.S. Citizenship and Immigration Services (USCIS) announced February 5, 2020, implementing the Inadmissibility of Public Charge Grounds Final Rule. This guidance is in effect as of February 24, 2020 and applies nationwide to all applications and petitions postmarked on or after that date. Certain classes of aliens are exempt from the public charge ground of inadmissibility (such as refugees, asylees, certain VAWA self-petitioners, U petitioners, and T applicants) and therefore, are not subject to the Final Rule. For more information about the classes of [noncitizens] who are exempt from the Final Rule, see the appendices related to applicability. For information on related litigation affecting implementation, see the USCIS webpage on the injunction.

Read More

Affected Sections

2 USCIS-PM A.4 - Chapter 4 - Extension of Stay, Change of Status, and Extension of Petition Validity

8 USCIS-PM G - Part G - Public Charge Ground of Inadmissibility

12 USCIS-PM D.2 - Chapter 2 - Lawful Permanent Resident Admission for Naturalization

POLICY ALERT - Public Charge Ground of Inadmissibility

February 05, 2020

Note: On Nov. 2, 2020, the U.S. District Court for the Northern District of Illinois vacated the Public Charge Final Rule nationwide. The U.S. Court of Appeals for the Seventh Circuit later issued a stay of the U.S. District Court for the Northern District of Illinois' Nov. 2, 2020 decision. On Mar. 9, 2021, the U.S. Court of Appeals for the Seventh Circuit lifted the stay and the U.S. District Court for the Northern District of Illinois' order vacating the Public Charge Final Rule went into effect. USCIS immediately stopped applying the Public Charge Final Rule to all pending applications and petitions that would have been subject to the rule. For information on related litigation affecting implementation, see the Inadmissibility on Public Charge Grounds Final Rule: Litigation webpage. The alert text below and related guidance are no longer in effect.

U.S. Citizenship and Immigration Services (USCIS) is issuing guidance in the USCIS Policy Manual to address the final rule on the public charge ground of inadmissibility. This policy guidance is effective on February 24, 2020, and will apply to all applicants and petitioners filing applications and petitions for adjustment of status, extension of stay, and change of status, except for applicants and petitioners in the State of Illinois, whose cases will be adjudicated under prior policy, including the 1999 Interim Field Guidance (PDF) and AFM Ch. 61.1 (PDF). For additional information, see Public Charge Inadmissibility Determinations in Illinois. Certain classes of aliens are exempt from the public charge ground of inadmissibility (such as refugees, asylees, certain VAWA self-petitioners, U petitioners, and T applicants) and therefore, are not subject to the Inadmissibility on Public Charge Grounds final rule. For more information about the classes of [noncitizens] who are exempt from the final rule, see the appendices related to applicability.

Read More

Affected Sections

2 USCIS-PM A.4 - Chapter 4 - Extension of Stay, Change of Status, and Extension of Petition Validity

8 USCIS-PM G - Part G - Public Charge Ground of Inadmissibility

12 USCIS-PM D.2 - Chapter 2 - Lawful Permanent Resident Admission for Naturalization

POLICY ALERT - Accepting Petition for Alien Relative (Form I-130) Abroad

January 31, 2020

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address the limited circumstances in which USCIS has delegated authority to the U.S. Department of State to accept and adjudicate the Form I-130 filed abroad at U.S. embassies and consulates. This guidance becomes effective February 1, 2020.

Read More

Affected Sections

6 USCIS-PM B.3 - Chapter 3 - Filing

POLICY ALERT - Biometrics Services Updates

January 30, 2020

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address the availability of mobile biometrics services and clarify guidance on the validity period for fingerprint waivers.

Read More

Affected Sections

1 USCIS-PM C.2 - Chapter 2 - Biometrics Collection

POLICY ALERT - Replacing Permanent Resident Card

January 16, 2020

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual regarding eligibility requirements, filing, and adjudication of requests to replace Permanent Resident Cards using the Application to Replace Permanent Resident Card (Form I-90).

Read More

Affected Sections

11 USCIS-PM B - Part B - Permanent Resident Cards

Technical Update - Naturalization of Spouses Subjected to Battery or Extreme Cruelty by U.S. Citizen Spouse

January 09, 2020

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual to clarify that the spouse of a U.S. citizen who was subjected to battery or extreme cruelty by his or her U.S. citizen spouse does not need to establish that he or she is still married to the abusive spouse at the time he or she files the application for naturalization.

Affected Sections

12 USCIS-PM G.3 - Chapter 3 - Spouses of U.S. Citizens Residing in the United States

POLICY ALERT - Effect of Travel Abroad by Temporary Protected Status Beneficiaries with Final Orders of Removal

December 20, 2019

U.S. Citizenship and Immigration Services (USCIS) is updating the USCIS Policy Manual to clarify the effect of travel outside the United States by temporary protected status beneficiaries who have final removal orders.

Read More

Affected Sections

7 USCIS-PM A.3 - Chapter 3 - Filing Instructions

Technical Update - Naturalization for Surviving Spouse, Child, or Parent of Service Member

December 18, 2019

U.S. Citizenship and Immigration Services (USCIS) is clarifying guidance in the USCIS Policy Manual to indicate that the spouse, child, or parent of a deceased U.S. citizen member of the U.S. armed forces who died “during a period of honorable service” (instead of as the result of honorable service) may be eligible for naturalization as the surviving relative of the service member, consistent with the statutory language in INA 319(d).

Affected Sections

12 USCIS-PM I.9 - Chapter 9 - Spouses, Children, and Surviving Family Benefits

POLICY ALERT - Conditional Bar to Good Moral Character for Unlawful Acts

December 13, 2019

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual on unlawful acts during the applicable statutory period that reflect adversely on moral character and may prevent an applicant from meeting the good moral character requirement for naturalization.

Read More

Affected Sections

12 USCIS-PM F.5 - Chapter 5 - Conditional Bars for Acts in Statutory Period

Technical Update - Health-Related Grounds of Inadmissibility

December 10, 2019

U.S. Citizenship and Immigration Services (USCIS) is updating existing guidance based on revised Centers for Disease Control and Prevention Technical Instructions regarding tuberculosis, gonorrhea, and syphilis and the change in nomenclature from leprosy to Hansen’s Disease. USCIS is also updating how USCIS submits a request to CDC for advisory opinion and removing the outdated vaccination chart.

Affected Sections

8 USCIS-PM B.1 - Chapter 1 - Purpose and Background

8 USCIS-PM B.6 - Chapter 6 - Communicable Diseases of Public Health Significance

8 USCIS-PM B.8 - Chapter 8 - Drug Abuse or Drug Addiction

8 USCIS-PM B.9 - Chapter 9 - Vaccination Requirement

POLICY ALERT - Implementing the Decisions on Driving Under the Influence Convictions on Good Moral Character Determinations and Post-Sentencing Changes

December 10, 2019

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual regarding how post-sentencing changes to criminal sentences impact convictions for immigration purposes and how two or more driving under the influence convictions affects good moral character determinations. These updates incorporate two recent decisions issued by the Attorney General.

Read More

Affected Sections

12 USCIS-PM F.2 - Chapter 2 - Adjudicative Factors

12 USCIS-PM F.5 - Chapter 5 - Conditional Bars for Acts in Statutory Period

Technical Update - Implementation of Fees for Submission of Benefit Requests

December 02, 2019

This technical update incorporates into Volume 1 the policy guidance that U.S. Citizenship and Immigration Services (USCIS) announced October 25, 2019, regarding submission and acceptance of fees for immigration benefit requests. USCIS published this guidance with an effective date of December 2, 2019. **Note: On December 11, 2019, the Federal District Court for the Northern District of California in *Seattle v. DHS* enjoined the Department of Homeland Security from requiring use of the new version of Form I-912, Request for Fee Waiver. USCIS has noted this in the corresponding Policy Manual guidance and reinstated the prior fee waiver policy guidance at AFM 10.9 and 10.10.**

Affected Sections

1 USCIS-PM B.3 - Chapter 3 - Fees

1 USCIS-PM B.4 - Chapter 4 - Fee Waivers and Fee Exemptions

POLICY ALERT - Adjustment on New Basis After Termination of Conditional Permanent Residence

November 21, 2019

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to update and clarify when USCIS may adjust the status of an applicant whose conditional permanent resident (CPR) status was terminated.

Read More

Affected Sections

7 USCIS-PM B.7 - Chapter 7 - Other Barred Adjustment Applicants

POLICY ALERT - USCIS Special Immigrant Juvenile Classification

November 19, 2019

U.S. Citizenship and Immigration Services (USCIS) is updating the USCIS Policy Manual regarding the special immigrant juvenile (SIJ) classification.

Read More

Affected Sections

6 USCIS-PM J - Part J - Special Immigrant Juveniles

POLICY ALERT - EB-5 Immigrant Investor Program Modernization Final Rule

November 06, 2019

U.S. Citizenship and Immigration Services (USCIS) is revising its policy guidance in the USCIS Policy Manual to align with the EB-5 Immigrant Investor Program Modernization Final Rule, published on July 24, 2019, and effective November 21, 2019. **Note: On June 22, 2021, the U.S. District Court for the Northern District of California, in *Behring Regional Center LLC v. Wolf*, 20-cv-09263-JSC, vacated the EB-5 Immigrant Investor Program Modernization Final Rule (PDF). While USCIS considers this decision, USCIS will apply the EB-5 regulations and policies that were in effect before the rule was finalized on November 21, 2019.**

Read More

Affected Sections

6 USCIS-PM G.1 - Chapter 1 - Purpose and Background

6 USCIS-PM G.2 - Chapter 2 - Immigrant Petition Eligibility Requirements

6 USCIS-PM G.4 - Chapter 4 - Regional Center Applications

6 USCIS-PM G.5 - Chapter 5 - Project Applications

7 USCIS-PM A.6 - Chapter 6 - Adjudicative Review

Technical Update - Implementation of Policy Guidance on Defining “Residence” in Statutory Provisions Related to Citizenship

October 29, 2019

This technical update incorporates into Volume 12 the policy guidance that U.S. Citizenship and Immigration Services (USCIS) announced August 28, 2019 addressing requirements for “residence” in statutory provisions related to citizenship. This guidance became effective October 29, 2019.

Affected Sections

12 USCIS-PM H - Part H - Children of U.S. Citizens

12 USCIS-PM I - Part I - Military Members and their Families

POLICY ALERT - Fees for Submission of Benefit Requests

October 25, 2019

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual regarding submission and acceptance of fees for immigration benefit requests, with an effective date of December 2, 2019. **Note: On December 11, 2019, the Federal District Court for the Northern District of California in *Seattle v. DHS* enjoined the Department of Homeland Security from requiring use of the new version of Form I-912, Request for Fee Waiver. USCIS has noted this in the corresponding Policy Manual guidance and reinstated the prior fee waiver policy guidance at AFM 10.9 (PDF, 2.87 MB) and 10.10 (PDF, 2.87 MB).**

Read More

Affected Sections

1 USCIS-PM B.3 - Chapter 3 - Fees

1 USCIS-PM B.4 - Chapter 4 - Fee Waivers and Fee Exemptions

Technical Update - Replacing the Term “Foreign National”

October 08, 2019

This technical update replaces all instances of the term “foreign national” with “alien” throughout the Policy Manual as used to refer to a person who meets the definition provided in INA 101(a)(3) [“any person not a citizen or national of the United States”].

Affected Sections

1 USCIS-PM - Volume 1 - General Policies and Procedures

2 USCIS-PM - Volume 2 - Nonimmigrants

6 USCIS-PM - Volume 6 - Immigrants

7 USCIS-PM - Volume 7 - Adjustment of Status

8 USCIS-PM - Volume 8 - Admissibility

9 USCIS-PM - Volume 9 - Waivers and Other Forms of Relief

10 USCIS-PM - Volume 10 - Employment Authorization

11 USCIS-PM - Volume 11 - Travel and Identity Documents

12 USCIS-PM - Volume 12 - Citizenship and Naturalization

Technical Update - Clarifying Policies and Procedures for Replacing Permanent Resident Cards

September 27, 2019

This technical update clarifies that, in circumstances involving the replacement or reissuance of a Permanent Resident Card, an Application to Replace Permanent Resident Card (Form I-90) is always required as outlined in form instructions and regulations. This may differ from the general reissuance policy.

Affected Sections

11 USCIS-PM A.3 - Chapter 3 - Reissuance of Secure Identity Documents

POLICY ALERT - Defining “Residence” in Statutory Provisions Related to Citizenship

August 28, 2019

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address requirements for “residence” in statutory provisions related to citizenship, and to rescind previous guidance regarding children of U.S. government employees and members of the U.S. armed forces employed or stationed outside the United States. This guidance becomes effective October 29, 2019.

Read More

Affected Sections

12 USCIS-PM H - Part H - Children of U.S. Citizens

12 USCIS-PM I - Part I - Military Members and their Families

POLICY ALERT - Employment Authorization for Parolees

August 19, 2019

U.S. Citizenship and Immigration Services (USCIS) is updating its existing policies on the exercise of discretion to address the use of discretion when assessing if certain foreign nationals who are paroled into the United States should be employment authorized.

Read More

Affected Sections

10 USCIS-PM B.2 - Chapter 2 - Employment Authorization for Certain H-4, E, and L Nonimmigrant Dependent Spouses

Technical Update - Civil Surgeon Designation and Revocation

June 06, 2019

This technical update changes language to state that USCIS officers “may” refer proposed civil surgeon designation revocations to the USCIS Office of the Chief Counsel for review. Previously, the language specified that USCIS counsel “must” review any proposed civil surgeon designation revocation.

Affected Sections

8 USCIS-PM C.4 - Chapter 4 - Termination and Revocation

Technical Update - Fraud and Willful Misrepresentation and Department of State’s 90-Day Rule

June 05, 2019

This technical update incorporates clarifications regarding the Department of State (DOS)'s "90-day rule." While this "rule" does not apply to USCIS because it is DOS policy, USCIS is clarifying that it may also find that an applicant made a willful misrepresentation due to a status violation or conduct in the United States that is inconsistent with the applicant's prior representations, especially where the violation or conduct occurred shortly after the consular interview or admission to the United States.

Affected Sections

8 USCIS-PM J.3 - Chapter 3 - Adjudicating Inadmissibility

POLICY ALERT - USCIS Public Services

May 10, 2019

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual regarding services USCIS provides to the public, including general administration of certain immigration benefits, online tools, and up-to-date information.

Read More

Affected Sections

1 USCIS-PM A - Part A - Public Services

Technical Update - Medical Certification for Disability Exceptions

May 03, 2019

This technical update incorporates minor clarifying editorial changes to the policy guidance regarding the Medical Certification for Disability Exceptions (Form N-648).

Affected Sections

12 USCIS-PM E.3 - Chapter 3 - Medical Disability Exception (Form N-648)

Technical Update - Communicating with Centers for Disease Control and Prevention

May 03, 2019

This technical update removes references to sending documents to the Centers for Disease Control and Prevention (CDC) by mail or fax. CDC now prefers all requests for waiver consultations and any subsequent notifications from USCIS to be communicated by email.

Affected Sections

9 USCIS-PM D.2 - Chapter 2 - Waiver of Communicable Disease of Public Health Significance

9 USCIS-PM D.4 - Chapter 4 - Waiver of Physical or Mental Disorder Accompanied by Harmful Behavior

POLICY ALERT - Controlled Substance-Related Activity and Good Moral Character Determinations

April 19, 2019

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to clarify that violation of federal controlled substance law, including for marijuana, remains a conditional bar to establishing good moral character (GMC) for naturalization even where that conduct would not be an offense under state law.

Read More

Affected Sections

12 USCIS-PM F.5 - Chapter 5 - Conditional Bars for Acts in Statutory Period

Technical Update - Implementation of Policy Guidance on Medical Certification for Disability Exceptions (Form N-648)

February 12, 2019

This technical update incorporates into Volume 12 the policy guidance that U.S. Citizenship and Immigration Services (USCIS) announced December 12, 2018 regarding the Medical Certification for Disability Exceptions (Form N-648). This guidance became effective February 12, 2019.

Affected Sections

12 USCIS-PM E.3 - Chapter 3 - Medical Disability Exception (Form N-648)

Technical Update - Visa Retrogression

February 06, 2019

This technical update removes language that restricted USCIS officers' ability to request a visa number from the Department of State in cases involving visa retrogression. As with all INA 245(a) adjustment cases, a visa must be available at the time of final adjudication.

Affected Sections

7 USCIS-PM A.6 - Chapter 6 - Adjudicative Review

Technical Update - Child Status Protection Act

January 23, 2019

This technical update clarifies that certain child beneficiaries of family-sponsored immigrant visa petitions who are ineligible for the Child Status Protection Act may continue their adjustment of status application if the petition is automatically converted to an eligible category.

Affected Sections

7 USCIS-PM A.7 - Chapter 7 - Child Status Protection Act

POLICY ALERT - Policies and Procedures for Secure Identity Documents

January 16, 2019

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address the general policies and procedures related to secure documents.

Read More

Affected Sections

11 USCIS-PM A - Part A - Secure Identity Documents Policies and Procedures

POLICY ALERT - Sufficiency of Medical Certification for Disability Exceptions (Form N-648)

December 12, 2018

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to update and clarify filing procedures and adjudications on the Medical Certification for Disability Exceptions (Form N-648). This guidance becomes effective February 12, 2019.

Read More

Affected Sections

12 USCIS-PM E.3 - Chapter 3 - Medical Disability Exception (Form N-648)

POLICY ALERT - Immigrant Investors and Debt Arrangements

October 30, 2018

U.S. Citizenship and Immigration Services (USCIS) is revising policy guidance in the USCIS Policy Manual to clarify its policy on debt arrangements.

Read More

Affected Sections

6 USCIS-PM G.2 - Chapter 2 - Immigrant Petition Eligibility Requirements

POLICY ALERT - Use of Form G-325A

October 25, 2018

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual to remove references to Biographic Information (Form G-325A).

Read More

Affected Sections

7 USCIS-PM A - Part A - Adjustment of Status Policies and Procedures

7 USCIS-PM B - Part B - 245(a) Adjustment

7 USCIS-PM F - Part F - Special Immigrant-Based Adjustment

7 USCIS-PM L - Part L - Refugee Adjustment

7 USCIS-PM M - Part M - Asylee Adjustment

7 USCIS-PM O - Part O - Registration

POLICY ALERT - Validity of Report of Medical Examination and Vaccination Record (Form I-693)

October 16, 2018

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in Volume 8, Part B of the USCIS Policy Manual regarding the period of time during which a Form I-693 submitted in support of a related immigration benefits application is considered valid.

Read More

Affected Sections

8 USCIS-PM B - Part B - Health-Related Grounds of Inadmissibility

POLICY ALERT - Marriage and Living in Marital Union Requirements for Naturalization

October 12, 2018

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual to clarify the marriage and living in marital union requirements under section 319(a) of the Immigration and Nationality Act (INA).

Read More

Affected Sections

12 USCIS-PM G.2 - Chapter 2 - Marriage and Marital Union for Naturalization

POLICY ALERT - Special Naturalization Provisions for Children

September 26, 2018

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance to amend the USCIS Policy Manual to clarify certain special naturalization provisions for children.

Read More

Affected Sections

12 USCIS-PM G.3 - Chapter 3 - Spouses of U.S. Citizens Residing in the United States

12 USCIS-PM H.6 - Chapter 6 - Special Provisions for the Naturalization of Children

Technical Update - Authorized Medical Professionals

September 26, 2018

This technical update provides clarification on the medical professionals (medical doctors, doctors of osteopathy, and clinical psychologists) authorized to complete a written evaluation of medical condition in connection with an oath waiver request.

Affected Sections

12 USCIS-PM J.3 - Chapter 3 - Oath of Allegiance Modifications and Waivers

POLICY ALERT - Geographic Area of a Regional Center

August 24, 2018

U.S. Citizenship and Immigration Services (USCIS) is updating guidance in the USCIS Policy Manual regarding a regional center's geographic area, requests to expand the geographic area, and how such requests impact the filing of Form I-526, Immigrant Petition by Alien Entrepreneur.

Read More

Affected Sections

6 USCIS-PM G - Part G - Investors

Technical Update - Certificates of Citizenship for U.S. National Children

August 15, 2018

This technical update clarifies that a person who is born a U.S. national and is the child of a U.S. citizen may acquire citizenship and may obtain a Certificate of Citizenship without having to establish lawful permanent resident status.

Affected Sections

12 USCIS-PM H.4 - Chapter 4 - Automatic Acquisition of Citizenship after Birth (INA 320)

Technical Update - Rescinding Tenant-Occupancy Methodology

July 26, 2018

This technical update clarifies that the rescission of the policy regarding the tenant-occupancy methodology does not affect petitions pending on May 15, 2018 (the date USCIS announced the rescission).

Affected Sections

6 USCIS-PM G.2 - Chapter 2 - Immigrant Petition Eligibility Requirements

POLICY ALERT - Child Status Protection Act

May 23, 2018

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual regarding the Child Status Protection Act (CSPA).

Read More

Affected Sections

7 USCIS-PM A.7 - Chapter 7 - Child Status Protection Act

POLICY ALERT - Rescinding Tenant-Occupancy Methodology

May 15, 2018

U.S. Citizenship and Immigration Services (USCIS) is revising policy guidance in the USCIS Policy Manual to reflect that, as of May 15, 2018, USCIS no longer considers tenant occupancy to be a reasonable methodology to support economically or statistically valid forecasting tools.

Read More

Affected Sections

6 USCIS-PM G.2 - Chapter 2 - Immigrant Petition Eligibility Requirements

POLICY ALERT - Adjustment of Status Interview Guidelines and Waiver Criteria

May 15, 2018

U.S. Citizenship and Immigration Services (USCIS) is updating guidance regarding adjustment of status interview guidelines and interview waivers.

Read More

Affected Sections

7 USCIS-PM A.5 - Chapter 5 - Interview Guidelines

POLICY ALERT - Documentation of Conditional Resident Status for Investors with a Pending Form I-829

May 02, 2018

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance regarding the documentation of conditional permanent resident (CPR) status for employment-based fifth preference (EB-5) immigrants.

Read More

Affected Sections

6 USCIS-PM G.5 - Chapter 5 - Project Applications

POLICY ALERT - Acquisition of U.S. Citizenship for Children Born Out of Wedlock

April 18, 2018

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance to clarify certain requirements for U.S. citizenship for children born outside the United States and out of wedlock under INA 301 and 309. USCIS is making conforming edits to the USCIS nationality charts.

Read More

Affected Sections

12 USCIS-PM H.3 - Chapter 3 - U.S. Citizens at Birth (INA 301 and 309)

Technical Update - Fraud and Willful Misrepresentation and Department of State’s 90-Day Rule

March 28, 2018

This technical update incorporates changes that the Department of State (DOS) made to its Foreign Affairs Manual (FAM) regarding its interpretation of the term “misrepresentation.”

Affected Sections

8 USCIS-PM J.3 - Chapter 3 - Adjudicating Inadmissibility

Technical Update - Authority to Administer the Oath of Allegiance

March 21, 2018

This technical update clarifies that the Secretary of Homeland Security has, through the Director of USCIS, delegated the authority to administer the Oath during an administrative naturalization ceremony to certain USCIS officials who can successively re-delegate the authority within their chains of command.

Affected Sections

12 USCIS-PM J.2 - Chapter 2 - The Oath of Allegiance

Technical Update - Military Accessions Vital to National Interest

March 21, 2018

This technical update clarifies that foreign nationals may apply for military naturalization after the certification of honorable service has been properly processed by the U.S. armed forces.

Affected Sections

12 USCIS-PM I.3 - Chapter 3 - Military Service during Hostilities (INA 329)

POLICY ALERT - Waiver Policies and Procedures

August 23, 2017

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance to address the general policies and procedures applicable to the adjudication of waivers of inadmissibility.

Read More

Affected Sections

9 USCIS-PM A - Part A - Waiver Policies and Procedures

POLICY ALERT - Biometrics Requirements for Naturalization

July 26, 2017

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual to specify that every naturalization applicant must provide biometrics regardless of age, unless the applicant qualifies for a fingerprint waiver due to certain medical conditions.

Read More

Affected Sections

12 USCIS-PM B.2 - Chapter 2 - Background and Security Checks

POLICY ALERT - Administrative Naturalization Ceremonies

June 28, 2017

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance on USCIS administrative naturalization ceremonies, to include guidance regarding participation from other U.S. government and non-governmental entities.

Read More

Affected Sections

12 USCIS-PM J.5 - Chapter 5 - Administrative Naturalization Ceremonies

POLICY ALERT - Job Creation and Capital At Risk Requirements for Investors

June 14, 2017

U.S. Citizenship and Immigration Services (USCIS) is updating the USCIS Policy Manual to provide further guidance regarding the job creation and capital at risk requirements for Form I-526, Immigrant Petition by Alien Entrepreneur, and Form I-829, Petition by Entrepreneur to Remove Conditions on Permanent Resident Status.

Read More

Affected Sections

6 USCIS-PM G - Part G - Investors

Technical Update - Medical Codes for Purposes of Medical Certification for Disability Exceptions

January 05, 2017

This technical update clarifies that, for purposes of Form N-648, Medical Certification for Disability Exceptions, USCIS accepts the relevant medical codes recognized by the Department of Health and Human Services. This includes codes found in the Diagnostic and Statistical Manual of Mental Disorders and the International Classification of Diseases.

Affected Sections

12 USCIS-PM E.3 - Chapter 3 - Medical Disability Exception (Form N-648)

Technical Update - Clarifying Intent to Reside in United States for Naturalization Purposes

January 05, 2017

This technical update clarifies that naturalization applicants are not required to intend to reside permanently in the United States after becoming U.S. citizens. This update is in accordance with current statutes; prior to 1994, a person who became a naturalized U.S. citizen was expected to hold the intention of residing permanently in the United States. See Section 104 of the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416 (October 25, 1994).

Affected Sections

12 USCIS-PM D.7 - Chapter 7 - Attachment to the Constitution

POLICY ALERT - Registration of Lawful Permanent Resident Status

December 21, 2016

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance addressing registration of lawful permanent resident (LPR) status.

Read More

Affected Sections

7 USCIS-PM O - Part O - Registration

POLICY ALERT - False Claim to U.S. Citizenship Ground of Inadmissibility

December 14, 2016

U.S. Citizenship and Immigration Services (USCIS) is issuing guidance to address the false claim to U.S. citizenship ground of inadmissibility under section 212(a)(6)(C)(ii) of the Immigration and Nationality Act (INA).

Read More

Affected Sections

8 USCIS-PM K - Part K - False Claim to U.S. Citizenship

Technical Update - Clarifying Designated Periods of Hostilities for Naturalization under INA 329

December 13, 2016

This technical update clarifies that, for purposes of naturalization under INA 329, the current period designated by Presidential Executive Order 13269 (July 3, 2002), as a period in which the U.S. armed forces are considered to be engaged in armed conflict with a hostile foreign force, is still in effect. In addition, this update adds information about the USCIS Military Help Line in this part.

Affected Sections

12 USCIS-PM I.1 - Chapter 1 - Purpose and Background

12 USCIS-PM I.3 - Chapter 3 - Military Service during Hostilities (INA 329)

POLICY ALERT - Employment-Based Fifth Preference Immigrants: Investors

November 30, 2016

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance regarding the eligibility requirements for regional centers and immigrant investors.

Read More

Affected Sections

6 USCIS-PM G - Part G - Investors

POLICY ALERT - Definition of Certain Classes of Medical Conditions and Other Updates Relating to Health-Related Grounds of Inadmissibility

November 02, 2016

U.S. Citizenship and Immigration Services (USCIS) is updating guidance regarding health-related grounds of inadmissibility in accordance with the U.S. Department of Health and Human Services (HHS) rulemaking updating Title 42 of the Code of Federal Regulations, part 34 (42 CFR 34).

Read More

Affected Sections

8 USCIS-PM B - Part B - Health-Related Grounds of Inadmissibility

POLICY ALERT - Special Immigrant Juvenile Classification and Special Immigrant-Based Adjustment of Status

October 26, 2016

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance regarding the special immigrant juvenile (SIJ) classification and special immigrant-based (EB-4) adjustment of status, including adjustment based on classification as a special immigrant religious worker, SIJ, and G-4 international organization or NATO-6 employee or family member, among others.

Read More

Affected Sections

6 USCIS-PM J - Part J - Special Immigrant Juveniles

7 USCIS-PM F - Part F - Special Immigrant-Based Adjustment

POLICY ALERT - Determining Extreme Hardship

October 21, 2016

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance on determinations of extreme hardship to qualifying relatives as required by certain statutory waiver provisions. This guidance becomes effective December 5, 2016.

Read More

Affected Sections

9 USCIS-PM B - Part B - Extreme Hardship

Technical Update - Military Accessions Vital to National Interest Program and Time of Filing for Naturalization

October 19, 2016

This technical update clarifies that, in general, Department of Defense (DOD) Military Accessions Vital to National Interest (MAVNI) enlistees may file an application for naturalization during basic training in the U.S. armed forces.

Affected Sections

12 USCIS-PM I.3 - Chapter 3 - Military Service during Hostilities (INA 329)

POLICY ALERT - Department of Defense Military Accessions Vital to National Interest Program

August 03, 2016

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance to provide information about the existing Department of Defense (DOD) Military Accessions Vital to National Interest (MAVNI) Program.

Read More

Affected Sections

12 USCIS-PM I.3 - Chapter 3 - Military Service during Hostilities (INA 329)

POLICY ALERT - Effective Date of Lawful Permanent Residence for Purposes of Citizenship and Naturalization

July 27, 2016

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance regarding the date of legal permanent residence (LPR) for naturalization and citizenship purposes.

Read More

Affected Sections

12 USCIS-PM D.2 - Chapter 2 - Lawful Permanent Resident Admission for Naturalization

12 USCIS-PM H.4 - Chapter 4 - Automatic Acquisition of Citizenship after Birth (INA 320)

POLICY ALERT - Removing Obsolete Form I-643 from Filing Requirements for Certain Adjustment Applications

June 22, 2016

U.S. Citizenship and Immigration Services (USCIS) is updating policy guidance in the USCIS Policy Manual to remove obsolete Form I-643, Health and Human Services Statistical Data for Refugee/Asylee Adjusting Status, from the filing requirements for applications for adjustment of status under section 209 of the Immigration and Nationality Act (INA).

Read More

Affected Sections

7 USCIS-PM L.4 - Chapter 4 - Documentation and Evidence

POLICY ALERT - Adjustment of Status Policies and Procedures and 245(a) Adjustment

February 25, 2016

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance addressing the general policies and procedures of adjustment of status as well as adjustment under section 245(a) of the Immigration and Nationality Act (INA).

Read More

Affected Sections

7 USCIS-PM A - Part A - Adjustment of Status Policies and Procedures

7 USCIS-PM B - Part B - 245(a) Adjustment

POLICY ALERT - Media Representatives (I) Nonimmigrant Visa Classification

November 10, 2015

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance regarding the foreign information media representative nonimmigrant visa classification, commonly known as the “I” visa category.

Read More

Affected Sections

2 USCIS-PM K - Part K - Media Representatives (I)

POLICY ALERT - Modifications to Oath of Allegiance for Naturalization

July 21, 2015

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance to clarify the eligibility requirements for modifications to the Oath of Renunciation and Allegiance for naturalization.

Read More

Affected Sections

12 USCIS-PM J.3 - Chapter 3 - Oath of Allegiance Modifications and Waivers

Technical Update - Child Citizenship Act and Children of U.S. Government Employees Residing Abroad

July 20, 2015

This technical update clarifies that the child of a U.S. government employee temporarily stationed abroad is considered to be residing in the United States for purposes of acquisition of citizenship under INA 320.

Affected Sections

12 USCIS-PM H.4 - Chapter 4 - Automatic Acquisition of Citizenship after Birth (INA 320)

12 USCIS-PM K.2 - Chapter 2 - Certificate of Citizenship

Technical Update - Multiple Absences and Residence and Physical Presence

July 20, 2015

This technical update clarifies that along with reviewing for absences of more than 6 months, officers review whether an applicant for naturalization with multiple absences of less than 6 months is able establish the required residence and physical presence for naturalization.

Affected Sections

12 USCIS-PM D.3 - Chapter 3 - Continuous Residence

POLICY ALERT - Effect of Assisted Reproductive Technology (ART) on Immigration and Acquisition of Citizenship Under the Immigration and Nationality Act (INA)

October 28, 2014

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance relating to the use of Assisted Reproductive Technology (ART).

Read More

Affected Sections

12 USCIS-PM H - Part H - Children of U.S. Citizens

12 USCIS-PM H.2 - Chapter 2 - Definition of Child and Residence for Citizenship and Naturalization

12 USCIS-PM H.3 - Chapter 3 - U.S. Citizens at Birth (INA 301 and 309)

12 USCIS-PM H.4 - Chapter 4 - Automatic Acquisition of Citizenship after Birth (INA 320)

12 USCIS-PM H.5 - Chapter 5 - Child Residing Outside the United States (INA 322)

Technical Update - Treating Certain Peace Corps Contractors as U.S. Government Employees

October 21, 2014

This technical update clarifies that Peace Corps personal service contractors are considered U.S. Government employees under certain circumstances for purposes of preserving their residence for naturalization while working abroad.

Affected Sections

12 USCIS-PM D.5 - Chapter 5 - Modifications and Exceptions to Continuous Residence and Physical Presence

Technical Update - Religious Missionaries Abroad and Residence and Physical Presence

October 21, 2014

This technical update clarifies who may be considered to be a missionary of a religious group for purposes of preserving residence and physical presence for naturalization while working abroad.

Affected Sections

12 USCIS-PM D.5 - Chapter 5 - Modifications and Exceptions to Continuous Residence and Physical Presence

POLICY ALERT - Nonimmigrant Trainees (H-3)

September 09, 2014

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance on the trainees (H-3) nonimmigrant visa category.

Read More

Affected Sections

2 USCIS-PM J - Part J - Trainees (H-3)

POLICY ALERT - Customer Service

August 26, 2014

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance on its standards in customer service.

Read More

Affected Sections

1 USCIS-PM A - Part A - Public Services

Technical Update - Validity of Same-Sex Marriages

July 01, 2014

This technical update addresses the Supreme Court ruling holding that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional.

Affected Sections

12 USCIS-PM G.2 - Chapter 2 - Marriage and Marital Union for Naturalization

POLICY ALERT - Changes to Dates of Birth and Names on Certificates of Citizenship

June 17, 2014

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance relating to changes of dates of birth and names per court orders.

Read More

Affected Sections

12 USCIS-PM K.2 - Chapter 2 - Certificate of Citizenship

12 USCIS-PM K.4 - Chapter 4 - Application for Replacement of Naturalization/Citizenship Document

POLICY ALERT - Validity Period of the Medical Certification on the Report of Medical Examination and Vaccination Record (Form I-693)

May 30, 2014

U.S. Citizenship and Immigration Services (USCIS) is issuing an update to policy guidance in the USCIS Policy Manual addressing the validity period of civil surgeon endorsements on the Report of Medical Examination and Vaccination Record, Form I-693.

Read More

Affected Sections

8 USCIS-PM B.4 - Chapter 4 - Review of Medical Examination Documentation

Technical Update - Civil Surgeon Applications and Evidentiary Requirements

April 08, 2014

This technical update clarifies that an applicant for civil surgeon designation must, at a minimum, submit a copy of the medical degree to show he or she is a Medical Doctor or Doctor of Osteopathy.

Affected Sections

8 USCIS-PM C.2 - Chapter 2 - Application for Civil Surgeon Designation

POLICY ALERT - Fraud and Willful Misrepresentation Grounds of Inadmissibility

March 25, 2014

U.S. Citizenship and Immigration Services (USCIS) is issuing guidance on the fraud and willful misrepresentation grounds of inadmissibility under INA 212(a)(6)(C)(i) and the corresponding waiver under INA 212(i).

Read More

Affected Sections

8 USCIS-PM J - Part J - Fraud and Willful Misrepresentation

9 USCIS-PM F - Part F - Fraud and Willful Misrepresentation

Technical Update - Vaccination Requirements for Pregnant or Immuno-Compromised Applicants

March 11, 2014

This technical update replaces the list of vaccines contraindicated for pregnant or immuno-compromised applicants with a reference to the Centers for Disease Control and Prevention (CDC)'s Vaccination Technical Instructions. This ensures the Policy Manual guidance includes the most up-to-date information.

Affected Sections

8 USCIS-PM B.9 - Chapter 9 - Vaccination Requirement

POLICY ALERT - Refugee and Asylee-Based Adjustment of Status under Immigration and Nationality Act (INA) Section 209

March 04, 2014

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address adjustment of status applications filed by refugees and asylees under INA sections 209(a) and 209(b).

Read More

Affected Sections

7 USCIS-PM L - Part L - Refugee Adjustment

7 USCIS-PM M - Part M - Asylee Adjustment

POLICY ALERT - Health-Related Grounds of Inadmissibility and Waivers

January 28, 2014

U.S. Citizenship and Immigration Services (USCIS) is issuing guidance in the USCIS Policy Manual on the health-related grounds of inadmissibility under INA 212(a)(1) and corresponding waivers under INA 212(g).

Read More

Affected Sections

8 USCIS-PM B - Part B - Health-Related Grounds of Inadmissibility

9 USCIS-PM D - Part D - Health-Related Grounds of Inadmissibility

POLICY ALERT - Civil Surgeon Designation and Centralization of the Designation Process at the National Benefits Center

January 28, 2014

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to centralize the civil surgeon designation process at the National Benefits Center, effective March 11, 2014.

Read More

Affected Sections

8 USCIS-PM C - Part C - Civil Surgeon Designation and Revocation

Technical Update - Commonwealth of the Northern Mariana Islands

September 30, 2013

This technical update adds the Commonwealth of the Northern Mariana Islands to list of certain territories of the United States where, subject to certain requirements, persons may be U.S. citizens at birth.

Affected Sections

12 USCIS-PM A.2 - Chapter 2 - Becoming a U.S. Citizen

Technical Update - Certified Court Dispositions

September 30, 2013

This technical update adds language addressing existing policy on circumstances where an applicant is required to provide a certified court disposition.

Affected Sections

12 USCIS-PM F.3 - Chapter 3 - Evidence and the Record

POLICY ALERT - Security-Related Positions Abroad

June 10, 2013

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the USCIS Policy Manual to address amendments to section 1059(e) of the National Defense Authorization Act of 2006 by Public Law 112-227.

Read More

Affected Sections

12 USCIS-PM D - Part D - General Naturalization Requirements

12 USCIS-PM D.5 - Chapter 5 - Modifications and Exceptions to Continuous Residence and Physical Presence

POLICY ALERT - Comprehensive Citizenship and Naturalization Policy Guidance

January 07, 2013

USCIS is issuing updated and comprehensive citizenship and naturalization policy guidance in the new USCIS Policy Manual.

Read More

Affected Sections

12 USCIS-PM - Volume 12 - Citizenship and Naturalization

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Volume 1 - General Policies and Procedures

Part A - Public Services

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures.

See more

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures. We are working quickly to update and incorporate all of the AFM content into the USCIS Policy Manual, the agency's centralized online repository for immigration policies. Until then, we have moved any remaining AFM content to its corresponding Policy Manual Part. To the extent that a provision in the Policy Manual conflicts with remaining AFM content or Policy Memoranda, the updated information in the Policy Manual prevails. If you have questions or concerns about any discrepancies among these resources, contact PolicyFeedback@uscis.dhs.gov.

AFM Chapter 10 - An Overview of the Adjudication Process (External)

Chapter 1 - Purpose and Background

A. Purpose

USCIS is the government agency that administers lawful immigration to the United States.[1] USCIS ensures its employees have the knowledge and tools needed to administer the lawful immigration system with professionalism. USCIS provides accessible, reliable, and accurate guidance and information about benefit requests[2] and public services.

This part provides guidance on USCIS public services, including case assistance, online tools, feedback, procedures when a person is a member of a special protected class, privacy and confidentiality requirements, and other general administration topics.

B. Background

On March 1, 2003, USCIS assumed responsibility for the immigration service functions of the federal government. The Homeland Security Act of 2002 dismantled the Immigration and Naturalization Service (INS) and separated the agency into three components within the Department of Homeland Security (DHS).[3]

The Homeland Security Act created USCIS to enhance the security and efficiency of national immigration services by focusing exclusively on the administration of benefit applications. The law also formed Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) to oversee immigration enforcement and border security.

USCIS benefits from a legacy of more than 100 years of federal immigration and naturalization administration.[4] The Agency History page on USCIS' website provides information about the agency's history, presents research from the History Office's historians, and makes selected historical documents available electronically.

C. Legal Authorities

- Homeland Security Act of 2002, Pub. L. 107–296 (PDF)[5] – Dismantled the INS and created USCIS to enhance the security and efficiency of national immigration services by focusing exclusively on the administration of benefit applications
- Privacy Act of 1974, 5 U.S.C. 552a (PDF), as amended[6] – Establishes a code of fair information practices that governs the collection, maintenance, use, and dissemination of information about persons that is maintained in systems of records by federal agencies
- Section 504 of the Rehabilitation Act of 1973, Pub. L. 93-112 (PDF)[7] – Ensuring persons with a disability are not excluded from participation in or subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any federal agency

Footnotes

[^ 1] For more information, see the About Us webpage.

[^ 2] The terms "benefit request" and "immigration benefit request," as used in this part, include, but are not limited to, all requests funded by the Immigration Examinations Fee Account (IEFA). These terms may also refer to forms or requests not directly resulting in an immigration benefit, such as those resulting in an exercise of prosecutorial discretion by DHS.

[^ 3] See Homeland Security Act of 2002, Pub. L. 107–296 (PDF), 116 Stat. 2135 (November 25, 2002).

[^ 4] See the Organizational Timeline page on USCIS' website.

[^ 5] See Pub. L. 107–296 (PDF), 116 Stat. 2135 (November 25, 2002).

[^ 6] See Pub. L. 93-579 (PDF), 88 Stat. 1896 (December 31, 1974).

[^ 7] See Section 504 of Pub. L. 93-112 (PDF), 87 Stat. 355, 394 (September 26, 1973).

Chapter 2 - Web-Based Information

A. Website

The USCIS website (uscis.gov) provides the public with access to current information about USCIS' work, as well as current news releases, alerts, and other updates.

The USCIS website provides the following:

- Timely and accurate information on immigration and citizenship services and benefits offered by USCIS;
- Easy access to forms, form instructions, agency guidance, and other information required to successfully submit applications and petitions;
- The latest news and policy updates, including progress in support of Executive Orders;
- Information on outreach events and efforts; and
- Information on ways to contact USCIS.[1]

USCIS designed the website to accommodate easy navigation to highly trafficked pages directly from the home page, as well as a logical structure and search capability for easy access to all other pages.

In addition to uscis.gov, USCIS also hosts sub-sites, including:

- myUSCIS – Allows stakeholders to explore immigration options, create an online USCIS account, locate a physician to complete medical exams, practice the civics test, and complete other tasks online
- USCIS Tools and Resources – Online tools and resources to check case status online, ask questions about a case, and calculate fees
- Enterprise Change of Address – Self-service change of address tool available through a USCIS online account[2]
- Citizenship Resource Center – Hosts information and resources designed to assist prospective citizens
- USCIS Policy Manual – The agency's centralized online repository for USCIS' immigration policies[3]
- My Appointment – Online form for benefit requestors or their authorized representatives to request an in-person appointment at their local field office.

USCIS makes every effort to provide complete and accurate information on its website. USCIS does its best to update information and correct errors brought to its attention as soon as possible. Both the English language and Spanish language pages are updated at the same time, as appropriate.

B. Social Media

Social media is an informal means of communication that also connects benefit requestors and other interested parties with core information and services on the USCIS website. In this way, social media complements the USCIS website and increases USCIS' ability to communicate with the public.

USCIS' social media presence includes:

- Twitter (Main and for E-Verify) – for concise information and news, usually accompanied by links back to uscis.gov
- Facebook – for information and news, usually accompanied by links back to uscis.gov
- YouTube – for videos
- Instagram – for photos and informational graphics

The USCIS Office of Public Affairs (OPA) manages all USCIS social media accounts, working with various USCIS leadership and other offices to develop content. USCIS' posts are visible to anyone with internet access.

USCIS generally uses social media to make information and services widely available to the general public, to promote transparency and accountability, and to help those seeking information or services from USCIS. USCIS posts information only after it has been appropriately approved and vetted by OPA. Only USCIS employees acting in their official capacity are authorized to post to USCIS social media sites.

Comments on USCIS' social media channels are visible to the public. To protect their privacy, commenters should not include full names, phone numbers, email addresses, Social Security numbers, case numbers, or any other private information in comments.

USCIS does not moderate user comments on its channels before posting, but reserves the right to remove any materials that pose a security risk or otherwise violate the USCIS social media policy. Any opinions expressed in comments, except as specifically noted, are those of the individual commenters and do not reflect any agency policy, endorsement, or action. USCIS does not collect or retain comments in its records.

Use of each social media site is governed by that site's privacy policy.[4]

Footnotes

[^ 1] See the Contact Us page on USCIS' website.

[^ 2] See the How to Change Your Address webpage. See Chapter 10, Changes of Address, Section A, Updating Address Online [1 USCIS-PM A.10(A)].

[^ 3] The USCIS Policy Manual will ultimately replace the Adjudicator's Field Manual (AFM), the USCIS Immigration Policy Memoranda site, and other policy repositories.

[^ 4] See the USCIS website for information on Social Media Policy.

Chapter 3 - Types of Assistance

A. In-Person

In general, benefit requestors can use the USCIS Contact Center resources, including USCIS online tools, to manage and obtain information about their cases. Specific customer service options are available for certain programs and populations. The Contact Us webpage provides more information on how to obtain assistance.

To prevent the unauthorized disclosure of information, USCIS follows privacy and confidentiality protections when managing case-specific inquiries.[1]

1. Local Field Office

In-person appointments at field offices[2] are reserved for services that require a person's physical presence in the office to resolve an inquiry.

USCIS does not allow walk-in appointments. Benefit requestors must have an appointment to visit a USCIS field office. Benefit requestors generally may request an appointment using the My Appointment online tool. Benefit requestors who are not able to request an appointment online may call the USCIS Contact Center at 1-800-375-5283 (TTY: 1-800-767-1833) for additional assistance.

Benefit requestors should bring any applicable forms, payment, photos, and evidence, including documentation related to their requested service to their appointment. For example, a person requesting an emergency travel document should bring evidence to support the emergency request.

If USCIS closes an office or changes office hours, USCIS informs the public of such on the USCIS Office Closing webpage. Benefit requestors should check this webpage on the day of their appointment for any office closures and other important information.

2. Community Outreach

USCIS engages in community outreach programs to educate and increase public awareness, increase dialogue and visibility, and solicit feedback on USCIS operations. During outreach events in local communities, USCIS employees do not respond to case-specific inquiries. Anyone asking case-specific questions at outreach events should be directed to submit their inquiry through appropriate channels.

The topics of community outreach programs are varied. Information on past and future outreach events can be found on the USCIS website. The website provides a list of future engagements and instructions on how to register to attend. Many events also have call-in numbers for those unable to attend in person. The website also contains notes and supporting documents from previous engagements.

B. Online

1. USCIS Online Account

USCIS online accounts allow applicants, petitioners, and representatives to access personalized, real-time information related to their individual case 24 hours a day through any internet-connected device. Persons can also communicate directly with the USCIS Contact Center through the secure messaging function to receive email responses to their case-specific inquiries. This is the easiest and most comprehensive way to communicate with USCIS regarding case-specific issues.

Benefit requestors can send messages and inquiries directly to the USCIS Contact Center, using the online webform when they need assistance with their online account, such as resetting their password or Online Access Code.[3] USCIS generally responds to these messages and inquiries by email or phone within 48 hours. Since these messages are outside of USCIS' secure online account experience, Contact Center staff are limited from sharing case-specific information to ensure the privacy of benefit requestors. The USCIS online account is the preferred method of contacting the agency for timely and effective responses to case-specific inquiries.

2. Emma and Live Web Chat

Emma is the USCIS Virtual Assistant. Emma can provide immediate responses to non-case-specific questions about immigration services and benefits, guide users through our comprehensive website, and connect benefit requestors and other interested parties to a live agent through web chat for more in-depth topics and questions.

3. Email

USCIS offices may provide designated email boxes for case-specific inquiries about a pending or adjudicated petition or application. Before submitting an inquiry, the person inquiring should review all available information listed on the Contact Us web page to ensure that the inquiry is properly routed.

USCIS officers should use caution when responding to email inquiries requesting case-specific information, as issues of privacy and identity may arise.[4]

C. Telephone

1. USCIS Contact Center

For the convenience of benefit requestors and other interested parties located within the United States, the USCIS Contact Center provides a toll-free phone number: 1-800-375-5283 (TTY: 1-800-767-1833). For more information, see the USCIS Contact Center webpage.

Multi-Tiered Structure

The USCIS Contact Center provides escalating levels of service to handle inquiries of increasing complexity, primarily through an Interactive Voice Response (IVR) system[5] and a multi-tiered level of live assistance.

- IVR – The IVR system may initially answer callers' questions and can send links via email and text. The IVR system offers callers live assistance if additional assistance is needed.
- Tier 1 – Tier 1 is the first level of live assistance. Tier 1 staff members, who are contract employees, provide basic case-specific and general non-case-specific information.
- Tier 2 – If Tier 1 is unable to completely resolve an inquiry, Tier 1 staff members may escalate the inquiry to a Tier 2 Immigration Services Officer. The Tier 2 Immigration Services Officer then contacts the caller by phone or email.

Callers may, at any time, request to have a call directed to a supervisor.

If an inquiry involves a case physically located at a domestic USCIS field office or service center, the USCIS Contact Center may create a service request. The service request is automatically routed to the USCIS office that can best resolve the inquiry. If an inquiry involves a case physically located at an international USCIS field office, the USCIS Contact Center may provide the caller with that office's contact information and refer the inquiry, as appropriate.

2. International Service

For the convenience of benefit requestors and other interested parties located outside the United States, USCIS provides a phone number for international callers. The phone number for persons calling from outside of the United States is (+1) 212-620-3418.

Benefit requestors located outside of the United States may also contact the international office with jurisdiction over their place of residence. USCIS provides a complete listing of international field offices and their contact information through the International Immigration Offices webpage.

D. Traditional Mail or Facsimile

While USCIS may respond to case-specific inquiries and requests for assistance by U.S. mail, the USCIS Contact Center and online tools are generally the preferred method of contacting the agency for timely and effective customer service.[6] Dedicated mailing addresses may be available, as appropriate, to address specific types of inquiries. Before submitting an inquiry, the benefit requestor should review the Contact Us webpage to ensure they properly submit their request.

USCIS does not provide general delivery facsimile (fax) numbers, but USCIS offices may provide a fax number in specific circumstances when appropriate. For example, an officer may provide a fax number to aid in the efficient resolution of a case or as a method to expedite delivery of requested documents or information. Documents should not be submitted by fax unless specifically requested by a USCIS employee.

Footnotes

[^ 1] See Chapter 7, Privacy and Confidentiality [1 USCIS-PM A.7].

[^ 2] See the Field Offices webpage.

[^ 3] See the Password Resets and Technical Support webpage.

[^ 4] See Chapter 7, Privacy and Confidentiality [1 USCIS-PM A.7].

[^ 5] IVR is an automated phone system technology that allows callers to access information through a voice response system without speaking to a person.

[^ 6] See Section B, Online [1 USCIS-PM A.3(B)].

Chapter 4 - Service Request Management Tool

If a benefit requestor or interested party who is entitled to receive the requested case-specific information needs assistance on a specific case,[1] they may place a service request with USCIS for certain applications, petitions, and services.[2] The Service Request Management Tool (SRMT) enables USCIS to record and transfer unresolved requests to the appropriate USCIS service center, National Benefits Center, domestic USCIS field office, USCIS asylum office, Administrative Appeals Office, or other USCIS entity where the benefit request is pending a decision or was adjudicated.

USCIS offers online tools and resources to deliver the information benefit requestors and interested parties need without having to call USCIS or create a service request. Benefit requestors who have a USCIS online account can utilize self-service options that may make it unnecessary to submit a service request. Self-service options allow certain benefit requestors to change their address, reschedule their biometrics appointment, access enhanced case processing time information for certain case types, and access receipt notices, requests for evidence, and other correspondence from USCIS.

A. Creating Service Requests

1. By USCIS Customer Service

If an inquiry received by the USCIS Contact Center cannot be resolved through secure messaging in the benefit requestor's USCIS online account or during the call and the inquiry warrants creation of a service request, the USCIS Contact Center staff creates a service request. Although the majority of service requests are created by staff at the USCIS Contact Center, officers in other locations may also create service requests. Using the SRMT to create a service request allows the person inquiring to receive a response without having to call the USCIS Contact Center again or return to a USCIS office in most instances.

2. By Requestor Through Online Tools

By using an online tool, a person may create a service request for the following reasons (unless a person is a protected person):[3]

- Request regarding a notice, card, or other document that was not received;[4]
- Request regarding a case outside normal processing time;
- Request for accommodations;[5] or
- Request for correction of a typographic error.[6]

3. By Requestor Through U.S. Mail

Benefit requestors may also submit a service request by mailing in a request to a domestic USCIS office.[7] However, the USCIS Contact Center and online tools are generally the preferred method of contacting the agency for timely and effective responses to case-specific inquiries.

B. Responding to Service Requests

1. Timely Response

The USCIS office receiving a service request should take the necessary steps to communicate directly with the benefit requestor about the inquiry or timely relocate the inquiry to another office or organization when appropriate.

USCIS categorizes a service request based upon the urgency and request type, and assigns a target completion date based on the category. USCIS completes requests within each category on a first-in, first-out basis. In general, the goal for resolution of service requests is 15 business days from the date of creation.

2. Prioritized Requests

The following requests receive processing priority:

Expedite Requests[8]

Immigration benefit requestors or their authorized representative may request that USCIS expedite the adjudication of their application, petition, request, appeal, or motion that is under USCIS jurisdiction.

Reasonable Accommodation[9]

Reasonable accommodation service requests must be responded to in accordance with the disability accommodations policy.

Military Referral

Military referrals have implied urgency based upon the uncertainty of reassignments and deployments.

Footnotes

[^ 1] See Chapter 7, Privacy and Confidentiality [1 USCIS-PM A.7].

[^ 2] Requestors generally submit service requests through the USCIS Contact Center or online.

[^ 3] Protected person refers to a person covered by 8 U.S.C. 1367 confidentiality protections, including VAWA self-petitioners, Form I-765V filers, and individuals seeking or who hold Continued Presence, U nonimmigrant status or T nonimmigrant status. If a protected person also has filed a benefit request that does not trigger 8 U.S.C. 1367 (for example, a U petitioner has also filed for temporary protected status), USCIS nonetheless considers that individual as covered by 8 U.S.C. 1367 protections for purposes of service requests related to all pending and approved benefits. See Chapter 7, Privacy and Confidentiality, Section E, VAWA, T, and U Cases [1 USCIS-PM A.7(E)]. In addition, there is specialized customer service for asylum and refugee-related applications. For more information see Chapter 7, Privacy and Confidentiality, Section F, Asylees and Refugees [1 USCIS-PM A.7(F)].

[^ 4] Before submitting a service request for a non-delivered secure document or card, benefit requestors should track delivery. If a secure document or card was returned to USCIS as non-deliverable, USCIS may be able to resend it. However, if a non-delivered secure document or card was not returned to USCIS, the requestor may need to file a new form for a new document to be issued (rather than submit a service request). For more information on reissuance of secure travel and identity documents, see Volume 11, Travel and Identity Documents, Part A, Secure Identity Documents Policies and Procedures [11 USCIS-PM A].

[^ 5] See Chapter 6, Disability Accommodation Requests [1 USCIS-PM A.6].

[^ 6] See Volume 11, Travel and Identity Documents, Part A, Secure Identity Documents Policies and Procedures, Chapter 3, Reissuance of Secure Identity Documents [11 USCIS-PM A.3]. See the Immigration Documents and How to Correct, Update, or Replace Them webpage.

[^ 7] See Chapter 3, Types of Assistance, Section D, Traditional Mail or Facsimile [1 USCIS-PM A.3(D)]. See the Find a USCIS Office webpage.

[^ 8] For information on expedite requests, see Chapter 5, Expedite Requests [1 USCIS-PM A.5].

[^ 9] See Chapter 6, Disability Accommodation Requests [1 USCIS-PM A.6].

Chapter 5 - Expedite Requests

Immigration benefit requestors or their authorized representative may request that USCIS expedite the adjudication of their application, petition, request, appeal, or motion that is under USCIS jurisdiction.[1] USCIS considers all expedite requests on a case-by-case basis in the exercise of discretion and generally requires documentation to support such requests. The decision to expedite is within the sole discretion of USCIS.

As expediting an application, petition, request, appeal, or motion generally means that USCIS would adjudicate the requestor's benefit ahead of others who filed earlier, USCIS carefully weighs the urgency and merit of each expedite request.

A. Expedite Criteria or Circumstances

USCIS may expedite adjudication of an application, petition, request, appeal, or motion at its discretion. USCIS considers the totality of the circumstances and evidence submitted in support of an expedite request.

Relevant criteria or circumstances that may be considered in determining whether to grant an expedite request include, but are not limited to, the following:

- Severe financial loss to a company or person, provided that the need for urgent action is not the result of the petitioner’s or applicant’s failure to timely file the benefit request or to timely respond to any requests for evidence.[2]
- Emergencies or urgent humanitarian situations.
- Nonprofit organization (as designated by the Internal Revenue Service (IRS)) whose request is in furtherance of the cultural or social interests of the United States.
- Government interests, including cases identified by the government as urgent because they involve the public interest, public safety, national interest, or national security interests.
- Clear USCIS error.

1. Severe Financial Loss as a Basis for Expedited Treatment

A company can demonstrate that it would suffer a severe financial loss if it is at risk of failing, losing a critical contract, or required to lay off other employees. For example, a medical office may suffer severe financial loss if a gap in a doctor’s employment authorization would require the medical practice to lay off its medical assistants.

Job loss may be sufficient to establish severe financial loss for a person, depending on the individual circumstances. For example, the inability to travel for work that would result in job loss might warrant expedited treatment. The need to obtain employment authorization, standing alone, without evidence of other compelling factors, does not warrant expedited treatment.

In addition, severe financial loss may also be established where failure to expedite would result in a loss of critical public benefits or services.

2. Expedited Treatment Based on Emergency or Urgent Humanitarian Situations

In the context of an expedite request, an emergency or urgent humanitarian situation is a pressing or critical circumstance related to human welfare. Human welfare means issues related to the well-being of a person or group. Examples include, but are not limited to, illness, disability, death of a family member or close friend, or extreme living conditions, such as those caused by natural catastrophes or armed conflict.

USCIS considers requests related to a requestor's individual welfare and requests that are related to the welfare of others. For example, to facilitate the well-being of an individual, USCIS may expedite a benefit request where a vulnerable person's safety may be otherwise compromised. To facilitate the well-being of others, for example, USCIS may expedite employment authorization for healthcare workers during a pandemic.

Certain benefit requests, such as asylum applications, refugee applications, and requests for humanitarian parole, by their nature involve urgent humanitarian situations. Therefore, filing a humanitarian-based benefit, standing alone, without evidence of other time-sensitive or compelling factors, generally may not warrant expedited treatment under this criterion.[3]

Travel-Related Requests

USCIS considers expedited processing of an Application for Travel Documents, Parole Documents, and Arrival/Departure Records (Form I-131) when there is a pressing or critical need for an applicant to travel outside the United States.

Expedited processing of a travel document may be warranted when there is an unexpected event, such as the pressing or critical need to travel outside the United States to obtain medical treatment in a limited amount of time, or due to the death or grave illness of a family member or close friend.

Expedited processing of a travel document may also be warranted when there is a pressing or critical need to travel outside the United States for a planned event, but processing times prevent USCIS from issuing the travel document by the planned date of departure. When the need to expedite issuance of a travel document is related to a planned event, USCIS considers whether the applicant timely filed the Form I-131 or timely responded to a request for evidence.[4]

For example, a requestor may have applied for a travel document 5 months ago when they learned of the event, but their case remains pending, and they must travel for an event which is now in 45 days, such as for a:

- Work or professional commitment (such as a meeting, conference, forum, seminar, or training);
- Academic commitment (such as a study abroad program, research trip, forum, seminar, conference, or practicum); or
- Personal commitment (such as a wedding or graduation).

The examples of travel-related emergencies provided above are not exhaustive. Officers should review travel-related expedite requests on a case-by-case basis to determine if the need to travel is pressing or critical.

A benefit requestor's desire to travel solely for vacation generally does not meet the definition of a pressing or critical need to travel.

3. Nonprofit Organization Seeking Expedited Treatment

A nonprofit organization seeking to expedite a beneficiary's benefit request must demonstrate an urgent need to expedite the case based on the beneficiary's specific role within the nonprofit in furthering cultural or social interests (as opposed to the organization's role in furthering social or cultural interests). Examples may include a medical professional urgently needed for medical research related to a specific "social" U.S. interest (such as the COVID-19 pandemic or other socially impactful research or project) or a university professor urgently needed to participate in a specific and imminent cultural program. Another example is a religious organization that urgently needs a beneficiary's specific services and skill set to continue a vital social outreach program. In such instances, the religious organization must articulate why the respective beneficiary is specifically needed, as opposed to pointing to a general shortage alone.

4. Expedited Treatment Based on Government Interests

Government interests refer to interests of any federal, state, tribal, territorial, or local government of the United States.[5] This includes cases identified as urgent by the government because they involve public interest, public safety, national interest, or national security interests. The request must be made by a person who has authority to represent the agency or department, such as an official, manager, supervisor, or tribal leader, on the matter for which expedited treatment is being requested. The request must demonstrate that the interests are pressing and substantive.

Where a federal agency or department identifies an articulable federal government interest in accordance with these criteria, USCIS generally defers to that federal agency or department's assessment.

If the request relates to employment authorization, the request must demonstrate that the need for the applicant to be authorized to work is critical to the mission of the requesting agency or department, and goes beyond a general need to retain a particular worker or person. For example, an applicant for employment authorization may warrant expedited processing based on government interests when the applicant is a victim or witness who is cooperating with the government and needs employment authorization because the respective agency is seeking back pay or reinstatement in court proceedings.

5. Clear USCIS Error

USCIS may consider an expedite request based on clear USCIS error when a requestor establishes an urgent need to correct the error. For example, an applicant who receives an Employment Authorization Document with incorrect information that prevents them from being able to work may request a replacement document on an expedited basis if USCIS caused the error.[6]

B. How to Request Expedited Processing

The process to request expedited processing may vary by form type and the office that has jurisdiction over the benefit request. USCIS provides specific information on submitting expedite requests on the Expedite Requests webpage.

Benefit requestors must demonstrate their need for expedited processing. Generally, USCIS requires documentation to support expedite requests. When additional documentation is needed, USCIS asks the requestor to submit supporting evidence.

1. Premium Processing

A benefit requestor cannot request expedited processing for petitions and applications where premium processing service is available for their filing category unless they meet the exception for certain nonprofit organizations.

A benefit requestor that is designated as a nonprofit organization by the IRS seeking a beneficiary whose services are needed in furtherance of the cultural or social interests of the United States may request that the benefit it seeks be expedited without a fee, even if premium processing is available for that benefit.[7] USCIS retains discretion not to expedite the

benefit request. The benefit requestor may also request premium processing for the benefit.

C. How USCIS Processes Requests for Expedited Treatment

Using its discretion, USCIS considers expedite requests according to the criteria and circumstances described above. Not every circumstance that fits under the criteria or examples above necessarily results in expedited processing.[8]

Circumstances that Impact USCIS' Ability to Expedite

Some circumstances may prolong or inhibit USCIS' ability to expedite certain benefit requests. Examples include, but are not limited to, when:

- The benefit requestor must perform a certain action or submit additional documentation or evidence, such as attend a biometric services appointment, be interviewed, or complete any required immigration medical examination;[9]
- There is a required background check that remains pending with a third-party agency;
- An application or petition requires an on-site inspection;[10] or
- An application or petition is dependent on the adjudication of a principal's application or petition.

Responding to Expedite Requests

USCIS generally sends a response to expedite requests that are submitted through the Contact Center. However, to increase efficiency in processing expedite requests, USCIS generally does not provide justifications regarding expedite decisions.

Requestors in Removal Proceedings

Expedited processing of benefit requests for aliens with final orders of removal or aliens in removal proceedings is coordinated between USCIS and U.S. Immigration and Customs Enforcement (ICE).[11]

Footnotes

[^ 1] Expedite procedures may vary by form type and the office that has the benefit request. For example, there are specific processes and requirements for requests to expedite certain benefits, such as asylum applications, refugee applications, and requests for humanitarian parole, among others. For more information, see specific procedures information on the Expedite Requests webpage.

[^ 2] For more information on timely filed requests, see Part B, Submission of Benefit Requests, Chapter 6, Submitting Requests [1 USCIS-PM B.6]. For more information about failure to timely respond to Requests for Evidence and Notices of Intent to Deny, see Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 3] Expedite procedures may vary by form type and the office that has the benefit request. For example, there are specific processes and requirements for requests to expedite certain benefits, such as asylum applications, refugee applications, and requests for humanitarian parole, among others. For more information, see specific procedures information on the Expedite Requests webpage.

[^ 4] USCIS considers a Form I-131 timely filed when the applicant files as soon as practicable after learning of the planned event. However, USCIS provides certain flexibilities if the applicant's failure to timely file or respond to a request for evidence is because of a situation outside of the applicant's control, such as an emergency or unforeseen circumstance. See the Immigration Relief in Emergencies or Unforeseen Circumstances webpage.

[^ 5] Examples include, but are not limited to, the Equal Employment Opportunity Commission, National Labor Relations Board, National Transportation Safety Board, U.S. Department of War, U.S. Department of Health and Human Services, U.S. Department of Justice, U.S. Department of Labor, U.S. Department of Commerce, U.S. Department of State, and other DHS agencies.

[^ 6] For more information about correcting documents based on USCIS error, see the Updating or Correcting Your Documents webpage.

[^ 7] See Section A, Expedite Criteria or Circumstances, Subsection 3, Nonprofit Organization Seeking Expedited Treatment [1 USCIS-PM A.5(A)(3)].

[^ 8] See Section A, Expedite Criteria or Circumstances [1 USCIS-PM A.5(A)].

[^ 9] For more information, see Part C, Biometrics Collection and Security Checks [1 USCIS-PM C]; Part E, Adjudications [1 USCIS-PM E]; and Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility [8 USCIS-PM B].

[^ 10] USCIS cannot expedite certain aspects of its processing, including on-site inspections.

[^ 11] See Part E, Adjudications, Chapter 3, Jurisdiction, Section A, Coordination in Cases Involving Removal Proceedings [1 USCIS-PM E.3(A)].

Chapter 6 - Disability Accommodation Requests

A. Background

USCIS accepts requests for accommodations from benefit requestors, other interested parties, and other persons with disabilities who use USCIS services and access USCIS facilities. Accommodation requests may be made in advance for instances that include, but are not limited to:

- An interview with an officer;
- An oath ceremony; or
- A USCIS-sponsored public event.

Accommodations ensure compliance with Section 504 of the Rehabilitation Act of 1973,[1] which states that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal

financial assistance or under any program or activity conducted by any Executive agency."[2] It is USCIS policy to provide equal access to its benefits, services, and activities for persons with disabilities, and to provide religious accommodations in accordance with applicable requirements.

B. Reasonable Accommodation

The essential feature of an accommodation is that it allows the person with a disability to participate in the process or activity. While USCIS is not required to make major modifications that would result in a fundamental change to the processes or cause an undue burden for the agency, USCIS makes every effort to provide accommodations to persons with disabilities. Reasonable accommodations vary, depending on the situation and the person's disability.

Benefit requestors must satisfy all of the legal requirements to receive an immigration benefit; however, USCIS must provide reasonable accommodations to persons with disabilities to afford them the opportunity to meet those requirements.

Examples of accommodations include, but are not limited to:

- Those unable to use their hands may be permitted to take a test orally rather than in writing;
- Those who are deaf or hard of hearing may be provided with a sign language interpreter for a USCIS-sponsored event;[3]
- Those unable to speak may be allowed to respond to questions in an agreed-upon nonverbal manner;[4]
- Those unable to travel to a designated USCIS location for an interview due to a disabling condition may be interviewed at their home or a medical facility.

C. Requesting Accommodation

1. How to Make a Disability Accommodation Request

To request disability accommodation for any phase of the application process, benefit requestors, other interested parties, and other persons with disabilities who use USCIS services and access USCIS facilities, should generally submit the request online using the Disability Accommodations for Appointments tool.[5] Requestors should submit accommodation requests to USCIS as soon as they are aware of the need for an accommodation for a particular event. The more advance notice USCIS has, the more likely it will be able to make appropriate arrangements for the accommodation request.[6]

2. USCIS Points-of-Contact

To ensure accountability, each field office, application support center (ASC), or asylum office must designate at least one employee to be responsible for handling accommodation requests. All employees should be aware of the procedures for handling such requests.

If a requestor contacts the field office, ASC, or asylum office directly to request a disability accommodation for an interview, the office may enter a service request into the Service Request Management Tool (SRMT) to work with the requestor to respond to the request, and mark the request as fulfilled when it is complete so that the request and the response are recorded.

Offices are encouraged to provide reasonable accommodation requests made by walk-ins whenever practical. If the accommodation is not available, the office should inform the requestor that the office is not able to provide the accommodation at that time, but that arrangements can be made to provide the accommodation for a future appointment or event.

3. USCIS Review

USCIS evaluates each request for a reasonable accommodation on a case-by-case basis. The Public Disability Access Coordinator must generally concur on any alternative accommodation offered or any accommodation denial before the office communicates either action to the requestor.

While a requestor is not required to include documentation of a medical condition in support of a reasonable accommodation request, an office may need documentation to evaluate the request in rare cases. In these situations, the office must consult the Public Disability Access Coordinator for guidance before the USCIS office requests medical documentation to support an accommodation request.

4. Review Timeframe

In general, the affected USCIS office determines whether it may reasonably comply with the accommodation request within 7 calendar days of receiving the request, unless unusual circumstances exist.

If an accommodation is warranted, it should be provided on the date and time of the scheduled event; rescheduling should be avoided, if possible. If an accommodation cannot be provided for the originally scheduled event, the requestor should be notified as soon as possible. Any rescheduling should occur within a reasonable period of time.

5. Reconsideration of Denied Request

To request a reconsideration of a denial of a disability accommodation request, the requestor should call the USCIS Contact Center and provide any new information they have in support of their request. Upon receiving the request, the relevant office must review the prior request and any additional information provided. The office should contact the requestor if additional information is needed.

Generally, all affirmed denials must be approved by the Public Disability Access Coordinator, the field office director, ASC manager, or asylum office director, whichever applies.

Footnotes

[^ 1] See Pub. L. 93-112 (PDF) (September 26, 1973).

[^ 2] See Section 504 of the Rehabilitation Act of 1973, Pub. L. 93-112 (PDF), 87 Stat. 355, 394 (September 26, 1973), codified at 29 U.S.C. 794(a). See 6 CFR 15.3 for applicable definitions relating to enforcement of nondiscrimination on the basis of disability in Department of Homeland Security (DHS) federal programs or activities, which includes those conducted by USCIS. See Volume 1, General Policies and Procedures, Part A, Public Service, Chapter 9, Feedback, Complaints, Misconduct, and Discrimination, Section D, Allegations of Discrimination, Subsection 1, Anti-Discrimination Policy [1 USCIS-PM A.9(D)(1)].

[^ 3] This applies to any member of the public who wants to attend the event, such as a naturalization ceremony or an outreach engagement.

[^ 4] Offices should understand that, while the inability to speak is considered a disability under the Rehabilitation Act, the inability to speak the English language (while being able to speak a foreign language) is not considered a disability under the Act. Therefore, no accommodation is required and one should not be provided if a requestor is unable to speak English. No request for an interpreter should be approved unless the requestor is otherwise eligible. See, for example, 8 CFR 312.4.

[^ 5] For additional instructions on how to submit a disability accommodation request, see the Disability Accommodations for the Public webpage. Applicants who cannot submit their request online should call the USCIS Contact Center at 1-800-375-5283 (TTY: 1-800-767-1833).

[^ 6] For more information on service requests, see Chapter 4, Service Request Management Tool [1 USCIS-PM A.4]. For information on handling disability accommodations related to asylum cases, see Chapter 7, Privacy and Confidentiality, Section F, Asylees and Refugees, Subsection 3, USCIS Assistance [1 USCIS-PM A.7(F)(3)].

Chapter 7 - Privacy and Confidentiality

A. Privacy Act of 1974

The Privacy Act provides that federal agencies must protect against the unauthorized disclosure of personally identifiable information (PII) that it collects, disseminates, uses, or maintains.[1] The Privacy Act requires that personal information belonging to U.S. citizens and lawful permanent residents (LPRs) be protected from unauthorized disclosure. Violations of these requirements may result in civil and criminal penalties.

B. Fair Information Practice Principles

DHS treats all persons, regardless of immigration status, consistent with the Fair Information Practice Principles (FIPPs).[2] The FIPPs are a set of eight principles that are rooted in the tenets of the Privacy Act of 1974. The principles are:

- Transparency;
- Individual participation;
- Purpose specification;
- Data minimization;
- Use limitation;
- Data quality and integrity;
- Security; and
- Accountability and auditing.

The table below provides a description of each principle.

Fair Information Practice Principles *DHS Framework for Privacy Policy*

Principle	Description
Transparency	DHS provides transparency for how it handles sensitive information through various mechanisms, including Privacy Impact Assessments, System of Records Notices, Privacy Act Statements, and the Freedom of Information Act (FOIA).
Individual Participation	To the extent practicable, DHS should involve persons in the process of using their personal information, and they may always request information about themselves through a FOIA request.
Purpose Specification	DHS' default action should be to not collect information, and if it is otherwise necessary, DHS should articulate the authorities that permit collection and must clearly state the purposes of the information collection.
Data Minimization	DHS collects only information relevant and necessary to accomplish the purposes specified and special emphasis is placed on reducing the use of sensitive personal information, where practical.
Use Limitation	Any sharing of information outside of the agency must be consistent with the use or purpose originally specified.
Data Quality and Integrity	DHS should, to the extent practical, ensure that PII is accurate, relevant, timely, and complete.
Security	DHS uses appropriate security safeguards against risks such as loss, unauthorized access or use, destruction, modification or unintended or inappropriate disclosure.
Accountability and Auditing	DHS has a number of accountability mechanisms, including reviews of its operations, training for employees, and investigations when appropriate.

C. Personally Identifiable Information

DHS defines PII as any information that permits the identity of a person to be directly or indirectly inferred, including any information which is linked or linkable to that person regardless of whether the person is a U.S. citizen, lawful permanent resident (LPR), visitor to the United States, or a DHS employee or contractor.[3]

Sensitive PII is defined as information which, if lost, compromised, or disclosed without authorization, could result in substantial harm, embarrassment, inconvenience, or unfairness to a person.[4] Some examples of PII that USCIS personnel may encounter include:

- Name;
- Address;
- Date of birth; and
- Certificate of Naturalization or Citizenship number.
- Alien number (A-number);
- Social Security number;
- Driver's license or state ID number;
- Passport number; and
- Biometric identifiers.

USCIS employees have a professional and legal responsibility to protect the PII the agency collects, disseminates, uses, or maintains. All USCIS employees must follow proper procedures when handling all PII and all information encountered in the course of their work. All USCIS employees processing PII must know and follow the policies and procedures for collecting, storing, handling, and sharing PII. Specifically, USCIS employees must:

- Collect PII only when authorized;
- Limit the access and use of PII;
- Secure PII when not in use;
- Share PII, only as authorized, with persons who have a need to know; and
- Complete and remain current with all privacy, computer security, and special protected class training mandates.

D. Case-Specific Inquiries

USCIS receives a variety of case-specific inquiries, including requests for case status updates, accommodations at interviews, appointment rescheduling, and the resolution of other administrative issues. USCIS personnel are permitted to respond to these inquiries if:

- The requestor is entitled to receive the requested case-specific information; and
- Disclosure of the requested case-specific information would not violate Privacy Act requirements or other special protected class confidentiality protections.

1. Verifying Identity of Requestor

USCIS employees must verify the identity of a person inquiring about a specific application or petition. For in-person inquiries, those present must provide a government-issued identity document so that USCIS can verify their identity.

For inquiries not received in person (for example, those received through telephone call or email), it may be difficult to verify the identity of the person making the request through a government-issued document. In these cases, USCIS employees should ask for specific identifying information about the case to ensure that it is appropriate to communicate case-specific information. Examples of identifying information include, but are not limited to: receipt numbers, A-numbers, full names, dates of birth, email addresses, and physical addresses.

If a person is unable to provide identifying information that an applicant, petitioner, or representative should reasonably know, USCIS employees may refuse to respond to the request, or direct the requestor to make an appointment at a local field office or create a myUSCIS account.

2. Disclosure of Information

Except for case types with heightened privacy concerns,[5] USCIS employees may communicate about administrative case matters if the requestor is able to demonstrate his or her identity (for example, by showing government-issued identification during an in-person encounter), or provide verifying information sufficient to demonstrate that communication would be proper. Administrative case matters are generally any issues that do not involve the legal substance or merit of an application or petition.

USCIS employees should not disclose PII when responding to case-specific requests; inquiries can generally be resolved without any discussion of PII.[6] To ensure that a USCIS employee is not disclosing PII, the USCIS employee can always require that the requestor first provide and confirm any PII at issue. In addition, a USCIS employee may take action that results in the resending of cards, notices, or documents containing PII to addresses on file instead of directly disclosing PII to a requestor.

Interested parties may be present at in-person appointments or during telephone calls, with the consent of the applicant or petitioner. Consent is usually implied if both the applicant or petitioner and the third party are present together. However, a USCIS employee may always ask the applicant or petitioner if he or she consents to the third-party's presence if there is any doubt.

3. Communication with Address on File

USCIS sends written correspondence to the address on file. Before USCIS is able to send any correspondence to a different address, the person must update their address in USCIS systems.[7] Change of address requests associated with people protected by 8 U.S.C. 1367 confidentiality provisions must follow separate procedures.[8]

4. Third-Party Information

Information from other agencies, such as Immigration and Customs Enforcement (ICE), the Federal Bureau of Investigation (FBI), or the U.S. Department of State (DOS) may be located in USCIS files and systems. This information must not be released in response to an inquiry, although it may be appropriate to refer the inquiry to another agency.

5. Third-Party Government Inquiries

USCIS may share records covered under the Privacy Act with written consent from the person or pursuant to a routine use listed in the applicable System of Records Notices. Before sharing information with a government entity, USCIS must determine if the disclosure and use of information is compatible with an existing routine use. Planned uses must also be compatible with the purpose for which DHS originally collected the information. There are, however, enumerated exceptions of the Act that may apply.

Congress

One exception is for disclosures to either house of Congress, or any Congressional committee, subcommittee, joint committee, or subcommittee of a joint committee, if the matter is within its jurisdiction. For all other requests from members of Congress, such as constituent requests, the person whose information is to be released must have provided the member of Congress with a privacy release for USCIS to disclose any information related to that person.

The USCIS Office of Legislative and Intergovernmental Affairs (OLIA)) and designated liaisons handle all inquiries and certain correspondence from Congress to USCIS. Members of Congress, congressional offices, and congressional committees should always go through OLIA when initiating an inquiry. The USCIS and Congress webpage on USCIS' website provides instructions on how members of Congress should interact with and contact USCIS. Non-liaison USCIS employees who are contacted directly with a congressional inquiry should refer it to OLIA so that it may proceed through the proper channels.

Law Enforcement Agencies

Information may be shared with other DHS components under the existing DHS information sharing policy,[9] which considers all DHS components one agency, as long as there is a mission need in line with the requestor's official duties.

Requests from law enforcement agencies outside of DHS must go through DHS Single Point of Service (SPS) Request for Information (RFI) Management Tool, which requires an account. Account requests can be submitted to DHS-SPS-RFI@hq.dhs.gov.

Before referring any relevant RFI to USCIS, SPS ensures any RFI is consistent with the USCIS mission, has been reviewed and cleared by DHS Counsel and Privacy (as required), and is provided a tracking number. SPS then submits the RFI to Fraud Detection and National Security (FDNS) Intelligence Division (ID). FDNS ID logs official RFIs and takes the necessary steps to process and answer them, including review by USCIS Office of the Chief Counsel and Office of Privacy.

Federal Investigators

If an Office of Personnel Management or DHS Office of Inspector General (OIG) investigator requests information, the USCIS employee should provide the information upon verifying the requestor's identity. Disclosure of any information needs to meet a routine use or be covered by a data share agreement. USCIS employees and contractors must provide prompt access for auditors, inspectors, investigators, and other personnel authorized by the OIG to any files, records, reports, or other information that may be requested either orally or in writing, and supervisors may not impede this cooperation.

Other Third-Party Inquiries

Prior to responding to a non-congressional third-party case inquiry, a written, signed, and notarized privacy release must be obtained from the applicant or petitioner. Third parties should submit a written authorization and identify the information the person desires to be disclosed. USCIS staff can accept the authorization via facsimile or email as long as the signature on the original is handwritten, and not typed or stamped.[10] The USCIS Office of Privacy will conduct an analysis for disclosure requests for PII on persons not covered by the Privacy Act or the Judicial Redress Act, absent another mechanism that confers a right or process by which a member of the public may access agency records.

E. VAWA, T, and U Cases

1. Confidentiality Provisions

Persons eligible for and recipients of victim-based immigration relief (specifically, Violence Against Women Act (VAWA) self-petitioners[11] as well as applicants and petitioners for, and recipients of, T and U nonimmigrant status (protected person[12])) are entitled to protections under 8 U.S.C. 1367. USCIS also extends the provisions of 8 U.S.C. 1367 to abused spouses of certain persons applying for employment authorization under INA 106.[13] The governing statute generally prohibits the unauthorized disclosure of information about petitioners and applicants for, and beneficiaries of VAWA, T, and U-related benefit requests to anyone other than an officer or employee of DHS, the U.S. Department of Justice (DOJ), or DOS for a legitimate agency purpose.[14]

This confidentiality provision is commonly referred to as "Section 384" because it originally became law under Section 384 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996,[15] which protects the confidentiality of victims of domestic violence, trafficking, and other crimes who have filed for or have been granted immigration relief.

An unauthorized disclosure of information which relates to a protected person can have significant consequences. USCIS employees must maintain confidentiality in these cases. Victims of domestic violence, victims of trafficking, and victims of crimes can be put at risk, as can their family members, if information is provided to a person who is not authorized.

Anyone who willfully uses, publishes, or permits any information pertaining to such victims to be disclosed in violation of the above-referenced confidentiality provisions may face disciplinary action and be subject to a civil penalty of up to $5,000 for each violation.

2. Scope of Confidentiality

Duration of Confidentiality Requirement

By law, the confidentiality provisions apply while a VAWA, T, or U case is pending and after it is approved. The protections end when the request for immigration relief is denied and all opportunities for appeal of the denial have been exhausted.

These protections also terminate once a protected person naturalizes. 8 U.S.C 1367 was drafted with the intention of protecting the "alien."[16] Naturalized U.S. citizens were not the intended category of persons to be protected.

USCIS maintains the ability to reapply 8 U.S.C 1367 protections to naturalized U.S. citizens in limited circumstances. For example, if a previously protected naturalized citizen's eligibility for citizenship were called into question, the protections would be reinstated. Additionally, the derivative beneficiaries of a protected naturalized U.S. citizen remain protected by statute until the beneficiaries become naturalized U.S. citizens.

Disclosure of Information

The statute prevents DHS from disclosing any information which relates to a person protected under 8 U.S.C. 1367 (protected person), subject to certain limited exceptions.[17] This includes information USCIS has in its records or other information about the protected person, even if those records do not specifically identify the person as one who has sought VAWA, T, or U benefits. Consequently, USCIS cannot disclose information about a protected person even if that information is not contained in a VAWA, T, or U filing.[18]

USCIS cannot release any information relating to a protected person until USCIS verifies both the identity of the requestor of information and the requestor's authorization to receive the protected information. USCIS must verify the identity and authorization before responding to any inquiry, expedite request, referral, or other communication. After identity and authorization verification, USCIS can provide protected information directly to the protected person or the protected person's representative authorized to receive 1367-protected information.

Representative refers to an attorney or accredited representative who has properly filed a Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28) on behalf of a protected person and who remains in good standing or is not otherwise ineligible to represent persons with matters before USCIS.

Exceptions for Disclosure of Information

USCIS is permitted to disclose information relating to a protected person in certain, limited circumstances. These circumstances include:

- Statistical Information – Disclosure of data and statistical information may be made in the manner and circumstances permitted by law.[19]
- Legitimate Law Enforcement Purposes – Disclosure of information may be made to law enforcement officials to be used solely for a legitimate law enforcement purpose.
- Judicial Review – Information can be disclosed in connection with judicial review of a determination provided it is in a manner that protects the confidentiality of the information.

- Applicant Waives Confidentiality – Adults can voluntarily waive the confidentiality provision; if there are multiple victims in one case, they must all waive the restrictions.
- Public Benefits – Information may be disclosed to federal, state, and local public and private agencies providing benefits, to be used solely in making determinations of eligibility for benefits.[20]
- Congressional Oversight Authority (for example, Government Accountability Office audits) – The Attorney General and the Secretary of Homeland Security can disclose information on closed cases to the chairmen and ranking members of Congressional Committees on the Judiciary, for the exercise of Congressional oversight authority. The disclosure must be in a manner that protects the confidentiality of the information and omits PII (including location-related information about a specific person).
- Communication with Non-Governmental Organizations (NGO) – Government entities adjudicating applications for relief[21] and government personnel carrying out mandated duties under the Immigration and Nationality Act (INA)[22] may, with the prior written consent of the person involved, communicate with nonprofit NGO victims' service providers for the sole purpose of assisting victims in obtaining victim services. Agencies receiving referrals are bound by the confidentiality provisions.
- National Security Purposes – The Secretary of Homeland Security, the Secretary of State, or the Attorney General may provide in their discretion the disclosure of information to national security officials to be used solely for a national security purpose in a manner that protects the confidentiality of such information.
- To sworn officers or employees of DOS or DOJ, for legitimate Department, bureau, or agency purposes.

Prohibited Source

USCIS employees are prohibited from making an adverse determination of admissibility, deportability, or removability on a protected person using information furnished solely by a prohibited source. The officer must not use information provided by the following prohibited sources to make an adverse determination:

- The abuser or perpetrator of the offense;
- Family member of the abuser; or
- Someone acting at the request of the abuser.

If the officer can independently corroborate the information from a non-prohibited source, the officer may use the information from the non-prohibited source in the adjudication process.

USCIS employees may receive information about a protected person through an anonymous personal letter, phone call, statement, tip form submission, or other method that raises questions regarding their eligibility for immigration benefits. USCIS employees should treat the information as inherently suspect and presume that derogatory information received from an unknown source came from a prohibited source.[23]

3. USCIS Assistance

USCIS employees must ensure confidentiality is maintained when a benefit requestor protected under 8 U.S.C. 1367 requests assistance.

Change of Address

Benefit requestors with a pending or approved VAWA, T, or U-related case can request a change of address by following the instructions on the How to Change Your Address webpage.

A benefit requestor with a pending or approved VAWA, T, or U-related case may also call the USCIS Contact Center at 1-800-375-5283 (TTY: 1-800-767-1833) to request an address change. The benefit requestor's identity must be verified before making the requested change. If the Contact Center is unable to make the change requested, they schedule an in-person appointment at a USCIS field office. If the change is made during an in-person appointment, the field office must make the change in electronic systems and notify the office with jurisdiction over the pending case of the change.

Customer Service Inquiries

Due to 8 U.S.C. 1367 protections, protected persons have specialized customer service options for their case inquiries to USCIS. As noted above, benefit requestors with pending or approved VAWA, T, or U-related cases may request customer service via the USCIS Contact Center at 1-800-375-5283 (TTY: 1-800-767-1833). USCIS must verify the identity of the person inquiring about a confidential case and verify that person's eligibility to receive information before providing any information or other requested service. To access Contact Center services, protected persons calling about a particular form (or forms) should have their receipt notice(s) on hand for reference during the call. They should also have a copy of the pending or approved application or petition that they are calling about readily available, if possible.

For more information related to how to make customer service inquiries for protected persons who have VAWA, T, and-U related filings, see the USCIS Contact Us webpage.

4. Mailing Address Procedures for Persons Protected Under 8 U.S.C. 1367

Defining "Safe Mailing Address" and "Preferred Mailing Address"

USCIS is committed to incorporating victim-centered approaches into agency policies, programs, and procedures related to interactions with protected persons.

A critical component of this approach is the prioritization of victim safety and autonomy. Under this framework, USCIS acknowledges that protected persons are best positioned to make decisions about where correspondence should be directed.

USCIS has policies and procedures in place so that information related to protected persons is disclosed only to authorized parties.[24] In the context of mailed correspondence, USCIS has implemented procedures to minimize the risk of unauthorized parties viewing the protected information. Many of the forms that initiate the 8 U.S.C. 1367 protections (victim-based forms) include a specific address field for a designated "safe mailing address."[25]

Other forms may not have a designated safe mailing address field, but instead may include space to provide a mailing address that may be different from the person's home or physical address (referred to in this guidance as the "preferred mailing address"). When a form does not have a safe mailing address field, but the protected person has listed a preferred mailing address, USCIS considers the preferred mailing address to be a safe and secure address to use for notices, correspondence, and secure identity documents for the protected person. The safe mailing address or preferred mailing address may change over time as the protected person files new benefit requests or submits a request to change their address.[26]

Adjudication of Non-Victim-Based Benefit Requests

The protections provided by 8 U.S.C. 1367 do not change which USCIS office has jurisdiction to adjudicate a benefit request that a protected person has filed.

In instances where a protected person files a non-victim-based benefit request, the USCIS office that has jurisdiction over that matter may still adjudicate the benefit request even though it contains information about a protected person. Officers are not required to involve the USCIS offices assigned to adjudicate victim-based benefit requests in the adjudication of the non-

victim-based benefit request.[27]

The prohibition on adverse determinations described in 8 U.S.C. 1367(a)(1) applies to all cases where a protected person is an applicant, beneficiary, or petitioner. Therefore, even if an officer is adjudicating a non-victim-based application or petition (such as a Petition for Nonimmigrant Worker (Form I-129), Petition for Alien Relative (Form I-130), Immigrant Petition for Alien Worker (Form I-140), or Application for Naturalization (Form N-400)), officers cannot make adverse determinations of admissibility, deportability, or removability based solely on information provided by a prohibited source. Officers can use information if that information can be located in, and sourced to, an independent, non-prohibited source.[28]

Sending Notices to the Designated Safe Mailing Address or Preferred Mailing Address

The designated safe mailing address or preferred mailing address may be the protected person's home address, their attorney or accredited representative's address, their preparer's address, or any other address listed on a form under the safe mailing address field or mailing address field.[29] If a protected person designates a safe mailing address or provides a preferred mailing address in an applicable field, USCIS sends original notices (including the notice containing the Arrival/Departure Record (Form I-94)), correspondence, and secure identity documents to that address, unless the person is represented and has a properly filed Form G-28 on record that requests USCIS send original notices, the Form I-94, and secure identity documents to the attorney or accredited representative.[30] In such a case, USCIS only sends courtesy copies of notices to the protected person at their designated safe or preferred mailing address.

Sending Notices to Protected Persons on Subsequent, Concurrent, or Previous Filings

Officers must review each form individually to determine where to send notices or secure identity documents issued from an adjudication of that form. Officers should not rely on addresses contained in prior filings, including any prior Form G-28 where representation does not extend to other forms, when sending notices related to forms filed with, or after, the 8 U.S.C. 1367 filing. This guidance applies to both the primary forms that are protected by 8 U.S.C. 1367, as well as any related or subsequent forms or requests submitted by a protected person, such as an Application for Employment Authorization (Form I-765), Application to Replace Permanent Resident Card (Form I-90), or Form N-400.

When adjudicating benefit requests filed by or for the protected person before the 8 U.S.C. 1367 protections applied, officers should review the immigration records to determine if the person filed a request for an address change.[31] In general, officers should use the preferred mailing address listed on the individual's benefit form under adjudication for notices, correspondence, or secure identity documents related to that form unless the person has changed their address for that specific form with USCIS or an exception to the policy applies.

There are certain exceptions to this policy, such as when the underlying basis for an Application to Register Permanent Residence or Adjust Status (Form I-485), is changed from a Form I-130 to a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360), filed as a VAWA self-petition. USCIS changes the mailing address of the pending ancillary forms, such as the Form I-765 and Application for Travel Documents, Parole Documents, and Arrival/Departure Records (Form I-131) to the safe mailing address on the VAWA self-petition. USCIS changes the mailing address on the Form I-485 to the safe mailing address on the VAWA self-petition after approval of the petition.

Guide to Mailing Address Procedures for Protected Persons

The table below outlines common scenarios relevant to safe address procedures. Officers should follow the instructions below to ensure all notices and secure identity documents are sent to the correct location.

Protected Persons With a Representative

If the protected person...	Then
Provided their representative's address as the safe or preferred mailing address.	USCIS sends original and courtesy copies of notices and secure identity documents to the address of the protected person's representative.
Provided a safe or preferred mailing address, which is not their representative's address, and selected the options on the Form G-28 for all original notices and secure identity documents to be sent to their representative.	According to the preferences indicated by the protected person on the Form G-28, USCIS sends all original notices and secure identity documents to the representative listed on the Form G-28. USCIS only sends a courtesy copy of a notice to the protected person at their safe or preferred mailing address.
Provided only a physical address.	For victim-based forms, USCIS always sends all notices or secure identity documents to the address of the protected person's representative, regardless of their selections on the Form G-28.[32] For non-victim-based forms,[33] USCIS sends original notices or secure identity documents to the physical address listed on the Form G-28. The representative only receives a courtesy copy of any notices sent to the protected person.
Provided only a physical address and selected the option on the Form G-28 that the Form I-94 be sent to the protected person's mailing address.	For victim-based forms, USCIS sends the Form I-94 to the address of the protected person's representative, regardless of their selections on the Form G-28.[34] For non-victim-based forms,[35] USCIS sends the Form I-94 to the physical address listed on the Form G-28. The representative only receives a courtesy copy of any notices sent to the protected person.

Protected Persons Without a Representative

If the protected person...	Then
Provided a safe mailing address or preferred mailing address.	Provided only a physical address.
Provided only a physical address.	USCIS sends all original notices and secure identity documents to the protected person's physical address listed on the form.[36]

Instructions for Mailing Address Procedures for Protected Persons with Multiple Pending Forms

If the protected person has more than one pending benefit request, in general, USCIS uses the safe mailing address or preferred mailing address that the person listed on the relevant form. USCIS may send correspondence to multiple addresses depending on the protected person's preferences listed on the relevant form or Form G-28.

Example

A protected person lists a friend's address as a safe mailing address on a Petition for U Nonimmigrant Status (Form I-918), but uses their physical address as a mailing address on their pending Application for Temporary Protected Status (Form I-821). In this case, USCIS considers the friend's address as the safe or preferred mailing address for the Form I-918. However, USCIS considers the physical address as the safe or preferred mailing address for the Form I-821. If the protected person has a Form G-28 on file, USCIS sends all original notices or secure documents according to their preferences listed on Form G-28.

The protected person must change their address for each individual form they have filed with USCIS. The filing of a subsequent benefit request with a new address does not automatically update the address for the prior filing.

F. Asylees and Refugees

1. Confidentiality Provisions

Federal regulations generally prohibit the disclosure to third parties of information contained in or pertaining to asylum applications, credible fear determinations, and reasonable fear determinations.[37] This includes information contained in the legacy Refugee Asylum and Parole System (RAPS) or the legacy Asylum Pre-Screening System (APSS), and Global System (the 2018 replacement for RAPS/APSS) or related information as displayed in CIS2 and PCQS, except under certain limited circumstances. As a matter of policy, the confidentiality protections in these regulations are extended to Registration for Classification as Refugee (Form I-590), Refugee/Asylee Relative Petitions (Form I-730), and Applications for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Section 203 of Public Law 105-100 (NACARA)) (Form I-881).

These regulations safeguard information that, if disclosed publicly, could subject the claimant to retaliatory measures by government authorities or non-state actors in the event the claimant is repatriated. Such disclosure could also endanger the security of the claimant's family members who may still be residing in the country of origin.

Moreover, public disclosure might give rise to a plausible protection claim by the claimant where one would not otherwise exist. This is because such disclosure may bring an otherwise ineligible claimant to the attention of the government authority or non-state actor against which the claimant has made allegations of mistreatment.

2. Breach of Confidentiality

Confidentiality is breached when the unauthorized disclosure of information contained in or pertaining to, these protected classes allows the third party to link the identity of the applicant to:

- The fact that the applicant or petitioner has applied for asylum or refugee status;
- Specific facts or allegations pertaining to the individual asylum or refugee claim contained in an asylum or refugee application; or
- Facts or allegations that are sufficient to give rise to a reasonable inference that the applicant has applied for asylum or refugee status.

The same principles generally govern the disclosure of information related to credible fear and reasonable fear determinations, and applications for withholding or deferral of removal under Article 3 of the Convention Against Torture, which are encompassed within the Application for Asylum and for Withholding of Removal (Form I-589). As a matter of policy, USCIS extends the regulatory safeguards to include claims under the Safe Third Country Agreement, applications for suspension of deportation, special rule cancellation of removal under NACARA 203, refugee case information, as well as refugee and asylee relative information.

Disclosures may only be made to U.S. government officials or employees and U.S. federal or state courts where there is a demonstrated need-to-know related to certain administrative, law enforcement, and civil actions. Any other disclosure requires the written consent of the claimant or the express permission of the Secretary of DHS.

3. USCIS Assistance

USCIS employees must not disclose information contained in, or pertaining to, any asylum or refugee application or claim to any third party without the written consent of the applicant, except as permitted by regulation or at the discretion of the Secretary of DHS.[38]

This includes neither confirming nor denying that a particular person filed a protection claim by submitting any of the following:

- Form I-589;
- Form I-590;
- Form I-730;
- A Request for a Safe Third Country Agreement Determination;
- A Request for a Credible Fear Determination;
- A Request for a Reasonable Fear Determination; and
- Form I-881.

USCIS employees should respond to inquiries related to Form I-589, Form I-881, requests for information pertaining to the Safe Third Country Agreement, credible fear and reasonable fear processes, Form I-590, and Form I-730 in different ways, depending on the inquiry:

Request for Disability Accommodation at an Upcoming Form I-589 Interview

Tier 2 staff members may use the Service Request Management Tool (SRMT) to record and transfer requests to the asylum office with jurisdiction over the pending application. The asylum office then contacts the applicant to arrange for disability accommodation at the interview. While officers must not confirm or deny the existence of a pending protection claim or NACARA 203 application, those making disability accommodation requests for upcoming asylum interviews should be told that the request is being recorded and will be forwarded to the appropriate office for follow-up.

Change of Address Request

Aliens can request a change of address by following the instructions on the How to Change Your Address webpage.[39]

If a requestor calls the USCIS Contact Center for a change of address request, staff members cannot confirm or deny the existence of a pending protection claim without completing enhanced identity and authorization verification. USCIS Contact Center staff may direct the requestor to the How to Change Your Address webpage and explain how a requestor can change their address.

Case Status Inquiries for Form I-589, Form I-881, and Screening Interviews

Form I-589 applicants and their authorized representatives may use the Case Status Online tool for case status updates. If they need further assistance, they may contact the USCIS Contact Center with case inquiries.

Form I-589 applicants, Form I-881 applicants, and aliens in the credible fear, reasonable fear, and Safe Third Country Agreement protection screening processes or their authorized representatives may request customer service via the USCIS Contact Center at 1-800-375-5283 (TTY: 1-800-767-1833). To access USCIS Contact Center services, applicants or their authorized representatives calling about Form I-589 or Form I-881 should have their receipt notices on hand for reference during the call. They should also have a copy of the pending or approved application that they are calling about readily available, if possible.

Due to certain confidentiality provisions,[40] USCIS must complete enhanced identity and authorization verification before confirming or denying the existence of these applications and protection screenings or responding to any such inquiry, expedite request, referral, or other communication. Only the alien or their authorized representative may receive information on the application or protection screening.

USCIS Contact Center personnel may direct the caller to USCIS tools or resources or to information on office-specific in-person appointment requirements when appropriate. If USCIS Contact Center staff is unable to resolve the inquiry, the USCIS Contact Center staff submits a service request to the appropriate office with jurisdiction for resolution. To locate an asylum office, use the Asylum Office Locator tool.

Asylum offices may also accept case inquiries directly from the alien or their attorney or accredited representative with a properly completed Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28) on file.

Asylum offices may receive case inquiries in a variety of ways, such as by mail, email, phone, fax, or in person. After enhanced identity and authorization verification is complete, asylum offices may respond to inquiries using any of those communication channels. To protect confidential information, asylum offices use encryption and password-protected attachments if responding by email. If it is not possible to verify the identity of the inquirer, asylum offices should respond by providing a written response to the last address the applicant provided.

USCIS Contact Center Status Inquiries for Form I-730

All preliminary case inquiries are fielded by the USCIS Contact Center for Form I-730 petitions. Should Contact Center staff be unable to resolve the inquiry, a service request is submitted to the appropriate office with jurisdiction for resolution. The domestic USCIS offices that process and make decisions on Form I-730 petitions may only respond to inquiries received through a service request from the USCIS Contact Center. International USCIS offices may respond to email inquiries from I-730 petitioners.

Due to certain confidentiality provisions that apply to asylees and refugees,[41] USCIS cannot release any information contained in or pertaining to Form I-730 petitions until USCIS verifies the identity of the requestor of information and the requestor's authorization to receive the protected information. The petitioner or their authorized representative may request information on the petition. USCIS must verify identity and authorization before responding to any inquiry, expedite request, referral, or other communication related to the Form I-730 petition. After identity and authorization verification, USCIS Contact Center personnel may respond to inquiries.

Form I-730 petitioners or their authorized representatives may request customer service via the USCIS Contact Center at 1-800-375-5283 (TTY: 1-800-767-1833). To access Contact Center services, petitioners or their authorized representatives calling about Form I-730 should have their receipt notice(s) on hand for reference during the call. They should also have a copy of the pending or approved petition that they are calling about readily available, if possible.

Representative refers to an attorney or accredited representative who has properly filed a Form G-28 on behalf of a petitioner and who remains in good standing or is not otherwise ineligible to represent persons with matters before USCIS.

Asylum offices do not process Form I-730 petitions. USCIS Contact Center personnel should not direct the caller to appear in person or contact asylum offices to inquire or seek information about Form I-730 petitions.

Additionally, initial domestic processing of Form I-730 following-to-join asylee and following-to-join refugee petitions is completed in offices that are not public facing. USCIS Contact Center personnel should not direct the caller to appear at USCIS service centers or RAIO offices in the United States relating to Form I-730 petitions.

USCIS Contact Center Status Inquiries for Form I-590 Applications

USCIS Contact Center personnel may not respond to any status inquiries and may not confirm or deny the existence of an application or petition. Instead, USCIS Contact Center personnel should obtain all relevant information from the inquirer and refer the inquiry to the USCIS Headquarters International and Refugee Affairs Division (IRAD) for response.

Inquiries Regarding Subsequent Applications or Petitions Based on Underlying Form I-589, Form I-590, or Form I-730

Staff members may respond to inquiries regarding subsequent applications or petitions that are based on an underlying Form I-589, Form I-590, or Form I-730 (including Form I-131, Form I-765, or Form I-485). Staff members may not confirm or deny the existence of the underlying Form I-590; however, staff members may confirm or deny the existence of the underlying Form I-589 application or Form I-730 petition after completing enhanced identity and authorization verification.

General Inquiries

USCIS employees may respond to general questions about the asylum program, the U.S. Refugee Admissions Program (USRAP), and credible and reasonable fear screenings.[42] However, for certain specific case questions relating to:

- Form I-589 applications: the inquiries may be routed to the local asylum office with jurisdiction over the application;
- Form I-730 petitions: the inquiries may be routed to the USCIS office with jurisdiction over the petition; or
- Form I-590 refugee applications: the inquiries may be routed to Refugee and International Operations (RIO) for response.

G. Temporary Protected Status

1. Confidentiality Provisions

Like refugee and asylum cases, information pertaining to Temporary Protected Status (TPS) cases may not be disclosed to certain third parties because unauthorized disclosure of information may place the applicant or the applicant's family at risk.[43]

The law prohibits the release of information contained in the TPS application or in supporting documentation to third parties without the written consent of the applicant. A third party is defined as anyone other than:

- The TPS applicant;
- The TPS applicant's attorney or authorized representative (with a properly completed Form G-28 on file);
- A DOJ officer, which has also been extended to include a DHS officer following the transfer of certain immigration functions from DOJ to DHS; or
- Any federal or state law enforcement agency.

2. USCIS Assistance

USCIS may not release any information contained in any TPS application and supporting documents in any form to any third party, without a court order or the written consent of the applicant.[44] Status inquiries may not confirm or deny the existence of a TPS application, or whether a person has TPS, until the identity of the inquirer has been confirmed and it has been determined the inquirer is not a third party to whom information may not be released.

USCIS employees must adhere to these same TPS confidentiality provisions regarding the disclosure of information to third parties, even if the information is contained in a TPS-related form such as:

- Form I-765, which every TPS applicant must file;
- A TPS-related waiver requested on Application for Waiver of Grounds of Inadmissibility (Form I-601); or
- A TPS-related Form I-131.

With respect to confidentiality, USCIS employees must treat these records as they do other TPS supporting documentation in the TPS application package.

USCIS employees may respond to general questions about the TPS program.[45] However, for all case-specific questions relating to Form I-821 applications, USCIS employees must first confirm the identity of the person and his or her eligibility to receive such information.

Offices must not take or respond to inquiries about the status of a TPS application made by telephone, fax, or email because it is not possible to sufficiently verify the identity of the inquirer. Offices may accept written status requests signed by the applicant (or the applicant's attorney or representative with a properly completed Form G-28 on file).

3. Exceptions for Disclosure

Information about TPS applications and information contained in supporting documentation can be disclosed to third parties in two instances:

- When it is mandated by a court order; or
- With the written consent of the applicant.

Information about TPS cases can be disclosed to officers of DOJ, DHS, or any federal or state law enforcement agency since they are not considered third parties.[46] Information disclosed under the requirements of the TPS confidentiality regulation may be used for immigration enforcement or in any criminal proceeding.

H. Legalization

1. Confidentiality Provisions

Statutory and regulatory provisions require confidentiality in legalization cases and Legal Immigration Family Equity (LIFE) Act legalization cases, prohibiting the publishing of any information that may be identified with a legalization applicant.[47] The laws also do not permit anyone other than sworn officers and employees of DHS and DOJ to examine individual applications.

Information contained in the legalization application can only be used in the following circumstances:

- To make a determination on the legalization application;
- For criminal prosecution of false statements violations;[48] or
- In preparation of certain reports to Congress.

A breach in confidentiality of legalization cases can result in a $10,000 fine.[49]

2. USCIS Assistance

Case-specific information may be provided to the applicant and the applicant's attorney or authorized representative (with a properly completed Form G-28 on file) after the inquirer's identity has been verified. No others are authorized to receive legalization information unless one of the enumerated exceptions to disclosure noted below applies.

3. Exceptions for Disclosure

USCIS is permitted to disclose information pertaining to legalization cases in certain, limited circumstances. These circumstances include:

Law Enforcement Purposes

USCIS is required to disclose information to a law enforcement entity in connection with a criminal investigation or prosecution, when that information is requested in writing.

Requested by an Official Coroner

USCIS is also required to disclose information to an official coroner for purposes of affirmatively identifying a deceased person (whether or not the person died as a result of a crime).

Statistical Information

Disclosure of data and statistical information may be made in the manner and circumstances permitted by law.[50]

Available from Another Source

USCIS may disclose information furnished by an applicant in the legalization application, or any other information derived from the application, provided that it is available from another source (for example, another application or if the information is publicly available).

I. Special Agricultural Workers

1. Confidentiality Provisions

Material in A-files filed pursuant to the Special Agricultural Workers (SAW) program is protected by strict confidentiality provisions.[51] The statute provides that the employee who knowingly uses, publishes, or permits information to be examined in violation of the confidentiality provisions may be fined not more than $10,000.[52]

In general, USCIS may not use information furnished by the SAW applicant for any purpose other than to make a determination on the application, for termination of temporary residence, or for enforcement actions relating to false statements in applications.[53] The applicant may not waive the confidentiality provisions, which even survive the death of the applicant.

2. USCIS Assistance

In general, it is permissible for USCIS employees to disclose only that an applicant has applied for SAW and the outcome of the adjudication. Case information may be provided to the applicant and the applicant's attorney or authorized representative (with a properly completed Form G-28 on file) after the inquirer's identity has been verified. No other parties are authorized to receive SAW information, unless one of the enumerated exceptions to disclosure noted below applies.

3. Exceptions for Disclosure

It is appropriate for DHS and DOJ employees to have access to SAW material. The materials are subject to the above-mentioned penalties for unlawful use, publication, or release. USCIS is permitted to disclose information pertaining to SAW cases in certain, limited circumstances. These circumstances include:

Law Enforcement Purposes

USCIS is required to disclose information to a law enforcement entity in connection with a criminal investigation or prosecution, when that information is requested in writing.

Requested by an Official Coroner

USCIS is also required to disclose information to an official coroner for purposes of affirmatively identifying a deceased person (whether or not the person died as a result of a crime).

Criminal Convictions

Information concerning whether the SAW applicant has at any time been convicted of a crime may be used or released for immigration enforcement or law enforcement purposes.

J. S Nonimmigrant Visa Category

Nonimmigrants under the S visa category are alien witnesses or informants. An S nonimmigrant is not readily identified in USCIS systems. However, if a USCIS employee discovers that an inquiry is from an S nonimmigrant or from someone who has applied for such status, the case must be handled carefully.

Inquiries regarding the following should come from a law enforcement entity:[54]

- An Interagency Alien Witness and Informant Record (Form I-854A);
- An Interagency Alien Witness and Informant Adjustment of Status (Form I-854B); and
- Form I-765 filed on the basis of being a principal nonimmigrant witness or informant in S classification.

If USCIS receives an inquiry regarding the status of a Form I-854 or a Form I-765 filed as an S nonimmigrant, the USCIS employee must neither confirm nor deny the existence of such applications and should inform the person that inquiries on these applications must be submitted through appropriate law enforcement channels.

Under no circumstances may USCIS employees ask questions about the S nonimmigrant's role in cooperating with law enforcement, the type of criminal activity for which the nonimmigrant is an informant or witness, or any specific information about the case in which the S nonimmigrant may be involved.

K. Witness Security Program

1. Program Participants

Participation in the Witness Security Program (commonly known as the Witness Protection Program) is not reflected in USCIS systems. Applicants in the Witness Security Program should not tell anyone, including USCIS employees, that they are participants in the program. A separate immigration file is created for a new identity of a participant in the program, and information from before and after the change in identity must be in separate files. However, one file will have documentation of a legal name change.

2. USCIS Assistance

If an applicant indicates that he or she is in the Witness Security Program, the applicant should be referred to the U.S. Marshals Service.[55] Also, under no circumstances should USCIS employees ask questions about why or how the applicant was placed in the Witness Security Program or any specific information about the case which resulted in the applicant being placed in the Witness Security Program.

Footnotes

[^ 1] See Privacy Act of 1974, Pub. L. 93-579 (PDF), 88 Stat. 1896 (December 31, 1974) (codified at 5 U.S.C. 552a).

[^ 2] See DHS Privacy Policy Guidance Memorandum (PDF), issued April 25, 2017.

[^ 3] See Privacy Incident Handling Guidance (PDF), DHS Instruction Guide 047-01-008, issued December 4, 2017.

[^ 4] See Privacy Incident Handling Guidance (PDF), DHS Instruction Guide 047-01-008, issued December 4, 2017.

[^ 5] The enhanced privacy protections and other confidentiality protections associated with certain applications and petitions mean that merely acknowledging the existence of a pending petition or application could violate statutory and regulatory requirements. As a result, when responding to inquiries about these types of cases, including Violence Against Women Act (VAWA), T, U, and asylum cases, USCIS employees should follow the policies in place for those specific benefits. For more information, see Section E, VAWA, T, and U Cases [1 USCIS-PM A.7(E)] through Section K, Witness Security Program [1 USCIS-PM A.7(K)].

[^ 6] A case's status generally refers to its current posture in the adjudication process, which is dictated by the last action taken. For example, a case could be pending background checks, with an officer, awaiting response to a Request for Evidence, or with a decision issued on a given date.

[^ 7] See the How to Change Your Address webpage.

[^ 8] See Section E, VAWA, T, and U Cases [1 USCIS-PM A.7(E)].

[^ 9] See The DHS Policy for Internal Information Exchange and Sharing.

[^ 10] For requests from federal, state, or local government agency representatives who want to review or want copies of documents from an A-file, USCIS employees should refer to USCIS records procedures regarding outside agency requests for USCIS files.

[^ 11] See Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162 (PDF) (January 5, 2006). When VAWA was reauthorized in 2005, Congress added the definition "VAWA self-petitioner" at INA 101(a)(51), which includes persons requesting relief as: a VAWA self-petitioner under INA 204(a); an abused conditional permanent resident spouse or child filing a waiver based on battery or extreme cruelty under INA 216(c)(4)(C) or INA 216(c)(4)(D); an abused spouse or child under the Cuban Adjustment Act, Pub. L. 89-732 (PDF) (November 2, 1966); an abused spouse or child under the Haitian Refugee Immigrant Fairness Act, Division A, Section 902 of Pub. L. 105-277 (PDF), 112 Stat. 2681, 2681-538 (October 21, 1998); and an abused spouse or child under the Nicaraguan Adjustment and Central American Relief Act, Title II of Pub. L. 105-100 (PDF), 111 Stat. 2160, 2193 (November 19, 1997). Applicants for special rule cancellation of removal under INA 240A(b)(2) are also protected under 8 U.S.C. 1367.

[^ 12] See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386 (PDF) (October 28, 2000). T nonimmigrant status is available for victims of a severe form of human trafficking and U nonimmigrant status is designated for victims of qualifying criminal activities.

[^ 13] See Eligibility for Employment Authorization for Battered Spouses of Certain Nonimmigrants, PM-602-0130, issued March 8, 2016. Abused spouses of certain nonimmigrants may apply for employment authorization by filing an Application for Employment Authorization for Abused Nonimmigrant Spouse (Form I-765V).

[^ 14] See 8 U.S.C. 1367(a)(2).

[^ 15] See Pub. L. 104-208 (PDF), 110 Stat. 3009-546, 3009-652 (September 30, 1996).

[^ 16] See INA 101(a)(3) ("The term 'alien' means any person not a citizen or national of the United States.").

[^ 17] See 8 U.S.C. 1367(a)(2) and 8 U.S.C. 1367(b).

[^ 18] See Implementation of Section 1367 Information Provisions (PDF), DHS Instruction 002-02-001, Revision 00.1, issued November 7, 2013.

[^ 19] See 13 U.S.C. 8.

[^ 20] See 8 U.S.C. 1641(c).

[^ 21] This applies to application for relief under 8 U.S.C. 1367(a)(2).

[^ 22] See INA 101(i)(1).

[^ 23] See Implementation of Section 1367 Information Provisions (PDF), DHS Instruction 002-02-001, Revision 00.1, issued November 7, 2013 for more information.

[^ 24] The term "authorized parties" includes employees of DHS, DOS, and DOJ for legitimate agency purposes. It also includes an attorney or accredited representative who has properly filed a Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28) on behalf of a protected person and who remains in good standing or is not otherwise ineligible to represent persons with matters before USCIS, as well as the protected person themselves.

[^ 25] See Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360). See Petition for U Nonimmigrant Status (Form I-918). See Application for T Nonimmigrant Status (Form I-914). See Application for Employment Authorization for Abused Nonimmigrant Spouse (Form I-765V).

[^ 26] For information on how to register an address change with USCIS, see the How to Change Your Address webpage.

[^ 27] However, officers may only disclose information from the previously-filed victim-based form in compliance with the confidentiality provisions of 8 U.S.C. 1367(a)(2).

[^ 28] See Implementation of Section 1367 Information Provisions (PDF), DHS Instruction 002-02-001, Revision 00.1, issued November 7, 2013 for more information.

[^ 29] Attorneys or accredited representatives can change their mailing address with USCIS by either submitting a new Form G-28 for every pending case (with the receipt number) or submitting a letter on office stationery that clearly states: "ATTORNEY CHANGE OF ADDRESS." The letter must include a list of pending cases with the form type, receipt number, A-number, and the benefit requestor's name listed for each case. A change of address for the attorney or accredited representative also changes the benefit requestor's safe address if the attorney or accredited representative's address is listed as the safe mailing address or preferred mailing address on the form. See the Filing Your Form G-28 webpage for additional information.

[^ 30] Prior editions of the Form G-28 may not include an option for sending certain notices or secure identity documents to an attorney or accredited representative. Officers should review the Form G-28 associated with the underlying form to determine which options were checked, if any.

[^ 31] As described above, 8 U.S.C. 1367(a)(2) protections apply when a person files a VAWA, T, or U benefit request.

[^ 32] This exception is in recognition of long-standing safe address procedures in place at the service centers with jurisdiction over adjudication of victim-based-forms. As described above, victim-based-forms are the forms that initiate 1367-protections, including the Form I-360, Form I-918, Petition for Qualifying Family Member of a U-1 Nonimmigrant (Form I-929), Form I-914, Form I-765V, Petition to Remove Conditions on Residence (Form I-751), and Form I-485.

[^ 33] This includes forms that may be commonly used by a person filing a VAWA, T, or U benefit requests, including but not limited to Notice of Appeal or Motion (Form I-290B), Application to Extend/Change Nonimmigrant Status (Form I-539), Application for Waiver of Grounds of Inadmissibility (Form I-601), or Form I-765.

[^ 34] This exception is in recognition of long-standing safe address procedures in place at the service centers with jurisdiction over adjudication of victim-based-forms. As described above, victim-based-forms are the forms that initiate 1367-protections, including the Form I-360, Form I-918, Form I-929, Form I-914, Form I-765V, Form I-751, and Form I-485.

[^ 35] This includes forms that may be commonly used by a person filing a VAWA, T, or U benefit requests, including but not limited to Form I-290B, Form I-539, Form I-601, or Form I-765.

[^ 36] Certain form instructions state that if a petitioner or applicant does not provide a safe mailing address, then USCIS may use the address of the preparer of the form. USCIS recognizes that preparers who are not the attorney or accredited representative listed on a Form G-28 may be only engaged in the case for a temporary period of time. In consideration of this factor, and USCIS' acknowledgment that protected persons are best positioned to make decisions about where their correspondence should be directed, USCIS sends notices and secure identity documents to the physical address listed on a form, should an unrepresented petitioner or applicant decide not to complete the safe mailing address or mailing address field on a form. Certain forms may require the completion of the mailing address field. Applicants and petitioners should review form instructions to determine when this field may be required.

[^ 37] See 8 CFR 208.6.

[^ 38] See 8 CFR 208.6.

[^ 39] For more information on changes of address, see Chapter 10, Changes of Address [1 USCIS-PM A.10].

[^ 40] See 8 CFR 208.6. The provisions of 8 CFR 208.6 currently applicable are those of the regulation as it existed prior to changes made by the rule titled Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 80274 (PDF) (Dec. 11, 2020) (final rule amending 8 CFR parts 208, 235, 1003, 1208, 1235, also called the "Global Asylum Rule"). The Global Asylum Rule, which made significant changes to 8 CFR 208.6, was to go into effect on January 11, 2021. However, it was enjoined on January 8, 2021, in *Pangea Legal Services v. Department of Homeland Security*, 512 F. Supp. 3d 966 (N.D. Cal. 2021) (order granting preliminary injunction). The previous version of 8 CFR 208.6 remains in effect and can be viewed on the USCIS Fact Sheet: Federal Regulation Protecting the Confidentiality of Asylum Applicants (PDF, 383.8 KB).

[^ 41] See 8 CFR 208.6, which is applied to refugees by policy.

[^ 42] Examples of general inquiries include: who can apply for asylum or refugee status, how to apply for asylum or access the USRAP, bars to protection, whether applicants are eligible for work authorization, and asylum interview scheduling priorities.

[^ 43] See INA 244(c)(6). See 8 CFR 244.16.

[^ 44] See 8 CFR 244.16 for exceptions.

[^ 45] Examples of general inquiries include: Who can apply for TPS, how to apply for TPS, bars to TPS, whether applicants are eligible for work authorization, and the number of days it normally takes to adjudicate an application for TPS.

[^ 46] See 8 CFR 244.16.

[^ 47] See INA 245A(c)(4)-(5). See 8 CFR 245a.2(t), 8 CFR 245a.3(n), and 8 CFR 245a.21.

[^ 48] See INA 245A(c)(6).

[^ 49] See INA 245A(c)(5)(E).

[^ 50] See 13 U.S.C. 8.

[^ 51] See INA 210. This pertains to the 1987-1988 SAW program.

[^ 52] See INA 210(b)(6)(D).

[^ 53] See INA 210(b)(7).

[^ 54] See 8 CFR 274a.12(c)(21).

[^ 55] Officers can find information on how to contact their local U.S. Marshals Service office (if they are in the United States) on the U.S. Marshals Service website. Officers should advise applicants to consult with the U.S. Marshals Service on how to handle the disclosure of their participation in the Witness Protection Program.

Chapter 8 - Conduct in USCIS Facilities

USCIS provides services to a diverse set of benefit requestors. USCIS always strives for the highest level of integrity and respect in all interactions with the public to ensure all parties are treated with dignity and courtesy. USCIS employees play a critical role in upholding these standards. USCIS employees should approach interactions in a manner that is consistent with USCIS policy.

A. Privacy in USCIS Offices

When communicating about personal or case specific information, both USCIS employees and the public should note the importance of protecting privacy.[1] Whenever possible, both USCIS employees and the public should take common sense steps to make communications as private as possible. For example, USCIS employees should:

- Avoid projecting so that others in the room can clearly hear conversations that involve personal information; and
- For in-person encounters about case-specific inquiries, ensure that inquirers are given sufficient space so that documents presented are not on display for others to see.

USCIS must strike a balance between quickly and accurately assisting large groups of benefit requestors on the one hand, and protecting the privacy of all persons on the other. USCIS employees and benefit requestors must work together to strike this balance as best as possible. Persons contacting USCIS regarding a matter with heightened privacy considerations should work with USCIS employees to ensure that their privacy is protected.

B. Electronic Devices

Visitors must abide by applicable policies established by the facility in which they are seeking services. Depending on the facility's policies, visitors may be permitted to possess cell phones, personal digital assistants, tablets, laptops, and other electronic devices.

No one may photograph or record at a USCIS office except when observing naturalization or citizenship ceremonies. In addition, phones should be silenced while in the waiting area and any conversations should be kept to a low level so as not to disrupt others. Phones should be turned off during interviews or while being served by USCIS staff at the information counter.

To ensure successful implementation of this guidance, USCIS field offices are encouraged to:

- Ensure all USCIS federal and contract employees are aware of the cell phone usage policies;
- Ensure all visitors are informed of the cell phone usage policies; and
- Display posters and signage regarding this guidance in common areas.

Footnote

[^ 1] See Chapter 7, Privacy and Confidentiality [1 USCIS-PM A.7].

Chapter 9 - Feedback, Complaints, Misconduct, and Discrimination

A. Feedback

Information on providing feedback is available on the USCIS website, including on the Contact Us and Feedback Opportunities webpages.

1. USCIS Contact Center

Through a brief and confidential survey solicited by email from the USCIS Contact Center, USCIS collects feedback on benefit requestors' interactions with the agency. USCIS sends the survey to any benefit requestor who interacts with the Contact Center, including by phone, live chat, or secure message.

2. In-Person Appointments

Benefit requestors may provide feedback by asking to talk to a supervisor, if available, while at the in-person appointment.

Benefit requestors may submit fraud, waste, and abuse allegations directly to DHS's Office of Inspector General (OIG). USCIS posts information on reporting fraud and employee misconduct on the Contact Us webpage and in the waiting rooms of USCIS field offices.

3. USCIS Website

USCIS collects feedback on the website by offering visitors an optional survey. USCIS regularly reviews the results of the survey and identifies opportunities to improve the USCIS website. USCIS also conducts analysis and performs research such as usability testing and focus groups to make improvements to the website. The data also informs USCIS where resources might best be used to improve overall satisfaction.

B. Complaints[1]

1. Ways to Submit Complaints

Complaint in USCIS Office

Persons can make a complaint in a USCIS office by asking to speak to a supervisor. In these situations, a supervisor must be made available within a reasonable amount of time. The supervisor should take the complainant's name and information about the nature of the complaint. The supervisor should attempt to resolve the issue before the complainant leaves the office.

Submit Written Complaint

Written complaints may include handwritten letters, emails, or faxes.[2]

Contact Office of Inspector General Directly[3]

Contact information for DHS Office of Inspector General (OIG) can be found on both the USCIS website and on the DHS website. OIG contact information must also be displayed in a public area and visible in every USCIS field office.

File Complaint with USCIS Headquarters

USCIS Headquarters (HQ) contact information is provided on USCIS' website. If the complaint is directed to the wrong directorate or program office, the complaint must be forwarded to the appropriate HQ entity.

Ask to Speak to Contact Center Supervisor

If a caller is dissatisfied with the service received during a call to the USCIS Contact Center, the caller may ask to speak to a supervisor.[4]

2. Complaints Received

A person should not be expected to know where to first submit a complaint or how to elevate a complaint if they think that their issue has not been adequately addressed. Under no circumstances should a person's complaint be dismissed or disregarded because the proper process for filing a complaint was not followed. All complaints received must be handled appropriately.

All complaints should be responded to by providing a written response, telephone call, or if applicable, addressing the complaint in person upon submission. The response should explain steps taken to resolve the issue. In cases where the complaint cannot be resolved in a reasonable time, the response should acknowledge the receipt of the complaint, when a resolution is expected, and any additional action the person may take.

Applicants with complaints about being victimized by a person engaged in the unauthorized practice of immigration law (UPIL) should be directed to USCIS' website where they can find state-by-state reporting information, as well as information on how to report UPIL to the Federal Trade Commission.

C. Allegations of Misconduct

USCIS employees are also subject to mandatory reporting requirements for known or suspected misconduct by federal employees and contractors.

1. Employee Misconduct

Allegations of misconduct by USCIS employees and contractors may include, but are not limited to:

- Fraud, corruption, bribery, and embezzlement;
- Sexual advances or sexual misconduct;
- Theft or misuse of funds and theft of government property;
- Perjury;
- Physical assault;[5]
- Unauthorized release of classified or special protected class[6] information;
- Drug use or possession;
- Unauthorized use or misuse of sensitive official government databases;
- Misuse of official position for private gain;
- Misuse of a government vehicle or property;
- Failure to properly account for government fund;
- Unauthorized use or misuse of a government purchase or travel card;
- Falsification of travel documents; and
- Falsification of employment application documents.

2. Reporting Employee Misconduct

Benefit requestors and other interested parties should report allegations of misconduct by USCIS employees promptly to a USCIS supervisor, USCIS Office of Investigations (OI), or DHS OIG.[7] Individuals may report allegations of misconduct involving discriminatory conduct to DHS Office of Civil Rights and Civil Liberties (CRCL).[8]

USCIS OI makes every effort to maintain the confidentiality of informational sources to protect the integrity of the investigation. However, for investigations in which an allegation is substantiated and disciplinary action is proposed, the subject of such investigation is entitled to review documentation and evidence relied upon as the basis for the proposed action.

OI refers matters to DHS OIG for review and investigative determination as required, depending on the nature of the allegations included in the report. If the allegation either does not meet the criteria for referral to DHS OIG or is not accepted by DHS OIG for investigation, OI may resolve the matter by conducting an investigation; referring the matter for an official management inquiry, if appropriate; or referring the matter to the appropriate USCIS manager for information and action deemed appropriate.

As a matter of procedure, OI does not provide a complainant, victim, witness, or subject of a complaint with the investigative determination of a complaint, since a disclosure of this nature could adversely impact the investigative process or agency resolution of the alleged behavior.

D. Allegations of Discrimination

1. Anti-Discrimination Policy

USCIS does not tolerate discriminatory treatment of any persons. USCIS considers discrimination to include the unlawful treatment of a person or group of persons based on classes or other categories to which they belong or are perceived to belong. It also includes retaliation against a person who reports or complains about discrimination, or who participates in the investigation of a discrimination complaint. It is USCIS policy to treat the public in a non-discriminatory manner regardless of whether they belong to a class or group specifically protected under federal anti-discrimination laws or other legal authorities.

USCIS policy on anti-discrimination is not limited to specific classes or groups. This policy prohibits discrimination by any USCIS employee[9] towards any benefit requestor,[10] other USCIS employee, or anyone else with whom USCIS employees interact by virtue of their work for USCIS.

In addition to training employees on the administration of immigration benefits, USCIS provides agency-wide training on USCIS' anti-discrimination policy to all employees who interact directly or indirectly with members of the public.

2. Reporting Discrimination

Benefit requestors and other interested parties should report allegations of discrimination, including those based on race, ethnicity, national origin, religion, sex, sexual orientation, or disability, promptly to a USCIS supervisor or to DHS CRCL; allegations may also be reported to USCIS OI or DHS OIG.[11] Individuals may report allegations of discrimination involving physical assault (such as grabbing, fondling, hitting, or shoving) to OI or DHS OIG.[12] USCIS employees also have a duty to report allegations of misconduct by federal employees and contractors promptly to a USCIS supervisor, USCIS OI, or DHS OIG.[13]

3. Retaliation

USCIS does not tolerate retaliation against any person for reporting discrimination. This includes filing a complaint, helping any other person file a complaint, or participating in an inquiry into potential violations of this policy. Any employee found to have engaged in retaliatory conduct or behavior is subject to disciplinary action.

E. Reporting Fraud, Abuse, and Scams

Benefit requestors and other interested parties should report fraud, abuse, and scams as indicated on the USCIS Contact Us page.

In addition, immigration fraud can be reported to:

- Immigration and Customs Enforcement;
- Department of Labor's Wage and Hour Division;
- The Federal Trade Commission; and
- State authorities.

The USCIS website also contains information on common scams and how to avoid scams.

Footnotes

[^ 1] This section specifically addresses complaints that do not involve egregious or criminal misconduct. For information on the Office of Security and Integrity's policy on reporting criminal and egregious misconduct, see Section C, Allegations of Misconduct [1 USCIS-PM A.9(C)].

[^ 2] See Appendix: Dissatisfaction with USCIS: Terms and Definitions for information on where to send complaints.

[^ 3] See Appendix: Dissatisfaction with USCIS: Terms and Definitions for information on how to contact the OIG.

[^ 4] See Chapter 3, Types of Assistance, Section C, Telephone [1 USCIS-PM A.3(C)].

[^ 5] Physical assault may include grabbing, fondling, hitting, or shoving.

[^ 6] See Chapter 7, Privacy and Confidentiality [1 USCIS-PM A.7].

[^ 7] Members of the public may file allegations of misconduct by following the instructions provided on the Report USCIS Employee Misconduct webpage. USCIS employees are also subject to mandatory reporting requirements for known or suspected misconduct by federal employees and contractors. In addition, see the DHS Office of Inspector General webpage.

[^ 8] See Section D, Allegations of Discrimination [1 USCIS-PM A.9(D)].

[^ 9] For the purposes of this anti-discrimination policy, USCIS considers the term "USCIS employee" to include both persons employed directly by the federal government and government contractors.

[^ 10] In accordance with DHS policy, USCIS may use race or ethnicity only when a compelling governmental interest is present, and only in a way narrowly tailored to meet that compelling interest. This policy further permits consideration of nationality when it is expressly relevant to the administration or enforcement of a statute, regulation, or Executive Order, or for individualized discretionary use of nationality as a screening, investigation, or enforcement factor. See DHS Memorandum, The Department of Homeland Security's Commitment to Nondiscriminatory Law Enforcement and Screening Activities (PDF), issued April 26, 2013.

[^ 11] See the DHS Make a Civil Rights Complaint webpage. The DHS Office for Civil Rights and Civil Liberties webpage also contains detailed information about avenues for filing complaints with different offices and components of DHS.

[^ 12] See Section C, Allegations of Misconduct [1 USCIS-PM A.9(C)].

[^ 13] See Section C, Allegations of Misconduct [1 USCIS-PM A.9(C)].

Chapter 10 - Changes of Address

All aliens in the United States (except A and G visa holders and visa waiver visitors) have a legal requirement to report a change of address to USCIS within 10 days of moving, regardless of whether they have a pending benefit request.[1]

Aliens who have pending applications, petitions, or other benefit requests should notify USCIS as soon as possible of an address change (and no later than 10 days after they move) to help ensure they receive correspondence and benefits in a timely manner.

The primary avenues for aliens to update their address are:

- Online, through a USCIS online account;[2] or
- By U.S. mail.[3]

USCIS has specific procedures for change of address requests for certain populations.[4]

A. Updating Address Online

USCIS encourages requestors to submit their address change online using the Enterprise Change of Address (E-COA) self-service tool.

Aliens who do not have any pending applications, petitions, or requests can use the E-COA tool to meet the requirement to notify USCIS they have moved, eliminating the need for them to submit a paper Alien's Change of Address Card (Form AR-11).

Requestors who have pending applications, petitions, or other benefit requests can use the E-COA tool to both meet the notification requirement and update their mailing and physical address with USCIS for such pending cases. When using E-COA, requestors should include the receipt numbers for all cases for which they would like their address updated.

The E-COA tool provides for a near-immediate change of address, helping to minimize risk of requestors not receiving correspondence and benefits in a timely manner. Requestors can access the E-COA tool through a USCIS online account and use it for all pending cases, regardless of whether the case was filed online or by mail.

The E-COA tool automates address changes for almost all form types.[5] Certain populations, however, may need to follow special procedures for change of address requests and are therefore unable to use this tool. These populations include, but are not limited to:

- Protected persons;[6]
- Certain intercountry adoption-based petitioners and applicants (for orphan and Hague intercountry adoption cases);[7]
- Certain special immigrant Afghan or Iraqi nationals;
- Attorneys and accredited representatives seeking to change their office address;
- Civil surgeons;
- U.S. citizens or nationals who have submitted an affidavit of support for another person; and
- Certain people with international addresses.

If a requestor falls into one of the above categories, they should visit the How to Change Your Address webpage for information on changing their address instead of using the E-COA tool.

B. Updating Address by U.S. Mail

Aliens may choose to file a Form AR-11 by U.S. mail to meet the requirement to notify USCIS they have moved. Some aliens may choose to send a signed written notice by mail to meet the requirement to notify USCIS they have moved.[8] However, mailing a paper Form AR-11 or signed written notice of an address change does not provide for near immediate processing of a change of address request like the E-COA online tool or the USCIS Contact Center.[9] If a requestor has a pending benefit request, filing the Form AR-11 or signed written notice of an address change by mail may increase the risk that important correspondence or benefits are sent to an outdated address.

C. Address Discrepancies

USCIS does not update the requestor's address outside of a specific request to change the requestor's address. For example, if the address listed for the requestor in a service request (such as a case status inquiry) is different from the address listed in USCIS case management systems, USCIS continues to use the address in USCIS case management systems as the address of record until the requestor specifically submits a change of address request.

Footnotes

[^ 1] See INA 265. See 8 CFR. 265.1 (Aliens who are required to report each change of address must do so in accordance with instructions provided by USCIS.).

[^ 2] See Section A, Updating Address Online [1 USCIS-PM A.10(A)].

[^ 3] See Section B, Updating Address by U.S. Mail [1 USCIS-PM A.10(B)].

[^ 4] For more information, see the How to Change Your Address webpage.

[^ 5] For more information, see the How to Change Your Address webpage.

[^ 6] Protected person refers to a person covered by 8 U.S.C. 1367 confidentiality protections, including VAWA self-petitioners, Form I-765V filers, and individuals seeking or who hold Continued Presence, U nonimmigrant status or T nonimmigrant status. If a protected person also has filed a benefit request that does trigger 8 U.S.C. 1367 protections (for example, a U petitioner has also filed for temporary protected status), USCIS nonetheless considers that individual as covered by 8 U.S.C. 1367 protections for purposes of E-COA requests related to all pending and approved benefits. See Chapter 7, Privacy and Confidentiality, Section E, VAWA, T, and U Cases [1 USCIS-PM A.7(E)]. See the Change of Address Procedures for VAWA/T/U Cases and Form I-751 Abuse Waivers webpage.

[^ 7] See the Updated Home Studies and Significant Changes webpage.

[^ 8] See the Change of Address Procedures for VAWA/T/U Cases and Form I-751 Abuse Waivers webpage.

[^ 9] For more information, see Section A, Updating Address Online [1 USCIS-PM A.10(A)].

Part B - Submission of Benefit Requests

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures.

See more

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures. We are working quickly to update and incorporate all of the AFM content into the USCIS Policy Manual, the agency's centralized online repository for immigration policies. Until then, we have moved any remaining AFM content to its corresponding Policy Manual Part. To the extent that a provision in the Policy Manual conflicts with remaining AFM content or Policy Memoranda, the updated information in the Policy Manual prevails. If you have questions or concerns about any discrepancies among these resources, contact PolicyFeedback@uscis.dhs.gov.

AFM Chapter 10 - An Overview of the Adjudication Process (External)

Chapter 1 - Purpose and Background

A. Purpose

Those seeking immigration benefits in the United States must generally request benefits by filing the appropriate USCIS form(s) with USCIS.[1] Proper submission of benefit requests provides USCIS the opportunity to determine whether a person is initially eligible for the benefit requested and facilitates an efficient management of requests.[2]

B. Background

With the Immigration Act of 1891, the federal government assumed direct control of inspecting, admitting, rejecting, and processing all immigrants seeking admission to the United States.[3] On January 2, 1892, the Immigration Service opened Ellis Island in New York Harbor. The Immigration Service began collecting arrival manifests from each incoming ship. Inspectors then questioned arrivals about their admissibility and noted their admission or rejection on the manifest records.[4]

Over the years, different federal government departments and offices have adjudicated immigration benefit requests. The process of submitting benefit requests has also changed over time. Today, requestors generally seek benefits from USCIS by submitting specific forms; the forms also help guide requestors in collecting and submitting necessary evidence. USCIS uses forms to establish the record, verify identity, and adjudicate the benefit request.

USCIS is primarily funded by immigration and naturalization benefit request fees charged to requestors.[5] Fees collected from individuals and entities filing immigration benefit requests are deposited into the Immigration Examinations Fee Account (IEFA). The fees collected are to ensure recovery of the full cost of providing all USCIS services, including those provided without charge to refugee, asylum, and certain other filers.

Form Types

USCIS adjudicates immigration benefit requests in and outside the United States. The table below provides a list of the major benefits USCIS provides, the corresponding form(s), and corresponding Policy Manual guidance for more information.[6]

Common USCIS-Issued Immigration Benefits

Benefit Sought	Relevant Form(s)	For More Information
Nonimmigrant status	Petition for a Nonimmigrant Worker (Form I-129)	Volume 2, Nonimmigrants [2 USCIS-PM]
	Petition for Alien Fiancé(e) (Form I-129F)	
	Petition for U Nonimmigrant Status (Form I-918)	
	Petition for Qualifying Family Member of a U-1 Nonimmigrant (Form I-929)	
	Application to Extend/Change Nonimmigrant Status (Form I-539)	
Immigrant status	Petition for Alien Relative (Form I-130)	Volume 6, Immigrants [6 USCIS-PM]
	Immigrant Petition for Alien Worker (Form I-140)	
	Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360)	
	Immigrant Petition by Alien Investor (Form I-526)	Volume 6, Immigrants, Part G, Investors [6 USCIS-PM G]
	Application to Register Permanent Residence or Adjust Status (Form I-485)	Volume 7, Adjustment of Status [7 USCIS-PM]
Refugee or asylee status	Application for Asylum and for Withholding of Removal (Form I-589)	Volume 4, Refugees [4 USCIS-PM] Volume 5, Asylees [5 USCIS-PM]
	Refugee/Asylee Relative Petition (Form I-730)	
Temporary Protected Status	Application for Temporary Protected Status (Form I-821)	Volume 3, Protection and Parole [3 USCIS-PM]
Employment authorization	Application for Employment Authorization (Form I-765)	Volume 10, Employment Authorization [10 USCIS-PM]
Travel authorization (including reentry permit, humanitarian parole, and advance parole document)	Application for Travel Documents, Parole Documents, and Arrival/Departure Records (Form I-131)	Volume 11, Travel and Identity Documents [11 USCIS-PM]
Citizenship	Application for Naturalization (Form N-400)	Volume 12, Citizenship and Naturalization [12 USCIS-PM]
	Application for Certificate of Citizenship (Form N-600)	Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens [12 USCIS-PM H]
	Application for Citizenship and Issuance of Certificate Under Section 322 (Form N-600K)	
Overcoming Inadmissibility	Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal (Form I-212)	Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM]
	Application for Waiver of Grounds of Inadmissibility (Form I-601)	
	Application by Refugee for Waiver of Grounds of Excludability (Form I-602)	
	Application for Advance Permission to Enter as a Nonimmigrant (Form I-192)	
	Application for Waiver of Grounds of Inadmissibility (Form I-690)	

Each USCIS form has accompanying instructions that explain how to complete the form, as well as the necessary supporting evidence and fees that must be submitted with the completed form.[7] In addition, some forms may require the submission of biometric information and an additional fee for biometric processing.[8]

C. Legal Authorities

- INA 103 - Powers and duties of the Secretary, Under Secretary, and Attorney General

- 8 CFR 103.2 - Submission and adjudication of benefit requests
- 8 CFR 103.7 - Fees
- 8 CFR 106 - USCIS fee schedule, including fee requirements, fees, waivers and exemptions, and premium processing service

Footnotes

[^ 1] See 8 CFR 103.2(a)(1).

[^ 2] The terms “benefit request” and “immigration benefit request,” as used in this Part, include, but are not limited to, all requests funded by the Immigration Examinations Fee Account (IEFA). These terms may also refer to forms or requests not directly resulting in an immigration benefit, such as those resulting in an exercise of prosecutorial discretion by DHS.

[^ 3] See Pub. L. 55-551 (March 3, 1891).

[^ 4] See the USCIS History and Genealogy website for additional information. See Overview of Legacy Immigration and Naturalization Service (INS) History.

[^ 5] See INA 286(m).

[^ 6] See the USCIS All Forms webpage for a complete list of all USCIS forms and form instructions.

[^ 7] See 8 CFR 103.2. For a list of all forms and form instructions, see the USCIS Forms page.

[^ 8] See 8 CFR 103.2(a)(1).

Chapter 2 - Signatures

A. Signature Requirement

USCIS requires a valid signature on applications, petitions, requests, and certain other documents filed with USCIS.[1] Except as otherwise specifically authorized, a benefit requestor must personally sign his or her own request before filing it with USCIS.[2]

In order to maintain the integrity of the immigration benefit system and validate the identity of benefit requestors, USCIS rejects any benefit request with an improper signature and returns it to the requestor.[3] USCIS does not provide an opportunity to correct (or cure) a deficient signature. The benefit requestor, however, may resubmit the benefit request with a valid signature. As long as all other filing requirements are met, including payment of the required fee, USCIS may accept the resubmitted benefit request.

If USCIS accepts a request for adjudication and later determines that it has a deficient signature, USCIS denies the request. If USCIS needs additional information to confirm that a person[4] is authorized to sign on behalf of another person, corporation, or other legal entity, USCIS may issue either a Request for Evidence (RFE) or a Notice of Intent to Deny (NOID) to confirm that such signature authority existed at the time the document was submitted.

If USCIS issues a denial based on a deficient signature or unauthorized power of attorney (POA), the benefit requestor retains any motion and appeal rights associated with the applicable form.[5]

B. Valid Signature

A valid signature consists of any handwritten mark or sign made by a person to signify the following:

- The person knows of the content of the request and any supporting documents;
- The person has reviewed and approves of any information contained in such request and any supporting documents; and
- The person certifies under penalty of perjury that the request and any other supporting documents are true and correct.

A valid signature does not need to be legible or in English, and may be abbreviated as long as this is consistent with how the person signing normally signs his or her name. A valid signature does not have to be in cursive handwriting. A person may use an “X” or similar mark as his or her signature. A signature is valid even if the original signature on the document is photocopied, scanned, faxed, or similarly reproduced. Regardless of how it is transmitted to USCIS, the copy must be of an original document containing an original handwritten signature, unless otherwise specified. The regulations do not require that the person signing submit an “original” or “wet ink” signature on a petition, application, or other request to USCIS.

When determining whether a signature is acceptable, officers should review any applicable regulations, form instructions, and policy to ensure that the signature on a particular benefit request is proper. USCIS does not accept signatures created by a typewriter, word processor, stamp, auto-pen, or similar device.

For benefit requests filed electronically as permitted by form instructions, USCIS accepts signatures in an electronic format. Benefit requestors must follow the instructions provided to properly sign electronically.[6]

Acceptable and Unacceptable Signatures

Acceptable	Unacceptable
• Original signature • Handwritten “X,” or similar mark, in ink (including a fingerprint, if unable to write) • Abbreviated signature, if that is the normal signature • Signature of parent or legal guardian of benefit requestor if requestor is under 14 years of age • Signature by the benefit requestor’s legal guardian, surrogate, or person with a valid durable power of attorney or a similar legally binding document[7] • An original signature on the benefit request that is later photocopied, scanned, faxed, or similarly reproduced, unless otherwise required by form instructions • Electronic signature[8]	• Typed name on signature line • Signature by an attorney or representative signing for the requestor or requestor's child • Signature created by a typewriter, word processor, stamp, auto-pen, or similar device[9]

C. Who May Sign

The signer of a benefit request or any document submitted to USCIS affirms that the signer has authority to sign the document, has knowledge of the facts being represented in the document, and attests to the veracity of the facts and claims made in the document. Signers may be held accountable for any fraud or material misrepresentation associated with the benefit request.

For any particular benefit request, USCIS may specify the signature requirements, as well as related evidentiary requirements, to establish signatory authority. Benefit requestors should refer to the benefit request and any accompanying instructions for benefit-specific information on signature requirements.

1. Benefit Requestors Themselves

In general, any person requesting an immigration benefit must sign their own immigration benefit request, and any other associated documents, before filing it with USCIS.[10] Therefore, corporations or other legal entities, attorneys, accredited representatives, agents,[11] preparers, and interpreters generally may not sign a benefit request, or associated documents, for a requestor.

By signing the benefit request, the requestor certifies under penalty of perjury that the benefit request, and all evidence submitted with it, either at or after the time of filing, is true and correct.

2. Parents and Legal Guardians of Requestors

A parent may sign a benefit request on behalf of a child who is under 14 years of age.[12] Children 14 years of age or older must sign on their own behalf. If a parent signs on behalf of a child, the parent must submit a birth certificate or adoption decree to establish the parent-child relationship.

A legal guardian[13] may also sign a benefit request on behalf of a child who is under 14 years of age, as well as for a mentally incompetent person of any age.[14]

By signing the benefit request, the parent or guardian certifies under penalty of perjury that the benefit request, and all evidence submitted with it, either at or after the time of filing, is true and correct.

Legal Guardian

A legal guardian is a person who a proper court or public authority has designated as the benefit requestor's legal guardian or surrogate and who is authorized to exercise legal authority over the requestor's affairs. Legal guardian does not include persons who were not appointed by the proper court or public authority, even if they have a legitimate interest in the legal affairs of the child or incapacitated adult, are acting in loco parentis, or are a family member.[15]

USCIS requires documentation to establish the legal guardian's authority to sign a benefit request on behalf of the child or mentally incompetent requestor. Acceptable documentation includes, but is not limited to, official letters of guardianship or other orders issued by a court or government agency legally authorized to make such appointment under the law governing the place where the child or incapacitated requestor resides.

Designated Representative

For purposes of naturalization, a designated representative may also sign for the applicant who is unable to understand or communicate an understanding of the Oath of Allegiance because of a physical or developmental disability or mental impairment.[16]

Durable Power of Attorney Requirements

USCIS accepts a durable POA or similar legally binding document only in the case of an incapacitated adult. A formal court appointment is not necessary if a person signs on behalf of an incapacitated adult under the authority of a POA.

A POA is a written authorization to act on another's behalf in private or business affairs or other legal matters. A durable POA is a contract signed while a person is still competent that assigns power of attorney in the event that the person becomes incapacitated at some point in the future.[17]

In most cases, the language of the durable POA specifies steps that need to be taken in order for the durable POA to take effect. To assess whether a durable POA is valid and in effect, USCIS generally requires, at minimum, a copy of the durable POA, as well as evidence showing that the steps required for the durable POA to take effect have occurred. Often this evidence includes a physician's statement indicating that the durable POA is in effect as the result of the incapacitated adult's disability. USCIS accepts a durable POA only if it complies with the state laws where it was executed. It is the burden of the person making the request to demonstrate that a durable POA is valid and in effect under the applicable state law.

If the person providing signatory authority under the POA is also acting as the incapacitated benefit requestor's attorney or authorized representative for purposes of appearing before DHS, the person must submit a Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28), and meet other regulatory requirements.[18]

3. Authorized Signers for Corporations or Other Legal Entities[19]

Under the Immigration and Nationality Act (INA), corporations and other legal entities, such as limited partnerships (LP), professional corporations (PC or P.C.), limited liability companies (LLC), or limited liability partnerships (LLP), may file certain requests with USCIS. Such a filing may include a request to classify an alien as an immigrant or nonimmigrant under a specific employment-based category, for example.

Benefit requests filed with USCIS by such legal entities may only be signed by a person with the authority to sign on behalf of the petitioning entity. Authorized persons may include, but are not limited to:

- An executive officer of a corporation or P.C. with authority to act on behalf of the corporate entity and legally bind and commit the corporate entity in all matters (for example, chief executive officer, president, or vice president);
- A managing partner or managing member of an LLC or LLP;
- A duly authorized partner of a partnership;
- An attorney employed in an employer-employee relationship by a corporation or other legal entity as its legal representative, or as a legal representative by the corporation or other legal entity's legal department in an employer-employee relationship (for example, in-house counsel, or other attorney employees or contractors);

- A person employed within the entity's human resources, human capital, employee relations, personnel, or similar department who is authorized to sign legal documents on behalf of the entity;
- An executor or administrator of an estate;
- A trustee of a trust or a duly appointed conservator; or
- Any other employee[20] of the entity who has the authority to legally bind and commit the entity to the terms and conditions attached to the specific request and attestations made in the request.

A sole proprietor is the only person authorized to sign a request filed on behalf of a sole proprietorship.

In all cases involving authorized signers for corporations or other legal entities, the benefit request must contain a statement by the person signing the request, affirming that:

- He or she has the legal authority to file the request on the petitioning employer's behalf;
- The employer is aware of all of the facts stated in the request; and
- Such factual statements are complete, true, and correct.

If such affirmation if the form itself, a signature by the person filing the form may be sufficient to meet this requirement. If the affirmation specified above is not contained in the form, the authorized signer must provide a separate statement affirming that he or she has the authority to legally bind the corporation or other legal entity.

If USCIS has reason to doubt a person's authority to sign or act on behalf of a corporation or other legal entity, USCIS may request evidence that demonstrates the person has the requisite legal authority to sign the request. Such requested evidence may include, but is not limited to:

- Bylaws;
- Articles of organization;
- A letter reflecting delegation of such authority from a corporate officer or board member;
- Board of director's minutes reflecting the grant or the board's approval of such authority being exercised by the person in question; or
- A similar document that indicates the employee may legally bind the corporation or other legal entity with his or her signature.

D. Clarification Regarding Form G-28

An attorney or accredited representative may sign and submit a Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28) to certify that the person, corporation, or other legal entity named in the Form G-28 has authorized the attorney or representative to act on the person's or legal entity's behalf in front of Department of Homeland Security (DHS). However, a Form G-28 by itself does not authorize a representative to sign a request or other document on behalf of a person or legal entity. Further, an attorney or representative may not use a POA to sign a Form G-28 on behalf of a person or legal entity to authorize his or her own appearance.

Footnotes

[^ 1] Except as specifically authorized in the regulations, this guidance, or in the respective form instructions, an applicant, petitioner, or requestor must personally sign his or her own request before filing it with USCIS.

[^ 2] See 8 CFR 103.2(a)(2). The term "request" refers to any written request for an immigration benefit, service, or request for action, whether the request is submitted on an Office of Management and Budget-approved form or is an informal written request submitted to USCIS. The term also includes any form supplements and any other materials that require the signature of the requestor. An example of an exception to this requirement is for naturalization applications where a designated representative may sign an application on behalf of an applicant who otherwise qualifies for an oath waiver under INA 337(a) because of a physical or developmental disability or mental impairment. For more information, see Volume 12, Citizenship and Naturalization, Part J, Oath of Allegiance, Chapter 3, Oath of Allegiance Modifications and Waivers, Section C, Waiver of the Oath [12 USCIS-PM J.3(C)].

[^ 3] See 8 CFR 103.2(a)(7).

[^ 4] Unless otherwise specified, the term "person" as used in the Policy Manual refers to a natural person.

[^ 5] A rejection of a filing with USCIS may not be appealed, see 8 CFR 103.2(a)(7)(iii).

[^ 6] See 8 CFR 103.2(a)(2).

[^ 7] Must contain evidence (such as a physician's statement) indicating that the durable POA is in effect as a result of the person's disability.

[^ 8] For benefit requests filed electronically as permitted by form instructions, USCIS accepts signatures in an electronic format. Benefit requestors must follow the instructions provided to properly sign electronically, see 8 CFR 103.2(a)(2).

[^ 9] In certain instances, a stamped signature may be allowed as provided by the form instructions. For example, a health department physician who is acting as a blanket-designated civil surgeon and submitting a vaccination assessment for a refugee adjusting status on the Report of Immigration Medical Examination and Vaccination Record (Form I-693) may provide an original (handwritten) or stamped signature, as long as it is the signature of the health department physician. See Form I-693 instructions. See Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility, Chapter 4, Review of Medical Examination Documentation, Section C, Documentation Completed by Civil Surgeon, Subsection 3, Signatures [8 USCIS-PM B.4(C)(3)]. For benefit requests filed electronically as permitted by form instructions, USCIS accepts signatures in an electronic format. Benefit requestors must follow the instructions provided to properly sign electronically, see 8 CFR 103.2(a)(2).

[^ 10] See 8 CFR 103.2(a)(2).

[^ 11] This Part does not address agents who are filing as a petitioner on behalf of a corporation or other legal entity seeking an H, O, or P nonimmigrant worker, as provided in 8 CFR 214.2(h)(2)(i)(F), 8 CFR 214.2(h)(5)(i)(A), 8 CFR 214.2(h)(6)(iii)(B), 8 CFR 214.2(o)(2)(i), 8 CFR 214.2(o)(2)(iv)(E), 8 CFR 214.2(p)(2)(i), and 8 CFR 214.2(p)(2)(iv)(E). See the governing regulations and Petition for a Nonimmigrant Worker (Form I-129) instructions for more information on the applicable signature requirements for these particular nonimmigrant categories.

[^ 12] See 8 CFR 103.2(a)(2).

[^ 13] If a legal guardian signs on behalf of a requestor, the legal guardian must submit evidence to establish legal guardianship.

[^ 14] See 8 CFR 103.2(a)(2).

[^ 15] Different jurisdictions may have different terms for legal guardians, including conservator, committee, tutor, or other titles designating a duly appointed surrogate.

[^ 16] See Volume 12, Citizenship and Naturalization, Part J, Oath of Allegiance, Chapter 3, Oath of Allegiance Modifications and Waivers, Section C, Waiver of the Oath, Subsection 2, Legal Guardian, Surrogate, or Designated Representative [12 USCIS-PM J.3(C)(2)].

[^ 17] This scenario specifically describes a “springing” durable POA (as distinguished from an “immediate” durable POA). See Black’s Law Dictionary, 2nd Ed. (“durable power of attorney”). Because USCIS only accepts durable POAs that are in effect as the result of an incapacitated adult’s disability, a valid durable POA accepted by USCIS would necessarily be springing.

[^ 18] See 8 CFR 292.

[^ 19] This section does not address agents who are permitted to act as a petitioner for a corporation or other legal entity seeking an H, O, or P nonimmigrant worker, as provided in 8 CFR 214.2(h)(2)(i)(F), (h)(5)(i)(A), (h)(6)(iii)(B), (o)(2)(i), (o)(2)(iv)(E), (p)(2)(i), or (p)(2)(iv)(E). See the particular nonimmigrant category’s regulations or the Petition for a Nonimmigrant Worker (Form I-129) instructions for the requirements governing the scope of an agent’s authority in those contexts.

[^ 20] The person’s title or department within the corporation or other legal entity is not determinative.

Chapter 3 - Fees

Unlike most government agencies, U.S. Citizenship and Immigration Services (USCIS) is not dependent on taxpayer dollars. USCIS is authorized to recover the full cost of providing immigration and naturalization services (screening, vetting, and adjudicating applicants and their benefit requests). USCIS receives 96 percent of its funding from filing fees and not from congressional appropriations.[1] USCIS has a fiduciary responsibility to manage its financial resources wisely and to eliminate any fraud, waste, or abuse.

INA 286(m), 8 U.S.C. 1356(m), authorizes the Department of Homeland Security (DHS) to charge fees for adjudication and naturalization services at a level to ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge. USCIS is not required to charge a fee for all its services, and it may set certain fees at less than full cost.

On a biennial basis, USCIS reviews the fees for its services.[2] If the review determines the current fees are inadequate to recover costs, or that they otherwise need to be adjusted, USCIS may initiate a rulemaking to adjust its fees. USCIS sets the fee amounts for benefit requests through regulation[3] and publishes its fees in the Fee Schedule (Form G-1055).

Requestors must include any required fees with the submission of a benefit request to USCIS. This payment must be in U.S. currency.[4]

The fee amount for each benefit request is controlled by regulation[5] or statute, and is published in Form G-1055. The total fee amount for each request is not determined solely by the fee required for the associated form.[6] Additional fees may be required, such as a biometric services fee[7] or the fraud detection and prevention fee.[8]

The additional services needed in a given situation dictate which additional fees, if any, are added to the total amount. Form G-1055 indicates which fees are required.

USCIS may waive the fee for certain immigration benefit requests if the individual requests that the fee be waived and meets the eligibility criteria for the fee waiver.[9] Certain forms and categories of requestors are exempt from fees. In addition to Form G-1055, the Filing Fees webpage provides information about how to pay USCIS fees. Requestors can use the Fee Calculator to determine the exact filing fee for any form.

A. Fee Submission

1. Submission of Benefit Request with Fee

USCIS rejects submissions that do not contain valid payment of the correct fee amount or otherwise do not meet the acceptance criteria.[10] All payments must be made from a U.S. bank and payable in U.S. currency.[11] USCIS rejects any payment issued from a foreign bank including Automated Clearing House (ACH), credit payments, debit card payments, or paper-based payments.

An ACH payment on Authorization for ACH Transactions (Form G-1650) is rejected if the requestor:

- Submits a Form G-1650 and a credit card authorization to split the payment for the transaction;
- Does not identify whether it is a Business or Personal Account;
- Does not identify whether it is a Checking Account or Savings Account;
- Does not provide the correct Authorized Payment Amount; or
- Does not provide the correct Routing Number and Account Number.

A credit card payment on Authorization for Credit Card Transactions (Form G-1450) is rejected if the requestor:

- Submits one Form G-1450 for multiple benefit requests;
- Submits a Form G-1650 and a credit card authorization to split the payment for a single benefit request;
- Does not provide the card holder’s first name;
- Does not provide the card holder’s last name;
- Does not provide the card holder’s credit card number or provides an invalid number;
- Does not provide the card expiration date; or
- Does not provide any authorized payment amount or does not authorize the total amount of the Form G-1450 or multiple Forms G-1450 to cover the required fee or fees.

Once USCIS receives the proper fee[12] and determines the benefit request meets all other acceptance criteria,[13] USCIS accepts the submission of the benefit request and sends the benefit requestor a receipt notice. The USCIS online system guides those benefit requestors filing online through the process of paying fees online. Once the form is ready for submission, the system directs the benefit requestor to Pay.gov to pay. If the payment is declined, the request cannot be submitted due to lack of payment.[14]

If the payment is not collectable and USCIS has approved the benefit request, USCIS may revoke, rescind, or cancel the approval with notice.[15]

2. Unfunded Payments

USCIS fees are generally non-refundable and must be paid when the benefit request is filed.[16] If the requestor pays a fee by credit card and the credit card is declined for any reason, USCIS does not attempt to process the credit card payment a second time and may reject the associated request for lack of payment.[17]

If an ACH transaction is used to pay a fee, and the ACH payment is returned as unpayable because of insufficient funds, USCIS resubmits the payment to the remitter institution one time.[18] If the remitter institution returns the form of payment as unpayable a second time, USCIS may reject or deny the filing.[19] USCIS does not resubmit payments returned as unpayable for a reason other than insufficient funds.[20]

If a payment is unfunded at the time of filing, USCIS does not generally issue a receipt. However, if a receipt was issued, the unfunded payment renders it void and the requestor does not retain the receipt date.[21]

If a payment was unfunded after the benefit request was approved, USCIS may revoke, rescind, or cancel the approval with notice, typically in the form of a Notice of Intent to Revoke (NOIR).[22] USCIS may at its discretion separately bill the requestor for the unpaid fee instead of sending a NOIR. If a requestor receives such a NOIR, the requestor may respond with payment of the correct fee amount.

USCIS does not ultimately revoke, rescind, or cancel the approval on the basis of an unfunded fee payment if the requestor cures the deficiency noted in the NOIR with payment of the correct fee amount. USCIS may revoke the approval with notice of an approved benefit request that required multiple fees if any single fee is unfunded. In such cases, any other fees paid for the approved benefit request are non-refundable.[23]

B. Forms of Payment

USCIS accepts different payment methods depending on whether the benefit requestor resides inside or outside of the United States or the nature of the request. Details regarding acceptable forms and methods of payment can be found on the Filing Fees webpage.

Benefit requestors filing from inside the United States may pay their fees in one of the following ways, depending on the form that is being submitted:

- Online using a credit card, debit card, or bank withdrawal; or
- By mail with a Form G-1450 or Form G-1650.

In limited circumstances, an individual may submit a benefit request directly at a USCIS field office. In such cases, the benefit requestor may submit his or her request and appropriate fee by mail to the field office using either Form G-1450 or Form G-1650.[24]

Benefit requestors filing from outside the United States should go to the All Forms webpage to determine whether a form may be filed from outside of the United States. Depending on the form, the benefit requestor may pay fees online, by mail, or in person at a U.S. embassy or consulate.[25]

1. Credit Card, Debit Card, or Pre-paid Card

USCIS accepts payments by credit card, debit card, or pre-paid card for fees associated with benefit requests filed with one of the USCIS Lockbox facilities, the appropriate Service Center, and most USCIS field office locations.

Requestors filing by mail must use Form G-1450 to pay with a credit card, debit card, or pre-paid card. USCIS uses the information provided on Form G-1450 to process a credit card, debit card, or pre-paid card payment through either the U.S. Department of Treasury Pay.gov Collection Control Panel (CCP) or the Trusted Collections Service (TCS).

CCP and TCS are web-based applications that allow federal government agencies to process payments by credit, debit, or prepaid cards. After USCIS processes Form G-1450, USCIS destroys the authorization, regardless of whether USCIS accepts or rejects the associated benefit request.

2. Automated Clearing House (ACH) Payment

USCIS accepts bank payments[26] from U.S. bank accounts, for fees associated with benefit requests when filed through Pay.gov, the proper USCIS Lockbox facility, appropriate Service Center, and most USCIS field office locations. For requestors who do not have access to a U.S. bank account, payment must be made using a credit card or pre-paid card (in U.S. dollars) or by submitting the Exemption for Paper Fee Payment (Form G-1651) to submit a paper-based payment issued in U.S. dollars.

Requestors filing by mail must use Form G-1650 to pay with a U.S. bank account. USCIS uses the information provided on the Form G-1650 to process an ACH payment through either the U.S. Department of Treasury Pay.gov CCP or the TCS. Requestors filing benefit requests electronically may enter their account information directly into Pay.gov through the CCP.

ACH Debit Block

Some requestors may have placed a debit block on his or her U.S. bank account to prevent unauthorized individuals from withdrawing funds through ACH. These blocks are placed by the requestor and the requestor must contact his or her bank and provide the appropriate Agency Location Code (ALC+2) prior to the ACH transaction to allow funds to be withdrawn. The Form G-1650 Instructions provide the complete list of ALC+2 codes and USCIS suggests that the benefit requestor provide the complete list to his or her bank to have all the codes unblocked.

3. Paper-Based Payments

USCIS does not accept payment with bank drafts, cashier's checks, certified checks, personal checks, or money orders to pay fees associated with benefit requests[27] unless an exception applies.

USCIS provides an exemption accommodation which allows a benefit requestor to submit a paper-based payment with the Exemption for Paper Fee Payment (Form G-1651) in the form of a bank draft, cashier's check, certified check, personal check or money order where one of the exceptions applies including:

- Individuals who do not have access to banking services or electronic payment systems;
- Electronic disbursement would cause undue hardship, as contemplated in 31 CFR Part 208;
- National security or law enforcement related activities where non-EFT transactions are necessary or desirable; and
- Other circumstances as determined by the Secretary of the Treasury, as reflected in regulations or other guidance.

To request an exemption under one of these accommodations, the benefit requestor must sign the Exemption for Paper Fee Payment (Form G-1651) and mail it to the appropriate lockbox with the benefit request and correct fee (see Form G-1055).

If a check or other paper-based method of payment is used to pay a fee, and is dated more than 365 days before USCIS receives the request, USCIS may reject the payment and benefit request.[28]

Only personal and business checks are accepted at a Field Office as a form of accepted paper-based payments when filing the Application for Travel Documents, Parole Documents, and Arrival/Departure Records (Form I-131) for emergency advance parole. Other forms of paper-based payments are not accepted at Field Office locations.

4. Cash

USCIS does not accept payment by cash to pay fees associated with benefit requests.

C. Refunds

Fees submitted to USCIS are generally non-refundable regardless of the ultimate decision on the benefit request or how much time is required to issue a decision.[29] There are a few exceptions to this rule, such as if USCIS makes an error that results in the inappropriate filing of a form or if USCIS collects the wrong fee.[30]

If a benefit requestor believes they are entitled to a refund of a fee, the requestor should contact the USCIS Contact Center or submit a written request for a refund to the USCIS office with jurisdiction over the benefit request.

USCIS reviews the request for a refund and either approves or denies the request based on the available information. If the officer finds USCIS made an error, the officer should complete a Request for Refund of Fee (Form G-266). USCIS then notifies the requestor of its decision on the request. All Forms G-266 must be signed by a District or Service Center Director, or a person within the chain of command that has been delegated that authority.

Fees paid to USCIS using a credit card, debit card, or pre-paid card are not subject to dispute, chargeback, forced refund, or return to the cardholder for any reason except at the discretion of USCIS.[31]

Footnotes

[^ 1] See 89 FR 6194 (PDF), 6195 (Jan. 31, 2024).

[^ 2] See 31 U.S.C. 902(a)(8).

[^ 3] See 8 CFR 106.2. See the USCIS All Forms webpage for a complete list of all forms and form instructions.

[^ 4] See 8 CFR 103.2(a)(7)(D) and 8 CFR 106.1.

[^ 5] See 8 CFR 106.2. See the USCIS All Forms webpage for a complete list of all forms and form instructions.

[^ 6] See 8 CFR 106.2.

[^ 7] See 8 CFR 103.17. Most forms no longer require a separate biometric services fee. See the form instructions for specific information about biometric services fee requirements.

[^ 8] See 8 CFR 106.2(c).

[^ 9] See INA 286(m) (authorizing USCIS fees to recover the costs of services provided without charge). See 8 CFR 106.3(a). For more information on Fee Waivers, see Chapter 4, Fee Waivers and Fee Exemptions [1 USCIS-PM B.4].

[^ 10] See 8 CFR 103.2.

[^ 11] See 8 CFR 106.1(b).

[^ 12] Unless the requestor is otherwise exempt from the fees or has an approved fee waiver.

[^ 13] For more information, see the Filing Guidance and Tips for Filing Forms by Mail webpages. For forms that are available for online filing, see the Tips for Filing Forms Online webpage.

[^ 14] For more information on submitting an online payment, see the Tips for Filing Forms Online webpage.

[^ 15] See 8 CFR 103.2(a)(7)(ii)(D) and 8 CFR 106.1(c)(2).

[^ 16] See 8 CFR 103.2(a).

[^ 17] See 8 CFR 103.2(a)(7)(ii)(D)(3).

[^ 18] See 8 CFR 103.2(a)(7)(ii)(D)(2).

[^ 19] See 8 CFR 103.2(a)(7)(ii)(D)(2).

[^ 20] See 8 CFR 103.2(a)(7)(ii)(D)(3).

[^ 21] See 8 CFR 106.1(c)(1).

[^ 22] See 8 CFR 103.2(a)(7)(ii)(D) and 8 CFR 106.1(c)(2).

[^ 23] See 8 CFR 106.1(c)(2).

[^ 24] Applicants submitting an Application for Travel Documents, Parole Documents, and Arrival/Departure Records (Form I-131) with an emergency advance parole request must make an appointment with the USCIS Contact Center, apply in person with their payment (if applicable) and supporting documentation, and pay the application fee by credit card with Form G-1450 or a U.S. bank account with Form G-1650 at the field office.

[^ 25] For information on how to pay USCIS fees outside of the United States, see the International Immigration Offices webpage or contact the appropriate U.S. Embassy or Consulate.

[^ 26] USCIS began accepting Form G-1650 on August 29, 2025. As of October 28, 2025, USCIS no longer accepts paper-based forms of payment for benefit requests. Benefit requestors can file Exemption for Paper Fee Payment (Form G-1651) if they meet one of the exemptions and would like to pay by check.

[^ 27] See Executive Order 14247, Modernizing Payments To and From America's Bank Account, 90 FR 14001 (PDF) (Mar. 25, 2025).

[^ 28] See 8 CFR 103.2(a)(7)(ii)(D)(4).

[^ 29] See 8 CFR 103.2(a)(1).

[^ 30] For example, when USCIS requests that an applicant file a waiver application for a ground of inadmissibility that was not necessary.

[^ 31] See 8 CFR 106.1(e).

Chapter 4 - Fee Waivers and Fee Exemptions

A. General

1. Eligibility to Request a Fee Waiver

USCIS permits certain categories of benefit requestors to submit a Request for Fee Waiver (Form I-912) for certain immigration benefits and services.[1] There is no fee required for filing a fee waiver request.

A benefit requestor may request a fee waiver from USCIS if:

- The form is eligible for a fee waiver and the benefit requestor meets any applicable conditions; and
- The benefit requestor is unable to pay the requisite fee based on one of three criteria described below (Section D, Basis for Inability to Pay).

If a benefit request includes both the appropriate filing fee and a fee waiver request, USCIS does not adjudicate the fee waiver request. In such a case, USCIS deposits the fee and processes the immigration benefit request, if it is otherwise acceptable.

USCIS cannot waive any fees that are required by the One Big Beautiful Bill Act (H.R.-1), which apply to certain benefit requests as listed in the USCIS Fee Schedule (Form G-1055).[2] USCIS rejects these benefit requests if they are postmarked or electronically submitted on or after August 21, 2025 and the proper fees are not included. If a benefit request is otherwise eligible for a fee waiver under 8 CFR 106.3(a), the requestor may seek a waiver of the filing fee listed at 8 CFR 106.2, but must submit a separate payment for the fee required by H.R.-1.

2. Filing a Fee Waiver Request

To request a fee waiver, a benefit requestor must submit:

- A Request for Fee Waiver (Form I-912) or written statement requesting a fee waiver; and
- Documentation establishing eligibility for a fee waiver.

Generally, each person requesting a fee waiver must submit a separate Form I-912 or written statement and supporting documentation.[3] The requestor must sign the Form I-912 or written statement.[4]

USCIS does not review fee waiver requests submitted for benefit requests that USCIS rejected for reasons unrelated to the fee. For example, USCIS does not review fee waiver requests if an application is defective due to a missing signature.

3. Burden of Proof and Standard of Proof

The burden of proof is on the requestor to establish an inability to pay the required fee by a preponderance of the evidence by establishing at least one of the criteria for eligibility.[5] The requestor satisfies the standard of proof if they submit relevant, probative, and credible evidence that leads the USCIS officer to conclude that it is “probably true” or “more likely than not” that the requestor is unable to pay the required fee.[6]

B. Forms Eligible for Fee Waiver

If not otherwise exempt from paying the fee, a benefit requestor may submit a request for a fee waiver for certain eligible forms.[7] There are three general categories of fee waivers allowed for eligible forms:

- General fee waivers;
- Conditional fee waivers; and
- Humanitarian fee waivers.

General fee waivers are available for eligible forms for requestors who demonstrate an inability to pay. Conditional fee waivers are available for eligible forms for requestors who demonstrate an inability to pay and meet certain conditions. Humanitarian fee waivers are available for eligible forms for requestors for humanitarian purposes as authorized by statute.

1. General Fee Waivers

The following table provides a list of forms for which USCIS may waive the fees based on a requestor’s inability to pay.

Forms Eligible for General Fee Waivers
Application to Replace Permanent Resident Card (Form I-90)
Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act (INA) (Form I-191)[8]
Petition to Remove Conditions on Residence (Form I-751)
Application for Family Unity Benefits (Form I-817)
Application for Temporary Protected Status (Form I-821) (biometric services fee only)[9]
Application for Suspension of Deportation or Special Rule Cancellation of Removal (Form I-881)
Application to File Declaration of Intention (Form N-300)
Request for a Hearing on a Decision in Naturalization Proceedings (Form N-336)
Application for Naturalization (Form N-400)
Application to Preserve Residence for Naturalization Purposes (Form N-470)
Application for Replacement Naturalization/Citizenship Document (Form N-565)
Application for Certificate of Citizenship (Form N-600)
Application for Citizenship and Issuance of Certificate under Section 322 (Form N-600K)

2. Conditional Fee Waivers

Certain fee waivers depend on specific conditions. The following table provides a list of forms for which USCIS may waive fees, other than those required by H.R.-1, based on the requestor's inability to pay and if they meet the specified conditions.

Forms Eligible for Conditional Fee Waivers
Petition for a CNMI-Only Nonimmigrant Transitional Worker (Form I–129CW) petitioning for a CW-1 CNMI-only transitional worker[10]
Application to Extend/Change Nonimmigrant Status (Form I–539), only in the case of an alien applying for CW–2 nonimmigrant status
Application for Travel Documents, Parole Documents, and Arrival/Departure Records (Form I-131) for those applying for humanitarian parole[11]
Notice of Appeal or Motion (Form I-290B) if the underlying benefit request was fee exempt, the fee was waived, or it was eligible for a fee waiver
Petition for a CNMI-Only Nonimmigrant Transitional Worker (Form I-129CW), or an Application to Extend/Change Nonimmigrant Status (Form I-539) for an applicant applying for CW-2 nonimmigrant status
Notice of Appeal of Decision Under Sections 210 or 245A of the Immigration and Nationality Act (Form I-694) if the underlying application or petition was fee exempt, the filing fee was waived, or was eligible for a fee waiver
Application for Employment Authorization (Form I-765), except persons filing under category (c)(33), Deferred Action for Childhood Arrivals (DACA)[12]
For the following forms if the applicant is exempt from public charge ground of inadmissibility under INA 212(a)(4):[13] • Application for Advance Permission to Enter as a Nonimmigrant (Form I-192); • Application for Waiver of Passport and/or Visa (Form I-193); • Application to Register Permanent Residence or Adjust Status (Form I-485); and • Application for Waiver of Grounds of Inadmissibility (Form I-601).

3. Humanitarian Fee Waivers

USCIS provides fee exemptions for many forms filed by certain humanitarian categories of requestors.[14] If not otherwise exempt from paying the fee, an individual may request a fee waiver for any application or petition that is related to any of the following humanitarian categories (except for fees required by H.R.-1):[15]

- Battered spouses of A, G, E-3, or H nonimmigrants;
- Battered spouses or children of a lawful permanent resident or U.S. citizen under INA Section 240A(b)(2);
- T nonimmigrants;
- Temporary Protected Status (TPS);
- U nonimmigrants;
- VAWA self-petitioners and derivative(s);
- Conditional permanent residents (CPRs) filing a waiver of the joint filing requirement based on battery or extreme cruelty;
- Abused spouses and children adjusting status under the Cuban Adjustment Act (CAA) and Haitian Refugee Immigration Fairness Act of 1998 (HRIFA);
- Abused spouses and children seeking benefits under Nicaraguan Adjustment and Central American Relief Act (NACARA);
- Special immigrant juveniles;
- Asylees; or
- Refugees.[16]

C. Category of Requestor Eligible for Fee Waiver

1. Documentation of an Eligible Category

A requestor must submit documentation to show that they fall into a category eligible for a fee waiver. Such documentation may include:

- A copy of any type of Notice of Action (Form I-797) for the eligible benefit;
- A copy of a permanent resident card with the eligible category annotated; or
- Any other evidence of a petition or application pending with USCIS for an eligible benefit category.

For concurrently filed applications, USCIS officers review the type of benefit request submitted and the category requested to determine whether the requestor is eligible for a fee waiver.

For separately filed applications, if the primary benefit eligible for a fee waiver has already been filed, the requestor may submit a copy of the primary benefit petition or application that was filed with the fee waiver request.

An officer may verify in the available systems whether the requestor has applied for or received a benefit for one of the eligible categories.

2. Other Agency Fee Waiver Request

USCIS cannot waive the fee for any U.S. Department of Justice (DOJ) Executive Office for Immigration Review (EOIR) forms, but an immigration judge may waive fees for EOIR forms as well as requests filed on USCIS forms in an immigration court proceeding.[17]

Immigration judges may also request that USCIS consider a fee waiver request for a party in their court. In such cases, the requestor must still submit Form I-912 or written statement along with evidence of eligibility for the fee waiver.

D. Basis for Inability to Pay

USCIS evaluates whether the requestor is unable to pay the filing fee based on the following criteria:

- The requestor or qualifying member of the requestor's household is receiving a means-tested benefit;
- The requestor's household income level is at or below 150 percent of the Federal Poverty Guidelines (FPG); or
- The requestor is experiencing extreme financial hardship due to extraordinary expenses or other circumstances that render the individual unable to pay the fee.

An officer must evaluate whether the requestor establishes an inability to pay under any of these three criteria.

1. Means-Tested Benefit

USCIS approves a request for fee waiver if the requestor or their qualifying family member is receiving a means-tested benefit at the time of filing the request for fee waiver. A means-tested benefit is a public benefit where a person's eligibility for the benefit, the amount of the benefit, or both, is based on the person's income and resources.

The benefit-granting agency determines whether the person is lawfully eligible for the means-tested benefit. USCIS considers means-tested benefits that are federally, state, locally, or tribal funded and granted by the benefit agency.

Examples of means-tested benefit programs include, but are not limited to:

- Any federal, state, local, or tribal cash assistance for income maintenance, such as:
  - Supplemental Security Income (SSI);
  - Temporary Assistance for Needy Families (TANF), which may be provided under another TANF-Program state name;
  - Other federal, state, or local cash benefit programs for income maintenance (often called "General Assistance" in the state context, but which may exist under other names);
- Supplemental Nutrition Assistance Program (SNAP);
- Medicaid (federally funded Medicaid may also be provided under a Medicaid Program state name);
- Section 8 Housing Assistance under the Housing Choice Voucher program, Section 8 Project-Based Rental Assistance (including Moderate Rehabilitation), and housing assistance under the McKinney-Vento Homeless Assistance Act;
- Housing under the Housing Act of 1937;
- Low Income Home Energy Assistance Program (LIHEAP) and other energy assistance programs;
- CNMI Nutrition Assistance Program (NAP);
- Any services provided under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act);
- Any cash benefit provided by the Department of Veteran's Affairs or other federal or state, local, or tribal benefit provided based on veteran status;
- Benefits under the Emergency Food Assistance Program (TEFAP);
- Child and Adult Care Food Program (CACFP);
- Food Distribution Program on Indian Reservations (FDPIR);
- Benefits through the Child Nutrition Act, Benefits from the National School Lunch Act and Summer Food Service program;
- Child Care and Development Block Grant Program (CCDBGP);
- Special Supplemental Nutrition Program for Women, Infants, and Children (WIC); and
- Children's Health Insurance Program (CHIP) and State Children's Health Insurance Program (SCHIP).

Family Member's Means-Tested Benefit

A requestor's spouse and unmarried children under 21 years of age who reside with the requestor are generally eligible for a fee waiver based on the requestor's receipt of a means-tested benefit. If the requestor is legally separated from the spouse or not living with the spouse, then the requestor is ineligible for the fee waiver based on the spouse's means-tested benefit.

A requestor may be eligible for a fee waiver based on their child's receipt of a means-tested benefit so long as their child is unmarried, under 21 years of age, resides with the requestor, and the child's eligibility for the benefit is based on the requestor's income.[18]

For example, a parent may use evidence of a child's receipt of public housing, WIC, or SNAP as proof of inability to pay when the parent resides in the same residence because the child's eligibility for public housing is partly based on the parent's income.

In general, a child over 21 years of age cannot use a parent's means-tested benefit to qualify for a fee waiver. However, if the child is disabled and the parent is the child's legal guardian or surrogate, the child may use the parent's means-tested benefit to support a request for fee waiver.[19]

Documentation

In general, if a requestor provides documentation of receipt of a means-tested benefit, the request for fee waiver is approved and no further information is required. To demonstrate that an individual is currently receiving a means-tested benefit, the requestor must provide a letter, notice, or other agency document(s) containing the following information:

- The name of the individual receiving the means-tested benefit;
- The name of the agency granting the public benefit;[20]
- The type of benefit; and
- Indication that the benefit is currently being received (for example, a recently dated letter or document with effective dates, date of renewal or period the approval ends, if available). If the documentation is more than 12 months old, the requestor must provide additional evidence that shows the benefit is currently being received.

If the basis of a request for fee waiver is a qualifying family member's receipt of a means-tested benefit, then the requestor must also provide documentation establishing that the requestor is listed as a person receiving the means-tested benefit or documentation establishing the qualifying familial relationship and that the requestor is residing in the same household as the individual that is receiving the means-tested benefit.

2. Household Income at or Below 150 percent of the Federal Poverty Guidelines

USCIS approves a request for fee waiver if the requestor demonstrates that their total adjusted gross household income at the time of the request is at or below 150 percent of the current FPG based on household size. USCIS does not review the requestor's past history of income or future income or financial situation when determining household income.

The Secretary of the U.S. Department of Health and Human Services (HHS) establishes the FPG annually. USCIS uses the adjusted gross income from an IRS Form 1040 or the gross income from an IRS Form W-2 including any overtime and irregular hours as listed to calculate the annual income.

For fee waiver purposes, a household[21] may include:

- The requestor;
- The head of household (if not the requestor);[22]
- The requestor's spouse, if living with the requestor (if the requestor and spouse are separated or not living together, then the spouse is not included as part of the household);[23] and
- Any family members living in the requestor's household who are dependent on the applicant's income, the spouse's income, or the head of household's income.

Family members living in the requestor's household may include:

- The requestor's children or legal wards who are unmarried and under 21 years of age;
- The requestor's children or legal wards who are unmarried, are 21 years of age or over, but under 24 years of age, and are full-time students;
- The requestor's children or legal wards who are unmarried and for whom the requestor is the legal guardian because the child or legal ward is physically or developmentally disabled, or mentally impaired and unable to self-care, establish, maintain, or re-establish their own household;
- The requestor's parents; and
- Any other dependents listed on the requestor's federal income tax return, or the spouse's or head of household's federal income tax return.[24]

For a fee waiver request, USCIS does not include people who are cohabitating with the applicant, but not financially supported by the applicant, such as roommates or nannies, within the definition of household or household member.

Additionally, if the requestor has been deemed legally incompetent[25] by a court of law, then the requestor's individual income is still used to determine household income. However, the income of any household member, legal guardian or surrogate, or any other care provider, does not count towards the calculation of household income for such requestors.

Documentation

To demonstrate household income at or below 150 percent of the FPG, the requestor may provide a copy of one or more of the following, where applicable, for each household member:

- Most recent federal tax return with signature (or transcript);[26]
- Most recent Wage and Tax Statement (IRS Form W-2);
- Consecutive pay statements (stubs) for a minimum period of one month dated within the three months preceding the receipt of the fee waiver request;
- Certain Government Payments (Form 1099-G);
- Form SSA-1099; or
- Documentation of any additional financial assistance.[27]

An officer may grant a request for fee waiver in the absence of some of this documentation so long as the available documentation supports that the requestor is more likely than not unable to pay the fee.

If the household member's income has changed since the tax return filing because of unemployment, the requestor provides evidence of the household member's unemployment such as a termination letter or unemployment insurance receipt. If the household member's income has changed since the tax return filing due to a change in employment or change in income, the requestor provides information on the current employment and income, such as recent pay statements (stubs) or Form W-2.

If the household members reside and filed tax returns in a U.S. territory and were not required to file a federal tax return, the requestor must submit the tax returns (or transcript) from the territory instead of a federal tax return.

Tax Returns

A copy of the most recent tax return with signature alone may provide sufficient proof of income for fee waiver purposes. However, where the requestor provides other proof of income (or lack of income), a request for fee waiver should not be rejected solely based on the absence of tax return(s).

If the request for fee waiver is filed between January 1 and the deadline for filing income taxes for the year, and the household member has not yet filed the previous year's income tax return, the requestor may submit the household member's tax return (or transcript[28]) for the most recently filed year. The requestor must certify by signing their fee waiver request that

their income has not changed since the most recently filed tax return. If the household member's income has changed since their most recently filed tax return, the requester must submit additional evidence of the household member's income.[29]

USCIS does not accept Earned Income Tax Credit (EITC) statements, Miscellaneous Income (Form 1099-MISC), and Certain Government Payments (Form 1099-G) or other G-1099 forms as proof of income without the tax returns, tax transcripts, W-2s, or Social Security statements.

If the requestor's current situation is different from the documentation provided, the requestor must provide an explanation regarding the inconsistency in the documentation. For example, if a tax return or transcript indicates the requestor is married, but the requestor is currently separated or annotates single in the fee waiver request, the requestor must provide an additional explanation for the inconsistency and the documentation for income. The requestor may provide additional documentation to establish marital status and household size.

A requestor may use IRS Form 4506-T (PDF) to request:

- An income tax transcript;
- A copy of Form W-2; or
- Form 1099-G.

Requestors do not need to submit multiple copies of tax returns. If the requestor provided their most recent tax returns as part of the underlying petition or application filed with the Form I-912, such as a naturalization application and tax returns, filed concurrently, the requestor does not need to submit additional tax returns or a transcript.

Additional Financial Assistance

To establish the total income, a request must include any additional financial assistance (not otherwise included in a tax return or W-2) including any Social Security income (as reflected on the SSA-1099) to the adjusted gross income in the tax return.

The table below includes some types of additional financial assistance that USCIS considers household income for a fee waiver request. The requestor must provide documentation of each type of additional financial assistance that applies.

Additional Financial Assistance
Parental support
Child support
Pensions
Royalties
Unemployment benefits
Alimony
Educational stipends
Social Security
Veterans benefits
A court order granting any child support or documentation from an agency providing other income or financial assistance
Consistent or regular financial support from adult children, parents, dependents, or other people living in the applicant's household

VAWA, T, and U-Based Requestors

Requestors seeking a fee waiver for any immigration benefit associated with or based on a pending or approved petition or application for VAWA benefits[30] or T or U nonimmigrant status that are not otherwise fee exempted do not need to list as household members or provide income information for the following people:

- Any person in the household who is or was the requestor's abuser, human trafficker, or perpetrator; or
- A person who is or was a member of the abuser, human trafficker, or perpetrator's household.

In addition, such requestors do not need to list their spouse as a household member or include their spouse's income in the fee waiver request.

If a VAWA self-petitioner or recipient[31] (or their derivative(s)) or applicant, petitioner, or recipient of T or U nonimmigrant status does not have any income or cannot provide proof of income, the requestor may:

- Describe the situation in sufficient detail in the fee waiver request to substantiate lack of income or income at or below 150 percent of the FPG, as well as the inability to obtain the required documentation; and
- Provide any documentation of the income, such as pay stubs or affidavits from religious institutions, non-profits, or other community-based organizations, verifying that the requestor is currently receiving some benefit or support from that entity and attesting to the financial situation, if available.

Special Immigrant Juveniles

A petitioner or recipient of Special Immigrant Juvenile (SIJ) classification who files a fee waiver request for a filing not otherwise fee exempted does not need to provide proof of income. USCIS considers requestors in this category as part of their own household, without including any foster or group home household members.

Instead of proof of income, the fee waiver request must include documentation showing that the requestor has an approved petition for SIJ classification (for example, a copy of Notice of Action (Form I-797) for Form I-360).[32]

3. Extreme Financial Hardship

Even if a requestor has income above 150 percent of the FPG, the requestor may be able to demonstrate that extreme financial hardship makes the requestor unable to pay the fee(s). Extreme financial hardship occurs when a requestor requires substantially all of their current income and liquid assets to meet current ordinary and necessary living expenses. An extreme financial hardship is more than a financial burden caused by paying the filing fee.

The requestor may demonstrate extreme financial hardship due to extraordinary expenses or other circumstances affecting the requestor's financial situation to the degree of inability to pay the fee. If the requestor is under extreme financial hardship, the requestor should demonstrate negative financial impact as a result of this hardship in the 12 months preceding the receipt of the fee waiver request that rendered the requestor unable to pay the fee.

The following list contains some examples of financial hardships for which USCIS may grant a request for fee waiver:

- A medical emergency or catastrophic illness affecting the alien or the alien's dependents;[33]
- Unemployment;
- Significant loss of work hours and wages (change in employment status);
- Eviction;
- Homelessness;
- Military deployment of spouse or parent;
- Natural disaster;
- Loss of home (destruction such as fire, water, or collapse);
- Inability to pay basic utilities, rent, childcare, or mortgage (payments and bills for each month are more than the monthly income);
- Substantial financial losses to small business that affect personal income;
- Victimization;
- Divorce or death of a spouse that affects overall income; or
- Other situations that could not normally be expected in the regular course of life events that would limit a person's ability to meet necessary living expenses.

Documentation

In addition to explaining the financial hardship in the request for fee waiver, a requestor may submit documentation as follows to demonstrate extreme financial hardship:

- Documentation of income, as provided above;
- Documentation of all assets owned, possessed, or controlled by the requestor and dependents; or
- Documentation concerning liabilities and expenses owed by the requestor and dependents, and any other expenses for which the requestor is responsible.

An officer may grant a request for fee waiver in the absence of some of this documentation as long as the available documentation supports that the requestor is more likely than not unable to pay the fee.

The table below provides a list of some assets and liabilities that may be identified as part of the fee waiver request.

Examples of Documentation of Financial Hardship

Assets	Liabilities
• Real estate; • Cash; • Checking and savings accounts; and • Stocks, bonds, and annuities (except for pension plans, Individual Retirement Accounts (IRAs), and other retirement funds).	• Rent; • Mortgages; • Lease; • Average monthly cost of food; • Utilities; • Child care and elder care; • Medical expenses; • Tuition costs; • Commuting costs; and • Monthly payments of lawful debts.

In general, if a requestor provides proof of inability to pay the fee based on financial hardship, the request for fee waiver may be approved on this basis and no further information is required.

4. Requestors Without Income

If the requestor has no income due to unemployment, homelessness, or other factors, the requestor may provide, as applicable:

- A detailed description of the financial situation that demonstrates eligibility for the fee waiver;
- Hospital bills;
- Bankruptcy documents;
- If the requestor is receiving support services, an affidavit from a religious institution, non-profit, hospital, or community-based organization verifying the person is currently receiving some benefit or support from that entity and attesting to the requestor's financial situation; or
- Evidence of unemployment, such as a termination letter or unemployment insurance receipt.

An officer may grant a request for fee waiver in the absence of some of this documentation, as long as the available documentation supports that the requestor is more likely than not unable to pay the fee.

VAWA, T, and U-Based Requestors

USCIS considers whether a requestor is unable to obtain proof of income due to alleged victimization such as trafficking or abuse. If not otherwise eligible for a fee exemption, the requestor should describe the situation in the Form I-912 or written request to substantiate the inability to pay as well as the inability to obtain the required documentation.

The requestor should provide any available documentation, such as affidavits from religious institutions, non-profits, or other community-based organizations verifying that the requestor is currently receiving some benefit or support from that entity and attesting to the financial situation.

E. Emergent Circumstance

Natural catastrophes and other extreme situations[34] beyond a person's control may affect the ability to pay USCIS fees. Based on the USCIS Director's authority to waive a required fee,[35] USCIS may designate certain time periods or events in which a person may file a fee waiver request when not otherwise eligible.[36]

In such cases, the requestor must still file a fee waiver request and establish eligibility under one of the criteria (generally, financial hardship). USCIS may accept the request based on the requestor's statement even if there is no documentation of the emergencies and unforeseen circumstances.

Unless otherwise eligible, requestors may only seek a fee waiver under those emergent circumstances described in the Immigration Relief in Emergencies or Unforeseen Circumstances webpage.

F. Adjudication

USCIS may grant a fee waiver request when USCIS determines that the requestor has met the eligibility requirements.

USCIS adjudicates the fee waiver request based on the information provided in the Request for Fee Waiver (Form I-912) or written statement, as well as any additional documentation submitted in support of the fee waiver request at the time of filing. USCIS does not issue any Requests for Evidence for fee waiver requests.

The table below provides a general outline to guide the adjudication of a request for a fee waiver.

Overview of Fee Waiver Eligibility Determination

Step		For More Information
1	Determine whether the application or petition form was properly signed.	Chapter 2, Signatures [1 USCIS-PM B.2]
2	Identify whether the form has a fee, or the requestor falls within a fee exempt category.	Chapter 3, Fees [1 USCIS-PM B.3], Section G, Fee Exemptions [1 USCIS-PM B.4(G)]
3	Verify whether the form type is eligible for a fee waiver.	Section B, Forms Eligible for Fee Waiver [1 USCIS-PM B.4(B)]
4	If applicable, verify whether the requestor has a pending or approved petition or application for a benefit category eligible for a fee waiver.	Section C, Category of Requestor Eligible for Fee Waiver [1 USCIS-PM B.4(C)]
5	Determine whether the requestor or a qualifying member of the requestor's household receives a means-tested benefit.	Section D, Basis for Inability to Pay, Subsection 1, Means-Tested Benefit [1 USCIS-PM B.4(D)(1)]
5a	If sufficient proof of a means-tested benefit, the request for fee waiver is approved and no further information is required.	Section D, Basis for Inability to Pay, Subsection 1, Means-Tested Benefit [1 USCIS-PM B.4(D)(1)]
5b	If no documentation of a means-tested benefit, proceed to 6.	Section D, Basis for Inability to Pay, Subsection 1, Means-Tested Benefit [1 USCIS-PM B.4(D)(1)]
6	Determine the household size and the income level at which the requestor may qualify based on the household size.	Section D, Basis for Inability to Pay, Subsection 2, Household Income at or Below 150 percent of Federal Poverty Guidelines [1 USCIS-PM B.4(D)(2)]
7	Identify all valid sources of income applicable to the household and that the requestor submitted the proper documentation of income (or lack of income).	Section D, Basis for Inability to Pay, Subsection 2, Household Income at or Below 150 percent of Federal Poverty Guidelines [1 USCIS-PM B.4(D)(2)]
8	Determine whether the requestor's adjusted gross income from tax returns (or gross income from W-2) is at or below 150 percent of the relevant FPG level (based on household size).	Section D, Basis for Inability to Pay, Subsection 2, Household Income at or Below 150 percent of Federal Poverty Guidelines [1 USCIS-PM B.4(D)(2)]

Step		For More Information
8a	If sufficient proof of household income at or below 150 percent of the FPG, the request for fee waiver is approved and no further information is required.	Section D, Basis for Inability to Pay, Subsection 2, Household Income at or Below 150 percent of Federal Poverty Guidelines [1 USCIS-PM B.4(D)(2)]
8b	If insufficient proof of household income at or below 150 percent of the FPG, proceed to 9.	Section D, Basis for Inability to Pay, Subsection 2, Household Income at or Below 150 percent of Federal Poverty Guidelines [1 USCIS-PM B.4(D)(2)]
9	Determine if the requestor is under extreme financial hardship due to extraordinary expenses or other circumstances that render the individual unable to pay the fee.	Section D, Basis for Inability to Pay, Subsection 3, Financial Hardship [1 USCIS-PM B.4(D)(3)]
9a	If sufficient proof of extreme financial hardship, the request for fee waiver is approved and no further information is required.	Section D, Basis for Inability to Pay, Subsection 3, Financial Hardship [1 USCIS-PM B.4(D)(3)]
9b	If insufficient proof of extreme financial hardship such that the requestor is unable to pay the fee, the requestor is not eligible for a fee waiver and the request is rejected.	Section D, Basis for Inability to Pay, Subsection 3, Extreme Financial Hardship [1 USCIS-PM B.4(D)(3)]

1. Family-Related Applications or Petitions

In general, a requestor may file one request for fee waiver for all eligible family-related applications or petitions filed together. For example, if the requestor files the Application to Register Permanent Residence or Adjust Status (Form I-485) and the requestor's spouse and children file separate Forms I-485 at the same time, the requestor, spouse, and children need only file one Form I-912 or written request for fee waiver.

If eligible family-related applications or petitions are filed separately, each individual family member must separately submit a Form I-912 or written request for fee waiver with the eligible application or petition.

Each fee waiver request is unique and USCIS considers each request on its own merits. However, where family members separately submit family-related applications or petitions and related requests for fee waiver, USCIS should issue consistent determinations on the family members' individual requests for fee waiver.

2. Rejection

If USCIS determines that the requestor is not eligible for a fee waiver, then USCIS rejects the fee waiver request and the benefit request. The rejection notice must provide the requestor detailed reasons for the rejection. The table below provides a non-exhaustive list of common reasons for rejection.

Reasons for Rejecting Fee Waiver Request

Reason	Explanation
Lack of proper filing	• Requestor did not submit a Request for Fee Waiver (Form I-912) or written statement.
Ineligible form or category	• Requestor does not fall within a category eligible for a fee waiver. • Requestor is not filing a form eligible for a fee waiver.
Income is above 150 percent of the FPG and does not otherwise qualify	• Income listed on the form or in the documentation is above the 150 percent FPG threshold and did not show receipt of a means-tested benefit or financial hardship.
Unable to determine household income	• Identification of household members[37] on the form, but the requestor does not provide sufficient statements or documentation of the household members' income. • Identification of a spouse[38] on the form, but the requestor does not provide sufficient statements or documentation of income or additional support. • The requestor's filing status in the tax returns or transcript (for example, married filing jointly, single,

There is no appeal of a rejection of a fee waiver request. Requestors may, however, file another fee waiver request with the required documentation to establish eligibility. An applicant may also refile the benefit request with the proper fees for USCIS to process the request. The filing of a fee waiver does not toll or pause any other applicable deadlines, such as the deadline for filing an appeal or motion. Therefore, if a fee waiver request is rejected, the requestor must endeavor to re-file within the applicable timeframe. USCIS uses the postmark date of a filing to determine which form version and fees are correct but uses the receipt date for purposes of any regulatory or statutory filing deadlines.[40]

G. Fee Exemptions

Aside from fee exemptions specifically listed in regulations, the USCIS Director may provide an exemption for any fee required.[41] The Director must determine that such action would be in the public interest and the action is consistent with the applicable law.

Fee exemptions are distinct from fee waivers in that exemptions apply automatically and do not require the requestor to establish eligibility. A benefit requestor may not individually request a fee exemption as they would a fee waiver. The Director may also provide temporary fee exemptions as necessary. A request for a USCIS Director's fee exemption must be submitted to the Office of the Director for clearance.

All current fee exemptions can be found in the Fee Schedule (Form G-1055).

Footnotes

[^ 1] See 8 CFR 106.3.

Reason	Explanation
	head of household) is inconsistent with the marital status declared on the fee waiver request, the immigration benefit forms, or supporting documents, and the requestor does not provide an explanation or evidence regarding the inconsistency. • The requestor's tax return or transcript indicates that the requestor may be claimed by another person, but the requestor does not provide income information for the tax filer.
Lack of income documentation[39]	Lack of documentation of income (such as tax return or transcript, W-2, or pay statements) and additional income or financial support for the requestor and each household member identified in the fee waiver request or of the person providing additional income, as appropriate.

[^ 2] See H.R.1—One Big Beautiful Bill Act (H.R.-1), Subtitle A, Title X of Pub. L. 119-21 (PDF) (Jul. 4, 2025). See 90 FR 34511 (PDF) (July 22, 2025).

[^ 3] There is an exception for family-related applications or petitions filed at the same time. See Section F, Adjudication [1 USCIS-PM B.4(F)].

[^ 4] For information on valid signatures and who may sign, see Chapter 2, Signatures [1 USCIS-PM B.2].

[^ 5] See Section D, Basis for Inability to Pay [1 USCIS-PM B.4(D)]. See *Matter of Chawathe (PDF)*, 25 I&N Dec. 369 (AAO 2010) (identifying preponderance of the evidence as the standard for immigration benefits generally, and in that case specifically naturalization).

[^ 6] See *Matter of Chawathe (PDF)*, 25 I&N Dec. 369, 376 (AAO 2010) (preponderance of the evidence means more likely than not). See *U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring).

[^ 7] See 8 CFR 106.3(a)(3).

[^ 8] Also known as the Application for Advance Permission to Return to Unrelinquished Domicile**.**

[^ 9] See 8 CFR 106.2(a)(50). Re-registrants are exempt from paying the Form I-821 fee.

[^ 10] Waiver of the fee for Form I-129CW does not waive the requirement for an employer petitioning for a CW-1, CNMI-only transitional worker to pay any fees in 8 CFR 106.2(c) that may apply. See 8 CFR 106.3(a)(3)(ii)(A).

[^ 11] "Humanitarian parole" refers to parole requests filed by (or on behalf of) aliens outside the United States, and re-parole requests filed by (or on behalf of) such aliens. See Fee Schedule (Form G-1055).

[^ 12] USCIS cannot waive any fees required by Sections 100003 or 100010-12 of H.R.-1. See H.R.1—One Big Beautiful Bill Act (H.R.-1), Subtitle A, Title X of Pub. L. 119-21 (PDF) (July 4, 2025).

[^ 13] See INA 212(a)(4). The receipt of public benefits does not negatively affect the review of a fee waiver request. For detailed guidance on the public charge grounds of inadmissibility, see Volume 8, Admissibility, Part G, Public Charge Ground of Inadmissibility [8 USCIS-PM G]. USCIS cannot waive any fees required by Section 100013 of H.R.-1. See H.R.-1—One Big Beautiful Bill Act (H.R.-1), Subtitle A, Title X of Pub. L. 119-21 (PDF) (July 4, 2025).

[^ 14] See 8 CFR 106.2 and 8 CFR 106.3(b). See Fee Schedule (Form G-1055).

[^ 15] See H.R.1—One Big Beautiful Bill Act (H.R.-1), Subtitle A, Title X of Pub. L. 119-21 (PDF) (July 4, 2025).

[^ 16] See Instructions for Form I-912.

[^ 17] See 8 CFR 1003.24(d) and 8 CFR 1103.7.

[^ 18] The requestor may also use the child's means-tested benefit to support a fee waiver request based on household income. See Subsection 2, Household Income at or Below 150 Percent of the Federal Poverty Guidelines [1 USCIS-PM B.4(D)(2)] for further discussion of qualifying members of a household.

[^ 19] In this situation, the child may also use the parent's means-tested benefit to support a fee waiver request based on household income. See Subsection 2, Household Income at or Below 150 Percent of the Federal Poverty Guidelines [1 USCIS-PM B.4(D)(2)].

[^ 20] USCIS may accept documentations from school for meal-related public benefits.

[^ 21] If the requestor submits any joint-filed federal tax returns, USCIS reviews the household size to determine household members or spouses.

[^ 22] In general, the head of the household is the person who files the most recent federal tax return with the Internal Revenue Service (IRS) for the household, or the person who earns most of the income for the household.

[^ 23] However, any additional income or financial support provided by the spouses must be included in the request, as discussed later in this subsection.

[^ 24] USCIS reviews the IRS federal income tax return to examine whether the requestor listed any dependents.

[^ 25] See Black's Law Dictionary (11th ed. 2019) (incompetency is generally defined as the quality, state, or condition of being unable or unqualified to do something).

[^ 26] The requestor is not required to have the IRS certify the tax return or transcript. A copy of an unsigned tax return alone is insufficient to establish income.

[^ 27] Documentation of additional financial assistance is discussed later in this subsection.

[^ 28] For information on obtaining federal income tax transcripts without a fee, see the IRS' Get Your Tax Record webpage.

[^ 29] Details on the type of documentation required to show the household member's income is discussed earlier in this subsection.

[^ 30] VAWA benefits include VAWA self-petitioners and derivatives as defined under INA 101(a)(51) and anyone otherwise self-petitioning due to battery or extreme cruelty under INA 204(a).

[^ 31] Includes VAWA self-petitioners and their derivatives as defined under INA 101(a)(51) and anyone otherwise self-petitioning due to battery or extreme cruelty under INA 204(a).

[^ 32] An officer may verify in the available systems whether the requestor has received SIJ classification.

[^ 33] Dependents include the alien's spouse, children, parents, or ward.

[^ 34] Including major natural disasters declared in accordance with 44 CFR 206, subpart B.

[^ 35] See 8 CFR 106.3(c). This discretionary authority may be delegated only to the USCIS Deputy Director.

[^ 36] See USCIS' Immigration Relief in Emergencies or Unforeseen Circumstances webpage. For example, USCIS allowed for consideration of fee waivers for those affected by South Carolina floods in 2015. See Volume 1, General Policies and Procedures, Part H, Emergencies or Unforeseen Circumstances, Chapter 2, Emergencies or Unforeseen Circumstances-Related Flexibilities, Section A, Immigration Policy Flexibilities, Subsection 10, Fee Waivers and Exemptions [1 USCIS-PM H.2(A)(10)].

[^ 37] Applicants for any immigration benefit associated with or based on a pending or approved petition or application for VAWA benefits or T or U nonimmigrant status do not need to list as a member of their household or provide the income of any person who is or was their abuser, human trafficker, or perpetrator or is or was a member of the abuser, human trafficker, or perpetrator's household. For more information, see Section D, Basis for Inability to Pay, Subsection 2, Household Income at or Below 150 Percent of Federal Poverty Guidelines, [1 USCIS-PM B.4(D)(2)].

[^ 38] Applicants for any immigration benefit associated with or based on a pending or approved petition or application for VAWA benefits or T or U nonimmigrant status do not need to list their spouse as a household member or provide their spouse's income.

[^ 39] Generally, applicants for any immigration benefit associated with or based on a pending or approved petition or application for VAWA benefits or T or U nonimmigrant status are not rejected for a lack of documentation if the applicant has described the inability to provide the required documentation in sufficient detail and provided any other available documentation. In addition, USCIS does not require SIJs to provide proof of income but does require other documentation for a fee waiver request. See Section D, Basis for Inability to Pay, Subsection 2, Household Income at or Below 150 Percent of the Federal Poverty Guidelines [1 USCIS-PM B.4(D)(2)].

[^ 40] See 8 CFR 103.2(a)(7).

[^ 41] See 8 CFR 106.3(c).

Chapter 5 - Interpreters and Preparers

If an interpreter assists the benefit requestor in reading the instructions and questions on a benefit request, the interpreter must provide his or her contact information, sign, and date the benefit request in the section indicated.

If a preparer assists the benefit requestor in completing his or her benefit request, the preparer and any other person who assisted in completing the benefit request must provide their contact information, sign, and date the benefit request in the section indicated.

If the person who helped interpret or prepare the benefit request is an attorney or accredited representative, he or she must determine if the level of involvement and rules of professional responsibility require him or her to submit a signed and completed Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28) with the benefit request. If the person intends to represent the benefit requestor before USCIS, he or she must submit a completed Form G-28. The attorney or accredited representative of the benefit requestor cannot serve as an interpreter during the interview.[1]

Footnote

[^ 1] Officers cannot make exceptions for good cause.

Chapter 6 - Submitting Requests

A. How to Submit

Before sending an application to USCIS, an applicant must become familiar with fees, properly submitting or filing the application (either by mail or electronically), and review any statutory or regulatory dates for the application or petition for it to be considered properly filed.[1]

1. Submitting Requests by Mail

Benefit requestors may use U.S. Postal Service or a commercial courier[2] to submit benefit requests to a USCIS lockbox or facility.[3] Because of safety and security requirements, USCIS must approve couriers. USCIS does not accept deliveries from other companies and individuals, including bicycle couriers.

Benefit requestors should refer to the form instructions and the USCIS All Forms webpage for more information on where and how to submit a particular benefit request, and what initial evidence is required.[4]

Assembling and Submitting a Benefit Request Package

USCIS recommends that benefit requesters assemble their benefit request packages in the order indicated for that particular benefit.[5]

Application Intake Inquiries

Requestors who have questions or concerns about the intake of a benefit request should route their inquiries as indicated on the USCIS Contact Us webpage.

2. Submitting Requests Online

Some USCIS forms are available for filing online. Filing forms online allows users to:

- Create and manage online accounts;
- Submit benefit requests, supporting documents, and evidence, and provide Request for Evidence (RFE) responses electronically;
- Link previously mailed benefit requests that are still pending with an online account;
- Receive notices and decisions electronically;
- Make payments online; and

- Access current information about the status of filed[6]benefit requests.

Users may also create draft benefit requests in their online account. A user can continue adding information to his or her draft before electronically filing the request with USCIS. Draft filings are generally saved in the user's online account for 30 days from the last time the user worked on the request. A benefit requestor cannot submit an electronic benefit request until the requestor completes the electronic form, provides a valid electronic signature, and provides the required payment, if any, or submits a fee waiver request (available using PDF upload option only[7]). Once submitted, USCIS labels the case accepted[8] and assigns a receipt number in the filer's account.

USCIS does not consider a benefit request that is in draft form to be filed, submitted, accepted, or date received by USCIS. USCIS does not describe a draft as submitted or assign a receipt number to draft filings.

In general, if a benefit requestor files a benefit request online, USCIS notifies the requestor and his or her authorized attorney or accredited representative (if any) electronically of any notices or decisions through his or her online account. A requestor may elect to receive paper notices by selecting this preference in his or her online account. USCIS may exercise discretion in also issuing paper notices or decisions for electronically-filed benefits.[9]

B. Intake Processing

Once USCIS receives a benefit request, including an appeal or motion, USCIS assesses whether the request meets the minimum requirements for USCIS to accept it. If all minimum requirements (including submission of initial evidence for intake purposes) for acceptance are not met, USCIS rejects the benefit request for improper filing.[10]

USCIS only begins to adjudicate a benefit request after USCIS accepts the request, processes any required fees, and issues a receipt notice (or date stamp, where applicable) to reflect the date of physical or electronic receipt.[11] USCIS does not consider benefit requests that are rejected to be properly filed.[12]

In order for USCIS to accept a benefit request, a submission must satisfy all applicable acceptance criteria.[13] USCIS generally accepts the request if it contains:

- A complete, properly executed form, with a proper signature;
- The correct fees;[14] and
- The required initial evidence for intake purposes, as directed by the form instructions.[15]

USCIS rejects benefit requests that do not meet these minimum requirements. Reasons for rejection may include, but are not limited to:

- Incomplete benefit request;[16]
- Improper signature or no signature;[17]
- Use of an outdated version of a USCIS form at time of submission;
- Principal application error (USCIS cannot process derivative or dependent applications if the related principal application is in error); and
- Incorrect fee, including missing fees or fees in the wrong amount.[18]

In addition, USCIS rejects benefit requests for an immigrant visa if an immigrant visa is not immediately available to the applicant.[19]

The rejection of a filing with USCIS may not be appealed.[20] However, rejections do not preclude a benefit requestor from resubmitting a corrected benefit request. If the benefit requestor later resubmits a previously rejected but corrected benefit request, USCIS processes the case anew, without prejudice.[21] The rejected case does not retain its original filing date when resubmitted.

If a rejected benefit request is properly and timely resubmitted, USCIS accepts and processes the corrected benefit request as a new request. If the resubmitted benefit request is not properly and timely resubmitted, the new benefit request may be rejected.

USCIS requires new fees with any new benefit request; a new filing date also generally applies.[22]

Effect of Declined or Returned Payment

Filing fees generally are non-refundable regardless of the outcome of the benefit request, or how much time the adjudication requires, and any decision to refund a fee is at the discretion of USCIS.[23]

If the benefit requestor pays a fee by credit card and the credit card is declined for any reason, USCIS does not attempt to process the credit card payment a second time and may reject the associated request for lack of payment.[24]

If a form of payment other than a credit card submitted for payment is returned as not payable because of insufficient funds, USCIS re-submits the payment to the remitter institution one time.[25] If the form of payment is returned as non-payable a second time, USCIS may reject or deny the benefit request as improperly filed and the received date is forfeited.[26]

USCIS does not resubmit payments returned as unpayable for a reason other than insufficient funds.[27] A rejection of a filing with USCIS may not be appealed.[28]

Returned Payment for an Underlying Petition

If a dishonored payment rejection occurs on an underlying petition that is accompanied by other filings that are dependent on the filing that is rejected, such as an Immigrant Petition for Alien Workers (Form I-140) concurrently filed with an Application to Register Permanent Residence or Adjust Status (Form I-485), even though the other filings' fees may be honored, USCIS administratively closes the dependent filings and refunds the fees.

Returned Payment for Premium Processing Service Requests

If a premium processing fee for a Request for Premium Processing Service (Form I-907) is declined or returned when it is filed at the same time as a Petition for Nonimmigrant Worker (Form I-129) or Immigrant Petition for Alien Workers (Form I-140), USCIS rejects the entire filing.

If USCIS has approved the petition and any fee, including one fee of a multiple fee filing, is declined or returned, USCIS may revoke the approval upon notice.

In this case, USCIS issues a Notice of Intent to Revoke (NOIR) to the requestor. If the requestor does not rectify the declined or returned payment within the requisite NOIR time period, USCIS revokes the approval and retains (and does not refund) any fee that was honored in association with the approval.

For example, if the Form I-907 fee is declined or returned after USCIS approves an associated Form I-140, USCIS revokes the Form I-140 approval (assuming the NOIR time period has passed without sufficient response). USCIS then retains the Form I-140 fee, administratively closes the Form I-485, and refunds the Form I-485 fee.

Response to a NOIR

If USCIS has approved the petition and any fee, including one fee of a multiple fee filing, is declined or returned, USCIS may revoke, rescind, or cancel the approval. In this case, USCIS issues a NOIR to the requestor.[29] If the approved benefit request requires multiple fees, approval may be revoked if any fee submitted is not honored. USCIS does not refund other fees that were paid for an approved benefit request that is revoked because of a declined or returned fee payment.[30]

To sufficiently respond to a NOIR, the requestor must, within the requisite NOIR time period, provide payment of the correct fee amount or demonstrate that the payment was honored or that it was rejected by USCIS by mistake.[31] If USCIS issues a NOIR and the request does not return sufficient evidence to reinstate the case to pending status, then USCIS reopens and denies the request.

USCIS then sends a notice to the requestor informing them that USCIS has revoked the approval and denied the benefit request. In contrast with the rejection of a filing, a revocation of an approval due to a declined or returned fee may be appealed to the USCIS Administrative Appeals Office.[32] All revocation notices instruct the requestor on how they may appeal the revocation or denial due to a declined or returned payment.[33]

If USCIS does not have the authority to revoke or reopen and deny the benefit request, USCIS annotates the file to indicate that USCIS never received payment and notifies the benefit requestor of the payment deficiency. USCIS then notifies the applicant or petitioner that there is a payment deficiency. The officer should also request local counsel assess the applicant's actions and intentions and assist in determining the appropriate next steps on a per case basis.

If USCIS already denied or revoked the benefit request for other reasons, or determined that the requestor abandoned the benefit request, the existence of a declined or returned payment does not affect that decision. USCIS pursues collection of all payment deficiencies, regardless of the outcome of adjudication.

C. Correct Fees and Form Versions

USCIS uses the postmark[34] or case acceptance date to determine whether the benefit requestor has submitted the correct form version and required filing fees. USCIS uses the received date[35] for purposes of any statutory or regulatory filing deadlines.

For electronic submission through the online account, the case acceptance date and received date are often the same date. A submission is received when the requestor completes the electronic form, provides a valid electronic signature, and submits the required filing fee or a fee waiver request.

Paper-Based Submissions

USCIS uses the postmark date on the envelope from the U.S. Postal Service to determine whether the benefit requestor submitted the correct form version and filing fees. For benefit requests sent by commercial couriers, USCIS uses the date on the shipping label to determine whether the form version and fees are correct at the time of submission.

If the commercial courier label does not contain a shipping date, USCIS considers the postmark date to be the date the shipping label is printed. If there is no shipping or print date indicated, USCIS considers the postmark date to be 10 calendar days before the USCIS lockbox or USCIS facility received the package.

Online Submissions

When a benefit requestor submits a benefit request through myUSCIS, the benefit request is accepted and receipted when all the steps are complete, and payment is made or a fee waiver is provided in the case management system. The date the system accepts the submission is the case acceptance date also known as the received date for online filings.

USCIS does not consider online draft forms to be submitted to or received by USCIS.

D. Received Date (Filing Date)

Paper-Based Submissions

USCIS uses the received date as the filing date for purposes of any statutory or regulatory filing deadlines and to determine a priority date, if applicable.

USCIS acknowledges a benefit request as "received" on the date it physically arrives at the USCIS lockbox or USCIS filing facility designated for filing. This received date, also known as the filing date,[36] is printed on a Notice of Action (Form I-797) in the box labeled Received Date. USCIS may also record a received date using a date stamp (where applicable).

Benefit requestors only retain a received date if the proper location as designated on the USCIS All Forms webpage accepts their submission.[37]

The received date (filing date) may impact eligibility for immigration benefits. For example, USCIS uses the received date to determine whether USCIS must reject a Notice of Appeal or Motion (Form I-290B) for failure to timely file, or a Petition for a Nonimmigrant Worker (Form I-129), because an annual numerical limit has been reached.

The received date (filing date) may also be significant for purposes of seeking lawful permanent residence. For example, sometimes the received date of a properly filed immigrant visa petition constitutes the beneficiary's priority date[38] which dictates when the benefit requestor is eligible to file an Application to Register Permanent Residence or Adjust Status (Form I-485) (or seek consular processing overseas). Similarly, USCIS may use the received date to establish the statutory period for some benefits, including naturalization.

Online Submissions

USCIS acknowledges an electronically filed request as "received" on the date when the requestor electronically signs the benefit request and submits payment or fee waiver request online.

E. Filing Periods Ending on Weekends or Federal Holidays

Benefit requestors must file a benefit request within the period for filing, if applicable, as prescribed by statute, regulation, and form instructions. This includes filing with USCIS before a certain time period ends or event occurs, such as before a period of lawful status ends or an individual reaches a certain age. For example, petitioners for special immigrant juvenile classification must file a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) before their 21st birthday.[39] As another example, principal refugees and asylees seeking to request follow-to-join immigration benefits for qualifying family members must file a Refugee/Asylee Relative Petition (Form I-730) for each member within 2 years of the refugee's admission to the United States as a refugee or the asylee's grant of asylum.[40]

USCIS does not accept paper-based applications or petitions on Saturdays, Sundays, or federal holidays.[41] Therefore, when the last day of the filing period for a paper benefit request falls on a Saturday, Sunday, or federal holiday, USCIS applies the regulatory definition of day[42] and extends the deadline for filing until the end of the next business day that is not a Saturday, Sunday, or federal holiday.[43] In these situations, while the received date continues to reflect the date USCIS physically received the request, USCIS considers the benefit request to have been timely filed if received on the next business day.[44]

The determination of whether a benefit request was timely submitted is not a criterion for acceptance; rather, it is part of the eligibility determination for the benefit request that an officer makes at the time of adjudication. Therefore, USCIS does not reject filings at intake due to missed deadlines.

USCIS considers electronically submitted benefit requests to be received immediately upon submission. Therefore, electronic filings are not affected by the fact that USCIS does not accept deliveries on Saturdays, Sundays, or federal holidays, and USCIS does not apply the regulatory definition of day to extend the filing period for benefit requests filed electronically.[45]

Footnotes

[^ 1] USCIS considers filed, submitted, and date received to mean the date USCIS officially, physically receives the request, based on regulation at 8 CFR 103.2(a)(7).

[^ 2] A commercial courier is a courier that is approved to deliver packages to the USCIS lockbox or facility, for example, the United Parcel Service (UPS), Federal Express (FedEx), and Dalsey, Hillblom and Lynn (DHL), or any other courier that USCIS has approved to deliver packages to USCIS facilities.

[^ 3] Registration for Classification as a Refugee (Form I-590) must be completed with the assistance of the Resettlement Support Center (RSC) staff overseas after a referral to the U.S. Refugee Admissions Program (USRAP), and cannot be completed independently by a benefit requestor. As such, any information in this section regarding submitting or filing a benefit request does not apply to Form I-590. For more information, see the Refugees USCIS web page.

[^ 4] See 8 CFR 103.2(b)(8)(ii). A benefit requestor may need to provide additional evidence to establish eligibility for the benefit sought at the time of an interview or in response to a Request for Evidence (RFE) or Notice of Intent to Deny (NOID).

[^ 5] For tips on filing applications with USCIS, see Tips for Filing Forms by Mail and Lockbox Filing Information.

[^ 6] USCIS considers filed, submitted, and date received to mean the date USCIS physically receives the request, based on the regulations at 8 CFR 103.2. For mailed filings, this is the date that USCIS receives the form at the lockbox or USCIS facility. USCIS records the date that the form is received at the lockbox or USCIS facility. For electronic filings, USCIS considers the case accepted on the date the requestor has completed both the form through a myUSCIS account and the payment through pay.gov. Electronic case acceptance date is equivalent to filed, submitted, and date received for paper-based filings.

[^ 7] PDF upload option is currently limited to those filing certain EAD categories. See Forms Available to File Online for more information. Filing a fee waiver request or Form I-912 may still be available for certain benefit requests based on an inability to pay.

[^ 8] Case acceptance occurs when a benefit requestor submits a USCIS form electronically using an online account and completes payment electronically or submits a waiver request in accordance with the online instructions.

[^ 9] See 8 CFR 103.2(b)(19)(ii)(B). Currently, USCIS mails notices in addition to posting electronic notices in the online account for most benefit requests, regardless of a selection made to opt-in to paper notices through the respondent's online account.

[^ 10] See 8 CFR 103.2.

[^ 11] See Section C, Date of Receipt [1 USCIS-PM B.6(C)].

[^ 12] See 8 CFR 103.2(a)(7).

[^ 13] See 8 CFR 103.2(a). Other regulations in Title 8 of the CFR may impose filing requirements specific to the request type.

[^ 14] See 8 CFR 106.2 and 8 CFR 106.3. See Fee Schedule (Form G-1055). For additional information on fee waivers, see Chapter 4, Fee Waivers and Fee Exemptions [1 USCIS-PM B.4].

[^ 15] For example, family-based or employment-based adjustment of status categories where an Affidavit of Support (Form I-864), if required, is submitted with the Application to Register Permanent Residence or Adjust Status (Form I-485).

[^ 16] See 8 CFR 103.2(b)(1). Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions. Benefit requestors can determine which fields are required based on the form type and form instructions.

[^ 17] See 8 CFR 103.2(a)(2).

[^ 18] See 8 CFR 103.2(a).

[^ 19] See 8 CFR 245.2(a)(2)(i). For more information, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section B, Definition of Properly Filed, Subsection 3, Visa Availability Requirement [7 USCIS-PM A.3(B)(3)].

[^ 20] See 8 CFR 103.2(a)(7)(iii).

[^ 21] USCIS treats the benefit request as if the requestor had not previously submitted it.

[^ 22] Some exceptions may apply. For example, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability, Subsection 3, Priority dates [7 USCIS-PM A.6(C)(3)]. See 8 CFR 204.2(h).

[^ 23] See 8 CFR 103.2(a).

[^ 24] See 8 CFR 103.2(a)(7)(ii)(D)(3).

[^ 25] See 8 CFR 103.2(a)(7)(ii)(D)(2).

[^ 26] See 8 CFR 103.2(a)(7)(ii)(D)(3).

[^ 27] See 8 CFR 103.2(a)(7)(ii)(D)(3).

[^ 28] See 8 CFR 103.2(a)(7)(iii).

[^ 29] See 8 CFR 205.2.

[^ 30] See 8 CFR 106.1(c)(2).

[^ 31] Otherwise, USCIS considers the requestor to have failed to file the required fees. See 8 CFR 103.2(a)(1).

[^ 32] In accordance with 8 CFR 103.3 and the applicable form instructions.

[^ 33] See 8 CFR 103.3.

[^ 34] USCIS generally considers the postmark as the date on the envelope or parcel indicating the day the item was delivered into the care of the U.S. Postal Service or commercial courier.

[^ 35] Based on regulation at 8 CFR 103.2(a), USCIS considers the received date for mailed filings to be the date the benefit request is received at the lockbox or USCIS facility and USCIS records the date that the form is received. For electronic filings, USCIS considers the received date to be the same as the case accepted date which occurs when the requestor has completed both the form through a myUSCIS account and the payment through pay.gov.

[^ 36] USCIS deems the Registration for Classification as Refugee (Form I-590) to be filed on the date the applicant is interviewed by a USCIS refugee officer and the applicant signs the Form I-590 at the conclusion of the interview. USCIS does not apply a date stamp and does not issue a Notice of Action, Form I-797.

[^ 37] See 8 CFR 103.2(a)(7)(ii).

[^ 38] See 8 CFR 204.1(b). For more information, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability, Subsection 3, Priority Dates [7 USCIS-PM A.6(C)(3)] and the USCIS webpage on Visa Availability and Priority Dates.

[^ 39] See 8 CFR 204.11(b)(1).

[^ 40] See 8 CFR 207.7(d) and 8 CFR. 208.21(d).

[^ 41] See the U.S. Office of Personnel Management's website for a list of federal holidays.

[^ 42] See 8 CFR 1.2 ("when computing the period of time for taking any action provided in this chapter including the taking of an appeal, shall include Saturdays, Sundays, and legal holidays, except that when the last day of the period computed falls on a Saturday, Sunday, or a legal holiday, the period shall run until the end of the next day which is not a Saturday, Sunday, or a legal holiday."). For example, in the case of an individual who applies for adjustment of status on the basis of eligibility as a T or U nonimmigrant, if the last day before the expiration date of T or U nonimmigrant status occurs on a Saturday, Sunday, or federal holiday, the applicant has until the end of the next business day after the Saturday, Sunday, or federal holiday for USCIS to physically receive their properly filed and receipted application. See 8 CFR 103.2(a)(7)(ii) (properly filed and receipted), 8 CFR 245.24(b)(2)(ii) (pertaining to U nonimmigrant eligibility for adjustment of status) and 8 CFR 245.23(a)(2)(ii) (pertaining to T nonimmigrant eligibility for adjustment of status).

[^ 43] The definitions in 8 CFR 1.2 generally apply to all benefit requests in 8 CFR Chapter I unless the statutes or regulations for the specific benefit request contain provisions that supersede those definitions. Certain immigration benefits, such as asylum applications, are governed by different regulations and procedures regarding Requests for Evidence, Notices of Intent to Deny, denials, and terminations. Therefore, the guidance in this Part does not apply to those immigration benefits governed by different regulations. For example, 8 CFR 1.2 does not apply to calculating the 1-year filing deadline for asylum, because it is superseded by 8 CFR 208.4(a)(2).

[^ 44] As provided under 8 CFR 103.2(a)(7)(i).

[^ 45] Regulations at 8 CFR 103.2(a)(7)(i) state, "USCIS will consider a benefit request received and will record the receipt date as of the actual date of receipt at the location designated for filing such benefit request whether electronically or in paper format." In addition, see Volume 1, General Policies and Procedures, Part B, Submission of Benefit Requests, Chapter 6, Submitting Requests, Section A, How to Submit [1 USCIS PM B.6(A)].

Part C - Biometrics Collection and Security Checks

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures.

See more

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures. We are working quickly to update and incorporate all of the AFM content into the USCIS Policy Manual, the agency's centralized online repository for immigration policies. Until then, we have moved any remaining AFM content to its corresponding Policy Manual Part. To the extent that a provision in the Policy Manual conflicts with remaining AFM content or Policy Memoranda, the updated information in the Policy Manual prevails. If you have questions or concerns about any discrepancies among these resources, contact PolicyFeedback@uscis.dhs.gov.

AFM Chapter 10 - An Overview of the Adjudication Process (External)

Chapter 1 - Purpose and Background

A. Purpose

As part of its administration of immigration benefits, USCIS has the general authority to require and collect biometrics, which include fingerprints, photographs, and digital signatures, from any person[1] seeking any immigration or naturalization benefit or request.[2]

B. Background

Biometrics collection allows USCIS to verify a person's identity, produce secure documents, and facilitate required criminal and national security background checks to protect national security and public safety, as well as to ensure that the person is eligible for the benefit sought. Biometrics collection and security checks enhance national security and protect the integrity of the immigration process by ensuring that USCIS only grants benefits to eligible requestors.

In addition, depending on the particular application, petition, or request filed, USCIS conducts security checks, which may include conducting fingerprint-based background checks, requesting a name check from the Federal Bureau of Investigation (FBI), and other DHS or inter-agency security checks.

USCIS promotes national security and public safety by conducting screening and vetting in all immigration programs. Screening and vetting standards include those needed for identity verification, which is crucial to protect against fraud and help USCIS determine if a person is eligible to receive an immigration benefit. Historically, USCIS collected biometrics (including photographs) for background and security checks. Presently, biometrics are also stored and used to verify a person's identity in subsequent encounters with DHS.

C. Legal Authorities

- 8 CFR 103.16 – Collection, use, and storage of biometric information
- 8 CFR 103.2 – Submission and adjudication of benefit requests
- INA 105 – Liaison with internal security officers
- INA 335; 8 CFR 335.1; 8 CFR 335.2 – Investigation and examination of applicants for naturalization

Footnotes

[^ 1] The term person includes any applicant, petitioner, beneficiary, sponsor, derivative, requestor, or person filing or associated with a benefit request.

[^ 2] The term biometrics refers to "the measurable biological (anatomical and physiological) or behavioral characteristics of a natural person, including the person's fingerprints, photograph, or signature."

Chapter 2 - Biometrics Collection

A. Biometric Services Appointments

After a person files an application, petition, or other benefit request, USCIS may schedule a biometric services appointment at a local Application Support Center (ASC).[1] The appointment notice indicates the date, time, and location of the appointment. The person submitting biometrics should bring the appointment notice and valid, unexpired photo identification (for example, Permanent Resident Card (Form I-551), passport, or driver's license), or other identity documentation[2] as authorized by USCIS to the appointment.

USCIS considers a person to have abandoned an application, petition, or request if the person fails to appear for the biometric services appointment unless, by the appointment time, USCIS receives a change of address or rescheduling request that it concludes warrants excusing the failure to appear.[3]

1. Timely Requests to Reschedule

Benefit requestors[4] who need to reschedule a biometric services appointment should follow the instructions provided in the appointment notice. USCIS only accepts rescheduling requests made through a myUSCIS online account or to the USCIS Contact Center and does not accept requests to reschedule submitted by mail or in person at a USCIS office.[5]

An authorized representative with a properly filed Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28) may also request to reschedule an appointment on behalf of their client through a myUSCIS online account or the USCIS Contact Center.

Any person required to appear for a biometric services appointment may, before the scheduled date and time, request that USCIS reschedule the appointment for good cause.[6] For the purposes of determining whether to grant a biometric services appointment reschedule request, good cause exists when the benefit requestor provides a sufficient reason for their inability to appear on the scheduled date.

Sufficient reasons may include, but are not limited to:

- Illness, medical appointment, or hospitalization;
- Previously planned travel;
- Significant life events such as a wedding, funeral, or graduation ceremony;
- Inability to obtain transportation to the appointment location;
- Inability to obtain leave from employment or caregiver responsibilities; and
- Late delivered or undelivered biometric services appointment notice.[7]

2. Missed Biometric Services Appointments[8]

In accordance with regulations, USCIS considers a benefit request abandoned and denied[9] if the benefit requestor fails to appear for a biometric services appointment unless, by the appointment time, USCIS receives a notice of a change of address or a request to reschedule the appointment that USCIS concludes warrants excusing the failure to appear.[10]

Applicants who have filed an Application for Asylum and for Withholding of Removal (Form I-589) who fail to comply with fingerprint processing without good cause will not have their applications denied for abandonment. Instead, USCIS may dismiss[11] the asylum application if the applicant is in lawful immigration status or paroled, or refer the application to an

immigration judge if the applicant is not in lawful immigration status or paroled.

Timely Notice of Change of Address

Before USCIS denies a benefit request for abandonment, USCIS reviews the record of proceeding and relevant systems for evidence of a notice of a change of address.[12] USCIS reschedules the biometric services appointment when a change of address is received by the appointment time.

Timely Request to Reschedule

Before denying for abandonment, USCIS reviews the record of proceeding and relevant systems for reschedule requests. USCIS reschedules the biometric services appointment when the benefit requestor submits, by the appointment time, a request to reschedule and provides a sufficient reason for the inability to appear.[13]

Untimely Request to Reschedule

A benefit request is considered abandoned and is denied when a requestor fails to appear for a biometric services appointment and USCIS has not received a rescheduling request by the appointment time.[14] However, notwithstanding the regulation and based on case law, agencies have some latitude to relax procedural rules adopted for the orderly transaction of business if justice so requires under the circumstances.[15]

Therefore, when a benefit requestor submits a request to reschedule the appointment after the appointment date has passed, and if the benefit request remains pending, USCIS may, in its discretion and based on the applicant's circumstances, consider whether the benefit request has been abandoned. In considering abandonment and whether the officer should exercise discretion to reschedule based on the applicant's circumstances, USCIS reviews such factors as:

- The length of time between the missed appointment and the reschedule request;
- Whether the benefit requestor has a sufficient reason[16] for failing to appear; and
- Whether a denial would cause undue hardship or expense.

USCIS only accepts untimely rescheduling requests made to the USCIS Contact Center and does not accept untimely requests to reschedule by mail or in person at a USCIS office or through the myUSCIS online rescheduling tool.

No Evidence of Change of Address or Request to Reschedule

USCIS considers a benefit request abandoned if the requestor fails to appear for a biometric services appointment and there is no evidence of a change of address or a request to reschedule.[17]

When USCIS denies an application for abandonment, USCIS notifies the requestor and the authorized representative, as appropriate, of the decision in writing.[18] The priority or processing date of an abandoned benefit request may not be applied to a later benefit request.[19]

B. Mobile Biometrics Collection

Mobile biometrics collection refers to a service USCIS provides in which the agency collects biometrics (for example, fingerprints and photographs, etc.) from persons with pending benefit requests (including derivatives, beneficiaries, or both), at pre-determined locations outside of an ASC. Mobile biometrics collection is typically performed by USCIS employees or contractors.[20] USCIS has sole discretion to conduct mobile biometrics collection.[21]

USCIS may provide domestic mobile biometric services to persons with a disability or health reason that prevents them from appearing in person at an ASC.[22] In very limited circumstances, USCIS may, in its sole discretion, provide domestic mobile biometric services to other benefit requestors who are unable to attend scheduled ASC appointments in person.[23]

Remote Locations

USCIS may, in its sole discretion and on a case-by-case basis, provide mobile biometrics collection services to persons residing in remote locations within the United States who are unable to attend scheduled ASC appointments in person.

When determining whether to exercise its discretion after a request for mobile biometrics collection, USCIS considers circumstances such as the difficulty of travel, the distance a person must travel to an ASC, and efficient use of USCIS resources. If USCIS can provide mobile biometric services, USCIS will inform the person.

Persons in Custody

USCIS does not grant requests to collect biometrics from persons in custody at correctional institutions. USCIS officers and contract staff therefore do not travel to jails, prisons, or similar non-DHS detention facilities to perform biometric collections for any detained or incarcerated persons (including applicants, petitioners, beneficiaries, derivatives, sponsors, or other requestors, regardless of their immigration status or country of citizenship). In the case of an incarcerated person, USCIS officers must continue to follow all applicable regulations and procedures in issuing ASC notices to those whose appearance is required for biometrics collection. Per intradepartmental agreement, U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations is responsible for completing background and security checks for those who are incarcerated at DHS facilities and applying for benefits with USCIS.

USCIS generally does not approve requests to reschedule a biometrics appointment for reason of detention or incarceration. The person must follow the procedures listed in the biometrics appointment notice to request their appointment be rescheduled.[24]

C. Fingerprint Waivers

A person may qualify for a waiver of the fingerprint requirement if he or she is unable to provide fingerprints because of a medical condition,[25] including but not limited to disability, birth defects, physical deformities, skin conditions, and psychiatric conditions.[26] Only certain USCIS employees are authorized to grant a fingerprint waiver.

A USCIS employee responsible for overseeing a person's fingerprinting may grant the waiver if all of the following requirements are met:

- The applicant, petitioner, beneficiary, sponsor, derivative, requestor, or individual person filing or associated with a benefit request appeared in person for the biometrics collection;

- The officer or authorized technician attempted to fingerprint the person (or determined that such an attempt was impossible); and
- The officer determines that the person is unable to be fingerprinted at all or is unable to provide a single legible fingerprint.

A USCIS employee should not grant a waiver if the waiver is solely based on the following situations:

- The person has fewer than 10 fingers;
- The officer considers the person's fingerprints as unclassifiable; or
- The person's condition preventing the fingerprint collection is temporary.

If a fingerprint waiver is granted, the waiver is valid only for the particular application(s), petition(s), or benefit request(s) listed on the ASC notice for which biometrics are collected. The person must request a fingerprint waiver for each individual application, petition, or benefit request subsequently filed if the subsequent filing has a biometrics collection requirement.

A person who is granted a fingerprint waiver must bring local police clearance letters or other form-specific documentation[27] covering the relevant periods to the interview. All clearance letters become part of the record. In cases where the person is granted a fingerprint waiver or has two unclassifiable fingerprint results, USCIS must take a sworn statement from the person covering the relevant periods.

USCIS' decision to deny a fingerprint waiver is final and may not be appealed.

D. Biometrics Collected [Partially Reserved]

[Partially Reserved]

1. Fingerprints [Reserved]

[Reserved]

2. Photographs

USCIS imbeds a photograph when creating secure documents as a security feature.[28] There are instances where USCIS requires a photograph be submitted with an application, petition, or request in order to create a secure document and the application, petition, or request does not have an associated biometrics collection requirement.[29] Where the applicant, petitioner, or requestor fails to submit a photograph at time of filing, USCIS may issue a Request for Evidence.

3. Signatures [Reserved]

[Reserved]

Footnotes

[^ 1] See 8 CFR 103.2(b)(9). For benefit requestors residing outside of the United States, USCIS may schedule biometrics collection at a USCIS office abroad, at a U.S. embassy or consulate, or at a U.S. military installation abroad. See 8 CFR 103.16. An exception to the requirement to collect new biometrics exists in the case of military naturalization. For military naturalization cases, a biometric background check must be performed, but USCIS may use previously collected fingerprints from a different immigration filing or may use fingerprints collected as part of enlistment processing to perform the check. For more information relating to biometrics collection for military members, see Volume 12, Citizenship and Naturalization, Part I, Military Members and their Families, Chapter 6, Required Background Checks, Section C, Ways Service Members may Meet Fingerprint Requirement [12 USCIS-PM I.6(C)].

[^ 2] Some aliens classified as special immigrant juvenile (SIJs) may not have government-issued photo identification. In this situation, USCIS may accept as evidence of identity a court-issued order citing the SIJ as the subject of the order, or official documentation issued by the U.S. Department of Health and Human Services (HHS) for unaccompanied children who are or have been in the custody of HHS. For more information on how to prepare for a biometric services appointment, see the Preparing for Your Biometric Services Appointment webpage.

[^ 3] See 8 CFR 103.2(b)(13)(ii).

[^ 4] For purposes of this Policy Manual part, the term requestor means any applicant, petitioner, sponsor, beneficiary, or individual filing a benefit request. See 8 CFR 103.2(b)(9).

[^ 5] For more information on rescheduling a biometric services appointment, see the Preparing for Your Biometric Services Appointment webpage.

[^ 6] See 8 CFR 103.2(b)(9)(ii). A benefit requestor may also appear at the ASC before the scheduled date or withdraw the benefit request. See 8 CFR 103.2(b)(9)(i) and 8 CFR 103.2(b)(9)(iii).

[^ 7] Benefit requestors may become aware of an undelivered biometric services appointment notice through their myUSCIS account or USCIS' Case Status Online tool.

[^ 8] This subsection does not apply to applicants who have filed an Application for Asylum and for Withholding of Removal (Form I-589). See instead 8 CFR 208.10 (Failure to comply with fingerprint processing without good cause may result in dismissal of the application. Failure to appear at the fingerprint appointment will be excused if the applicant demonstrates that such failure was the result of exceptional circumstances.).

[^ 9] See Part E, Adjudications, Chapter 9, Rendering a Decision, Section B, Denials, Subsection 2, Abandonment Denials [1 USCIS-PM E.9(B)(2)].

[^ 10] See 8 CFR 103.2(b)(13)(ii).

[^ 11] See 8 CFR 208.10.

[^ 12] Evidence of such notice may include written correspondence from the benefit requestor or authorized representative, notice of change of address to the USCIS Contact Center, U.S. Postal Service address correction services, or Alien's Change of Address Card (Form AR-11). For more information, see the How to Change Your Address webpage.

[^ 13] For examples of what warrants excusing a failure to appear, see Subsection 1, Timely Requests to Reschedule [1 USCIS-PM C.2(A)(1)].

[^ 14] See 8 CFR 103.2(b)(13)(ii).

[^ 15] While generally regulations must be followed by an agency as well as the regulated public, courts have allowed agencies some latitude to relax their procedural requirements in the interest of justice. See *American Farm Lines v. Black Ball Freight Services*, 397 U.S. 533, 539 (1970).

[^ 16] For examples of sufficient reasons, see Subsection 1, Timely Requests to Reschedule [1 USCIS-PM C.2(A)(1)].

[^ 17] See 8 CFR 103.2(b)(13).

[^ 18] See 8 CFR 103.3(a)(1)(i). A denial due to abandonment may not be appealed, but an applicant or petitioner may file a motion to reopen. See 8 CFR 103.2(b)(15). A denial due to abandonment may only be reopened in limited circumstances. See 8 CFR 103.5(a)(2)(i)-(iii).

[^ 19] See 8 CFR 103.2(b)(15).

[^ 20] In some instances, USCIS may use other government agencies to perform remote biometrics collection. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Title I, Pub. L. 105-119 (PDF), 111 Stat. 2440, 2447-2448 (November 26, 1997). See 8 CFR 103.2(b)(9) and 8 CFR 103.16(a).

[^ 21] See 8 CFR 103.16 and 8 CFR 103.2(b).

[^ 22] The USCIS website provides a definition of the term accommodation; mobile biometrics is only one subset of accommodations. For more information on accommodations generally, see the Disability Accommodations for the Public webpage.

[^ 23] See the USCIS Contact Center webpage.

[^ 24] If the person is no longer in custody, he or she must also submit a change of address request on an Alien's Change of Address Card (Form AR-11) for the appointment to be rescheduled at the new address.

[^ 25] The regulations at 8 CFR 204.3(c)(3) allow USCIS to waive the fingerprint requirement for prospective adoptive couples or additional adult members of the prospective adoptive parents' household when it determines that such adult is "physically unable to be fingerprinted because of *age* or medical condition." (Emphasis added.) As such, solely with respect to Petition to Classify Orphan as an Immediate Relative (Form I-600) and Application for Advance Processing of an Orphan Petition (Form I-600A) adjudications, USCIS must also consider whether the person is unable to be fingerprinted due to age in addition to medical condition.

[^ 26] The officer responsible for overseeing fingerprinting may request that a licensed mental health professional (that is, a psychologist, psychiatrist, or similar practitioner) or a licensed medical practitioner who has responsibility for the person's care submit reasonable documentation in accordance with the procedure laid out in Part A, Public Services, Chapter 6, Disability Accommodation Requests [1 USCIS-PM-A.6].

[^ 27] For example, affidavits under 8 CFR 204.310(b) for an Application for Determination of Suitability to Adopt a Child from a Convention Country (Form I-800A) if the person is "physically unable to comply" with biometrics collection.

[^ 28] For example, Permanent Resident Card (Form I-551) and Employment Authorization Document (Form I-766).

[^ 29] See the relevant form instructions for more information.

Chapter 3 - Security Checks [Reserved]

Part D - Attorneys and Representatives

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures.

See more

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures. We are working quickly to update and incorporate all of the AFM content into the USCIS Policy Manual, the agency's centralized online repository for immigration policies. Until then, we have moved any remaining AFM content to its corresponding Policy Manual Part. To the extent that a provision in the Policy Manual conflicts with remaining AFM content or Policy Memoranda, the updated information in the Policy Manual prevails. If you have questions or concerns about any discrepancies among these resources, contact PolicyFeedback@uscis.dhs.gov.

AFM Chapter 12 - Attorneys and Other Representatives (External)

Part E - Adjudications

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See more

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AFM Chapter 10 - An Overview of the Adjudication Process (External)

AFM Chapter 11 - Evidence (External)

AFM Chapter 15 - Interview Techniques (External)

Chapter 1 - Purpose and Background

A. Purpose

In administering U.S. immigration laws, one of USCIS' primary functions is to adjudicate immigration benefit requests.

Upon proper filing, each benefit request must be thoroughly reviewed to determine jurisdiction, presence of required supporting documentation, existence of related files, and eligibility.

This part provides general guidance on how USCIS adjudicates across the various types of benefit requests.[1] Variations in requirements and procedures may exist, depending on the benefit type, and are discussed in more detail in the program-specific parts of the Policy Manual.[2]

B. Background [Reserved]

[Reserved]

C. Legal Authorities

- Homeland Security Act of 2002[3]
- Federal Records Act of 1950, 44 U.S.C. 31, as amended – Records management by federal agencies
- Privacy Act of 1974, 5 U.S.C. 552a, as amended[4] – Records maintained on individuals
- Freedom of Information Act, 5 U.S.C. 552 – Public information; agency rules, opinions, orders, records, and proceedings
- INA 103 – Powers and duties of the Secretary, Under Secretary, and Attorney General
- 8 CFR 103.2 – Submission and adjudication of benefit requests
- INA 291 – Burden of proof upon alien
- Delegation of Authority 0150.1 – Delegation to the Bureau of Citizenship and Immigration Services

Footnotes

[^ 1] For purposes of this Policy Manual part, the term requestor means the person, organization, or business requesting an immigration benefit from USCIS. This may include an applicant or petitioner, depending on the request. The term benefit request means any application, petition, appeal, motion, or other request submitted to USCIS for adjudication.

[^ 2] Certain immigration benefit requests, such as asylum or refugee applications, are governed by different regulations and procedures. Therefore, the guidance in this chapter may not apply to these immigration benefits governed by different regulations. Officers should consult the corresponding Policy Manual part and procedures for program-specific guidance.

[^ 3] See Pub. L. 107–296 (PDF), 116 Stat. 2135 (November 25, 2002).

[^ 4] See Pub. L. 93-579 (PDF), 88 Stat. 1896 (December 31, 1974).

Chapter 2 - Record of Proceeding

A. Maintaining a Record of Proceeding

A record of proceeding is the organized, official material constituting the record of any application, petition, hearing, or other proceeding before USCIS. A record of proceeding is typically contained within an Alien Registration File (A-File) or other agency file or electronic case management system, or a hybrid paper and electronic file.[1]

B. A-Files

A-files are a series of records maintained on a person that document the person's immigration history. A-files are created when an application or petition for a long-term or permanent benefit is received, or when enforcement action is initiated.

A-files may exist in physical format, or they may be created in digital format in various electronic case management systems, or they may be a hybrid of both paper and electronic files.[2]

A-files are stored and maintained by Department of Homeland Security (DHS) for persons born less than 100 years ago. For persons born 100 years ago or more, A-files are transferred to and stored by the National Archives and Records Administration (NARA).

Footnotes

[^ 1] Information contained in a record of proceeding is protected by the Privacy Act. For more information on the Privacy Act and confidentiality provisions, see Part A, Public Services, Chapter 7, Privacy and Confidentiality, [1 USCIS-PM A.7].

[^ 2] Digitized A-files may exist in the Enterprise Document Management System (EDMS) or STACKS.

Chapter 3 - Jurisdiction

A. Coordination in Cases Involving Removal Proceedings

In some cases, U.S. Immigration and Customs Enforcement (ICE) may notify USCIS of an application or petition pending with USCIS for a person in removal proceedings that must be timely adjudicated. In these cases, USCIS attempts to issue a decision on the relevant petition or application within 30 calendar days of receiving the necessary file(s) if the person is detained. If the person is not detained, USCIS attempts to issue a decision within 45 calendar days of receiving the file(s). If the next hearing in the removal case is scheduled within the 30- or 45-day time frame, USCIS typically works with ICE, to the extent possible, to complete action on the petition or application before the hearing date. USCIS maintains communication with ICE regarding the progress and status of the case.

USCIS adjudicates all immigration benefit requests according to existing laws, regulations, and USCIS policies and procedures. If acting on ICE's request to adjudicate an application or petition might compromise those responsibilities or adherence to any law, regulation, policy or procedure, USCIS notifies ICE that the adjudication cannot be completed within the 30- or 45-day timeframe. USCIS continues to communicate with ICE about the status of the case.

To the extent ICE currently coordinates directly with USCIS service centers with respect to benefit requests pending at the service centers, this guidance does not supersede or amend those arrangements.

B. Transferring Jurisdiction

A pending application or petition may be transferred to a different office or jurisdiction for several reasons, including but not limited to:

- The application or petition was not filed in the proper jurisdiction;
- The benefit requestor now resides within another jurisdiction;
- An application or petition pending at a service center appears to warrant an in-person interview at a field office; or
- Regulations require transfer of an application or petition to another office for specific action.

For certain applications, such as an Application for Naturalization (Form N-400), the applicant must meet certain jurisdictional requirements relating to residency as of the date of filing; transferring jurisdiction alone may not adequately address such filing deficiency.[1]

Footnote

[^ 1] See Volume 12, Citizenship and Naturalization, Part D, General Naturalization Requirements, Chapter 6, Jurisdiction, Place of Residence, and Early Filing [12 USCIS-PM D.6].

Chapter 4 - Burden and Standards of Proof

A. Burden of Proof

The burden of proof to establish eligibility for an immigration benefit always falls solely on the benefit requestor.[1] The burden of proof never shifts to USCIS.

Once a benefit requestor has met his or her initial burden of proof, he or she has made a prima facie case. This means that the benefit requestor has come forward with the facts and evidence which show that, at a minimum, and without any further inquiry, he or she has proven initial eligibility for the benefit sought, though in certain cases the officer is then required to determine whether approval or denial is appropriate, in his or her discretion.

B. Standards of Proof

The standard of proof is different than the burden of proof. The standard of proof is the amount of evidence needed to establish eligibility for the benefit sought. The standard of proof applied in most administrative immigration proceedings is the preponderance of the evidence standard. Therefore, even if there is some doubt, if the benefit requestor submits relevant, probative, and credible evidence that leads an officer to believe that the claim is “probably true” or “more likely than not,” then the benefit requestor has satisfied the standard of proof.[2]

If the requestor has not met this standard, it is appropriate for the officer to either request additional evidence or issue a notice of intent to deny, or deny the case.[3]

The preponderance of the evidence standard of proof does not apply to those applications and petitions where a different standard is specified by law. The Immigration and Nationality Act (INA) provides for a higher standard in some cases, such as the clear and convincing evidence standard that is required when a beneficiary enters into a marriage while in exclusion, deportation, or removal proceedings, and to determine the citizenship of children born out of wedlock.[4]

Footnotes

[^ 1] See INA 291.

[^ 2] See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (defining “more likely than not” as a greater than 50 percent probability of something occurring).

[^ 3] See Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)] for more information.

[^ 4] See INA 245(e)(3). See INA 309(a)(1).

Chapter 5 - Verification of Identifying Information

As part of the adjudication of immigration benefits requests, USCIS reviews evidence, including biographical and biometrics information, submitted by the benefit requestor, as well as DHS systems, to verify identifying information.

A. Full Legal Name

In general, the requestor’s full legal name is comprised of the requestor’s:

- Given name (first name);
- Middle name(s) (if any); and
- Family name (last name).

The legal name is one of the following:

- The requestor’s name at birth as it appears on the birth certificate (or other qualifying identity documentation when a birth certificate is unavailable);[1]
- The requestor’s name following a legal name change (such as a petition for name change or adoption decree or order); or
- The requestor’s name following a common law name change evidenced by a state-issued identification document.[2]

Determining a Benefit Requestor’s Legal Name

When reviewing an immigration benefit request, the officer must review all evidence to support the name provided on the request.[3] Examples of evidence that the name used is the requestor’s legal name are as follows:

- Birth certificate;[4]
- Civil marriage certificates, certificates of domestic partnership, and civil union certificates;
- Divorce decree;
- Family registry entry;
- Government-issued identity document (including passport);
- Certificate of naming;
- Court order; or
- Documentation demonstrating change of name by operation of state or local law.[5]

Officers may determine the legal name by examining any one document or a combination of documents. Officers should use the requestor's expressed preference for their name from the evidence reviewed if their preferred name is confirmed by the governing state or local law.[6] If documents submitted in support of the benefit request do not support the name desired or claimed by the requestor, an officer may request additional evidence.[7]

1. Name Changes

The place of jurisdiction controls whether the name change is legally valid.

Foreign Law

If the benefit requestor changes their name while under foreign jurisdiction, USCIS considers the name change to be legally valid if the country has jurisdiction over the requestor at the time of the change and the change is legally valid and documented under that country's law. For questions relating to the validity of a legal name change that occurred in a foreign country, officers may review the case with local counsel, review the U.S. Department of State's Reciprocity Schedule for available documentation, and request a Library of Congress report.

Common Law

In the United States, including its territories and possessions, state and local law govern name changes. Therefore, USCIS may issue a document in a new name based on the operation of the provisions of any state or local law that recognizes a new name. If the requestor resides in a state that recognizes common law name changes, the requestor may provide a state-issued identification document and appropriate documentation issued by the state or locality recognizing a common law name change based upon customary usage. The documentary evidence should show the issue date, acquired name, and at least one other piece of identifying data such as the applicant's date of birth, place of birth, age, photograph, or Social Security number. Acceptable documentary evidence includes but is not limited to driver's licenses and non-driver state-issued identification. For questions relating to the validity of a common law name change, officers may review the case with local counsel.

Name After Marriage or Divorce

A married person may retain their pre-marital name or use a different legal married name (such as a spouse's surname or a hyphenated name combining the pre-marital name and spouse's surname). This change is often dependent on the married person's preferences and may not be the name as it appears on a marriage license or certificate. However, if the marriage occurred in the United States, the officer should refer to the applicable state law to determine if the name change should be reflected on the marriage license or certificate.

Similarly, a divorce might result in a change of name. Such change may be reflected on the divorce decree or order in support of the decree. As with marriages, the officer should refer to the applicable state law to determine if the name change should be reflected on the divorce decree.

2. Construction of Foreign Names

Construction of foreign names varies from culture to culture.[8] For example, certain countries' birth certificates display names in this order: family name, middle name, given name. This contrasts with most birth certificates issued in the United States, which display names in this order: given name, middle name, family name.[9]

When determining a benefit requestor's legal name, officers should be aware of the varying construction of foreign names. Officers also can consider the requestor's preferences if consistent with the governing state or local law.[10] Officers should verify that the legal name entered in USCIS systems reflects U.S. customary name order (given name, middle name, family name) to avoid USCIS issuing an incorrect name on USCIS secure identity documents.[11]

For purposes of determining a requestor's legal name, officers consider the foreign construction of the name. For example, a Vietnamese birth certificate or passport might read:

Nguyen [Family Name] Van [Middle Name] Nam [Given Name]

Although the foreign government-issued documentation may display in that order, USCIS considers the legal name to be Nam Van Nguyen.

In some cultures, a person may have two first names and two last names and may use all their names or only some through customary usage. For example, a Mexican birth certificate or passport might read:

Maria [Given Name] Guadalupe [Given Name] Gonzalez [Father's Paternal Last Name] Gomez [Mother's Paternal Last Name]

Although the foreign government-issued documentation may be displayed in that order, USCIS may consider the legal name to be any of the following, if supported by evidence:

- Maria Guadalupe Gonzalez Gomez
- Maria Gonzalez Gomez
- Guadalupe Gonzalez Gomez
- Maria Gonzalez
- Guadalupe Gonzalez

One-Word Names

Some benefit requestors may only have a one-word name, or mononym. The mononym may be a given name only, or a family name (last name) only. For example, in Afghanistan, it is common to have a name that consists of a given name only:

- Laila [Given Name]

For purposes of properly filing benefit requests, data entry in USCIS systems, and issuing secure documents such as Permanent Resident Cards or travel documents, when a benefit requestor has a single name, USCIS considers the single name as the family name. USCIS may insert No Name Given as the given name in this circumstance.

B. Personal Information

1. Date of Birth [Reserved]

[Reserved]

2. Sex

Certain USCIS applications, petitions, and requests require a benefit requestor to indicate his or her sex. In these cases, a benefit requestor must provide his or her biological sex as generally evidenced on his or her birth certificate issued at the time of birth or issued closest to the time of birth. Sex is not "gender identity."

Many immigration benefits require sex (male (M) or female (F)) and not gender, two examples of which are INA 338 that requires the bearer's "sex" on the Certificate of Naturalization, and a host of immigration benefits that rely on the binary legal term "sons or daughters" for the allocation of immigrant visas, such as family-sponsored visas under INA 203(a), alien witness or informant (S) visas under INA 101(a)(15)(S), and employment-based investor (EB-5) visas under INA 203(b)(5).[12]

USCIS only recognizes the two biological sexes: male (M) or female (F). If there is a discrepancy between the requestor's selection and the birth certificate issued at the time of birth or issued closest to the time of birth, USCIS considers the sex indicated on the requestor's birth certificate to be controlling, provided the birth certificate issued at the time of birth or issued closest to the time of birth indicates a male or female sex. Where a birth certificate issued at the time of birth or issued closest to the time of birth indicates a sex other than male or female, USCIS may base the determination of sex on secondary evidence in the record, where available.[13]

USCIS does not deny immigration benefits solely based on a failure to properly indicate the benefit requestor's sex. However, USCIS must indicate the benefit requestor's sex when issuing certain documents,[14] and USCIS does not issue a document indicating a sex that is inconsistent with the benefit requestor's biological sex as generally evidenced on a birth certificate issued at the time of birth or issued closest to the time of birth (provided the birth certificate indicates a male or female sex).[15] Therefore, if a benefit requestor does not indicate their sex or indicates a sex different from the sex on his or her birth certificate issued at the time of birth or issued closest to the time of birth, it may cause delays in adjudication.

Footnotes

[^ 1] There may be instances in which a birth certificate is unobtainable because of country conditions or personal circumstances. In these instances, a requestor may submit secondary evidence or affidavits to establish the requestor's identity. Any affidavit should explain the reasons primary evidence is unavailable. For more information, see the Department of State (DOS) Reciprocity Tables for identity documents that cannot be obtained in particular countries and during specific time periods. Asylum applicants may be able to establish their identity, including their full legal name, with testimony alone.

[^ 2] Certain states recognize common law name changes. USCIS recognizes common law name changes if the benefit requestor's state of residence has recognized such a name change through the issuance of a state-issued identification document. See Subsection 1, Name Changes [1 USCIS-PM E.5(A)(1)].

[^ 3] In addition, various regulatory provisions specifically discuss name change requirements. See 8 CFR 204.2 (certain family-based immigrant petitions). See 8 CFR 320.3(b) and 8 CFR 322.3(b) (Certificates of Citizenship for certain children born outside the United States).

[^ 4] An adoption decree or order may result in the issuance of a birth certificate in a new name.

[^ 5] In the United States, including its territories and possessions, state and local law govern name changes. Therefore, USCIS may issue a document in a new name based on the operation of the provisions of any state law that recognizes a new name. If the requestor resides in a state that recognizes common law name changes, the requestor may provide a state-issued identification document recognizing a common law name change based upon customary usage. The documentary evidence should show the issue date, acquired name, and one other piece of identifying data such as the applicant's date of birth, place of birth, age, photograph, or Social Security number. Acceptable documentary evidence includes but is not limited to driver's licenses or non-driver state-issued identification. See Subsection 1, Name Changes [1 USCIS-PM E.5(A)(1)].

[^ 6] Additional considerations may apply when adjudicating refugee and asylum-based adjustment of status applications. See Volume 7, Adjustment of Status, Part L, Refugee Adjustment, Chapter 5, Adjudication Procedures, Section C, Requests to Change Name or Date of Birth [7 USCIS-PM L.5(C)] and Section D, Spelling of Names and Naming Convention Issues [7 USCIS-PM L.5(D)]; and Part M, Asylee Adjustment, Chapter 5, Adjudication Procedures, Section D, Requests to Change Name or Date of Birth [7 USCIS-PM M.5(D)], and Section E, Spelling of Names and Naming Convention Issues [7 USCIS-PM M.5(E)].

[^ 7] See Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 8] For more information on the construction of foreign names and country or region-specific information, see A Guide to Names and Naming Practices (PDF).

[^ 9] For more information, see 8 Foreign Affairs Manual (FAM) 403.1, Name Usage and Name Change.

[^ 10] Additional considerations may apply when adjudicating refugee and asylum-based adjustment of status applications. See Volume 7, Adjustment of Status, Part L, Refugee Adjustment, Chapter 5, Adjudication Procedures, Section C, Requests to Change Name or Date of Birth [7 USCIS-PM L.5(C)] and Section D, Spelling of Names and Naming Convention Issues [7 USCIS-PM L.5(D)]; and Part M, Asylee Adjustment, Chapter 5, Adjudication Procedures, Section D, Requests to Change Name or Date of Birth [7 USCIS-PM M.5(D)], and Section E, Spelling of Names and Naming Convention Issues [7 USCIS-PM M.5(E)].

[^ 11] Benefit requestors may seek a new USCIS-issued secure document, often without a new application or fee, if based on correction of a USCIS error on the document. See Volume 11, Travel and Identity Documents, Part A, Secure Identity Documents Policies and Procedures, Chapter 3, Reissuance of Secure Identity Documents [11 USCIS-PM A.3].

[^ 12] See INA 203(b)(5)(A)(ii), which specifies "sons, or daughters."

[^ 13] For more information, see Chapter 6, Evidence [1 USCIS-PM E.6].

[^ 14] For example, USCIS indicates the benefit requestor's sex on Permanent Resident Cards, Employment Authorization Documents, Certificates of Naturalization, and Certificates of Citizenship.

[^ 15] USCIS may provide notice to benefit requestors if USCIS issues a USCIS document reflecting a sex different than that indicated by the benefit requestor on the request.

Chapter 6 - Evidence

Any evidence submitted in connection with a benefit request is incorporated into and considered part of the request.[1] The purpose of gathering evidence is to determine some fact or matter at issue. When adjudicating a benefit request under the preponderance of evidence standard, the officer examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is "more likely than not" or "probably" true.[2]

The administrative record created by an officer is often crucial in later proceedings relating to the same requestor, such as appeals, rescission proceedings, removal proceedings, applications for relief and protection from removal, other benefit requests, and investigations of fraud. Additionally, under the Jencks Act,[3] anyone who provides a statement at an administrative proceeding, such as an immigration interview, is a potential government witness whose statement the government may be required to produce. Therefore, officers and other USCIS staff must retain and enter into the administrative record the following:

- Written and signed affidavits from statements, such as sworn statements;
- Recordings and transcripts of interviews;
- Original interview notes;
- Original notes made during site visits and surveillance operations; and
- Original drafts of reports concerning interviews or surveillance operations if they are the first written record of the interview or surveillance.

A requestor must establish eligibility for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. If the evidence the requestor provides meets their burden of proof to establish eligibility,[4] USCIS approves the benefit request. If the law requires an exercise of discretion, USCIS can approve the request only if the requestor merits a favorable exercise of discretion and otherwise establishes eligibility.[5] If the evidence is not sufficient to establish eligibility, USCIS may request evidence or proceed to denial, as appropriate.

A. Initial and Additional Evidence [Reserved]

[Reserved]

B. Primary and Secondary Evidence

Each benefit request has specific eligibility requirements that a requestor must meet, which must be demonstrated by evidence. Any evidence the requestor submits in connection with a benefit request is incorporated into and considered part of the request.[6]

Some evidence is considered primary evidence, and other evidence is considered secondary evidence. Primary evidence is evidence that on its own proves an eligibility requirement. For example, a divorce certificate is primary evidence of a divorce. Secondary evidence is evidence that may demonstrate a fact is more likely than not true, but the evidence does not derive from a primary, authoritative source. Records maintained by religious or faith-based organizations showing that a person was divorced at a certain time are an example of secondary evidence of the divorce.

Likewise, a government-issued birth certificate is an example of primary evidence of the birth of a child, whereas a baptismal certificate is an example of secondary evidence of the birth of a child.[7]

USCIS requires primary evidence where such evidence is generally available according to the U.S. Department of State (DOS).[8] If the requestor cannot obtain such primary evidence, the requestor must demonstrate that the required primary evidence does not exist or cannot be obtained and provide secondary evidence.[9] Any secondary evidence submitted must overcome the unavailability of primary evidence.[10]

However, for some applications and petitions, such as asylum applications and applications for classification as a refugee, testimony alone may meet the evidentiary requirements.[11]

Primary Evidence that Does not Exist or Cannot be Obtained

Officers might encounter situations in which primary evidence is available according to DOS's U.S. Visa: Reciprocity and Civil Documents by Country webpage, but the applicant asserts it does not exist or cannot be obtained.[12] This generally gives rise to a presumption of ineligibility, which is the requestor's burden to overcome.[13] A requestor cannot simply assert that primary evidence does not exist.

In the absence of primary evidence as required by regulation,[14] the requestor must:

- Demonstrate that the required document does not exist or cannot be obtained by providing a written statement from the appropriate issuing authority attesting to the fact that no primary record exists and the reason the record does not exist;[15] and
- Submit secondary evidence that overcomes the unavailability of the primary evidence.

In the absence of primary and secondary evidence as required by regulation,[16] the requestor must:

- Demonstrate that the required document does not exist or cannot be obtained by providing a written statement from the appropriate issuing authority attesting to the fact that the primary record does not exist and the reason the record does not exist;
- Demonstrate the unavailability of any secondary evidence; and
- Submit two or more affidavits by persons who are not parties to the benefit request and who have direct personal knowledge of the event and circumstances.[17]

A requestor who is not able to provide a written statement of unavailability from the relevant foreign authority may instead submit evidence of repeated good faith attempts to obtain the required document or statement.[18]

Primary Evidence that is Generally Available but is Unreliable

Officers may also encounter cases where primary evidence is generally available, but DOS reports that such documents are unreliable. Civil records may be considered unreliable or require additional scrutiny for various reasons, including inaccurate recording, date of issuance, inconsistent standards for issuance, or widespread fraud.

If foreign documents submitted as primary evidence are unreliable according to DOS,[19] USCIS may request secondary evidence[20] in support of the benefit request. In cases where the secondary evidence is insufficient, or where interview criteria indicate, USCIS may refer the benefit requestor for an in-person interview. In addition, petitioners or applicants should be encouraged to submit all evidence at their disposal in response to any Request for Evidence (RFE). Whether evidence establishes the eligibility requirements is evaluated by the totality and quality of the evidence presented.

C. Copies vs. Originals

When adjudicating an immigration benefit, officers need to verify facts such as dates of marriage, birth, death, and divorce, as well as criminal and employment history. The “best evidence rule” states that where the facts are at issue in a case, the officer should request the original document. For example, if evidence of a divorce decree is required and a submitted photocopy looks altered, the officer should request the original divorce decree.

1. When Originals Required and Photocopies Permitted

When a requestor files a paper form[21] with USCIS, original documents may be required. Examples of supporting documents that requestors must generally present in the original are:

- Medical examinations;
- Affidavits; and
- Labor certifications.

Unless otherwise required, the requestor may submit a legible photocopy of any other supporting document at the time of filing.[22]

2. Requesting Original Documents

USCIS may, at any time, request submission of an original document for review. The request sets a deadline for submission of the original document.

If a requestor does not submit the requested original of the document by the deadline, USCIS may deny the benefit request as abandoned, based on the record, or both.[23]

3. Returning Original Documents

Upon completion of the adjudication, USCIS may return original documents if the submission was in response to a USCIS request. All retained originals become part of the record. Although USCIS does not automatically return originals that it did not request, offices are encouraged to voluntarily return submitted original documents.[24]

To request return of originals that were not returned during the adjudication process, the requestor may submit a Request for the Return of Original Documents (Form G-884).

D. Types of Evidence

Strict rules of evidence used in judicial proceedings do not apply in administrative proceedings, including benefits requests before USCIS. Usually, requestors may submit any oral or documentary evidence for USCIS’ consideration when determining eligibility for the benefit sought.

Because the strict rules of evidence do not apply in administrative proceedings, officers may consider a wide range of oral or documentary evidence.

1. Documentary Evidence

Documentary evidence includes all types of documents, records, and writings and is subject to the same considerations regarding competency and credibility as is testimonial evidence discussed below. Documentary evidence may be divided into two categories: public documents and private documents.

Public Documents

Public documents are the official records of legislative, judicial, and administrative bodies. A requestor may submit public documents as evidence to demonstrate eligibility for the benefit sought. For example, a government-issued birth certificate is a public document.

Birth or baptismal records maintained by officials in religious or faith-based organizations are not considered public documents but may be accepted as secondary evidence of birth if the actual place of birth is indicated on the certificate.

Private Documents

Private documents include all documents other than the official records of legislative, judicial, or administrative bodies of government. Requestors often submit private documents as supporting evidence for benefit requests. Private documents can include, but are not limited to, business or tax records, bank statements, affidavits, education credentials, or photographs.

2. Testimonial Evidence

Officers frequently take testimony to determine eligibility for immigration benefits.[25] An officer should only take testimony from a person who is mentally competent at the time set to testify. An officer should not attempt to take testimony from any person who might lack the mental capacity, such as:

- A person who has been found mentally incompetent by an appropriate authority;
- A person who is under the influence of drugs or alcohol; or
- A person the officer suspects is mentally incompetent. In those cases, the officer must clearly document their reason(s) for reaching that conclusion.

In any situation where the witness’ competency is in doubt, officers should supplement the record with the testimony of another witness, with other evidence relating to the same matter or reschedule the interview, per local procedures.

When interviewing minors, officers should consider the child’s age, stage of language development, and emotional maturity when eliciting testimony. Such interviews must be conducted with sensitivity and may warrant special considerations, including determining whether a trusted adult may be present.

Credibility of Testimony

Discrepancies in statements do not necessarily discredit the witness.[26] A truthful witness, in speaking of a past event, might not repeatedly reproduce the facts in their entirety without some change in detail.

Witnesses who have signed statements might later indicate that they wish to retract the statement, or they might give contrary testimony when later called upon to testify. USCIS may not prevent such witnesses from retracting or changing prior statements. However, contradictory statements may adversely impact the credibility of the witness.[27]

If an officer determines that the testimony of a witness is not credible, the written decision or interview notes or both should indicate this conclusion. However, it generally is not enough to simply say that the witness is not credible. Instead, the officer's decision should give the specific reason(s) for the conclusion and refer to evidence in the record that supports the conclusion.

Privileged Testimony

Officers may occasionally encounter the issue of privilege. A testimonial privilege allows the person who invokes it to bar testimony that would violate the privilege. Examples include the privilege against self-incrimination and spousal privileges.

Each privilege differs slightly in how it applies, such as whose testimony may be barred and who may invoke the privilege. The scope of the material covered by the privilege also differs.[28]

Sworn Statements

An officer may also take a sworn statement. A sworn statement is a written declaration given under an oath (or affirmation). It must be witnessed and signed and contain an accurate record of the questions asked, and answers received. The sworn statement becomes part of the permanent, official record and may be used in a subsequent proceeding or prosecution. The determination of benefit eligibility may depend on the evidence in the sworn statement and the interview record it creates may be particularly important in complex cases, such as those involving national security or fraud concerns.

An officer taking a sworn statement must focus on gathering all necessary information to make a decision. The officer must structure the statement in a manner that is logical, using a clear progression of facts and questions. Officers should explore each relevant fact uncovered in a statement by further questioning to the extent necessary before changing topics.

When a sworn statement is taken and the affiant signs it, the affiant (the person making the statement) or authorized representative may request a copy of the statement. Upon request, USCIS provides a copy of the signed sworn statement to an affiant, without fee, at the conclusion of the interview where the statement was taken.[29]

3. Expert and Opinion Evidence

On occasion, officers may require evidence from an expert to assist in completing an adjudication. For example, in cases involving handwritten, counterfeit, or altered documents, U.S. Immigration and Customs Enforcement (ICE)'s Homeland Security Investigations Forensic Laboratory may serve as experts.[30] A requestor may also submit evidence from a non-DHS expert.

An expert is permitted to give an opinion on a particular set of facts or circumstances involving scientific, technical, or other specialized knowledge. Knowledge, skill, experience, training, or education must qualify the expert. Officers may reject or afford lesser evidentiary weight to expert opinions that conflict with the evidence of record or are questionable.[31]

E. Translations

1. Document Translations

Any document containing a foreign language submitted in support of a benefit request must be accompanied by a full English language translation.[32] The translator must certify that the translation is complete and accurate, and that the translator is competent to translate from the foreign language into English.[33] Sometimes the keeper of a record issues an "extract" version of a document. Such official extracts are acceptable, but only if they contain all the information necessary to make a decision on a case. Only extracts prepared by an authorized official (the "keeper of record") are acceptable. A summary of a document prepared by a translator is unacceptable.

2. Document Translators

If an officer takes a written statement in a foreign language and a translator translates it into English, it may be necessary to produce the translator at a subsequent interview or hearing. When there is evidence that a written statement might not be accurately translated, the translator may be called upon to testify not only as to knowledge of the English and the foreign language, but also to confirm the accuracy of the translation.[34]

F. Requests for Evidence and Notices of Intent to Deny

Under the regulations, USCIS has the discretion to issue Requests for Evidence (RFEs) and Notices of Intent to Deny (NOIDs) for immigration benefit requests in appropriate circumstances.[35] USCIS also has the discretion in some instances to issue a denial without first issuing an RFE or a NOID.

An officer should issue an RFE or NOID when the facts and the law warrant; an officer should not avoid issuing an RFE or NOID when one is needed. However, an officer should not issue an RFE or NOID if the officer determines the evidence already submitted establishes eligibility or ineligibility for the request. An unnecessary RFE or NOID can delay case completion and result in additional unnecessary costs to both the government and the benefit requestor.[36]

Generally, USCIS issues written notices in the form of an RFE or NOID to request missing initial[37] or additional evidence from benefit requestors. However, USCIS has the discretion to deny a benefit request without issuing an RFE or NOID. If the officer determines a benefit request does not have any legal basis for approval, the officer should issue a denial without prior issuance of an RFE or a NOID.[38]

1. Evaluating Evidence and Eligibility

Unless otherwise specified, officers should generally follow these principles in each case:

- Understand the specific elements required to demonstrate eligibility for the benefit request.[39]

- Understand the standard of proof that applies to the benefit request. In most instances, the benefit requestor must establish eligibility under the preponderance of the evidence standard. Under that standard, the benefit requestor must prove it is more likely than not that the requestor meets each of the required elements.[40]
- Review all the evidence to determine if each of the essential elements has been satisfied by the applicable standard of proof.

If the officer determines that the benefit requestor is eligible for the benefit requested (all the essential elements have been satisfied by the applicable standard of proof, including but not limited to, when applicable, that a favorable exercise of discretion is warranted), the officer approves the benefit request without issuance of an RFE or NOID.[41]

If the benefit requestor has not established eligibility under the applicable standard of proof, the officer generally issues an RFE or NOID to request evidence of eligibility. However, if the benefit request does not have a legal basis for approval, and the officer determines that there is no possibility that additional information or explanation will establish a legal basis for approval, then the officer generally should deny the benefit request without first issuing an RFE or NOID.[42]

2. Considerations Before Issuing Requests for Evidence or Notices of Intent to Deny

Instead of or in addition to issuing an RFE or NOID, the officer may also:

- Perform additional research;
- If not already required for the benefit type, interview the benefit requestor or other witnesses; or
- Initiate an investigation.

Each option requires varying degrees of resources. Therefore, officers should carefully evaluate each option when deciding next steps.

Performing Additional Research

Although the burden of proof to establish eligibility for an immigration benefit is on the benefit requestor,[43] an officer may assess, before issuing an RFE or a NOID, whether the information or evidence needed is available in USCIS records or systems. Officers have the discretion[44] to validate assertions or corroborate evidence and information by reviewing USCIS (or other governmental) files, systems, and databases, or by obtaining publicly available information that is readily accessible.[45]

For example, an officer may, in the exercise of discretion, verify information relating to a petitioner's corporate structure by consulting a publicly available government website or corroborate evidence relating to a person's history of nonimmigrant stays in the United States by searching a U.S. government database.

3. Requests for Evidence

If the benefit requestor either has not submitted all of the required initial evidence[46] for the benefit request, or the evidence in the record does not establish eligibility for the benefit sought, the officer should issue an RFE or NOID requesting such evidence unless the officer determines that there is no legal basis for the benefit request and no possibility that additional information or explanation will establish a legal basis for approval.[47]

Content of RFEs

RFEs should:

- Identify the eligibility requirement(s) that has not been established and why the evidence submitted is insufficient;
- Identify any missing evidence specifically required by the applicable statute, regulation, or form instructions;
- Identify examples of other evidence that may be submitted to establish eligibility; and
- Request that evidence.

An officer should not request evidence that is outside the scope of the adjudication or otherwise irrelevant to an identified deficiency.

The RFE should ask for all the evidence the officer anticipates needing to determine eligibility and should clearly state the deadline for response.

Avoiding Multiple RFEs

In certain instances, the evidence provided in response to an RFE may raise eligibility questions that the officer did not identify during initial case review or open new lines of inquiry. In such a case, the officer may issue a follow-up RFE or NOID. However, officers should include in a single RFE all the evidence they anticipate needing to determine eligibility. The officer's careful consideration of all the apparent deficiencies in the evidence minimizes the need for multiple RFEs.

Timeframe for Response

The maximum response time for an RFE is 12 weeks (84 days); regulations prohibit officers from granting additional time to respond to an RFE.[48]

However, the regulations permit USCIS to assign flexible timeframes for benefit requestors to respond to an RFE.[49] To ensure consistency, officers should follow standard timeframes but may reduce the response time on a case-by-case basis after obtaining supervisory concurrence. This discretion should only be used when warranted by circumstances as determined by the officer and the supervisor.

The RFE must clearly state the deadline by which the requested initial or additional evidence must be submitted to USCIS.

Regulations govern the effect of service, which may be in person, by ordinary mail, or electronically.[50] When USCIS serves an RFE by ordinary mail, the service of the RFE is complete upon the benefit requestor on the day that USCIS physically mails the RFE.[51] When USCIS serves an RFE by ordinary mail, an RFE response is timely if USCIS receives it no more than 3 days after the prescribed period. This provides a total of 87 days after USCIS mails the RFE, for USCIS to receive an RFE response.

Further, USCIS applies the regulatory definition of day[52] when reviewing a mailed RFE response for timeliness. Where USCIS receives the response on a Monday or on the next business day after a federal holiday, USCIS considers the response to be timely if the deadline fell on the preceding Saturday, Sunday, or federal holiday. As such, when the last day of the filing period falls on a Saturday, Sunday, or federal holiday, the RFE response period is extended until the end of the next business day that is not a Saturday, Sunday, or federal holiday.

USCIS considers a response to an RFE that is issued through the USCIS online system to be received on the date it is electronically filed through the individual's (or attorney or representative's) online account, regardless of whether the day is on a weekend or federal holiday.

Additional mailing time (14 days) should be given to benefit requestors residing outside the United States or when USCIS mails an RFE from an international USCIS field office.

Standard Timeframes

In compliance with the regulations, the guidelines in the table below provide standard timeframes for benefit requestors to respond to RFEs.[53] These standard timeframes do not apply to circumstances in which a fixed maximum response time is specified by regulation.[54]

Standard Timeframes for Response to an RFE

When Submitting Evidence Required For	Standard Response Time (Calendar Days)	Additional Mailing Time When Residing Inside the United States	Additional Mailing Time When Residing Outside the United States or When an International Field Office Issues RFEs
Application to Extend/Change Nonimmigrant Status (Form I-539)[55]	30	3	N/A
Application for Provisional Unlawful Presence Waiver (Form I-601A)[56]	30	3	N/A
All other form types, regardless of whether the request is for initial or additional evidence, or whether the evidence is available in the United States or from overseas sources[57]	84	3	14

4. Notices of Intent to Deny

Circumstances Under Which NOIDs are Required[58]

USCIS issues a NOID before denying any immigration benefit requests submitted on the following forms:

- Application for Determination of Suitability to Adopt a Child from a Convention Country (Form I-800A) based on a mandatory denial ground;[59]
- Petition to Classify Convention Adoptee as an Immediate Relative (Form I-800) based on a mandatory denial ground;[60] or
- Application to Register Permanent Residence or Adjust Status (Form I-485) filed by a physician because the physician failed to comply with the conditions attached to his or her national interest waiver.[61]

Additional Circumstances Under Which USCIS May Issue NOIDs

While not required in other situations, a NOID also provides a benefit requestor with adequate notice and sufficient opportunity to respond to an intended denial because of a determination of ineligibility.[62]

It is also appropriate for officers to issue NOIDs in the following circumstances:

- The benefit requestor submitted little or no evidence;[63] or
- The benefit requestor has met the eligibility requirements for the requested benefit or action but has not established that he or she warrants a favorable exercise of discretion (where there is also a discretionary component to the adjudication).[64]

Content of NOIDs

NOIDs should:

- Identify the reasons for the intended denial, including the eligibility requirement(s) that has not been established, and why the evidence submitted is insufficient;
- Explain the nature of the adverse information, if any.
- Identify any missing evidence specifically required by the applicable statute, regulation, or form instructions;
- Identify examples of other evidence that may be submitted to establish eligibility; and
- Request that evidence.

The NOID should also instruct the benefit requestor that a failure to respond may result in a denial and must clearly state the deadline for response.[65]

Timeframe for Response

The NOID must clearly state the deadline by which the response must be submitted to USCIS. The maximum response time for a NOID is 30 days.[66]

Regulations govern the effect of service, which may be in person, by ordinary mail, or electronically.[67] When USCIS serves a NOID by ordinary mail, the service of the NOID is complete upon the benefit requestor on the day that USCIS physically mails the NOID.[68] When USCIS serves a NOID by ordinary mail, a NOID response is timely if USCIS receives it no more than 3 days after the prescribed period. If the response time is 30 days, this provides a total of 33 days after USCIS mails the NOID, for USCIS to receive a NOID response.

Further, USCIS applies the regulatory definition of day[69] when reviewing a mailed NOID response for timeliness. Where USCIS receives the response on a Monday or on the next business day after a federal holiday, USCIS considers the response to be timely if the deadline fell on the preceding Saturday, Sunday, or federal holiday. As such, when the last day of the filing period falls on a Saturday, Sunday, or federal holiday, the NOID response period is extended until the end of the next business day that is not a Saturday, Sunday, or federal holiday.

USCIS considers a response to a NOID that is issued through the USCIS online system to be received on the date it is electronically filed through the individual's (or attorney or representative's) online account, regardless of whether the day is a weekend or federal holiday.

Additional mailing time (14 days) should be given to benefit requestors residing outside the United States or when USCIS mails a NOID from an international USCIS field office.

Standard Timeframes

In compliance with the regulations, the guidelines in the table below provide standard timeframes for benefit requestors to respond to NOIDs.[70]

Standard Timeframes for Response to a NOID

When Submitting Evidence Required For	Standard Response Time (Calendar Days)	Additional Mailing Time When Residing Inside the United States	Additional Mailing Time When Residing Outside the United States or When an International Field Office Issues NOIDs
All form types[71]	30	3	14

5. Responses to Requests for Evidence and Notices of Intent to Deny

Within the timeframe specified, benefit requestors may respond to an RFE or NOID in one of three ways:

- Submit a complete response containing all requested information;
- Submit a partial response, which is considered a request for a decision on the record; or
- Withdraw the application or petition.[72]

Requested Materials Must Be Submitted Together

Whether in response to an RFE or a NOID, benefit requestors must submit all requested materials together at one time, along with the original RFE or NOID. USCIS treats any submission partially responding to an RFE or NOID as a request for a final decision on the record.[73] USCIS does not wait for a second response or issue a second RFE simply because a response from the benefit requestor is a partial response.

Failure to Respond to an RFE or NOID

Failure to submit requested evidence that is relevant to the adjudication is grounds for denying the request.[74] If a benefit requestor does not respond to an RFE or NOID by the required date,[75] USCIS may:

- Deny the benefit request as abandoned;[76]
- Deny the benefit request on the record; or
- Deny the benefit request for both reasons.[77]

G. Derogatory Information Unknown to the Benefit Requestor

Derogatory information is information that is relevant to the adjudication and adverse to the benefit requestor's ability to demonstrate eligibility or warrant a favorable exercise of discretion for the benefit sought.[78]

If USCIS intends to deny a benefit request based on derogatory information of which the requestor is unaware,[79] USCIS must first give the requestor sufficient notice of and an opportunity to rebut the derogatory information and to present evidence in support of the benefit request.[80] The use of certain information, including classified information, is subject to specific requirements and policies.

Officers intending to utilize classified derogatory information, or derogatory information that otherwise require specific procedures by regulation or policy, must comply with these requirements as directed in this Policy Manual section. Additionally, USCIS generally does not disclose information that may be limited by procedural agreements or contracts.

USCIS encounters a wide array of adverse information through a variety of sources.

USCIS must also follow applicable laws and policies pertaining to privacy, confidentiality, and sharing personally identifiable information with third parties.[81]

1. Documents and Information That USCIS Cannot Disclose

Certain documentation is privileged, sensitive, or otherwise protected by statute or regulation and cannot be disclosed, even if such adverse information would otherwise be relied upon in an adverse decision.

Information that USCIS generally cannot disclose includes:

- Information that is classified under Executive Order 13526;[82]
- Information owned by another agency for which use or sharing authority has not been provided;
- Information related to an alien who is protected by 8 U.S.C. 1367[83] unless it can be sufficiently anonymized to protect the confidentiality of the protected individual or an exception applies;[84] and
- Information related to certain applications for asylum status, extended to refugees as a matter of policy, and withholding of removal under INA 241(b)(3).[85]

Classified Information

USCIS cannot provide the benefit requestor any information contained in the record or outside the record that is classified[86] as requiring protection from unauthorized disclosure in the interest of national security, unless the classifying authority has agreed in writing to such disclosure or the information has been declassified.[87] This information cannot be provided in any form, including summarized in a detailed description or verbally during an interview.

Other Agency Records

USCIS generally does not disclose records owned by another agency[88] unless USCIS is authorized to use or share such information.[89] However, USCIS may disclose the information in a detailed description if the benefit requestor or alien beneficiary provided that information to the U.S. Government agency (USGA) himself or herself or if permission is granted by the USGA owner and subject to the terms and conditions of applicable data sharing agreements, such as the agreement between USCIS and the U.S. Department of State (DOS) on disclosure authorization requirements.[90]

USCIS officers are responsible for following information security controls, as established by DHS policies and federal laws, that protect federal operations and assets when sharing or using information across agencies.[91] Other agency information includes records from DOS and other agencies outside of USCIS or DHS.

If other agency records yield information upon which USCIS intends to make an adverse decision and that information was provided by the benefit requestor or alien beneficiary, is clearly attributable to the benefit requestor or alien beneficiary, is not based exclusively on the other agency's records and is otherwise disclosable, or the benefit requestor is already aware of the information, USCIS may confront the benefit requestor with it in an interview or disclose the information in a NOID, whichever applies.

2. Derogatory Information Containing Details That May or May Not Be Disclosed

Derogatory information may be found in any evidence, document, or statement relevant to the benefit request. The sections below discuss different types of information an officer may encounter that may include derogatory information for potential use in an adverse decision, and which parts of such derogatory information may or may not be disclosed.

Private Information

Derogatory information is sometimes found in documents or statements that contain information that may cause harm or embarrassment to an individual or that may be protected by privacy laws.[92] USCIS may generally disclose this type of information but may be restricted from providing certain details, such as personally identifiable information (PII) and sensitive personally identifiable information (SPII). In some cases, certain information may be disclosed if permission is obtained from the individual about whom the information pertains.

Information Designated as Law Enforcement Sensitive (LES) or Sensitive But Unclassified (SBU), including For Official Use Only (FOUO)

Information that is owned by USCIS and designated as LES, SBU, or FOUO may sometimes contain derogatory information that USCIS intends to rely on in an adverse determination. USCIS generally does not disclose information that is labeled as LES, SBU, or FOUO without following specific protocols, which may include obtaining permission from the individuals involved in the investigation, redesignating the relevant information by the appropriate designation authorities, withholding sensitive details that could reveal investigative methods or sensitive information or sources (including government names in investigative reports), or following Freedom of Information Act procedures.[93]

Information Related to an Ongoing or Past Investigation

Derogatory information is sometimes found in records that pertain to an investigation including information that could jeopardize investigative sources or methods, or ongoing criminal, civil, or administrative investigations.

Certain derogatory information that is part of a past investigation may generally be disclosed in a detailed description. If unclear whether the investigation is closed, officers should contact the lead investigator to confirm the status of the investigation. Officers may be required to obtain permission from the investigating source or from a third party involved in the past investigation to disclose certain details. However, USCIS must follow applicable laws, rules and data sharing agreements and officers are expected to interpret information from various sources and know what information must be disclosed or confronted with the benefit requestor and what details are necessary to provide a legally sufficient decision, including whether details require permission from another agency.

Officers must omit any non-disclosable information from the detailed description (NOID) or verbally during an interview. For example, USCIS may disclose the derogatory information in a detailed description without providing the name of the person who provided the information if the source has not given USCIS permission to reveal his or her identity. For example, USCIS does not need to provide the names or identities of neighbors that provided adverse information to USCIS during a site visit so long as USCIS provides sufficient detail of derogatory information unknown to the benefit requestor.[94]

Officers should discuss an ongoing investigation with the investigator before disclosing parts of the investigation or derogatory information as premature disclosures could impact the investigation. Generally, investigative reports specify the origin of derogatory information and special limitations on disclosure. However, in the absence of such designations, officers are expected to utilize all resources available to them and apply the information they have obtained from both investigations and government resources to adjudicate a benefit request appropriately. Each USCIS employee is responsible for safeguarding sensitive information.

Third-Party Information

Certain records containing derogatory information may include PII or SPII relating to a person or entity other than the benefit requestor or alien beneficiary. This third-party information includes, but is not limited to:

- Financial information;[95]
- Patient or health records;
- Consumer reporting agency reports;
- Trade secrets;
- Student education records from an educational institution;
- Cable subscriber records;
- Tax return information;
- Utility company correspondence (such as gas or internet bills); or
- Electronic communication records from a communication service provider or remote computing service.

USCIS generally may disclose third-party information that was provided to or obtained by USCIS, which is sometimes mixed with the benefit requestor's or alien beneficiary's information; however, certain details or information that are protected by specific privacy or confidentiality laws may not be disclosed without permission from the individual to whom the information pertains.[96]

3. How USCIS Discloses Derogatory Information

If USCIS has the authority and permission to disclose the information, officers provide notice of derogatory information with a detailed description[97] in the form of a Request for Evidence (RFE), Notice of Intent to Deny (NOID), or in certain cases, a Notice of Intent to Revoke (NOIR), Notice of Intent to Rescind (NOIR), or a Notice of Intent to Terminate (NOIT).[98] Officers may also provide derogatory information or a detailed description during an interview, if permissible.[99]

Generally, when disclosing derogatory information through a detailed description, USCIS must describe the derogatory information in sufficient detail to give the benefit requestor a meaningful opportunity to rebut the adverse information used in arriving at the decision.[100] USCIS does not need to inform the benefit requestor of every detail in the record. Rather, USCIS only informs the benefit requestor in "sufficient detail" so the benefit requestor is provided an opportunity to resolve any inconsistencies in the record by objective evidence.[101]

When a benefit requestor is aware of the information that USCIS may use to make an adverse determination because the benefit requestor provided the information[102] or the information was provided in support of another benefit request filed by the same requestor[103] USCIS may, but is not required to,[104] disclose information in a detailed description before issuing a final decision.

When USCIS intends to deny the benefit request based on derogatory information of which the benefit requestor is unaware and the information is not prohibited from being disclosed as described above, USCIS may, in some discretionary instances,[105] provide a legible copy of the primary source document containing the derogatory information to the benefit requestor. USCIS may attach the primary source document to a NOID, RFE, NOIR, or NOIT, with necessary redactions.[106]

Before providing source copies of any derogatory information, USCIS, in consultation with other agencies as appropriate, redacts the primary source document as required by the Privacy Act and other confidentiality laws or policies. If the relevant derogatory information appears in a section of a larger document that makes releasing the entire document unfeasible or burdensome, USCIS releases only that section as necessary to adequately advise the benefit requestor of the derogatory information and give them a meaningful opportunity to rebut or explain it.

There may be instances where a primary source document must be redacted to the point that it no longer contains sufficient information to provide the benefit requestor a meaningful opportunity to rebut the information on which USCIS will base an adverse decision. In such cases, USCIS may instead provide a detailed description of the relevant derogatory information.

Footnotes

[^ 1] See 8 CFR 103.2(b).

[^ 2] See *Matter of Chawathe (PDF)*, 25 I&N Dec. 369, 376 (AAO 2010). Certain documentation requirements do not apply to asylees adjusting status. See INA 212(a)(7)(A).

[^ 3] See 18 U.S.C. 3500. The Jencks Act requires that a statement that was made by a government witness be produced after the government witness has testified upon demand by the defense. Failure by the government to produce the statement requires the suppression of the testimony of that witness.

[^ 4] See INA 291.

[^ 5] See Chapter 8, Discretionary Analysis [1-USCIS PM E.8].

[^ 6] See 8 CFR 103.2(b)(1).

[^ 7] Although birth certificates are primary evidence, when the birth certificate was not registered contemporaneously with the birth, the officer must consider the birth certificate, as well as all the other evidence of record and the circumstances of the case, to determine whether the petitioner has submitted sufficient reliable evidence to demonstrate the claimed relationship by a preponderance of the evidence. See *Matter of Rehman*, 27 I&N Dec. 124 (BIA 2017). In addition, as of September 30, 2010, all birth certificates that were issued in Puerto Rico before July 1, 2010 are invalid. For any benefit request received after September 30, 2010, officers should verify that the Puerto Rico birth certificate was issued by the General Vital Statistics Office of Puerto Rico (Puerto Rico Department of Health) on or after July 1, 2010. For additional information related to the legislation that amended Puerto Rico law with respect to the issuance and validity of birth certificates, see S.B. 1653, Law No. 68 of 2009.

[^ 8] Officers reference DOS's U.S. Visa: Reciprocity and Civil Documents by Country webpage for country-specific document standards.

[^ 9] See 8 CFR 103.2(b).

[^ 10] See 8 CFR 103.2(b)(2). For self-petitions under the Violence Against Women Act (VAWA) and petitions and applications for T and U nonimmigrant status (for victims of human trafficking and other specified crimes), USCIS considers any credible evidence relevant to the petition or application. Requestors may submit any credible, relevant, and probative evidence to establish eligibility. The determination of what evidence is credible and the weight to be given that evidence is within the sole discretion of USCIS and determined on a case-by-case basis. See INA 204(a)(1)(J). See INA 214(p)(4). See 8 CFR 103.2(b)(2)(iii). See 8 CFR 204.1(f)(1). See 8 CFR 204.2(c)(2)(i). See 8 CFR 204.2(e)(2)(i). See 8 CFR 214.14(c)(4). See 8 CFR 214.11(d)(2) and 8 CFR 214.11(d)(5). VAWA self-petitioners may not be required to demonstrate that preferred primary or secondary evidence is unavailable. See 8 CFR 103.2(b)(2)(iii). See Volume 3, Humanitarian Protection and Parole [3 USCIS-PM].

[^ 11] See INA 208(b)(1)(B)(ii).

[^ 12] The DOS's website provides country-specific information on the availability of various foreign documents. If DOS shows that a record is generally not available in a particular country, USCIS may accept secondary evidence without requiring the written statement from the issuing authority. See 8 CFR 103.2(b)(2)(ii).

[^ 13] See 8 CFR 103.2(b)(2)(i).

[^ 14] See 8 CFR 103.2(b).

[^ 15] See 8 CFR 103.2(b)(2)(ii).

[^ 16] See 8 CFR 103.2(b).

[^ 17] Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence. See 8 CFR 103.2(b)(2).

[^ 18] See 8 CFR 103.2(b)(2)(ii).

[^ 19] See 8 CFR 204.1(f)(1). DOS's U.S. Visa: Reciprocity and Civil Documents by Country webpage provides country-specific information on the availability and reliability of various foreign documents. If DOS shows that a record is generally not reliable in a particular country, USCIS should request secondary evidence.

[^ 20] Secondary evidence may include optional submission of DNA results. In certain cases where primary and secondary evidence are not sufficient to demonstrate a claimed family relationship, USCIS may send the requestor a Request for Evidence (RFE) suggesting DNA testing to support a claim of a biological family relationship. DNA collection is voluntary and a decision to omit DNA evidence is not factored into an adjudicative decision. For additional information on voluntary DNA submission, see USCIS Response to COVID-19 webpage.

[^ 21] For benefit requests filed electronically as permitted by form instructions, requestors must follow the instructions provided to properly submit all required evidence. For additional information relating to electronic filings, see Part B, Submission of Benefit Requests, Chapter 6, Submitting Requests [1 USCIS-PM B.6].

[^ 22] For additional information on when USCIS requires original documents, see form-specific filing instructions.

[^ 23] See 8 CFR 103.2(b)(4)-(5). See 8 CFR 103.2(b)(13).

[^ 24] See 8 CFR 103.2(b)(5).

[^ 25] For example, an officer reviews all relevant records and considers the applicant's testimony to determine whether a naturalization applicant has met the required period of continuous residence.

[^ 26] Witnesses may include, but are not limited to, applicants, petitioners, and other benefit requestors.

[^ 27] Retraction of prior statements made under oath may, under certain conditions, render the witnesses liable for perjury. However, witnesses have a legal right to claim that written statements are not true, or that they were obtained by fraud or duress.

[^ 28] Officers should not confuse privileged testimony with confidentiality provisions. For more information on confidentiality, see Part A, Public Services, Chapter 7, Privacy and Confidentiality. [1 USCIS-PM A.7].

[^ 29] See 8 CFR 103.2(b)(7).

[^ 30] If an officer intends to issue an adverse decision based on derogatory information of which the benefit requestor is unaware, the officer must disclose the information and provide the benefit requestor the opportunity to rebut the information and present information in the requestor's own behalf. See 8 CFR 103.2(b)(16)(i).

[^ 31] See *Matter of Caron Int'l, Inc. (PDF)*, 19 I&N Dec. 791, 795 (Comm. 1988).

[^ 32] See 8 CFR 103.2(b)(3).

[^ 33] See 8 CFR 103.2(b)(3).

[^ 34] See 8 CFR 103.2(b)(3).

[^ 35] See 8 CFR 103.2(b)(8). However, certain immigration benefits, such as refugee and asylum applications, are governed by different regulations and procedures regarding RFEs, NOIDs, denials, and failures to appear; therefore, the guidance in this chapter does not apply to these immigration benefits governed by different regulations. The terms "benefit request" and "immigration benefit request," as used in this Policy Manual part, include, but are not limited to, all requests funded by the Immigration Examinations Fee Account (IEFA). These terms may also refer to forms or requests not directly resulting in an immigration benefit.

[^ 36] For purposes of this Policy Manual part, the terms "benefit requestor" and "requestor" mean the person, organization, or business requesting an immigration benefit from USCIS. In most instances, this will either be an applicant or a petitioner, depending on the request.

[^ 37] See 8 CFR 103.2(b)(1). Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions.

[^ 38] For more information, see Chapter 9, Rendering a Decision, Section B, Denials, Subsection 1, Denials Based on Lack of Legal Basis [1 USCIS-PM E.9(B)(1)].

[^ 39] See the program-specific part of the Policy Manual for more information on eligibility requirements that apply to a particular benefit request.

[^ 40] For more information, see Chapter 4, Burden and Standards of Proof [1 USCIS-PM E.4].

[^ 41] See 8 CFR 103.2(b)(8)(i).

[^ 42] See Chapter 9, Rendering a Decision, Section B, Denials, Subsection 1, Denials Based on Lack of Legal Basis [1 USCIS-PM E.9(B)(1)].

[^ 43] See INA 291. See *Matter of Arthur (PDF)*, 16 I&N Dec. 558 (BIA 1978).

[^ 44] However, under 8 CFR 103.2(b)(17), officers must verify the status of an applicant or petitioner who claims that he or she is a lawful permanent resident by reviewing USCIS records.

[^ 45] See INA 287(b). See 8 CFR 103.2(b)(16)(i).

[^ 46] For applications and petitions for T and U nonimmigrant status (for victims of trafficking and other specified crimes) and Violence Against Women Act (VAWA) benefit requests, USCIS considers any credible evidence relevant to the request. Requestors may submit any credible, relevant, and probative evidence to establish eligibility. See INA 204(a)(1)(J). See INA 214(p)(4). See 8 CFR 103.2(b)(2)(iii). See 8 CFR 204.1(f)(1). See 8 CFR 204.2(c)(2)(i). See 8 CFR 204.2(e)(2)(i). See 8 CFR 214.14(c)(4). See 8 CFR 214.11(d)(2) and 8 CFR 214.11(d)(5).

[^ 47] If there is no legal basis for the benefit request and no possibility that additional information or explanation will establish a legal basis, the officer may deny the request without first issuing an RFE or NOID. See Chapter 9, Rendering a Decision, Section B, Denials, Subsection 1, Denials Based on Lack of Legal Basis [1 USCIS-PM E.9(B)(1)].

[^ 48] See 8 CFR 103.2(b)(8)(iv). Officers adjudicating a benefit request may exercise their discretion to consider late responses to RFEs to have been submitted timely if in their view circumstances warrant it.

[^ 49] See 8 CFR 103.2(b)(8) and 8 CFR 103.2(b)(11).

[^ 50] See 8 CFR 103.8(b) ("[w]henever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, 3 days shall be added to the prescribed period. Service by mail is complete upon mailing."). See 8 CFR 103.8(a) (describing routine service by ordinary or electronic mail and personal service, performed by a government employee).

[^ 51] See 8 CFR 103.8(b) ("[w]henever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, 3 days shall be added to the prescribed period. Service by mail is complete upon mailing.").

[^ 52] See 8 CFR 1.2.

[^ 53] See 8 CFR 103.2(b)(8)(iv).

[^ 54] For example, USCIS generally provides an applicant for naturalization 30 days (33 if mailed) to respond to an RFE. See 8 CFR 335.7. See Volume 12, Citizenship and Naturalization, Part B, Naturalization Examination, Chapter 4, Results of the Naturalization Examination, Section B, Continuation of Examination, Subsection 1, Continuation to Request Evidence [12 USCIS-PM B.4(B)(1)].

[^ 55] Due to the relatively short processing times required by the Form I-539, a response time of only 30 days applies to RFEs for Form I-539 filings.

[^ 56] Due to the streamlined nature of the provisional unlawful presence waiver process and to avoid long delays in immigrant visa processing, a response time of 30 days applies to RFEs for the Form I-601A. Officers, in their discretion, may increase the response time for the Form I-601A after obtaining supervisory concurrence. This discretion should be used on a case-by-case basis when warranted by circumstances as determined by the officer and the supervisor.

[^ 57] Certain immigration benefits, such as refugee and asylum applications, are governed by different regulations and procedures regarding RFEs, NOIDs, denials, and failures to appear. Therefore, the guidance in this table does not apply to these immigration benefits governed by different regulations.

[^ 58] Certain immigration benefits, such as refugee and asylum applications, are governed by different regulations and procedures regarding RFEs, NOIDs, denials, and failures to appear. Therefore, the guidance in this section does not apply to these immigration benefits governed by different regulations.

[^ 59] See 8 CFR 204.309(a). See 8 CFR 204.309(c).

[^ 60] See 8 CFR 204.309(a). See 8 CFR 204.309(c).

[^ 61] See 8 CFR 245.18(i).

[^ 62] However, if the officer determines that there is no legal basis for the benefit request, the officer generally denies the request. See Chapter 9, Rendering a Decision, Section B, Denials, Subsection 1, Denials Based on Lack of Legal Basis [1 USCIS-PM E.9(B)(1)].

[^ 63] USCIS generally issues RFEs when some required evidence is missing but may issue a NOID if all or most of the required evidence is missing. However, USCIS generally rejects incomplete benefit requests, including those with filing deficiencies, such as missing or invalid signatures. USCIS does not issue NOIDs for such filing deficiencies since the requests were never accepted for adjudicative review and therefore are not subject to approval or denial criteria. See 8 CFR 103.2(a)(7)(ii). See Part B, Submission of Benefit Requests, Chapter 6, Submitting Requests, Section B, Intake Processing [1 USCIS-PM B.6(B)].

[^ 64] For more information, see Chapter 8, Discretionary Analysis [1 USCIS-PM E.8].

[^ 65] See 8 CFR 103.2(b)(13).

[^ 66] See 8 CFR 103.2(b)(8)(iv). Officers adjudicating a benefit request may exercise their discretion to consider late responses to NOIDs to have been submitted timely if in their view circumstances warrant it.

[^ 67] See 8 CFR 103.8(b) ("[w]henever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, 3 days shall be added to the prescribed period. Service by mail is complete upon mailing."). See 8 CFR 103.8(a) (describing routine service by ordinary or electronic mail and personal service, performed by a government employee).

[^ 68] See 8 CFR 103.8(b) ("[w]henever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, 3 days shall be added to the prescribed period. Service by mail is complete upon mailing.").

[^ 69] See 8 CFR 1.2.

[^ 70] See 8 CFR 103.2(b)(8)(iv).

[^ 71] Certain immigration benefits, such as refugee and asylum applications, are governed by different regulations and procedures regarding RFEs, NOIDs, denials, and failures to appear. Therefore, the guidance in this table does not apply to these immigration benefits governed by different regulations.

[^ 72] See 8 CFR 103.2(b)(6). USCIS' acknowledgement of a withdrawal may not be appealed. See 8 CFR 103.2(b)(15).

[^ 73] See 8 CFR 103.2(b)(11).

[^ 74] See 8 CFR 103.2(b)(14).

[^ 75] Applications for asylum are not subject to denial under 8 CFR 103.2(b), like other benefit requests, generally. See 8 CFR 208.14(d).

[^ 76] The benefit requestor may not appeal a denial due to abandonment, but the benefit requestor may file a motion to reopen. See 8 CFR 103.2(b)(15). See Notice of Appeal or Motion (Form I-290B). A new proceeding will not be affected by the withdrawal or denial due to abandonment, but the facts and circumstances surrounding the prior benefit request will otherwise be material to the new benefit request. See 8 CFR 103.2(b)(15). See 8 CFR 1.2 (definition of benefit request).

[^ 77] See 8 CFR 103.2(b)(13).

[^ 78] See 8 CFR 103.2(b)(16)(i).

[^ 79] Information that the requestor has forgotten is not considered information that the requestor is unaware of and USCIS is generally not required to disclose such information. See *Sardo v. DHS*, 284 Fed. Appx. 262, 266 (6th Cir. 2008). Information included on a form that the requestor, person authorized to sign on behalf of the requestor, or their G-28 counsel has signed is considered to be imputed knowledge of the requestor, as are documents or statements submitted with or in furtherance of the benefit requested on that form, regardless of whether the requestor or alien beneficiary alleges a lack of awareness.

[^ 80] See 8 CFR 103.2(b)(16)(i). See *Matter of Cuello* (PDF), 20 I&N Dec. 94, 96-98 (BIA 1989).

[^ 81] See Part A, Public Services, Chapter 7, Privacy and Confidentiality [1 USCIS-PM A.7]. See Privacy Act of 1974, Pub. L. 93-579 (PDF) (December 31, 1974) (codified at 5 U.S.C. 552a). See 8 U.S.C. 1367. See INA 244(c)(6), INA 210(b)(6), and INA 245A(c)(5). See 8 CFR 244.16, 8 CFR 210.2(e), 8 CFR 245a.2(t), 8 CFR 245a.3(n), 8 CFR 245a.21, and 8 CFR 208.6.

[^ 82] See Classified National Security Information, 75 FR 707 (PDF) (Dec. 29, 2009). See 8 CFR 103.2(b)(16)(iv). See DHS Policy and Guidelines for the Use of Classified Information in Immigration Proceedings (PDF), issued May 9, 2024.

[^ 83] This generally includes Violence Against Women Act (VAWA) self-petitioners; applicants and petitioners for, and recipients of, T and U nonimmigrant status; and abused spouses of certain persons applying for employment authorization under INA 106.

[^ 84] See Part A, Public Services, Chapter 7, Privacy and Confidentiality [1 USCIS-PM A.7].

[^ 85] See 8 CFR 208.6. This also applies to withholding of removal under Article 3 of the Convention Against Torture.

[^ 86] See National Security Information, 47 FR 14667, 14874 (PDF) (Apr. 6, 1982).

[^ 87] See 8 CFR 103.2(b)(16)(iv).

[^ 88] This refers to information that is subject to what is sometimes known informally as the third-agency rule.

[^ 89] See Part A, Public Services, Chapter 7, Privacy and Confidentiality [1 USCIS-PM A.7].

[^ 90] For example, DOS visa records covered under INA 222(f) and consular return memoranda are considered other agency documents, and unclassified derogatory information contained in such records and memoranda may generally be disclosed with a few exceptions. For instance, USCIS cannot disclose information about DOS's investigatory methods, the identity of an information source, DOS officials' names and identifiers, or perceptions, opinions, or internal deliberations by DOS. All external agencies that share information with DHS should define the responsibilities and requirements in a Memorandum of Understanding or Memorandum of Agreement.

[^ 91] See the Federal Information Security Modernization Act of 2014, Pub. L. 113-284 (PDF) (December 18, 2014).

[^ 92] USCIS must follow standard procedures for handling sensitive personally identifiable information. See Part A, Public Services, Chapter 7, Privacy and Confidentiality [1 USCIS-PM A.7].

[^ 93] See Safeguarding Sensitive But Unclassified (For Official Use Only) Information (PDF), DHS Management Directive 11042.1, signed January 6, 2005.

[^ 94] Notably, 8 CFR 103.2(b)(16) does not require USCIS to provide the benefit requestor with an opportunity to inspect actual evidence or cross-examine witnesses. See *Owusu-Boakye v. Barr*, 376 F.Supp.3d 663, 678-79 (E.D. Va. 2019), aff'd, 836 F. App'x 131 (4th Cir. 2020). See *Koffi v. Holder*, 487 F. App'x 658, 660–61 (2d Cir. 2012) and *Mangwiro v. Johnson*, 554 F. App'x 255, 261 (5th Cir. 2014). 8 CFR 103.2(b)(16) only requires USCIS to inform the benefit requestor of derogatory information and offer the benefit requestor an opportunity to rebut it. See *Zizi v. Field Office Director*, 753 F. App'x 116, 117 (3d Cir. 2019). Judicial decisions in several jurisdictions impose different requirements in the visa petition context.

[^ 95] For example, bank records, pay stubs, or other records about an individual's income or finances.

[^ 96] Various laws and regulations may limit or prevent USCIS from disclosing information about or from a third party. See Privacy Act of 1974, Pub. L. 93-579 (PDF) (December 31, 1974) (codified at 5 U.S.C. 552a) and FOIA Improvement Act of 2016, Pub. L. 114-185 (PDF) (June 30, 2016) (codified at 5 U.S.C. 552). Other protective measures include the Right to Financial Privacy Act of 1978, Pub. L. 95-360 (PDF), 92 Stat. 3641, 3697 (November 10, 1978) (codified at 12 U.S.C. 3401 and following); the Health Insurance Portability and Accountability Act (HIPAA) of 1996, Pub. L. 104-191 (PDF) (August 21, 1996); 45 CFR Part 2; the Electronic Communications Privacy Act of 1986, Pub. L. 99-508 (PDF) (October 21, 1986) (codified at 18 U.S.C. 2701 and following); the Fair Credit Reporting Act, Pub. L. 91-508 (PDF), 84 Stat. 1114, 1127 (October 26, 1970) (codified at 15 U.S.C. 1681 and following); and the Family Educational Rights and Privacy Act of 1974, Pub. L. 93-380 (PDF), 88 Stat. 484, 571 (August 21, 1974) (codified at 20 U.S.C. 1232g). This is not an exhaustive list.

[^ 97] Some courts have addressed how USCIS provides notice of derogatory information relevant to the adjudication of a Petition for Alien Relative (Form I-130), generally finding that summarizing derogatory information is sufficient under 8 CFR 103.2(b)(16). See *Mestanek v. Jaddou*, 93 F.4th 164 (4th Cir. 2024); *Ghaly v. INS*, 48 F.3d 1426, 1434 (7th Cir. 1995); *Diaz v. U.S. Citizenship & Immigration Servs*., 499 F. App'x 853, 855 (11th Cir. 2012); *Hassan v. Chertoff*, 593 F.3d 785, 789 (9th Cir. 2010); *Ogbolumani v. Napolitano*, 557 F.3d 729, 735 (7th Cir. 2009); *Owusu-Boakye v. Barr*, 376 F.Supp.3d 663, 675 (E.D. Va. 2019); *Brinklys v. Johnson*, 175 F.Supp.3d 1338, 1353-56 (M.D. Fla. 2016); *Mangwiro v. Johnson*, 554 F. App'x 255, 261-62 (5th Cir. 2014). In some jurisdictions, USCIS must provide the petitioner with "specific, rebuttable details" or the "underlying documents" when USCIS intends to deny a family-based petition based on derogatory information of which the petitioner is unaware. See *Zerezghi v. USCIS* (PDF), 955 F.3d 802, 810 (9th Cir. 2020). The Board of Immigration Appeals (BIA) has not directly spoken to the method of providing derogatory information for a Form I-130 in a precedent decision, however the BIA has generally found that a visa petition revocation based on an "unsupported statement or unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence…cannot be sustained." See *Matter of Estime* (PDF), 19 I&N Dec. 450 (BIA 1987).

[^ 98] See Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 99] If the derogatory information is disclosed during an interview, the officer records the information and the benefit requestor's rebuttal. See Section D, Types of Evidence, Subsection 2, Testimonial Evidence [1 USCIS-PM E.6(D)(2)].

[^ 100] See 8 CFR 103.2(b)(16). A determination of statutory eligibility must be based only on information contained in the record of proceeding that is disclosed to the benefit requestor, except as provided in 8 CFR 103.2(b)(16)(iv). See 8 CFR 103.2(b)(16)(ii).

[^ 101] Any attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. See *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

[^ 102] For example, a benefit requestor's tax return statement submitted with the Form I-130 that USCIS uses as evidence of a lack of a qualifying spousal relationship.

[^ 103] For example, records such as marriage certificates or personal financial statements submitted with a previous spousal petition.

[^ 104] USCIS is not required to disclose derogatory information of which the benefit requestor is aware. See 8 CFR 103.2(b)(16). See Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)]. However, USCIS may disclose derogatory information that the benefit requestor may be aware of to ensure the benefit requestor has sufficient opportunity to rebut information used in an adverse decision.

[^ 105] For example, officers may provide a copy of the source document containing derogatory information, such as a lease agreement, in instances where the document contains no privileged or confidential information, or information that is otherwise prohibited from disclosure.

[^ 106] USCIS must not provide screenshots of information obtained from DHS or other third agency systems absent permission from the data owner. If an adverse decision is based primarily on derogatory information that originates from such systems, any disclosure must be in a detailed summary statement and is subject to the terms and conditions of applicable data sharing agreements, such as the agreement between USCIS and DOS on disclosure authorization requirements.

Chapter 7 - Interviews [Reserved]

Chapter 8 - Discretionary Analysis

Many immigration benefits require the requestor[1] to demonstrate that the request merits a favorable exercise of discretion in order to receive the benefit.[2] For these benefits, a discretionary analysis is a separate, additional component of adjudicating the benefit request. Whether to favorably exercise discretion is typically assessed after an officer has determined that the requestor meets all applicable threshold eligibility requirements.

The discretionary analysis involves the review of all relevant, specific facts and circumstances in an individual case. However, there are limitations on how the officer may exercise discretion; the officer may not exercise discretion arbitrarily, inconsistently, or in reliance on biases or assumptions.

In some contexts, there are regulations and case law that outline certain factors that officers must review and use as a guide in making a discretionary determination. However, there is no exhaustive list of factors that officers must consider. To perform a discretionary analysis, officers must weigh all positive factors present in a particular case against any negative factors in the totality of the record.[3] The analysis must be comprehensive, specific to the case, and based on all relevant facts known at the time of adjudication. For complex or difficult cases, officers should consult with supervisors and local counsel.

A. Applicability

Congress generally provides discretionary authority explicitly in the statutory language that governs an immigration benefit. In some instances, however, discretionary authority is less explicit and must be inferred from the statutory language. Executive agencies may also outline their discretionary authority explicitly in regulations.[4]

Many immigration benefit requests are filed under provisions of law that require the favorable exercise of discretion to administer the benefit.[5] In these cases, the benefit requestor has the burden of demonstrating eligibility for the benefit sought and that USCIS should favorably exercise discretion.[6] Where an immigration benefit is discretionary, meeting the statutory and regulatory requirements alone does not entitle the requestor to the benefit sought.

Certain immigration benefits are not discretionary.[7] In these cases, if the requestor properly filed and meets the eligibility requirements then USCIS must approve the benefit request. There is no discretionary analysis as part of the adjudication, and these requests cannot be denied as a matter of discretion.

The following table provides a non-exhaustive overview of immigration benefits and whether discretion is involved in the adjudication of such benefits.

Immigration Benefits Involving Discretionary Review

Benefit Type	Discretion Involved (Yes or No)
Petition to classify an alien as a nonimmigrant worker[8]	No (with some exceptions)
Petition to classify an alien as a fiancé(e) of a U.S. citizen[9]	Yes
Application to extend or change nonimmigrant status[10]	Yes
Advance permission to enter as a nonimmigrant[11]	Yes
Humanitarian parole[12]	Yes
Temporary protected status[13]	Yes
Refugee status[14]	Yes (with some exceptions)[15]
Asylum[16]	Yes
Petition to classify an alien as a family-based immigrant[17]	No (with some exceptions)
Petition to classify an alien as an employment-based immigrant[18]	No (with one exception)[19]
Petition to classify an alien as an immigrant investor[20]	No (with some exceptions)[21]
Applications by an existing or prospective Regional Center[22]	No (with some exceptions)[23]
Adjustment of status[24]	Yes (with some exceptions)[25]
Registration[26]	No
Recognition as an American Indian born in Canada[27]	No
Waivers of inadmissibility[28]	Yes
Consent to reapply for admission after deportation or removal[29]	Yes
Employment authorization[30]	Yes (with some exceptions)
Removal of conditions on permanent residence[31]	No (with some exceptions)[32]
Naturalization[33]	No

Benefit Type	Discretion Involved (Yes or No)
Application for a Certificate of Citizenship[34]	No

B. Overview of Discretion

1. Definition

The Board of Immigration Appeals (BIA) has described the exercise of discretion as:

- A balancing of the negative factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented on his or her behalf to determine whether relief appears in the best interests of this country.[35]
- A matter of administrative grace where the applicant has the burden of showing that discretion should be exercised in his or her favor.[36]
- A consideration of negative factors and the need for the applicant to offset such factors by showing unusual or even outstanding equities.[37]

These characterizations imply that the exercise of discretion cannot be arbitrary, inconsistent, or dependent on intangible or imagined circumstances.

In short, discretion is defined as the ability or power to exercise sound judgment in decision-making. While the discretionary analysis gives the officer some autonomy in the way in which he or she decides a particular case after all applicable eligibility requirements are established, that autonomy may only be exercised within the confines of certain legal restrictions. These restrictions define the scope of the officer's discretionary authority.[38]

2. Adjudicative Discretion

There are two broad types of discretion that may be exercised in the context of immigration law: prosecutorial (or enforcement) discretion[39] and adjudicative discretion. The scope of discretion is defined by what type of discretionary decision is being made. This chapter only discusses the exercise of adjudicative discretion.

Adjudicative discretion requires an officer to decide whether to exercise discretion favorably when adjudicating a request for an immigration benefit. This decision is guided by the applicable statutes, regulations, and policies that outline the eligibility requirements for the benefit and the facts present in the case at issue. The U.S. Supreme Court has referred to adjudicative discretion as merit-deciding discretion.[40]

In general, an officer may exercise favorable adjudicative discretion to approve a benefit request when the requestor has met the applicable eligibility requirements and negative factors impacting discretion are not present.[41] An exercise of discretion to grant a benefit may also be appropriate when the requestor has met the eligibility requirements for the benefit, and the positive factors outweigh the negative factors. An exercise of discretion to deny, rather than to grant, may likewise be appropriate when the requestor has met the requirements of the request, but negative factors found in the course of the adjudication outweigh the positive factors.

3. Who Exercises Discretion

Congress expressly granted discretion to the Secretary of Homeland Security in deciding when to grant certain immigration benefits. For example, the Immigration and Nationality Act (INA) states: "The Secretary of Homeland Security or the Attorney General, in the Secretary's or the Attorney General's discretion and under such regulations as the Secretary or the Attorney General may prescribe, may adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum . . . ."[42]

The Secretary's discretionary power is delegated to the officer, through DHS and USCIS. Therefore, when an officer exercises discretion in adjudicating a request for an immigration benefit, the officer is exercising discretion on behalf of the Secretary of Homeland Security.

In many cases, the INA still refers to the Attorney General's discretion because the statutory text has not been changed to reflect the creation of DHS and the transfer of many functions from the U.S. Department of Justice (DOJ) to DHS.[43] If USCIS has adjudicative authority over the benefit, the statute should be read as conferring the power to exercise discretion on the Secretary of Homeland Security.[44]

4. Discretion

Eligibility Threshold

For discretionary benefits, there is never discretion to grant an immigration benefit if the benefit requestor has not first met all applicable threshold eligibility requirements.

It is legally permissible to deny an application as a matter of discretion without determining whether the requestor is otherwise eligible for the benefit.[45] However, the record is essentially incomplete if USCIS denies an application, petition, or request in its exercise of discretion without making a determination concerning eligibility.

Therefore, as a matter of policy, officers should generally make a specific determination regarding eligibility before addressing the exercise of discretion. Where denying the benefit request is appropriate, the officer should generally include in the denial letter his or her determination on all eligibility requirements, including but not limited to discretionary grounds, if applicable, so that the reasons for the ultimate denial are clearly reflected in the record.

Lack of Negative Factors

An alien's threshold eligibility for the benefit sought is generally also a positive factor. Therefore, absent any negative factors, USCIS ordinarily exercises discretion positively.[46] Generally, if there are no negative factors to weigh against that positive factor, denial of the benefit would be an inappropriate use of discretion.

C. Adjudicating Discretionary Benefits

When adjudicating a discretionary benefit, the officer should first determine whether the requestor meets all threshold eligibility requirements. For example, in adjudicating an application for adjustment of status under INA 245(a), the officer should first determine:

- Whether the applicant was inspected and admitted or paroled or has an approved petition as a VAWA self-petitioner;

- Is eligible to receive an immigrant visa;
- Is admissible to the United States for permanent residence; and
- Has an immigrant visa immediately available to him or her at the time he or she files the adjustment application.[47]

If the officer finds that the requestor does not meet the eligibility requirements but may be eligible for a waiver, exemption, or other form of relief, the officer should determine whether the requestor qualifies for a waiver, exemption, or other form of relief. Not all applications are concurrently filed, and in some instances, applicants must file a separate waiver application or application for relief and have that application approved before the applicant qualifies for the benefit.

If the officer finds that the requestor meets the eligibility requirements because of an approved waiver, exemption, or other form of relief, the officer must then determine whether the request should be granted as a matter of discretion. If the officer finds that the requestor does not meet all applicable eligibility requirements, the officer can still include a discretionary analysis in the denial. The discretionary determination is the final step in the adjudication of a benefit request. Adding a discretionary analysis to a denial is useful if an appellate body on review disagrees with the officer's conclusion that the requestor failed to meet the threshold eligibility requirements. In such a situation, the discretionary denial may still stand.

1. Basic Adjudication Steps

Officers should generally follow a three-step process when adjudicating a benefit request involving a discretionary analysis.

Basic Adjudication Steps Involving Discretion	
Step One	Fact finding
Step Two	Determine whether requestor meets the threshold eligibility requirements
Step Three	Conduct discretionary analysis

Fact Finding[48]

Fact finding refers to the process of gathering and assessing evidence. The focus of fact finding should be to obtain credible evidence relevant to a requestor's eligibility for the benefit, including the discretionary determination. If a requestor is interviewed, the officer should elicit information pertinent to fact finding during the interview. As part of fact finding, officers should evaluate relevant information present in the record. Depending on the benefit sought, such information might include, but is not limited to:

- Immigration history;
- Family ties in the United States;
- Any serious medical conditions;
- Any criminal history;
- Other connections to the community; or
- Information indicating a public safety or national security concern.

Background information may be relevant for eligibility determinations and to the exercise of discretion.

For discretionary benefits, the benefit requestor has the burden of showing that a favorable exercise of discretion is warranted through the submission of evidence.[49] In cases where negative factors are present, the officer may ask the requestor directly why he or she warrants a favorable exercise of discretion. The officer should document any response, or lack thereof, in the record.

Determining Whether Requestor First Meets Threshold Eligibility Requirements

The discretionary analysis is the final step in the adjudication. Generally, the officer should first determine whether the requestor meets all threshold eligibility requirements before beginning the discretionary analysis. If the officer determines the requestor has not met the eligibility requirements for the benefit sought, the officer may deny the request without completing a discretionary analysis. However, an officer may include a discretionary analysis if a discretionary denial would be warranted even if the requestor had met the threshold statutory and regulatory requirements.

In the process of determining whether the requestor has met the eligibility requirements for the benefit sought, the officer might find that certain facts related to threshold eligibility for the specific benefit may also be relevant to the discretionary determination.

For example, if an officer finds that an adjustment applicant was convicted of a crime, the applicant might be inadmissible. The criminal conviction may also affect the discretionary analysis.

Conducting Discretionary Analysis

The act of exercising discretion involves the weighing of positive and negative factors and considering the totality of the circumstances in the specific case. In the immigration context, the goal is to assess whether, based on the totality of the circumstances, the alien warrants a favorable exercise of discretion.[50]

2. Identifying Discretionary Factors

Any facts related to the alien's conduct, character, family ties, other lawful ties to the United States, immigration status, or any other humanitarian concerns may be appropriate factors to consider in the exercise of discretion. An alien's conduct can include how he or she entered the United States and what he or she has done since arrival, such as employment, schooling, or any evidence of criminal activity.

Whether the alien has family members living in the United States also is relevant to the discretionary analysis. Ties to the United States may include owning real estate or a business; the conduct of that business (including maintenance of such business in compliance with the law) may also be relevant to the discretionary analysis. Humanitarian concerns may include, but are not limited to, health issues.

Precedent case law provides guidance on how to consider evidence and weigh the positive and negative factors present in a case. These precedent decisions and USCIS guidance provide a framework to assist officers in arriving at decisions which are consistent and fair.[51]

Factors That May Be Considered

There are a number of factors or factual circumstances that are generally considered when conducting a discretionary analysis. Factors may include, but are not limited to:

- Whether the alien is eligible for the benefit sought;[52]
- The applicant or beneficiary's ties to family members in the United States and the closeness of the underlying relationships;[53]
- Hardship due to an adverse decision;[54]
- The applicant or beneficiary's value and service to the community;[55]
- Length of the alien's lawful residence in the United States and status held during that residence, including the age at which the alien began residing in the United States;[56]
- Service in the U.S. armed forces;[57]
- History of employment;[58]
- Property or business ties in the United States;[59]
- History of taxes paid;
- Nature and underlying circumstances of any inadmissibility grounds at issue, the seriousness of the violations, and whether the applicant or beneficiary is eligible for a waiver of inadmissibility or other form of relief;[60]
- Likelihood that lawful permanent resident (LPR) status will ensue soon;
- Evidence regarding respect for law and order, good character, and intent to hold family responsibilities (for example, affidavits from family, friends, and responsible community representatives);[61]
- Criminal history (in the United States and abroad) and whether the applicant or beneficiary has rehabilitated and reformed;[62]
- Community service beyond any imposed by the courts;
- Whether the alien is under an unexecuted administratively final removal, deportation, or exclusion order;[63]
- Public safety or national security concerns;[64]
- Moral depravity or criminal tendencies reflected by a single serious crime or an ongoing or continuing criminal record, with attention to the nature, scope, seriousness, and recent occurrence of criminal activity.[65]
- Findings of juvenile delinquency;[66]
- Compliance with immigration laws;[67]
- Whether the alien has endorsed, promoted, supported, or otherwise espoused anti-American views or the views of a terrorist organization or group (including in social media content by, or involving an alien). This includes organizations who support or promote anti-American ideologies or activities, antisemitic terrorism, antisemitic terrorist organizations, antisemitic ideologies, or has engaged in physical harassment of any person in furtherance of the organization or group;[68]
- In the case of an alien who was admitted or paroled into the United States, whether the application for admission or parole violated the laws, regulations, and policies in place at the time;[69]
- Previous instances of fraud or false testimony in dealings with USCIS or any government agency;
- Marriage to a U.S. citizen or LPR for the primary purpose of circumventing immigration laws;[70]
- Other indicators of an alien's character.[71]

This is a non-exhaustive list of factors; the officer may consider any relevant fact in the discretionary analysis.

USCIS considers factors involving circumstances where an alien has endorsed, promoted, supported, or otherwise espoused anti-American views or the views of a terrorist organization or group, including terrorist organizations who support or promote antisemitic terrorism, antisemitic terrorist organizations, and antisemitic ideologies, as mentioned above, to be an overwhelmingly negative factor in any applicable case involving USCIS discretionary analysis. Accordingly, USCIS enforces all relevant immigration laws to the maximum degree, including the use of discretion, to deny the benefit request involving such circumstances.

3. Weighing Factors

The act of exercising discretion involves weighing both positive and negative factors and considering the totality of the circumstances in the case before making a decision. Whether a favorable exercise of discretion is warranted is case-specific and depends on the evidence of positive and negative factors submitted by the requestor. As the negative factors grow more serious, a favorable exercise of discretion may not be warranted without the existence of unusual or outstanding equities in the case.[72]

Totality of the Circumstances: Evaluating the Case-Specific Considerations for Each Factor

An officer must consider the totality of the facts and circumstances of each individual case involving discretionary benefit requests. To do so, officers should ensure discretionary factors are considered in the context of all factors in the case.

There is no formula for determining the weight to be given a specific positive or negative factor. Officers should not attempt to assign numbers or points to a specific factor to determine if one factor is more or less favorable than another. Officers should consider each factor separately and then all the factors as a whole. The negative and positive factors should be balanced against each other and then evaluated cumulatively.[73] The weight given to each factor may vary depending on the facts of a particular case as well as the relationship of the factor to other factors in the analysis.

Discretionary factors are often interrelated. Officers must therefore determine whether each particular factor is positive or negative and how it affects the other factors under consideration. Some factors are generally given more weight than others. A small number of positive factors may overcome a larger number of negative factors, and vice versa, depending on the specific factors.

For example, when weighing the positive and negative factors, the officer should not consider the various factors individually, in isolation from one another.[74] When considering each factor individually, without considering how all the factors relate to each other, it becomes difficult to weigh the positive and negative factors properly.

Once the officer has weighed each factor individually, the officer should consider all the factors cumulatively to determine whether the unfavorable factors outweigh the favorable ones. If, after weighing all the factors, the officer determines that the positive factors outweigh the negative factors, then the requestor merits a favorable exercise of discretion. If the negative factors outweigh the positive factors, then the officer may decline to favorably exercise discretion and deny the benefit request. There may be instances where the gravity of a negative factor is of such significance that the factor by itself weighs heavily against a favorable exercise of discretion.[75]

Cases that are denied on the basis of an unfavorable exercise of discretion must include an officer's explanation of why USCIS is not exercising discretion in the requestor's favor.[76] The denial notice must clearly set forth the positive and negative factors considered and explain why the negative factors outweigh the positive factors.

4. Supervisory Review[77]

Officers should discuss complex or difficult cases with their supervisors, as needed, particularly those involving criminality or national security issues, regardless of whether the outcome is favorable or unfavorable to the applicant. As appropriate, supervisors may raise issues with USCIS local counsel.

Sometimes a case, especially when coupled with government errors or delay and compelling humanitarian factors, may justify an exercise of discretion resulting in an extraordinarily favorable outcome for the applicant. Officers considering such action should carefully confirm the availability of such action under the law, weigh the factors as in every discretionary decision, consult with supervisors or counsel, and make a record of the analysis and consultation.

D. Documenting Discretionary Determinations

When issuing a decision that involves a discretionary determination, a careful explanation of the officer's findings and analysis (communicating the positive and negative factors considered and how the officer weighed these factors) helps ensure that the decision is legally sufficient and appropriate. The discretionary determination gives the officer authority to ultimately approve a benefit or form of relief or deny a benefit or form of relief when the applicant otherwise meets eligibility requirements. Officers, however, cannot exercise that authority arbitrarily or capriciously.

Favorable Exercise of Discretion

If no negative factors are present, the officer may provide a simple statement in the file noting the absence of negative factors (for example, comments indicating that the applicant is eligible, that there are no negative factors, and that therefore USCIS grants the benefit in the exercise of discretion).

If an officer grants a benefit in the exercise of discretion where negative factors are present but the positive factors outweigh the negative factors, the file should contain a record of the officer's deliberations. The officer should clearly annotate the favorable factors in the file. The officer should also annotate the file regarding any consultations that supported the approval in complex or difficult cases. In some situations, the file annotation may be the only record or documentation for other officers to understand the reasons for the decision.

The officer should indicate the rationale for the decision in a clear manner so that it is easily understandable to others reviewing the file. This may include the officer addressing the discretionary issues in the written decision or by making an annotation in the file.

Unfavorable Exercise of Discretion[78]

If negative factors outweigh the positive factors and USCIS denies the benefit request, the written decision must contain an analysis of the factors considered in exercising discretion, where possible.[79]

Negative factors must never be analyzed in a generalized way. The decision must address negative factors on an individualized basis, applying the totality of the circumstances to the specific facts of the case. The decision should specify both the positive and negative factors that the officer identified and considered in support of the decision and should explain how the officer weighted the different factors. The denial notice should set forth the rationale for the decision so that the officer's deliberation may be understood by the requestor as well as any administrative reviewer (such as the Administrative Appeals Office or immigration judge) and the federal courts.

Articulating Analysis Separately for Discretion and Threshold Eligibility Requirements

In cases involving the negative exercise of discretion, officers should generally articulate clearly the legal analysis of whether the applicant meets the threshold eligibility requirements and then, separately, the discretionary analysis.

Denying Benefit Requests as a Matter of Discretion

If the officer denies a benefit request as a matter of discretion, the officer generally must, in the written notice to the requestor:[80]

- Indicate the decision to deny was made as a matter of discretion;
- Identify, specifically, each positive factor presented by the facts of the case;
- Identify, specifically, each negative factor;
- Explain the relative decisional weight given to each negative and positive factor; and
- Explain the cumulative weight given to the negative and positive factors, and reason for the outcome.

By including the appropriate articulation of discretionary determinations in USCIS decision-making, officers enhance the quality of adjudications and provide appropriate explanation to the requestor.

Footnotes

[^ 1] For purposes of this Policy Manual part, the term requestor means the person, organization, or business requesting an immigration benefit from USCIS. This may include an applicant or petitioner, depending on the request.

[^ 2] See *Matter of Patel (PDF)*, 17 I&N Dec. 597 (BIA 1980). See the program-specific Policy Manual part to determine whether the adjudication of a benefit request requires the exercise of discretion.

[^ 3] See Section C, Adjudicating Discretionary Benefits, Subsection 3, Weighing Factors [1 USCIS-PM E.8(C)(3)].

[^ 4] For example, see *Kucana v. Holder*, 558 U.S. 233 (2010) (comparing discretion provided in statutory language against regulations promulgated by the U.S. Department of Justice).

[^ 5] See, for example, INA 245(a) (adjustment of status).

[^ 6] See INA 291. See *Matter of Patel (PDF)*, 17 I&N Dec. 597 (BIA 1980). See *Matter of Leung (PDF)*, 16 I&N Dec. 12 (BIA 1976). See *Matter of Arai (PDF)*, 13 I&N Dec. 494 (BIA 1970).

[^ 7] See, for example, INA 316 (naturalization).

[^ 8] See Petition for a Nonimmigrant Worker (Form I-129). See INA 101(a)(15). See INA 214 and 8 CFR 214.

[^ 9] See Petition for Alien Fiancé(e) (Form I-129F). See INA 101(a)(15)(K). See INA 214(d) and INA 214(r). See 8 CFR 214.2(k).

[^ 10] See Application to Extend/Change Nonimmigrant Status (Form I-539). See INA 214 and 8 CFR 214.

[^ 11] See Application for Advance Permission to Enter as a Nonimmigrant (Form I-192). See INA 212(d)(3)(A).

[^ 12] See Application for Travel Documents, Parole Documents, and Arrival/Departure Records (Form I-131). See INA 212(d)(5)(A).

[^ 13] See Application for Temporary Protected Status (Form I-821). See INA 244 and 8 CFR 244.

[^ 14] See Refugee/Asylee Relative Petition (Form I-730). See INA 207 and 8 CFR 207.

[^ 15] Except for following-to-join refugee adjudications. See 8 CFR 207.7.

[^ 16] See Application for Asylum and for Withholding of Removal (Form I-589). See INA 208 and 8 CFR 208. See *Matter of Pula (PDF)*, 19 I&N Dec. 467, 471 (BIA 1987).

[^ 17] See Petition for Alien Relative (Form I-130). See INA 203(a) and INA 204(a)(1)(A)-(D). See 8 CFR 204.

[^ 18] See Immigrant Petition for Alien Workers (Form I-140). See INA 203(b) and INA 204(a)(1)(E)-(G). See 8 CFR 204.5.

[^ 19] The national interest waiver element of a petition seeking classification under INA 203(b)(2)(B) is discretionary. See *Mousavi v. USCIS*, 828 Fed. Appx. 130, 133 (3rd Cir. 2020). See *Poursina v. USCIS*, 936 F.3d 868, 870-72 (9th Cir. 2019). See *Matter of Dhanasar*, 26 I&N Dec. 884, 889 n. 9 (AAO 2016). For specific information on applying discretion in national interest waiver petitions, see Volume 6, Immigrants, Part F, Employment-Based Classifications, Chapter 5, Advanced Degree or Exceptional Ability, Section D, National Interest Waiver of Job Offer [6 USCIS-PM F.5(D)].

[^ 20] See Immigrant Petition by Standalone Investor (Form I-526) or Immigrant Petition by Regional Center Investor (Form I-526E). See INA 203(b)(5) and INA 204(a)(1)(H). See 8 CFR 204.6.

[^ 21] Exceptions include threats to the national interest, fraud, deceit, misrepresentation, and criminal misuse. See INA 203(b)(5)(N)(i) and INA 203(b)(5)(O)(i). See Volume 6, Immigrants, Part G, Investors, Chapter 8, Sanctions and Discretionary Determinations [6 USCIS-PM G.8].

[^ 22] See Application for Regional Center Designation (Form I-956) and Application for Approval of an Investment in a Commercial Enterprise (Form I-956F).

[^ 23] Exceptions include threats to the national interest, fraud, deceit, misrepresentation, and criminal misuse. See INA 203(b)(5)(N)(i) and INA 203(b)(5)(O)(i). See Volume 6, Immigrants, Part G, Investors, Chapter 8, Sanctions and Discretionary Determinations [6 USCIS-PM G.8].

[^ 24] See Application to Register Permanent Residence or Adjust Status (Form I-485). For more information on how to conduct a discretionary analysis in the context of an adjustment application, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 10, Legal Analysis and Use of Discretion [7 USCIS-PM A.10].

[^ 25] See, for example, INA 245(a) and INA 209(b). Exceptions include adjustment of status based on Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA), Title II of Pub. L. 105-100 (PDF), 111 Stat. 2160, 2193 (November 19, 1997); refugee-based adjustment under INA 209(a)(2); adjustment of status based on Haitian Refugee Immigration Fairness Act of 1998 (HRIFA), Section 902 of Division A, Title IX of Pub. L. 105-277 (PDF), 112 Stat. 2681, 2681-538 (October 21, 1998); adjustment of status based on Liberian Refugee Immigration Fairness (LRIF) law, Section 7611 of the National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116-92 (PDF), 113 Stat. 1198, 2309 (December 20, 2019).

[^ 26] See Application to Register Permanent Residence or Adjust Status (Form I-485). See INA 249. See 8 CFR 249. For more information, see Volume 7, Adjustment of Status, Part O, Registration [7 USCIS-PM O].

[^ 27] See INA 289 and 8 CFR 289.

[^ 28] See Application for Waiver of Grounds of Inadmissibility (Form I-601). See Application for Provisional Unlawful Presence Waiver (Form I-601A). See Application by Refugee for Waiver of Inadmissibility Grounds (Form I-602). See, for example, INA 209(c), INA 212(a)(9)(B)(v), INA 212(a)(9)(C)(iii), and INA 212(g)-(i). For more information on how to conduct a discretionary analysis in the context of a waiver application, see Volume 9, Waivers and Other Forms of Relief, Part A, Waiver Policies and Procedures, Chapter 5, Discretion [9 USCIS-PM A.5].

[^ 29] See Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212). See INA 212(a)(9)(A)(iii) and INA 212(a)(9)(C)(ii).

[^ 30] See Application for Employment Authorization (Form I-765). See INA 274A. See 8 CFR 274a.12. For more information, see Volume 10, Employment Authorization [10 USCIS-PM].

[^ 31] See Petition to Remove Conditions on Residence (Form I-751). See Petition by Investor to Remove Conditions on Permanent Resident Status (Form I-829). See INA 216 and INA 216A. See 8 CFR 216.

[^ 32] When a family-based conditional permanent resident files a Petition to Remove Conditions on Residence (Form I-751) as a waiver request based on termination of marriage, battery or extreme cruelty, or extreme hardship, it is a discretionary decision. See INA 216(c)(4).

[^ 33] See Application for Naturalization (Form N-400). See INA 316. For more information, see Volume 12, Citizenship and Naturalization [12 USCIS-PM].

[^ 34] See Application for Certificate of Citizenship (Form N-600). See INA 301, INA 309 and INA 320. For more information, see Volume 12, Citizenship and Naturalization, Part K, Certificates of Citizenship and Naturalization [12 USCIS-PM K].

[^ 35] See *Matter of Marin (PDF)*, 16 I&N Dec. 581, 584 (BIA 1978). See *Matter of Buscemi (PDF)*, 19 I&N Dec. 628, 633 (BIA 1988). See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 195 (BIA 1990). See *Matter of Mendez-Morales (PDF)*, 21 I&N Dec. 296, 300 (BIA 1996).

[^ 36] See *Matter of Patel (PDF)*, 17 I&N Dec. 597 (BIA 1980) (adjustment of status). See *Von Pervieux v. INS*, 572 F.2d 114, 118 (3rd Cir. 1978). See *Ameeriar v. INS*, 438 F.2d 1028, 1030 (3rd Cir. 1971). See *Matter of Marques (PDF)*, 16 I&N Dec. 314 (BIA 1977).

[^ 37] See *Matter of Ortiz-Prieto (PDF)*, 11 I&N Dec. 317 (BIA 1965).

[^ 38] See Subsection 4, Discretion [1 USCIS-PM E.8(B)(4)].

[^ 39] Prosecutorial discretion is a decision to enforce or not enforce the law against someone. Prosecutorial discretion is exercised when an agency makes a decision with respect to enforcing the law. USCIS, along with other DHS agencies such as U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection, has the authority to exercise prosecutorial discretion related to immigration enforcement actions it may take, particularly in the context of initiating removal proceedings through the issuance of a non-mandatory Notice to Appear. Prosecutorial discretion does not decrease USCIS' commitment to enforcing the immigration laws. Rather, it is a means to use agency resources in a way that best accomplishes the mission of administering and enforcing the immigration laws of the United States.

[^ 40] See *INS v. Doherty (PDF)*, 502 U.S. 314 (1992).

[^ 41] See *Matter of Arai (PDF)*, 13 I&N Dec. 494, 496 (BIA 1970) ("In the absence of adverse factors, adjustment will ordinarily be granted, still as a matter of discretion."). See *Matter of Pula (PDF)*, 19 I&N Dec. 467, 474 (BIA 1987) ("In the absence of any adverse factors, however, asylum should be granted in the exercise of discretion.").

[^ 42] See INA 209(b).

[^ 43] As of March 1, 2003, in accordance with Section 1517 of the Homeland Security Act of 2002 (HSA), Pub. L. 107-296 (PDF), 116 Stat. 2135, 2311 (November 25, 2002), any reference to the Attorney General in a provision of the INA describing functions that were transferred from the Attorney General or other DOJ official to DHS by the HSA "shall be deemed to refer to the Secretary" of Homeland Security. See 6 U.S.C. 557 (codifying Section 1517 of the HSA).

[^ 44] See 6 U.S.C. 275.

[^ 45] See *INS v. Abudu (PDF)*, 485 U.S. 94, 105 (1988). See *INS v. Bagamasbad (PDF)*, 429 U.S. 24, 26 (1976). See *INS v. Rios-Pineda (PDF)*, 471 U.S. 444 (1985).

[^ 46] See *Matter of Arai (PDF)*, 13 I&N Dec. 494, 496 (BIA 1970). See *Matter of Lam (PDF)*, 16 I&N Dec. 432 (BIA 1978).

[^ 47] See INA 245(a). See Volume 7, Adjustment of Status, Part B, 245(a) Adjustment, Chapter 2, Eligibility Requirements [7 USCIS-PM B.2].

[^ 48] See Chapter 6, Evidence [1 USCIS-PM E.6].

[^ 49] See 8 CFR 103.2(b)(1).

[^ 50] See *Matter of Marin (PDF)*, 16 I&N Dec. 581, 586-587 (BIA 1978). See *Matter of Buscemi (PDF)*, 19 I&N Dec. 628, 633 (BIA 1988). See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 195 (BIA 1990).

[^ 51] See *Matter of Arai (PDF)*, 13 I&N Dec. 494, 496 (BIA 1970). See *Matter of Lam (PDF)*, 16 I&N Dec. 432, 434 (BIA 1978). See *Matter of Marin (PDF)*, 16 I&N Dec. 581, 584 (BIA 1978). See *Matter of Buscemi (PDF)*, 19 I&N Dec. 628, 633 (BIA 1988). See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 195 (BIA 1990). See *Matter of Mendez-Morales (PDF)*, 21 I&N Dec. 296, 301 (BIA 1996).

[^ 52] See *Matter of Mendez-Morales (PDF)*, 21 I&N Dec. 296, 301 (BIA 1996) (In the context of waivers of inadmissibility requiring a showing of extreme hardship: ". . . those found eligible for relief under section 212(h)(1)(B) will by definition have already established extreme hardship to qualified family members, which would be a factor favorable to the alien in exercising discretion.").

[^ 53] See *Matter of Arai (PDF)*, 13 I&N Dec. 494, 496 (BIA 1970). See *Matter of Marin (PDF)*, 16 I&N Dec. 581, 584 (BIA 1978). See *Matter of Buscemi (PDF)*, 19 I&N Dec. 628, 633 (BIA 1988). See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 195 (BIA 1990). See *Matter of Mendez-Morales (PDF)*, 21 I&N Dec. 296, 301-302 (BIA 1996) (". . . if the alien has relatives in the United States, the quality of their relationship must be considered in determining the weight to be awarded this equity.").

[^ 54] See *Matter of Arai (PDF)*, 13 I&N Dec. 494, 496 (BIA 1970). See *Matter of Marin (PDF)*, 16 I&N Dec. 581, 585 (BIA 1978). See *Matter of Buscemi (PDF)*, 19 I&N Dec. 628, 633 (BIA 1988). See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 195 (BIA 1990). See *Matter of Mendez-Morales (PDF)*, 21 I&N Dec. 296, 301 (BIA 1996).

[^ 55] See *Matter of Marin (PDF)*, 16 I&N Dec. 581, 585 (BIA 1978). See *Matter of Buscemi (PDF)*, 19 I&N Dec. 628, 633 (BIA 1988). See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 195 (BIA 1990).

[^ 56] See *Matter of Arai (PDF)*, 13 I&N Dec. 494, 496 (BIA 1970). See *Matter of Marin (PDF)*, 16 I&N Dec. 581, 584-85 (BIA 1978). See *Matter of Buscemi (PDF)*, 19 I&N Dec. 628, 633 (BIA 1988). See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 195 (BIA 1990). See *Matter of Mendez-Morales (PDF)*, 21 I&N Dec. 296, 301 (BIA 1996). Residence must be lawful to be considered a positive factor. See *Matter of Lee (PDF)*, 17 I&N Dec. 275, 278 (Comm. 1978).

[^ 57] See *Matter of Marin (PDF)*, 16 I&N Dec. 581, 585 (BIA 1978). See *Matter of Buscemi (PDF)*, 19 I&N Dec. 628, 633 (BIA 1988). See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 195 (BIA 1990). See *Matter of Mendez-Morales (PDF)*, 21 I&N Dec. 296, 301 (BIA 1996).

[^ 58] See *Matter of Lam (PDF)*, 16 I&N Dec. 432, 434 (BIA 1978). See *Matter of Marin (PDF)*, 16 I&N Dec. 581, 585 (BIA 1978). See *Matter of Buscemi (PDF)*, 19 I&N Dec. 628, 633 (BIA 1988). See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 195 (BIA 1990). See *Matter of Mendez-Morales (PDF)*, 21 I&N Dec. 296, 301-302 (BIA 1996) (". . . if the alien has a history of employment, it is important to consider the type of employment and its length and stability.").

[^ 59] See *Matter of Marin (PDF)*, 16 I&N Dec. 581, 585 (BIA 1978). See *Matter of Buscemi (PDF)*, 19 I&N Dec. 628, 633 (BIA 1988). See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 195 (BIA 1990). See *Matter of Mendez-Morales (PDF)*, 21 I&N Dec. 296, 301 (BIA 1996).

[^ 60] See *Matter of Mendez-Morales (PDF)*, 21 I&N Dec. 296, 301 (BIA 1996).

[^ 61] See *Matter of Marin (PDF)*, 16 I&N Dec. 581, 585 (BIA 1978). See *Matter of Buscemi (PDF)*, 19 I&N Dec. 628, 633 (BIA 1988). See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 195 (BIA 1990).

[^ 62] See *Matter of Marin (PDF)*, 16 I&N Dec. 581, 585 (BIA 1978). See *Matter of Buscemi (PDF)*, 19 I&N Dec. 628, 633 (BIA 1988). See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 195 (BIA 1990). See *Matter of Mendez-Morales (PDF)*, 21 I&N Dec. 296, 301 (BIA 1996). However, reformation is not an absolute prerequisite to a favorable exercise of discretion. Rather, the discretionary analysis must be conducted on a case-by-case basis, with rehabilitation a factor to be considered in the exercise of discretion. See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 196 (BIA 1990) (considering rehabilitation a significant factor in view of the nature and extent of the respondent's criminal history, which spanned 10 years).

[^ 63] USCIS generally does not exercise discretion favorably to grant adjustment where the adjustment applicant has an unexecuted removal order. For information on the effect of an unexecuted removal order of an arriving alien on adjustment of status, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 10, Legal Analysis and Use of Discretion, Section B, Discretion, Subsection 2, Issues and Factors to Consider [7 USCIS-PM A.10(B)(2)].

[^ 64] See Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens, PM-602-0187, issued February 28, 2025.

[^ 65] The officer should not go behind the record of conviction to reassess an applicant's ultimate guilt or innocence, but rather inquire into the circumstances surrounding the commission of the crime in order to determine whether a favorable exercise of discretion is warranted. See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 197 (BIA 1990).

[^ 66] USCIS considers findings of juvenile delinquency on a case-by-case basis, based on the totality of the evidence, to determine whether a favorable exercise of discretion is warranted. Therefore, an adjustment applicant must disclose all arrests and charges. If any arrest or charge was disposed of as a matter of juvenile delinquency, the applicant must include the court or other public record that establishes this disposition. See Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 4, Documentation, Section A, Initial Evidence, Subsection 7, Certified Copies of Arrest Records and Court Dispositions [7 USCIS-PM A.4(A)(7)]. For more information, see Volume 7, Adjustment of Status, Part B, 245(a) Adjustment [7 USCIS-PM B] and Part F, Special Immigrant-Based Adjustment, Chapter 7, Special Immigrant Juveniles, Section C, Eligibility Requirements, Subsection 4, Admissibility and Waiver Requirements [7 USCIS-PM F.7(C)(4)].

[^ 67] See *Matter of Marin (PDF)*, 16 I&N Dec. 581, 584 (BIA 1978). See *Matter of Lee (PDF)*, 17 I&N Dec. 275, 278 (Comm. 1978). See *Matter of Buscemi (PDF)*, 19 I&N Dec. 628, 633 (BIA 1988). See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 195 (BIA 1990). See *Matter of Mendez-Morales (PDF)*, 21 I&N Dec. 296, 301 (BIA 1996). However, the BIA found that a record of immigration violations standing alone does not conclusively support a finding of lack of good moral character. Further, how recent the deportation was can only be considered when there is a finding of a poor moral character based on moral turpitude in the conduct and attitude of an alien which evinces a callous conscience. In such circumstances, there must be a measurable reformation of character over a period of time in order to properly assess an alien's ability to assimilate into society. In all other instances, when the cause for deportation has been removed and the alien now appears eligible for issuance of a visa, the time factor should not be considered. See *Matter of Lee (PDF)*, 17 I&N Dec. 275 (Comm. 1978).

[^ 68] USCIS uses the definitions at INA 313(a) [8 U.S.C. 1424(a)] when identifying and determining anti-American organizations, views, activities, and ideologies.

[^ 69] This includes compliance with any requirements announced by DHS for any parole program or process, including whether the alien had knowledge of any false or fraudulent information. For example, in certain circumstances, DHS required a financial sponsor to submit an approvable Declaration of Financial Support (Form I-134) or Online Request to Be a Supporter and Declaration of Financial Support (Form I-134A) as a condition of an alien being authorized parole. An officer adjudicating an alien's pending immigration benefit request involving discretion may determine that the alien's prior application for parole was not in accordance with the policies in place at the time if the Form I-134 or Form I-134A relied upon by DHS to authorize parole contained false information or was accompanied by supporting evidence that contained false or fraudulent information.

[^ 70] Although this factor could lead to a statutory denial under INA 204(c).

[^ 71] See *Matter of Marin (PDF)*, 16 I&N Dec. 581, 584 (BIA 1978). See *Matter of Buscemi (PDF)*, 19 I&N Dec. 628, 633 (BIA 1988). See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 195 (BIA 1990). See *Matter of Mendez-Morales (PDF)*, 21 I&N Dec. 296, 301 (BIA 1996).

[^ 72] See *Matter of Marin (PDF)*, 16 I&N Dec. 581, 585 (BIA 1978). See *Matter of Buscemi (PDF)*, 19 I&N Dec. 628, 633 (BIA 1988). See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 195 (BIA 1990). See *Matter of Mendez-Morales (PDF)*, 21 I&N Dec. 296, 301 (BIA 1996). For example, USCIS generally does not favorably exercise discretion in certain cases involving violent or dangerous crimes except in extraordinary circumstances. See 8 CFR 212.7(d). For more information, see Volume 9, Waivers and Other Forms of Relief, Part A, Waiver Policies and Procedures, Chapter 5, Discretion, Section C, Cases Involving Violent or Dangerous Crimes [9 USCIS-PM A.5(C)]. See Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 10, Legal Analysis and Use of Discretion, Section B, Discretion, Subsection 2, Issues and Factors to Consider [7 USCIS-PM A.10(B)(2)]. Another example relates to applicants seeking adjustment based on U nonimmigrant status: Depending on the nature of the adverse factors, applicants may be required to clearly demonstrate that denial of adjustment would result in exceptional and extremely unusual hardship. Even if the applicant makes such a showing, however, USCIS may still find favorable exercise of discretion is not warranted in certain cases. See 8 CFR 245.24(d)(11).

[^ 73] See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 200 (BIA 1990) (concurring opinion).

[^ 74] See *Matter of Pula (PDF)*, 19 I&N Dec. 467, 473-74 (BIA 1987).

[^ 75] See, for example, 8 CFR 212.7(d) (In adjudicating an application for a waiver of a criminal ground of inadmissibility involving a violent or dangerous crime, "depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion . . . .") For more information on discretion in the context of waivers of inadmissibility, see Volume 9, Waivers and Other Forms of Relief, Part A, Waiver Policies and Procedures, Chapter 5, Discretion [9 USCIS-PM A.5].

[^ 76] See 8 CFR 103.3(a).

[^ 77] Supervisory review is required in certain situations. The law provides for outcomes that may be extraordinarily favorable for the applicant but uphold principles of fairness and equity. See *Munoz v. Ashcroft*, 339 F.3d 950 (9th Cir. 2003) (stating, "It is true that equitable tolling is available in INA cases, as there is a 'presumption, read into every federal statute of limitation, that filing deadlines are subject to equitable tolling [and that] the same rebuttable presumption of equitable tolling . . . applies in suits against private defendants and . . . in suits against the United States'", but concluding that the April 1, 1990 (asylum application deadline to qualify under the Nicaraguan Adjustment and Central American Relief Act, Title II of Pub. L. 105-100 (PDF), 111 Stat. 2160 (November 19, 1997)) is a statute of repose that cannot be subject to equitable tolling). See *Mohawk Power Corp. v. Federal Power Commission*, 379 F.2d 153, 160 (D.C. Cir. 1967) ("Conceptions of equity are not a special province of the courts but may properly be invoked by administrative agencies seeking to achieve 'the necessities of control in an increasingly complex society without sacrifice of fundamental principles of fairness and justice.'").

[^ 78] These analytical steps amplify guidance concerning denial notices, and do not replace them.

[^ 79] See 8 CFR 103.3(a). In some cases, the officer may not be able to fully reveal negative discretionary factors if they are classified. Additionally, an exception may be made for denial letters issued to applicants for admissions as a refugee under the U.S. Refugee Admissions Program, which contain only summary reasons for denials and are not required to contain detailed analysis of the basis for negative decisions.

[^ 80] See 8 CFR 103.3(a). In some cases, the officer may not be able to fully reveal negative discretionary factors if they are classified. Additionally, an exception may be made for denial letters issued to applicants for admissions as a refugee under the U.S. Refugee Admissions Program, which contain only summary reasons for denials and are not required to contain detailed analysis of the basis for negative decisions.

Chapter 9 - Rendering a Decision

A. Approvals

If the requestor properly filed the benefit request and the officer determines that the requestor meets all eligibility requirements, then the officer may approve the request. Upon approval, the officer updates all relevant electronic systems to reflect the approval.

B. Denials[1]

If, after evaluating all evidence submitted (including in response to a Request for Evidence (RFE) or Notice of Intent to Deny (NOID), if applicable), the officer determines the requestor is ineligible for the benefit sought, the officer denies the benefit request.[2] Upon denial of a request, the officer updates all relevant electronic systems and issues a written decision informing the requestor of the reason(s) for denial.[3]

If the denial notice is returned as undeliverable, USCIS verifies the mailing address and places the notice, including the original mailing envelope, in the appropriate file as evidence of service of the decision.[4]

Written decisions should use plain language that the requestor can understand. When applicable, the decision includes guidance on the procedures for filing appeals and motions, including instructions for where to find the appropriate forms.[5]

1. Denials Based on Lack of Legal Basis

Generally, if a benefit request does not have a legal basis for approval, and the officer determines there is no possibility additional evidence could establish a legal basis for approval, the officer should issue a denial without first issuing an RFE or NOID.

This includes any filing in which the benefit requestor has no legal basis for the benefit sought or submits a request for an inactive or terminated program. For example, this includes family-based petitions filed for family members based on claimed relationships under categories not provided by statute (such as a grandparent filing a petition for a grandchild).

2. Abandonment Denials[6]

USCIS denies the benefit request as abandoned if the requestor fails to appear for a required interview or biometrics appointment or fails to provide an original document or other evidence when requested to do so.[7] When USCIS denies an application for abandonment, USCIS must notify the requestor, and the authorized representative, as appropriate, of the decision in writing.[8] Such a denial is without prejudice to a later re-filing of the benefit request.[9] The priority or processing date of a withdrawn or abandoned benefit request may not be applied to a later benefit request.[10]

3. Discretionary Denials

Many immigration benefits require requestors to demonstrate that their request merits a favorable exercise of discretion. For these benefits, a discretionary analysis is a separate, additional component of adjudicating the benefit request. Whether to favorably exercise discretion is typically assessed after an officer has determined that the requestor meets all applicable threshold eligibility requirements.

The discretionary analysis involves the review of all relevant, specific facts and circumstances in an individual case, both favorable and unfavorable to the exercise of discretion. However, there are limitations on how the officer may exercise discretion; the officer may not exercise discretion arbitrarily, inconsistently, or in reliance on biases or assumptions.

If the officer denies a request as a matter of discretion, the denial will explain the reasons the request was not granted.

Footnotes

[^ 1] See 8 CFR 103.3. Generally, applications for asylum are not subject to denial under 8 CFR 103.2(b), unlike most other benefit requests. See 8 CFR 208.14(d).

[^ 2] Except that, if an asylum applicant appears to be deportable, excludable, or removable, the asylum officer must either grant asylum or refer the application to an immigration judge for adjudication in deportation, exclusion, or removal proceedings. See 8 CFR 208.14.

[^ 3] See 8 CFR 103.3(a)(1)(i).

[^ 4] See 8 CFR 103.8.

[^ 5] See 8 CFR 103.3(a)(1)(iii)(A) (appeal) and 8 CFR 103.5 (motion to reopen or reconsider). When USCIS denies a benefit request for lack of prosecution due to abandonment, the denial cannot be appealed (although the requestor can file a motion). See 8 CFR 103.2(b)(15).

[^ 6] Asylum officers should refer to asylum-specific procedures regarding abandonment of an asylum application.

[^ 7] See 8 CFR 103.2(b)(13).

[^ 8] See 8 CFR 103.3(a)(1)(i). A denial due to abandonment may not be appealed. See 8 CFR 103.2(b)(15).

[^ 9] A denial due to abandonment may not be appealed, but an applicant or petitioner may file a motion to reopen. See 8 CFR 103.2(b)(15).

[^ 10] See 8 CFR 103.2(b)(15).

Chapter 10 - Post-Decision Actions

A. Updating Systems [Reserved]

[Reserved]

B. Notices to Appear [Reserved]

[Reserved]

C. Action on an Approved Application or Petition

In most instances, once a benefit request is adjudicated and notices are sent to the relevant parties, no further action on the part of the officer is required. However, there are certain situations that may require additional actions. Such actions may be initiated by the requestor, ordinarily by filing an Application for Action on an Approved Application or Petition (Form I-824).

For example, Form I-824 may be filed, with fee, to request a duplicate approval notice or to transfer a visa petition requiring visa issuance from one consulate to another.

Jurisdiction to act on a Form I-824 lies with the office that originally approved the underlying benefit or, if the file has been transferred, with the office currently holding the file. Officers should follow local procedures for completing action on Form I-824.

D. Revocation, Rescission, or Termination

After approving a benefit request, USCIS may revoke, rescind, or terminate that immigration benefit in certain circumstances.[1] For example, USCIS may revoke the approval of an immigrant visa petition, in the agency's discretion, for good and sufficient cause.[2]

Timeframe for Response

The maximum response time for a Notice of Intent to Revoke or a Notice of Intent to Rescind (NOIR) is 30 days.[3] Generally, the maximum response time for a Notice of Intent to Terminate (NOIT) is also 30 days.[4] The NOIR or NOIT must clearly state the deadline by which the response must be submitted to USCIS.

Regulations govern the effect of service, which may be in person, by ordinary mail, or electronically.[5] When USCIS serves a NOIR or NOIT by ordinary mail, the service of the NOIR or NOIT is complete upon the benefit requestor on the day that USCIS physically mails it.[6] When USCIS serves a NOIR or NOIT by mail, a NOIR or NOIT response is timely if USCIS receives it no more than 3 days after the deadline. This provides a total of 33 days after USCIS mails the NOIR or NOIT, for USCIS to receive a NOIR or NOIT response.[7]

Further, USCIS applies the regulatory definition of day[8] when reviewing a mailed NOIR or NOIT response for timeliness. Where USCIS receives the response on a Monday or on the next business day after a federal holiday, USCIS considers the response to be timely if the deadline fell on the preceding Saturday, Sunday, or federal holiday. As such, when the last day of the filing period falls on a Saturday, Sunday, or federal holiday, the NOIR or NOIT response period is extended until the end of the next business day that is not a Saturday, Sunday, or federal holiday.

USCIS considers a response to a NOIR or NOIT that is issued through the USCIS online system to be received on the date it is electronically filed through the individual's (or attorney or representative's) online account, regardless of whether the day is a weekend or federal holiday.

Additional mailing time (14 days) should be given to benefit requestors residing outside the United States or when USCIS mails a NOIR or a NOIT from an international USCIS field office.

Footnotes

[^ 1] For example, see INA 205 (revocation of approval of petitions), 8 CFR 246.1 (rescission of lawful permanent resident status), and 8 CFR 204.6(m)(6) (notice of intent to terminate the designation of a regional center). See the program-specific parts of the Policy Manual for more information about revocation, rescission, or termination.

[^ 2] See INA 205.

[^ 3] See 8 CFR 205.2 and 8 CFR 246.1.

[^ 4] See, for example, 8 CFR 204.6(m)(6)(iv). However, procedures that relate to USCIS seeking to terminate a grant of asylum differ in that USCIS schedules an interview at least 30 days after USCIS sends the asylee the NOIT. See 8 CFR 208.24.

[^ 5] See 8 CFR 103.8(b) ("[w]henever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, 3 days shall be added to the prescribed period. Service by mail is complete upon mailing."). See 8 CFR 103.8(a) (describing routine service by ordinary or electronic mail and personal service, performed by a government employee).

[^ 6] See 8 CFR 103.8(b) ("[w]henever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, 3 days shall be added to the prescribed period. Service by mail is complete upon mailing.").

[^ 7] This does not apply to the termination of asylum status, as the regulations regarding the termination of a grant of asylum by USCIS provide that USCIS must set the termination interview at least 30 days after the date of mailing the NOIT. See 8 CFR 208.24.

[^ 8] See 8 CFR 1.2.

Part F - Motions and Appeals

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures.

See more

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures. We are working quickly to update and incorporate all of the AFM content into the USCIS Policy Manual, the agency's centralized online repository for immigration policies. Until then, we have moved any remaining AFM content to its corresponding Policy Manual Part. To the extent that a provision in the Policy Manual conflicts with remaining AFM content or Policy Memoranda, the updated information in the Policy Manual prevails. If you have questions or concerns about any discrepancies among these resources, contact PolicyFeedback@uscis.dhs.gov.

AFM Chapter 10 - An Overview of the Adjudication Process (External)

Part G - Notice to Appear

Part H - Emergencies or Unforeseen Circumstances

Chapter 1 - Purpose and Background

A. Purpose

Whether occurring in the United States or abroad, emergencies or unforeseen circumstances, such as natural disasters (for example, hurricanes, wildfires, or severe weather), national emergencies (for example, public health emergencies), or other circumstances (for example, terrorist attacks, mass shootings, system outages, or cyber attacks), may present unanticipated challenges to immigration benefit requestors.

Generally, USCIS may, in its discretion, implement certain flexibilities to assist benefit requestors during and after these events on a case-by-case basis. The degree to which USCIS may exercise discretion depends on the specific circumstances and applicable legal authorities. USCIS may also publicly announce the flexibilities and may issue guidance to ensure consistent application of these flexibilities.

B. Background

During or after an emergency or unforeseen circumstances, benefit requestors may experience various setbacks, including difficulties in obtaining documentation demonstrating eligibility for certain immigration benefits, being unable to receive notification of (or respond in a timely manner to) a USCIS-issued request or notice related to a pending benefit request, failing to appear for a scheduled appointment, or being unable to depart the United States before their authorized period of stay expires.

Benefit requestors may also experience unanticipated economic hardship, endure prolonged family separation, find that their USCIS-issued documents are damaged or destroyed, or find that they need to travel outside the United States because of the emergency or unforeseen circumstances.

Emergencies or unforeseen circumstances may also affect the operations of USCIS offices.[1] USCIS management officials may consider the operational requirements for implementing the flexibilities described in this part as they develop contingency plans in response to emergencies.

In response to certain emergencies or unforeseen circumstances, USCIS informs the public of the availability of various flexibilities.[2] If a benefit requestor seeks accommodation from USCIS based on the flexibilities referenced in this part, officers must follow corresponding guidance, including any guidance from USCIS headquarters related to the emergency or unforeseen circumstances.

C. Legal Authorities

- INA 103 – Powers and duties of the Secretary, Under Secretary, and Attorney General
- INA 291 – Burden of proof
- 8 CFR 103 – Immigration benefit requests; USCIS filing requirements; Biometric requirements; Availability of records

Footnotes

[^ 1] See Federal Emergency Management Agency's Federal Continuity Directive 1, Federal Executive Branch National Continuity Program and Requirements (PDF), issued January 17, 2017, which provides guidance to federal executive branch departments and agencies for use in developing contingency plans and programs for Continuity of Operations (COOP). COOP planning is an effort to ensure that the capability exists to continue essential agency functions across a wide range of emergencies.

[^ 2] See USCIS' Immigration Relief in Emergencies or Unforeseen Circumstances webpage.

Chapter 2 - Emergencies or Unforeseen Circumstances-Related Flexibilities

USCIS may, in its discretion, implement certain flexibilities when there are emergencies or unforeseen circumstances, such as:

- Natural disasters (for example, hurricanes, wildfires, or other severe weather);[1]
- National emergencies (for example, public health emergencies);
- Conflicts abroad; or
- Other unforeseen circumstances (for example, terrorist attacks, mass shootings, system outages, or cyber attacks) that may present unanticipated challenges to benefit requestors.

When an emergency or unforeseen circumstance occurs, USCIS may analyze the potential challenges presented to benefit requestors. USCIS may decide to implement flexibilities available within existing authorities to address the challenges.

If a requestor has been affected by an emergency or unforeseen circumstance, USCIS may have discretion to take measures on a case-by-case basis including, but not limited to, requests related to:

- Delays in filing applications, petitions, or requests by or on behalf of nonimmigrants present in the United States;
- Fee waivers;
- Document replacement;
- Rescheduling;
- Parole;
- Expedited processing; and
- Additional periods of satisfactory departure by Visa Waiver Program (VWP) entrants.

The President and the Secretary of Homeland Security have the discretionary authority to provide certain additional flexibilities for requestors, which include:

- Approving individual requests for deferred action submitted by aliens inside the United States;[2]
- For certain students, suspending limitations on employment, authorizing off-campus work, or authorizing a reduced course load under special student relief;[3]
- Designating, at the Secretary of Homeland Security's discretion, a foreign state (or part of a foreign state) for temporary protected status, if the statutory conditions exist to support such designation;[4]
- Exercising discretion to defer certain employment eligibility verification requirements;[5] or
- Authorizing deferred enforced departure for a designated class of aliens.[6]

A. Immigration Policy Flexibilities

1. Nonimmigrants Present in the United States

Generally, nonimmigrants must depart the United States before their authorized period of stay expires.[7] USCIS recognizes that nonimmigrants affected by an emergency or unforeseen circumstance may unexpectedly remain in the United States beyond their authorized period of stay.

Extension of Stay and Change of Status

If seeking an extension of stay or change of status in the United States, nonimmigrants (or petitioners filing on their behalf) generally must file such a request before their authorized period of stay expires to be eligible for an extension of stay or change of status.[8]

Officers may, in their discretion, excuse a failure to timely file applications or petitions to extend or change status if:

- The benefit requestor is otherwise eligible for the benefit;
- The failure to timely file the extension of stay or change of status before the authorized period of stay expired was due to extraordinary circumstances beyond the control of the applicant or petitioner; and
- The delay in filing was commensurate with the circumstances.[9]

Officers determine whether an emergency or unforeseen circumstance constitutes extraordinary circumstances beyond the control of the benefit requestor and, if so, may excuse the failure to timely file.[10]

If the officer denies an extension of stay or change of status request, and the alien has fallen out of status, the officer should follow current Notice to Appear (NTA) policies to determine if issuance of an NTA is appropriate.

Visa Waiver Program Entrants – Satisfactory Departure

VWP entrants are generally not eligible for an extension of stay or change of status.[11] However, where an emergency or unforeseen circumstance prevents the departure of a VWP entrant, USCIS may exercise discretion to grant up to 30 days to allow for satisfactory departure.[12] For those VWP entrants already granted satisfactory departure and unable to depart within this 30-day period because of an emergency or unforeseen circumstance, USCIS has the authority to provide an additional 30-day period of satisfactory departure.[13] Officers determine whether an emergency or unforeseen circumstance constitutes an emergency that merits an approval of satisfactory departure.

To request satisfactory departure from USCIS, a VWP entrant should contact the USCIS Contact Center[14] and provide proof of the emergency or unforeseen circumstance. The USCIS Contact Center forwards the request to the local field office for consideration. If USCIS approves the request, the officer provides the requestor with a notification of a grant of satisfactory departure. Any notice issued by USCIS approving satisfactory departure should reflect:

- The period of satisfactory departure;
- The A-number, if any;
- The office name; and
- The date of notification.

USCIS provides similar notification to U.S. Customs and Border Protection (CBP).

Aliens stranded at a U.S. port of departure should contact CBP officers to request satisfactory departure. Alternatively, VWP entrants may contact the USCIS Contact Center.[15]

Adjustment of Status

Generally, aliens applying for adjustment of status must demonstrate that they have maintained continuous lawful immigration status since entry into the United States.[16] However, an applicant for adjustment of status may still be eligible notwithstanding their failure to maintain continuously a lawful status if such a failure was through no fault of the applicant or for technical reasons.[17]

Reinstatement to Student Status

If otherwise eligible for reinstatement, students who fail to maintain their F-1 or M-1 nonimmigrant status as a result of an emergency or unforeseen circumstances may apply for reinstatement to student status by filing an Application to Extend/Change Nonimmigrant Status (Form I-539).[18] Exchange visitors who fail to maintain their J-1 nonimmigrant status may request reinstatement to exchange visitor status under the U.S. Department of State regulations.[19]

2. Parolees

Parole allows an individual, who may be inadmissible or otherwise ineligible for admission into the United States, to come to or remain in the United States for a temporary period.[20] Generally, parolees must depart the United States when their authorized period of parole expires.[21]

USCIS recognizes that emergencies and unforeseen circumstances may unexpectedly prevent parolees from departing the United States before the expiration of their authorized period of parole, which would result in the accrual of unlawful presence unless the alien is otherwise protected from such accrual under the law or USCIS policy.

Parolees whose initial period of parole was authorized by USCIS who wish to request a new period of parole, also known as re-parole, may generally file such a request with USCIS before their initial parole period expires.[22] USCIS may exercise discretion to approve re-parole for urgent humanitarian reasons or significant public benefit on a case-by-case basis.[23]

3. Expedited and Emergency Issuance of Travel Documents

USCIS may, in its discretion, consider expedited or emergency issuance of certain travel documents for applicants who are inside the United States and wish to travel outside the United States due to an emergency or unforeseen circumstances and later return to the United States.[24] USCIS considers these requests on a case-by-case basis.

4. Deferred Action

Deferred action is a form of prosecutorial discretion to defer removal action (deportation) against an alien for a certain period of time.[25] Aliens granted deferred action are considered to be in a period of stay authorized under USCIS policy for the period deferred action is in effect.[26] However, deferred action is not a lawful immigration status and does not excuse any past or future periods of unlawful presence.[27]

USCIS reviews deferred action requests on a case-by-case basis and considers all positive and negative factors when considering whether to exercise discretion to defer removal action.[28]

USCIS may consider emergencies or unforeseen circumstances that prevent the departure of an alien without another lawful basis to remain in the United States when determining whether to approve deferred action.

5. Employment Authorization for F-1 Students

Emergencies or unforeseen circumstances beyond the student's control may cause alien students severe economic hardship. If otherwise eligible, an F-1 student who is experiencing severe economic hardship may qualify for off-campus employment authorization or other relief.[29]

6. Document Replacement

A benefit requestor may file to replace a USCIS-issued document in the event that the document is not delivered, lost, damaged, destroyed, or contains incorrect information.[30] The requestor must file any application for document replacement according to the instructions and regulations in existence at the time of filing. Eligible applicants may seek a fee waiver or be eligible for a fee exemption for certain document replacement requests.[31]

7. Flexibilities for Conditional Permanent Residents

In general, conditional permanent residents must file either a Petition to Remove Conditions on Residence (Form I-751) or a Petition by Investor to Remove Conditions on Permanent Resident Status (Form I-829) during the 90-day period immediately preceding the second anniversary of the conditional permanent resident receiving permanent resident status.[32]

Officers may excuse the late filing of Form I-751 or Form I-829 if the conditional permanent resident files after the 90-day period and includes a written statement indicating that there is good cause, such as an emergency, that prevented a timely filing.[33]

8. Flexibilities for Failure to Respond to a Request for Evidence or to Certain Notices

If the evidence a benefit requestor submits is incomplete or insufficient to establish eligibility, officers may issue a Request for Evidence (RFE) or a Notice of Intent to Deny (NOID) to the requestor.[34] USCIS may deny an application, petition, or request on the merits of the case if the requestor fails to establish eligibility through the submission of additional evidence before the deadline provided in the notice.

USCIS may also (or alternatively) deny for abandonment if the requestor fails to respond to the RFE or NOID or fails to provide required initial evidence by the required date.[35] In general, USCIS does not reopen applications or petitions denied for abandonment unless the benefit requestor meets certain limited criteria, or USCIS decides to reopen the proceeding on its own motion.[36]

In response to an emergency or unforeseen circumstance, USCIS may temporarily delay the adjudication of the benefit request following the RFE or NOID deadline. During this period of time the requestor may submit additional evidence, including that requested in the RFE or NOID, and USCIS may consider such evidence before adjudicating the benefit request.

In determining such a period, USCIS considers any applicable extenuating circumstances related to the emergency or unforeseen circumstance, including, but not limited to:

- Disruptions to the postal service during or after an emergency;
- Disruptions to public transportation;
- Loss of domicile;
- Loss or damage to property;
- Displacement;
- Inoperable telephone or cellular service; or
- Lack of access to the internet.

If the benefit requestor fails to respond to any notice issued by the end of the flexibility period, the officer may adjudicate the case on the existing record. USCIS must notify the requestor of the decision and, if applicable, the termination of any associated benefit.[37]

If the benefit requestor demonstrates that they are unable to obtain certain evidence due to an emergency or unforeseen circumstances, the officer may exercise their discretion to provide the benefit requestor an opportunity to demonstrate they meet eligibility requirements through alternative means, if permitted under the applicable statutory or regulatory framework.[38]

Officers may also exercise their discretion to reopen a denial decision upon USCIS motion and reconsider the benefit requestor's eligibility if the benefit requestor establishes that they failed to respond as a result of an emergency or unforeseen circumstance.[39]

9. Motions to Reopen and Appeals

Untimely Motions to Reopen

Applicants and petitioners must file a motion to reopen a proceeding within 30 calendar days of the decision that the motion seeks to reopen, or within 33 days if the decision was mailed.[40] USCIS may excuse failure to file before this period expires where the applicant or petitioner demonstrates that the delay was reasonable and was beyond their control.[41] USCIS may consider delays caused by emergencies or unforeseen circumstances to be reasonable and beyond the control of the applicant or petitioner.

There is no similar provision excusing untimely filings for a motion to reconsider.

Untimely Appeals

Appeals must be filed within 30 calendar days of the adverse decision, or within 33 days if the decision was mailed.[42] The Administrative Appeals Office must reject an appeal that is not filed within the time allowed.[43] However, if the untimely appeal meets the requirements of a motion, USCIS treats the appeal as a motion to reopen or reconsider.[44]

10. Fee Waivers and Exemptions

Individuals impacted by an emergency or unforeseen circumstances may experience financial disruptions, including unexpected expenses and temporary or permanent loss of income or employment. Such disruptions may impact the ability of benefit requestors to pay required filing fees. A fee waiver request may be filed with certain benefit requests based on various criteria, including financial hardship.[45]

USCIS announces via the public website any fee exemption the USCIS Director may approve in connection with an emergent circumstance,[46] including a declared major natural disaster.[47]

11. Expedited Processing

Immigration benefit requestors may request that USCIS expedite the adjudication of an application, petition, request, appeal, or motion that is under USCIS jurisdiction.[48] Relevant expedite criteria or circumstances that may be considered in determining whether to approve an expedite request include, but are not limited to, emergencies or urgent humanitarian situations.[49]

Benefit requestors seeking expedited processing must demonstrate that their request merits expedited processing as a matter of discretion based on one or more criteria or circumstances.[50] If a benefit requestor is seeking expedited processing on the basis of an emergency or unforeseen circumstance, they must demonstrate how the emergency or unforeseen circumstance created the need for expedited processing.

USCIS may expedite adjudication of an application, petition, request, appeal, or motion at its discretion. USCIS considers the totality of the circumstances and evidence submitted in support of an expedite request. In general, officers do not need to request approval before deciding whether to expedite; however, local policies for various immigration applications, petitions, or requests may outline operational requirements associated with expedited processing, including supervisory review.

B. Burden of Proof

The benefit requestor has the burden of proof to establish eligibility for an immigration benefit.[51] To satisfy this burden, requestors must provide sufficient evidence to meet the applicable standard of proof.[52]

In the event of an emergency or unforeseen circumstances, requestors may have difficulty presenting certain types of evidence to meet their burden of proof for the benefit sought. In these situations, if permitted under the applicable statutory or regulatory framework, officers may exercise discretion in evaluating other types of evidence to determine whether it is sufficient for the benefit requestor to satisfy the applicable standard of proof for the benefit sought.[53]

If a requestor does not provide certain documentation to meet the burden of proof, officers may, in their discretion, corroborate the information through systems checks, file review, third-party affidavits, testimony, or other means, in determining whether the evidence meets the standard of proof.[54] USCIS may also extend this flexibility to a specified group of benefit requestors and their family members following an emergency or unforeseen circumstance.

C. Considerations for Aliens Outside the United States

USCIS may assist certain aliens requesting urgent travel to the United States or who require documentation to return from temporary travel outside the United States.

1. Humanitarian or Significant Public Benefit Parole

Aliens who are outside of the United States may request parole into the United States based on urgent humanitarian reasons or significant public benefit.[55] Parole is not intended to be used solely to avoid normal visa processing procedures and timelines, to bypass inadmissibility waiver processing, or to replace established refugee processing channels.

An applicant may demonstrate urgency by establishing a reason to be in the United States that calls for immediate or other time-sensitive action, including (but not limited to) critical medical treatment, or the need to visit, assist or support a family member who is at an end-of-life stage of an illness or disease. The factors considered in determining urgent humanitarian reasons depend on the type of parole request.[56]

Parole based on significant public benefit includes, but is not limited to, law enforcement and national security reasons or foreign or domestic policy considerations.

2. Returning from Temporary Travel Outside the United States

Lawful Permanent Residents (LPRs), including conditional residents, returning from temporary travel outside the United States of less than 1 year and whose Permanent Resident Card has been lost, stolen, or destroyed may apply for a travel document (carrier documentation) that allows them to board an airline or other transportation carrier without the airline or transportation carrier being penalized. LPRs returning from temporary travel outside the United States of less than 2 years and whose reentry permits have been lost, stolen, or destroyed may do so as well.

Aliens outside the United States whose advance parole document, TPS travel document, or Employment Authorization Document with travel endorsement has not expired but has been lost, stolen, damaged, or destroyed while the alien was abroad may also request carrier documentation from USCIS.

LPRs and other aliens who wish to request carrier documentation may do so by filing an Application for Carrier Documentation (Form I-131A).

Footnotes

[^ 1] Domestically, USCIS may apply flexibilities, as appropriate, to individuals affected by natural catastrophes who live in a location that the Federal Emergency Management Agency (FEMA) has identified as a disaster area for purposes of public assistance. See FEMA's Disasters & Assistance and How a Disaster Gets Declared webpages for more information.

[^ 2] USCIS, as well as U.S. Immigration and Customs Enforcement (ICE), may authorize deferred action as a discretionary act of administrative convenience to delay or decline to exercise immigration enforcement authority on a case-by-case basis. See Section 442(c) of the Homeland Security Act of 2002, Pub. L. 107-296 (PDF), 116 Stat. 2135, 2194 (November

25, 2002). See Delegation to the Bureau of Citizenship and Immigration Services, Delegation 0150.1, signed June 5, 2003 (effective March 1, 2003) (delegating authority to grant deferred action).

[^ 3] ICE may allow designated school officials to authorize a reduced course load for students. See 8 CFR 214.2(f)(6)(iii). ICE or USCIS may authorize a temporary change to employment requirements for students. See INA 101(a)(15)(F)(i). See 8 CFR 214.2(f). See Volume 2, Nonimmigrants, Part F, Students (F, M) [2 USCIS-PM F].

[^ 4] The Secretary of Homeland Security, after consultation with appropriate federal agencies, may designate a foreign state (or any part of such foreign state) for temporary protected status if the conditions in the foreign state fall into one, or more, of the three statutory bases for designation: armed conflict, environmental disasters, or extraordinary and temporary conditions. See INA 244(b)(1).

[^ 5] DHS may exercise discretion to defer requirements associated with Employment Eligibility Verification (Form I-9) generally found in INA 274A.

[^ 6] The President of the United States may authorize deferred enforced departure for a designated group of aliens as an exercise of the President's power to conduct foreign relations.

[^ 7] See Volume 2, Nonimmigrants, Part A, Nonimmigrant Policies and Procedures, Chapter 4, Extension of Stay, Change of Status, and Extension of Petition Validity [2 USCIS-PM A.4].

[^ 8] See 8 CFR 214.1(c)(4) and 8 CFR 248.1(b) (timely filling for change of status applications). However, this requirement does not apply to an alien applying to obtain V nonimmigrant status. See INA 101(a)(15)(V). See 8 CFR 214.15(f). For specific filing and eligibility requirements for extensions of stay and changes of status, see instructions for Petition for a Nonimmigrant Worker (Form I-129) and instructions for Application to Extend/Change Nonimmigrant Status (Form I-539).

[^ 9] See 8 CFR 214.1(c)(4) and 8 CFR 248.1(b).

[^ 10] For more discussion of how USCIS exercises its discretion for these untimely requests and the effect of approval on the nonimmigrant's lawful status, see Volume 2, Nonimmigrants, Part A, Nonimmigrant Policies and Procedures, Chapter 4, Extension of Stay, Change of Status, and Extension of Petition Validity [2 USCIS-PM A.4]. For a discussion of how approved untimely requests could impact a subsequent adjustment of status application, see Volume 7, Adjustment of Status, Part B, 245(a) Adjustment, Chapter 4, Status and Nonimmigrant Visa Violations (INA 245(c)(2) and INA 245(c)(8)) [7 USCIS-PM B.4].

[^ 11] See 8 CFR 248.2(a).

[^ 12] See 8 CFR 217.3(a). USCIS determines whether unforeseen circumstances qualify as an emergency under this provision.

[^ 13] See 8 CFR 217.3(a).

[^ 14] See the USCIS Contact Center webpage.

[^ 15] See the USCIS Contact Center webpage.

[^ 16] See INA 245(c)(2) and INA 245(c)(7). See Volume 7, Adjustment of Status, Part B, 245(a) Adjustment, Chapter 4, Status and Nonimmigrant Visa Violations (INA 245(c)(2) and INA 245(c)(8)) [7 USCIS-PM B.4].

[^ 17] See INA 245(c). See 8 CFR 245.1(b)(6), 8 CFR 245.1(d)(2)(i), 8 CFR 245.1(d)(2)(ii), and 8 CFR 245.1(d)(2)(iii) (maintenance of status in adjustment of status to permanent residence applications). See Volume 7, Adjustment of Status, Part B, 245(a) Adjustment, Chapter 4, Status and Nonimmigrant Visa Violations (INA 245 (c)(2) and INA 245 (c)(8)), Section E, Exceptions [7 USCIS-PM B.4(E)].

[^ 18] See 8 CFR 214.2(f)(16) and 8 CFR 214.2(m)(16).

[^ 19] See 22 CFR 62.45.

[^ 20] See INA 212(d)(5)(A). For more information on parole, see the Humanitarian or Significant Public Benefit Parole for Aliens Outside the United States webpage.

[^ 21] See 8 CFR 212.5(d). Parole is not an immigration status and is temporary in nature. However, a parolee may apply for any immigration status for which they may otherwise be eligible while present in the United States, which may allow them to remain in the United States pursuant to such lawful status.

[^ 22] For information on filing requirements, see instructions for Application for Travel Documents, Parole Documents, and Arrival/Departure Records (Form I-131). See Volume 3, Humanitarian Protection and Parole, Part F, Parolees [3 USCIS-PM F]. Re-parole requests should generally be directed to the DHS component that initially authorized parole. However, in certain limited instances, DHS components may agree that USCIS may consider re-parole requests submitted by aliens present in the United States pursuant to parole authorized by another DHS component. Certain populations have their own specific filing requirements for re-parole requests, which must be followed as applicable. See the Humanitarian webpage for additional information.

[^ 23] See INA 212(d)(5)(A).

[^ 24] For general policy on expedite requests related to travel documents, see Part A, Public Services, Chapter 5, Expedite Requests [1 USCIS-PM A.5]. For information on how to make an expedite request, see the Expedite Requests webpage. For information on emergency issuance of certain travel documents, see the Emergency Travel webpage. For filing requirements, see instructions for Form I-131.

[^ 25] See AFM 40.9.2(b)(3)(J) (PDF, 1017.74 KB).

[^ 26] See AFM 40.9.2(b)(3)(J) (PDF, 1017.74 KB).

[^ 27] See AFM 40.9.2(b)(3)(J) (PDF, 1017.74 KB).

[^ 28] To request deferred action, an individual must submit to a local field office Biographic Information (for Deferred Action) (Form G-325A), along with a signed written request and supporting evidence of the underlying basis for the request.

[^ 29] See 8 CFR 214.2(f)(9)(ii)(C). For information on employment authorization flexibilities for certain students, including when the Secretary of Homeland Security may suspend duration of status, full course of study, and on-campus and off-campus employment regulatory requirements due to emergent circumstances, see Volume 2, Nonimmigrants, Part F, Students (F, M), Chapter 6, Employment, Section B, Off-Campus Employment, Subsection 2, Severe Economic Hardship Due to Emergent Circumstances (Special Student Relief) [2 USCIS-PM F.6(B)(2)]. See DHS's Study in the States, Special Student Relief webpage.

[^ 30] See Volume 11, Travel and Identity Documents, Part A, Secure Identity Documents Policies and Procedures, Chapter 3, Reissuance of Secure Identity Documents [11 USCIS-PM A.3]. For information on replacing an Arrival/Departure Record (Form I-94), see USCIS' How do I replace a Form I-94, Arrival-Departure Record guide. For information on requesting CBP replace a Form I-94, see CBP's Official Site for Travelers Visiting the United States: Apply for or Retrieve Form I-94, Request Travel History and Check Travel Compliance webpage. To request USCIS replace a Form I-94, see the Application for Replacement/Initial Nonimmigrant Arrival-Departure Document (Form I-102). Asylees issued Form I-94 by a USCIS asylum office as proof of asylee status should contact the asylum office with jurisdiction over their current residence for further information on replacing or correcting the form.

[^ 31] For more information, see Subsection 10, Fee Waivers and Exemptions [1 USCIS-PM H.2(A)(10)].

[^ 32] See INA 216 and INA 216A. See 8 CFR 216.

[^ 33] See 8 CFR 216.4(a)(6). For more information, see Volume 6, Immigrants, Part I, Family-Based Conditional Permanent Residents, Chapter 3, Petition to Remove Conditions on Residence, Section C, Filing Requirements, Subsection 2, Late Joint Filing [6 USCIS-PM I.3(C)(2)].

[^ 34] See 8 CFR 103.2(b)(8). See Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 35] See 8 CFR 103.2(b)(13). However, certain immigration benefits, such as refugee and asylum applications, are governed by different regulations and procedures regarding RFEs, NOIDs, denials, and failure to appear; therefore, the guidance in this chapter does not apply to these immigration benefits governed by different regulations.

[^ 36] See 8 CFR 103.5.

[^ 37] See 8 CFR 103.3(a).

[^ 38] See 8 CFR 103.2(b)(9). See Part E, Adjudications, Chapter 6, Evidence, Section B, Primary and Secondary Evidence [1 USCIS-PM E.6(B)] and Part E, Adjudications, Chapter 4, Burden and Standards of Proof [1 USCIS-PM E.4].

[^ 39] See 8 CFR 103.5(a).

[^ 40] See 8 CFR 103.5 and 8 CFR 103.8(b).

[^ 41] See 8 CFR 103.5(a)(1)(i).

[^ 42] See 8 CFR 103.3(a)(2)(i) and 8 CFR 103.8(b). This guidance does not apply to an appeal of a decision on a Petition for Alien Relative (Form I-130) or on a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360). Benefit requestors must file appeals of decisions on these petitions to the Board of Immigration Appeals. See 8 CFR 1003.1(b)(5).

[^ 43] See 8 CFR 103.3(a)(2)(v)(B)(1).

[^ 44] See 8 CFR 103.3(a)(2)(v)(B)(2) and 8 CFR 103.5(a)(1)(iii). Only a motion to reopen may be excused as late. However, the appellate period for a revocation on notice is generally 15 days, so an appeal filed after 15 days could be treated as a motion. See 8 CFR 205.2.

[^ 45] For additional information see, Part B, Submission of Benefit Requests, Chapter 4, Fee Waivers and Fee Exemptions, Section D, Basis for Inability to Pay [1 USCIS-PM B.4(D)]. See the Frequently Asked Questions on the USCIS Fee Rule webpage.

[^ 46] See Part B, Submission of Benefit Requests, Chapter 4, Fee Waivers and Fee Exemptions, Section E, Emergent Circumstance [1 USCIS-PM B.4(E)]. See USCIS' Immigration Relief in Emergencies or Unforeseen Circumstances webpage and the Frequently Asked Questions on the USCIS Fee Rule webpage.

[^ 47] See 8 CFR 106.3.

[^ 48] See Part A, Public Services, Chapter 5, Expedite Requests [1 USCIS-PM A.5].

[^ 49] For more information on the criteria or circumstances that may be considered in determining whether to grant an expedite request, see Part A, Public Services, Chapter 5, Expedite Requests, Section A, Expedite Criteria or Circumstances [1 USCIS-PM A.5(A)].

[^ 50] For more information on what criteria, circumstances, and scenarios warrant expedited processing, see Part A, Public Services, Chapter 5, Expedite Requests, Section A, Expedite Criteria or Circumstances [1 USCIS-PM A.5(A)].

[^ 51] See INA 291. See Part E, Adjudications, Chapter 4, Burden and Standards of Proof, Section A, Burden of Proof [1 USCIS-PM E.4(A)].

[^ 52] See INA 291. See Part E, Adjudications, Chapter 4, Burden and Standards of Proof, Section B, Standards of Proof [1 USCIS-PM E.4(B)].

[^ 53] See Part E, Adjudications, Chapter 6, Evidence [1 USCIS-PM E.6].

[^ 54] See Part E, Adjudications, Chapter 6, Evidence [1 USCIS-PM E.6].

[^ 55] For more information on requesting humanitarian or significant public benefit parole for someone who is outside the United States, please see USCIS' Humanitarian or Significant Public Benefit Parole for Aliens Outside the United States webpage.

[^ 56] For more information on factors often considered in some of the more common types of requests, see USCIS' Guidance on Evidence for Certain Types of Humanitarian or Significant Public Benefit Parole Requests webpage.

Chapter 3 - Operational Responses

A. General

When an emergency or unforeseen circumstance arises that may disrupt operations at a USCIS facility or facilities that are open to the public, both local USCIS leadership and USCIS Headquarters assess the situation and determine the appropriate response. USCIS tailors its response based on numerous factors and measures, which in general include filing a report, informing the public, and activating local emergency response procedures, as appropriate.

B. Informing the Public

When an emergency or unforeseen circumstance disrupts operations at a public-facing USCIS facility, USCIS uses a variety of tools to communicate with the public.[1]

1. Facility Closures or USCIS System Outages or Impairments

If the emergency or unforeseen circumstance results in the closure of a public-facing facility such as a field office, asylum office, or application support center, or in the impairment or unavailability of USCIS information technology systems, the responsible official ensures the closure is announced on the USCIS website.[2] USCIS also uses USCIS social media channels to inform the public, as appropriate.

Additionally, when feasible, USCIS attempts to directly contact individuals with appointments scheduled at the closed facility, as well as their attorneys or representatives of record, to inform them of the closure and to reschedule their appointments. Local USCIS staff also contact the public affairs specialist with responsibility for the impacted facility to notify their media contacts of the closure.

When the field office is accessible and an employee is able to go the field office safely, USCIS places signage informing the public of the closure at all entrances to the impacted facility and adds outgoing messages regarding the closure to any public telephone numbers or email addresses utilized by the facility.

In the event a closure occurs during business hours, USCIS notifies staff and visitors of the impacted facility verbally or via a public address system and gives instructions to facilitate their safe and orderly departure.

2. Facility Remains Open

In the event an emergency or unforeseen circumstance arises within the jurisdiction of a public-facing USCIS facility, but the facility remains open, USCIS may reschedule missed appointments for individuals in the impacted area. USCIS may also attempt to directly contact individuals with appointments scheduled at the facility, as well as their attorneys or representatives of record, to provide them the option to reschedule their appointments, especially in situations where benefit requestors may have difficulty receiving USCIS notices due to disruptions to the postal service, displacement or loss of housing, or other factors.

C. Local Emergency Response

Depending on the nature of the emergency or unforeseen circumstance, USCIS staff at an impacted facility may need to activate local emergency responses procedures. In the event of a facility closure occurring when staff or visitors are present, USCIS evacuates the facility according to the facility's Occupant Emergency Plan. As appropriate, facility leadership and the field security manager with responsibility for the facility also coordinate with local first responders, as well as relevant federal, state, and municipal entities.

As part of the USCIS response, the local USCIS field office may be activated to a local emergency response center to assist the affected population with immigration matters. USCIS personnel may be able to assist with immigration questions, provide Alien Documentation, Identification, and Telecommunication (ADIT) stamps for temporary evidence of lawful permanent resident status, provide Arrival/Departure Records (Form I-94) for proof of status, process biometrics through mobile biometrics machines, and provide verification of U.S. citizenship through a verification letter. Local USCIS field offices coordinate closely with their headquarters and other USCIS directorates to ensure USCIS provides consistent information and services to the affected population.[3]

Footnotes

[^ 1] Depending on the nature and extent of the emergency or unforeseen circumstance, USCIS may issue a web alert on USCIS' Alerts webpage or similar public communications.

[^ 2] See the USCIS Office Closings webpage.

[^ 3] See Part C, Biometrics Collection and Security Checks, Chapter 2, Biometrics Collection, Section B, Mobile Biometrics Collection [1 USCIS-PM C.2(B)].

Volume 2 - Nonimmigrants

Part A - Nonimmigrant Policies and Procedures

Chapter 1 - Purpose and Background

A. Purpose

A nonimmigrant is an alien who is admitted to the United States for a specific temporary period of time. Section 101(a)(15) of the Immigration and Nationality Act (INA) lists most categories of nonimmigrants; additionally, nonimmigrant categories may be authorized in legislation other than the INA.[1] In order to be admitted to the United States as a nonimmigrant, the alien must generally have a permanent residence abroad and qualify for the nonimmigrant classification sought.

B. Background

The U.S. Department of State (DOS) issues nonimmigrant visas at U.S. embassies and consulates abroad. Background and history specific to each nonimmigrant visa is discussed in the category-specific parts of the Policy Manual.

C. Legal Authorities

- INA 101(a)(15) – Nonimmigrant classifications
- INA 214; 8 CFR 214 – Admission of nonimmigrants and nonimmigrant classes; extension of stay
- INA 248; 8 CFR 248 – Change of nonimmigrant classification

Footnote

[^ 1] For example, certain professional nonimmigrants are authorized under the United States-Mexico-Canada Agreement (USMCA) (PDF) and implementing legislation and regulations. See 8 CFR 214.6.

Chapter 2 - General Requirements [Reserved]

Chapter 3 - Maintaining Status [Reserved]

Chapter 4 - Extension of Stay, Change of Status, and Extension of Petition Validity

A. Extension of Stay or Change of Status

Generally, certain nonimmigrants present in the United States admitted for a specified period of time, or their petitioners, may request an extension of their admission period in order to continue to engage in those activities permitted under the nonimmigrant classification in which they were admitted.[1]

Also, certain nonimmigrants present in the United States or their petitioners may seek to change their status to another nonimmigrant classification if certain requirements are met.[2]

An alien seeking an extension of stay (EOS) or change of status (COS) generally files the request on a Petition for a Nonimmigrant Worker (Form I-129) or Application to Extend/Change Nonimmigrant Status (Form I-539),[3] depending upon the nonimmigrant classification the petitioner or applicant seeks to extend or change.[4]

The decision to grant or deny an extension of stay or change of status request involves an exercise of discretion by USCIS. There are a number of factors or factual circumstances that USCIS officers consider when conducting a discretionary analysis.[5]

Requirements to Timely File a Request to Extend Stay or Change Status

In general, USCIS does not approve an extension of stay or change of status for a person who failed to maintain the previously accorded status or where such status expired before the filing date of the application or petition.[6] USCIS, in its discretion, may excuse the failure to file before the period of authorized status expired where the requester demonstrates within the extension of stay or change of status request that:

- The delay was due to extraordinary circumstances beyond the person's control;
- The length of the delay was commensurate with the circumstances;
- The person has not otherwise violated their nonimmigrant status;
- The person remains a bona fide nonimmigrant; and
- The person is not the subject of removal proceedings and, in the case of extensions of stay, is also not the subject of deportation proceedings.[7]

In general, subject to its discretion, examples of what USCIS considers extraordinary circumstances beyond the control of the person may include, but are not limited to:

- Where the person remained in the United States after the expiration of the period of admission due to a slowdown or stoppage of work involving a strike, lockout, or other labor dispute; or
- Where the primary reason for the late filing is the inability to obtain a certified labor condition application or temporary labor certification due to a lapse in government funding supporting those adjudications.

If USCIS approves an untimely filed application or petition to extend an applicant's or beneficiary's stay, the approval is effective as of the date of the expiration of the prior nonimmigrant admission period.[8] When USCIS approves a late filed application for a change of status, the change of status takes effect on the approval date. USCIS considers the applicant or beneficiary of an approved untimely change of status request to have maintained lawful status during the period USCIS excused.[9]

B. Extension of Petition Validity

1. Significance of Prior USCIS Approvals and Deference

Deference to Previous Approvals

A request for an extension of petition validity, which is often submitted in conjunction with an EOS request, follows a previous finding of eligibility for the classification. Typically, these determinations are made by USCIS, although U.S. Customs and Border Protection (CBP) and U.S. Department of State (DOS) also make these determinations. Although there is a previous finding of eligibility, the burden of proof in the request for an extension of petition validity remains on the petitioner.[10]

Officers are not bound to approve subsequent petitions or applications seeking immigration benefits where eligibility has not been demonstrated strictly because of a prior approval (which may have been erroneous).[11] USCIS decides each matter according to the evidence of record on a case-by-case basis.[12] However, deviation from a previous approval carries important consequences and implicates predictability and consistency concerns.

As such, any deviation requires close consideration of the previous approval by USCIS. When adjudicating a subsequent petition or application involving the same parties (for example, petitioner and beneficiary) and the same underlying facts, officers should defer to a prior determination that the beneficiary or applicant is eligible for the nonimmigrant classification sought, where appropriate.

Deviating from Previous Approvals

Officers should not defer to prior approvals in cases where:

- There was a material error involved with previous approval(s);
- There has been a material change in circumstances or eligibility requirements;[13] or
- There is new material information that adversely impacts the petitioner's or beneficiary's eligibility.[14]

An officer who determines that deference to a prior approval is not appropriate must acknowledge the previous approval(s) in the denial, Request for Evidence (RFE), or Notice of Intent to Deny (NOID). In addition, the officer must articulate the reason for not deferring to the previous determination (for example, due to a material error, change in circumstances, or new adverse material information). Officers must provide the petitioner or applicant an opportunity to respond to the new information.[15]

As mentioned above, an officer should not defer to a prior approval where new material information is available. This may include publicly available information that affects eligibility for a benefit. For example, an officer may be aware that a petitioner has recently gone out of business. This also includes information that affects national security or public safety garnered from security checks conducted on beneficiaries and petitioners. An officer should not defer to a prior approval when there are indicators of potential fraud or willful misrepresentation of a material fact. The officer must articulate the new material information in an RFE or NOID.

In all cases, officers must obtain supervisory approval before deviating from a prior approval in their final decision.

2. Cases Involving Previous Determinations by Other Agencies

USCIS officers consider, but do not defer to, previous eligibility determinations on petitions or applications made by CBP or DOS.[16] Officers make determinations on the petition filed with USCIS and corresponding evidence on record, as provided above.

C. Split Decisions in Extension Requests

Officers may, when warranted, deny an applicant or petitioner's request to extend the nonimmigrant's stay in the United States in the same classification.[17] Even if an applicant or petitioner continues to demonstrate eligibility for the nonimmigrant classification, an officer may determine that sufficient reason exists to deny the request for an extension of stay (such as inadmissibility factors or failure to maintain status).

This "split" decision process may result in approval of the petition for the same classification where the petitioner and the beneficiary relationship has not changed, and a simultaneous denial of the extension of stay request.

Footnotes

[^ 1] See 8 CFR 214.1(a). See 8 CFR 214.1(c) for general requirements, such as those relating to passport validity and waivers of inadmissibility for an extension of stay (EOS). The decision to grant or deny an extension of stay request involves an exercise of discretion. See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis [1 USCIS-PM E.8]. For a list of factors that should be considered in the discretionary analysis, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis, Section C, Adjudicating Discretionary Benefits, Subsection 2, Identifying Discretionary Factors [1 USCIS-PM E.8(C)(2)].

[^ 2] See INA 248. See 8 CFR 248. For a list of factors that should be considered in the discretionary analysis, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis, Section C, Adjudicating Discretionary Benefits, Subsection 2, Identifying Discretionary Factors [1 USCIS-PM E.8(C)(2)].

[^ 3] See 8 CFR 214.1(c). The application should be filed in accordance with the form instructions.

[^ 4] The instructions for Form I-539 and Form I-129 provide detailed information regarding who may file each form. A petitioner or applicant may file a Supplemental Information for Application to Extend/Change Nonimmigrant Status (Form I-539A) or Petition for a CNMI-Only Nonimmigrant Transitional Worker (Form I-129CW) where applicable.

[^ 5] See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis [1 USCIS-PM E.8].

[^ 6] See 8 CFR 214.1(c)(4) and 8 CFR 248.1(b).

[^ 7] See 8 CFR 214.1(c)(4) and 8 CFR 248.1(b).

[^ 8] See 8 CFR 214.1(c)(4).

[^ 9] The period of stay for a beneficiary admitted as an H-1B or H-2 is limited by the validity of the labor certification as modified by 8 CFR 214.2(h)(13)(i)(A) and 8 CFR 214.2(h)(5)(viii)(B) (setting the number of days before the validity period when a beneficiary may be admitted and after the expiration of that period before the beneficiary must depart). See 8 CFR 214.2(h)(15)(ii)(C) and 8 CFR 214.2(h)(9)(iii)(A)(1). For a discussion of how approved untimely requests impact the adjudication of a subsequent adjustment application, see Volume 7, Adjustment of Status, Part B, 245(a) Adjustment, Chapter 4, Status and Nonimmigrant Visa Violations (INA 245(c)(2) and INA 245(c)(8)), Section E, Exceptions, Subsection 3, Effect of Extension of Stay and Change of Status [7 USCIS-PM B.4(E)(3)].

[^ 10] See INA 291. See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 4, Burden and Standards of Proof [1 USCIS-PM E.4].

[^ 11] See *Matter of Church Scientology International (PDF)*, 19 I&N Dec. 593, 597 (Comm. 1988).

[^ 12] See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 2, Record of Proceeding [1 USCIS-PM E.2] for information on what constitutes a record of proceeding.

[^ 13] This includes situations in which the regulations require criteria to be met after approval, such as the nonimmigrant treaty investor (E) classification at 8 CFR 214.2(e)(2)(i) (petitioner must be actively in the process of investing a substantial amount of capital in a bona fide enterprise), and the nonimmigrant intracompany transferee (L) classification at 8 CFR 214.2(l)(3)(v)(C) (a new office has 1 year from the date of the initial approval to support an executive or managerial position).

[^ 14] A fact is material if it would have a natural tendency to influence or is predictably capable of affecting the decision. See *Kungys v. United States*, 485 U.S. 759, 770-72 (1988). See *Matter of D-R- (PDF)*, 25 I&N Dec. 445, 450 (BIA 2011).

[^ 15] See 8 CFR 103.2(b)(16)(i).

[^ 16] For example, L-1, TN, E-1, E-2, and H-1B1 eligibility determinations.

[^ 17] See 8 CFR 214.1(c)(5).

Part B - Diplomatic and International Organization Personnel (A, G)

Part C - Visitors for Business or Tourism (B)

Part D - Exchange Visitors (J)

Chapter 1 - Purpose and Background

A. Purpose

Congress created the J-1 nonimmigrant visa classification (category) for exchange visitors who intend to participate in an approved program for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, receiving training, or receiving graduate medical education or training.[1] Within the J-1 category, there are a number of different programs designed to promote educational and cultural exchanges between the United States and other countries around the world.[2]

The U.S. Department of State (DOS) plays the primary role in administering the J-1 exchange visitor program, including the designation of public and private entities to act as designated exchange sponsors. Once the exchange visitor is in the United States, USCIS adjudicates change of status requests, extension of stay requests (for J exchange visitors not admitted for duration of status), waiver applications (when required), and employment authorization applications filed by their dependent family members who are in J-2 nonimmigrant status.[3]

B. Background

1. Establishment of Exchange Visitor Program

Congress established the exchange visitor program in 1948 with the passage of the Information and Educational Exchange Act of 1948 (the Smith-Mundt Act).[4] The Smith-Mundt Act provided for the interchange between the United States and other countries of "students, trainees, teachers, guest instructors, professors, and leaders in fields of specialized knowledge or skill."[5] At that time, those who entered the United States to participate in the exchange program were admitted as nonimmigrant visitors for business under the Immigration Act of 1924, as amended.[6]

2. 2-year Foreign Residence Requirement and Waiver

In 1952, Congress passed the Immigration and Nationality Act (INA), which provided that all persons who come to the United States under an exchange visitor program would be subject to a 2-year foreign residence requirement before being eligible to either immigrate to the United States or obtain temporary worker (H nonimmigrant) status.[7] These provisions helped address Congress's concern that program participants were subverting the goals of the program by immigrating to the United States.

This provision, which became INA 212(e), applied to both J-1 exchange program participants and their J-2 dependent family members.[8] The amendment also allowed waivers of the 2-year foreign residence requirement under limited circumstances. Since then, Congress has amended the INA multiple times to further specify the circumstances under which an exchange visitor may seek a waiver of the foreign residence requirement.[9]

Congress further amended the INA in 1961 with the passage of the Mutual Educational and Cultural Exchange Act of 1961 (the Fulbright-Hayes Act). The Fulbright-Hayes Act allowed waivers under limited circumstances dealing with exceptional hardship.[10]

In 1970, Congress amended the INA further so that the 2-year foreign residence requirement only applied to those exchange visitors who:

- Participated in programs financed in whole or in part by either their own government or the U.S. government; or
- Were engaged in a field of specialized knowledge or skill that the U.S. Information Agency designated as being a knowledge or skill that was needed in the exchange visitor's country of nationality or last residence.

In 1970, Congress also created additional waivers of the 2-year foreign residence requirement based on a determination that the exchange visitor's departure from the United States would impose exceptional hardship upon the exchange visitor's U.S. citizen or lawful permanent resident spouse or child, a determination that the exchange visitor would be subject to persecution in the exchange visitor's country of nationality or last residence, a finding that the exchange visitor's admission to the United States would be in the public interest, or a "no objection" statement by the exchange visitors' home country.[11]

The Exchange Visitor Skills List was first published on April 25, 1972, and has been revised a number of times since then.[12] A 1976 amendment to the statute (which took effect in January 1977) made any exchange visitor who seeks an immigrant visa, adjustment of status, or H or L nonimmigrant status after having received graduate medical education or training subject to the 2-year foreign residence requirement.[13]

3. Conrad 30 Program

The Immigration and Nationality Technical Corrections Act of 1994 created a special program to waive the 2-year foreign residence requirement for J-1 foreign medical graduates. The waiver must be based on a request by a state department of public health, or its equivalent, who enter into a 3-year contract to practice medicine at a health care facility located in a medically underserved area designated by the Department of Health and Human Services (HHS designated shortage area). This program was initially commonly referred to as the Conrad 20 program and is now referred to as the Conrad 30 program.[14]

4. Electronic System to Collect Information

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[15] IIRIRA required the legacy Immigration and Naturalization Service (INS) to collect current information from schools and exchange programs relating to nonimmigrant foreign students and exchange visitors during the course of their stay in the United States. IIRIRA authorized legacy INS to create an electronic system to collect information on F, M, and J nonimmigrants to address the problem of F, M, and J nonimmigrants who are out of status and remain in the United States without authorization.

After September 11, 2001, Congress updated the legislation to mandate the use of an electronic system to collect information on all F, M, and J nonimmigrants. To meet this mandate, DHS and DOS deployed the Student and Exchange Visitor Information System (SEVIS), a web-based information system that tracks and monitors F, M, and J nonimmigrants and their dependents throughout the duration of approved participation within the U.S. education system or designated exchange visitor program.[16]

IIRIRA also imposed new terms and conditions on INA 212(e) waivers granted to foreign medical graduates that are based on a request by an interested U.S. government agency (federal program). The terms and conditions are the same as those applied to waivers requested by a state department of public health.[17]

5. Adding Air Flight, Language, and Vocational Schools

In 2001, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act) became law and added air flight schools, language training schools, and vocational schools to the schools that must comply with SEVIS requirements. It also authorized $36.8 million for SEVIS implementation.[18]

The Enhanced Border Security and Visa Entry Reform Act (EBSVER) amended Section 641 of IIRIRA by requiring additional features to be incorporated into SEVIS.[19] In 2006, DOS determined that it did not have the expertise and resources to fully monitor its J-1 exchange visitor flight training programs and ensure their compliance with program requirements. Consequently, DOS announced that it would no longer designate any new J-1 visa flight training programs, nor would it permit currently designated flight training programs to expand.[20]

C. Legal Authorities

- INA 101(a)(15)(J) – Definition of J nonimmigrant
- INA 212(e) – Educational visitor status; foreign residence requirement; waiver
- INA 212(j)(1) – Limitation on immigration of foreign medical graduates
- INA 214(l) – Restrictions on waiver of the foreign residence requirement
- INA 248 – Change of nonimmigrant classification
- 8 CFR 212.7(c) – Waiver of inadmissibility grounds, documentary requirements
- 8 CFR 214.2(j) – Exchange aliens
- 8 CFR 248.2 – Change of nonimmigrant classifications, ineligible classes
- 22 CFR 62, Subpart B – Specific program provisions

Footnotes

[^ 1] See INA 212(e).

[^ 2] See Chapter 2, J Exchange Visitor Eligibility, Section A, Programs [2 USCIS-PM D.2(A)].

[^ 3] Spouse and unmarried child(ren) under the age of 21 of J-1 exchange visitors who accompany or join the J-1 in the United States are eligible for a J-2 nonimmigrant visa as a dependent family member.

[^ 4] See the Information and Educational Exchange Act of 1948, Pub. L. 80-402 (January 27, 1948).

[^ 5] See Section 201 of Pub. L. 80-402, 62 Stat. 6, 7 (January 27, 1948).

[^ 6] See the Immigration Act of 1924, Pub. L. 68–139 (May 26, 1924).

[^ 7] See Immigration and Nationality Act of 1952, Pub. L. 82–414 (PDF) (June 27, 1952). Currently, if the J-1 nonimmigrant's training is in a field that is on the Exchange Visitor Skills List for the J-1 nonimmigrant's country of nationality or last legal residence, the J-1 nonimmigrant may be subject to the 2-year residence requirement. See 9 FAM 402.5-6(L)(1), Subject to INA 212(e).

[^ 8] See INA 212(e).

[^ 9] For more information on the J-1 foreign residence requirement, see Chapter 4, Waiver of the Foreign Residence Requirement [2 USCIS-PM D.4].

[^ 10] See Mutual Educational and Cultural Exchange Act of 1961, Pub. L. 87-256 (PDF) (September 21, 1961).

[^ 11] See INA Amendments, Pub. L. 91-225 (PDF), 84 Stat. 116, 117, amending INA 212(e) (April 7, 1970).

[^ 12] DOS periodically updates the Exchange Visitor Skills List. It was last updated in 2009. See 74 FR 20108 (PDF) (Apr. 30, 2009).

[^ 13] See Health Professions Educational Assistance Act of 1976, Pub. L. 94-484 (PDF) (October 12, 1976).

[^ 14] See Section 220 of the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416 (PDF), 108 Stat. 4305, 4319 (October 25, 1994).

[^ 15] See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C, Title III of Pub. L. 104-208 (PDF) (September 30, 1996).

[^ 16] See the Immigration and Customs Enforcement's Student Exchange Visitor Information System webpage for an overview of the creation of SEVIS.

[^ 17] The terms and conditions imposed on INA 212(e) waivers under the federal and state programs are specified in INA 214(l).

[^ 18] See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. 107-56 (PDF) (October 26, 2001).

[^ 19] See Section 501 of the Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. 107-173 (PDF), 116 Stat. 543, 560 (May 14, 2002). See 67 FR 76256 (PDF) (Dec. 11, 2002).

[^ 20] See Vision 100 – Century of Aviation Reauthorization Act, Pub. L. 108-176 (PDF) (December 12, 2003). See 71 FR 3913 (PDF) (Jan. 24, 2006) (statement of policy), 71 FR 17768 (PDF) (Apr. 7, 2006) (proposed rule), and 72 FR 33669 (PDF) (Jun. 19, 2007) (interim final rule).

Chapter 2 - J Exchange Visitor Eligibility

A. Programs

The J exchange visitor must be entering the United States to take part in a program that has been designated by the U.S. Department of State (DOS) and meets the DOS regulatory requirements stated in 22 CFR 62. The designated exchange visitor program categories are:

- Professors and research scholars;
- Short-term scholars;
- Trainees and interns;
- College and university students;
- Teachers;
- Secondary school students;
- Specialists;
- Physicians;
- International visitors;
- Government visitors;
- Camp counselors;
- Au pairs; and
- Summer work travel.[1]

B. General Criteria

While each program has specific requirements, J-1 exchange visitors are required to:

- Have been accepted in a DOS-approved exchange visitor program before applying for a visa[2] or applying for a change of status to J-1 while in the United States;
- Have sufficient funds to cover their expenses while in the United States;[3]
- Have sufficient knowledge of English to be able to participate effectively in the exchange visitor program;[4] and
- Have a residence abroad which they do not intend to abandon.[5]

Footnotes

[^ 1] See 22 CFR 62, Subpart B.

[^ 2] See 9 FAM 402.5-6(C), Qualifying for an Exchange Visitor Visa (J-1). DOS is responsible for visa processing. See 22 CFR 41.62(a)(1).

[^ 3] Exchange visitors must maintain sufficient medical insurance for accident or illness for themselves and their dependent family members in a minimum amount of $50,000 per accident or illness. See 22 CFR 62.14.

[^ 4] See 22 CFR 41.62(a)(3).

[^ 5] See INA 101(a)(15)(J).

Chapter 3 - Terms and Conditions of J Exchange Visitor Status

A. Eligibility for Admission

U.S. Customs and Border Protection may admit the exchange visitor and any accompanying dependent family members into the United States in J-1 and J-2 classifications[1] if each applicant:

- Presents a valid passport;
- Valid J-1 or J-2 visa; and
- Certificate of Eligibility for Exchange Visitor (J-1) Status (Form DS-2019), issued in the exchange visitor’s (or accompanying dependent family member’s) name by a program approved by the U.S. Department of State (DOS) for participation by J-1 exchange visitors.[2]

B. Admission and Grace Periods

DOS may issue J-1 and J-2 visas to qualified applicants at any time that the Form DS-2019 is valid. However, the exchange visitor may not enter the United States more than 30 days before the program start date on the Form DS-2019 and may only remain in the United States for 30 days after completing the program for the purpose of travel.[3]

C. Length of Programs and Duration of Status

J-1 exchange visitors are initially admitted for duration of status. Duration of status is defined as completion of the J-1 program plus 30 days.[4] J-1 exchange visitors and their dependent family members are admitted for duration of status, but a Responsible Officer (RO) has the discretion to extend a participant's program to its maximum regulatory duration (the limit imposed by the regulations specific to a program category or to a program sponsor's designation).

The total length of time that a J-1 exchange visitor is permitted to stay in the United States depends on the program. The durational limits for each of the J-1 programs are set forth below.

Period J-1 Exchange Visitor is Permitted to Stay in United States

Category	Length of Stay[5]
Secondary School Students	Minimum 1 semester, maximum not to exceed 1 academic year.
College or University Students	Time needed to complete the academic program and practical training, not to exceed the duration of program or 18 months (36 months for postdoctoral students).
Short-Term Scholars	Time necessary to complete the program, not to exceed 6 months.
Trainees and Interns	18 months for a training program and 12 months for an intern program (limited exception for training programs in the field of agriculture, which may be designated for a total duration of 18 months).
Teachers	Time necessary to complete the program but may not exceed 3 years. Exception: Sponsors may request from DOS an extension of 1 or 2 years, but not by a semester or by other fractions of academic years.
Professors and Research Scholars	Time necessary to complete the program but may not exceed 5 years. Extension of the 5-year limitation is possible when the J-1 visa holder is engaged with a G-7 program sponsor.
Specialists	Time necessary to complete the program, but not to exceed 1 year.
Physicians	Time necessary to complete the program, but may not exceed 7 years, unless the country the J-1 exchange visitor will return to requires a person with additional qualifications.
International Visitors	Time necessary to complete the program, but not to exceed 1 year.
Government Visitors	Time necessary to complete the program, but not to exceed 18 months.
Camp Counselors	No more than 4 months.
Au Pairs	12 months, but may be extended for an additional 6, 9, or 12 months.
Summer Work Travel Participants	4-month period during post-secondary school summer vacation.

D. Reporting Requirements

A J-1 exchange visitor must inform USCIS and exchange visitor program RO of any legal name changes or change of address within 10 days of the change in a manner prescribed by the program sponsor.[6]

A J-1 exchange visitor enrolled in a Student and Exchange Visitor Information System (SEVIS) program satisfies the requirement of notifying USCIS by providing a notice of a change of address within 10 days to the RO, who in turn is required to enter the information in SEVIS within 21 days of notification by the exchange visitor.[7]

J-1 foreign medical graduates granted a waiver of the 2-year foreign residence requirement under the Conrad 30 program[8] must notify USCIS of any material change in the terms and conditions of the H-1B employment during the 3-year period following waiver approval.[9]

E. Employment Authorization

Several J-1 exchange visitor programs involve a work component. Exchange visitors participating in those programs are authorized to work incident to status.[10]

F. Foreign Residence Requirement

Certain J-1 exchange visitors are subject to a 2-year foreign residence requirement.[11] After leaving the United States, J-1 exchange visitors subject to the requirement must reside and be physically present in their country of nationality or last legal residence abroad for an aggregate of at least 2 years before they are eligible to apply for an immigrant visa, adjustment of status, or a nonimmigrant H, L, or K visa.[12] Such country is the country of nationality or legal permanent residence listed on the Certificate of Eligibility for Exchange Visitor Status (Form DS-2019), and is referred to herein as the “Home Country.”

These exchange visitors are further prohibited from changing status from J nonimmigrant status to another nonimmigrant status, other than A, G, T, or U, or H-1B for physicians receiving waivers on the basis of a 3-year waiver position.[13]

Exchange visitors participating in the following programs are subject to the foreign residence requirement: [14]

- Programs facilitated by the DOS designated sponsor, Educational Commission for Foreign Medical Graduates (ECFMG), for medical trainees. (ECFMG sponsored medical researchers are generally not subject to the requirement as medical trainees, but may be subject to the requirement on another basis);
- Programs in which the exchange visitor has received any type of government funding or support from the exchange visitor's home country or country of last legal permanent residence, the U.S. Government, or an international organization, as indicated on the Form DS-2019. (Government-sponsored programs beginning with G in the program number on Form DS-2019 are usually government-funded where the exchange visitor received financial support from the sponsor);
- Programs in which the exchange visitor's field of endeavor appears on the DOS Exchange Visitor Skills List (list of fields of specialized knowledge or skills in which the services of exchange visitor participants are critically needed) for the exchange visitor's home country or country of last legal permanent residence; [15] and
- Programs whose purpose is graduate medical training, typically a residency or fellowship.

Determining if the Foreign Residence Requirement Has Been Met

USCIS determines whether the exchange visitor has met the 2-year foreign residence requirement within the context of a subsequent application or petition. USCIS applies the preponderance of the evidence standard when it makes this determination.

Benefit requestors may submit any relevant evidence showing their physical presence in the Home Country. For example, benefit requestors may submit a chart of days spent in the Home Country. Benefit requestors may also submit supporting evidence such as passport stamps, travel receipts, employment records, school transcripts, leases, or affidavits.

Any day where a fraction of a day is spent in the Home Country counts toward satisfaction of the requirement. For example, a travel day, where a fraction of the day is spent in the country of last permanent residence, counts as a day towards satisfying the requirement.

In certain cases, conditions in the applicant's Home Country, such as war or civil unrest, may make compliance with the 2-year residence requirement effectively impossible. Additionally, some countries have periodically imposed travel bans that have made traveling to the Home Country effectively impossible. In other cases, the applicant's Home Country is now part of another country due to shifting borders or other political changes. USCIS considers these circumstances, on a case-by-case basis, in consultation with the Department of State.

Footnotes

[^ 1] See INA 101(a)(15)(J).

[^ 2] The Form DS-2019 is issued by an exchange program sponsor to an exchange visitor at the time of application for admission or change to J-1 nonimmigrant classification. An official who is authorized to issue Form DS-2019 is known as a Responsible Officer (RO) or Alternate Responsible Officer (ARO). Information about exchange visitors and any dependent family members is captured in the Student and Exchange Visitor Information System (SEVIS).

[^ 3] See 8 CFR 214.2(j)(1)(ii). Employment is not authorized during this 30-day period, also known as a grace period. Employment is also not authorized during the 30-day period before the report date of the program listed on the Form DS-2019.

[^ 4] See 8 CFR 214.2(j)(1)(ii).

[^ 5] See 9 FAM 402.5, Students and Exchange Visitors – F, M, and J Visas. An RO or ARO seeking to extend the participation of an exchange visitor beyond the maximum duration of participation for the category in which the exchange visitor is participating must receive prior approval from DOS for an extension of program. The RO or ARO must submit a request in SEVIS and provide the required written documentation in support of the request to the DOS Office of Exchange Designation, Bureau of Educational and Cultural Affairs. If approved, the exchange visitor presents a Form DS-2019 with an extended end date. Such a form can only be produced from SEVIS with DOS approval.

[^ 6] See 8 CFR 214.2(j)(1)(viii).

[^ 7] See 8 CFR 265.1.

[^ 8] For more information on the Conrad 30 programs, see Chapter 4, Waiver of the Foreign Residence Requirement, Section F, Foreign Medical Graduates – Federal, State, and Conrad 30 Programs [2 USCIS-PM D.4(F)].

[^ 9] See 8 CFR 212.7(c)(9)(vi).

[^ 10] See 8 CFR 274a.12(b)(11). For information about employment authorization for J-2s, see Chapter 6, Family Members of J-1 Exchange Visitor [2 USCIS-PM D.6]. For information about applications for adjustment of status to permanent residence and associated requests for employment authorization filed by J-1 foreign medical graduates with an approved Immigrant Petition for Alien Workers (Form I-140) with a national interest waiver pursuant to 8 CFR 245.18(d)(2), see the Green Card Through a Physician National Interest Waiver (NIW) website.

[^ 11] See INA 212(e).

[^ 12] See INA 212(e), INA 214(l), and INA 248. See *Friedberger v. Schultz*, 616 F. Supp. 1315 (D.C. Pa 1985). An exchange visitor could be subject to the 2-year foreign residence requirement even if the J visa was obtained by fraud. See *Espejo v. INS*, 311 F.3d 976 (9th Cir. 2002), and *Matter of Park (PDF)*, 15 I&N Dec. 436 (BIA 1975).

[^ 13] See INA 212(e), INA 214(l), and INA 248.

[^ 14] See INA 212(e).

[^ 15] For the Exchange Visitor Skills List, see 74 FR 20108 (PDF) (Apr. 30, 2009). A determination is made on the basis of the most current skills list at the time of admission or acquisition of J-1 status or when beginning a new program or changing program objective. Advancing to a higher level of study in the field of study is not considered a change of program objective.

Chapter 4 - Waiver of the Foreign Residence Requirement

A. Bases for Waiver

Exchange visitors who are subject to the foreign residence requirement may apply for a waiver. There are five bases for waiving the requirement:

- Exceptional hardship to U.S. citizen or lawful permanent resident (LPR) spouse or child;
- Persecution;
- No objection;
- Interested U.S. government agency (IGA); and
- Federal, state, and Conrad 30 programs for foreign medical graduates.

The filing of an application for a waiver of the 2-year foreign residence requirement does not terminate an exchange visitor's nonimmigrant status.[1]

Applicants are required to submit the Application for Waiver of the Foreign Residence Requirement (under Section 212(e) of the Immigration and Nationality Act, as Amended) (Form I-612), to USCIS only if requesting a waiver on the basis of exceptional hardship or persecution. If USCIS determines that the applicant has established exceptional hardship or persecution, it transmits the information to the U.S. Department of State's (DOS) Waiver Review Division (DOS-WRD). DOS-WRD makes a recommendation after reviewing the program, policy, and foreign relations aspects of the case and transmits its recommendation to USCIS.

If USCIS denies the waiver before the referral to the DOS, the applicant may appeal the decision to the USCIS Administrative Appeals Office (AAO). If a waiver is denied due to a negative DOS recommendation, there is no appeal, but it may be possible for the applicant reapply for a waiver.[2]

DOS-WRD makes a recommendation for waivers based on the remaining grounds, no objection, IGA, or federal, state, and Conrad 30 programs for foreign medical graduates, and transmits the recommendation to USCIS. USCIS reviews and issues the decision to the applicant and if applicable, to the applicant's attorney. If a waiver is denied due to a negative DOS recommendation, there is no appeal of that denial, but it may be possible for the applicant to reapply on a different basis.[3]

B. Exceptional Hardship

Exchange visitors may be eligible for a waiver of the foreign residence requirement if they can establish exceptional hardship to their U.S. citizen or LPR spouse or child. Exceptional hardship must be beyond the normal hardship expected from a temporary relocation or separation.

There are different levels of hardship. In the context of general immigration waivers, there is exceptional hardship, extreme hardship, and exceptional and extremely unusual hardship.[4] Exceptional hardship is more than normal hardship (general disruption), but less than extreme or exceptional and extremely unusual hardship.[5]

When determining whether the applicant has established that the foreign residence requirement would result in an exceptional hardship to the U.S. citizen or LPR spouse or child, USCIS officers must evaluate whether:

- The qualifying spouse or child or children would experience exceptional hardship if they were to relocate with the applicant to the country of foreign residence; and
- The qualifying spouse or child children would experience exceptional hardship if they were to be separated from the applicant for the 2-year foreign residence requirement period.

1. Evidence

To request a waiver based on exceptional hardship to the U.S. citizen or LPR spouse or child, applicants must file a Foreign Residence Requirement waiver application with USCIS.[6]

Applicants must submit evidence to demonstrate that:

- The applicant and their dependents, if any, are subject to the foreign residence requirement;[7]
- There is a qualifying relationship (U.S. citizen or LPR spouse or child);[8] and
- Exceptional hardship would occur for the qualifying relative.[9]

If the applicant fails to provide such evidence, the officer issues a Request for Evidence (RFE), providing the applicant an opportunity to submit the requested documentation or information. If the applicant fails to respond to the RFE or does not provide the requested documentation or information, the officer denies the waiver for failure to establish exceptional hardship.

While no single factor is normally determinative with exceptional hardship findings, USCIS generally considers the following when adjudicating the foreign residence requirement waiver application:

- Whether the anxiety, loneliness, and altered financial circumstances to the qualifying family member is greater than normal hardship;[10]
- The country conditions of the country of foreign residence;[11]
- Medical conditions of the qualifying family member or members where treatment in the country of foreign residence is insufficient or where the medical problems would be worse in the country of foreign residence than in the United States;[12] and
- Other relevant evidence submitted by the applicant.[13]

Such evidence could include DOS travel alerts, medical diagnosis and prognosis from physicians, and comprehensive bank records. In addition, USCIS officers may consult with DOS-WRD in cases where the DOS-WRD has better access to information necessary for the adjudication, or if DOS-WRD has made a recommendation that appears to be based upon incomplete or inaccurate information (for example, where an applicant failed to mention previously participating in a J-1 program funded by the government).

2. Adjudication

If the evidence establishes a prima facie[14] case of exceptional hardship, officers must notify the DOS-WRD of USCIS' determination, so that DOS-WRD can make a recommendation based on the program, policy, and foreign relations considerations. USCIS may not approve the foreign residence requirement waiver application without a favorable recommendation from DOS-WRD.

Cases that USCIS sends to DOS-WRD for recommendation must include:

- A completed Request for Waiver Review Division Recommendation (Form I-613);

- A copy of the waiver application; and
- Copies of supporting documentation, if applicable.

The dependent family members of a principal applicant (J-1) who have been in J-2 status during a time when the principal applicant was subject to the foreign residence requirement must be included on the Form I-613 sent to DOS-WRD. Officers should review the Arrival/Departure Record (Form I-94) for each dependent family member to make that determination. Where the application includes such dependent family members, officers should designate USCIS as the interested agency recommending their inclusion in the waiver request on Form I-613.

Burden of Proof

In all cases, applicants have the burden of proving eligibility for a waiver and must demonstrate by a preponderance of the evidence that they are fully qualified for the waiver.[15]

Officers generally should not apply leniency in the adjudication of exceptional hardship waivers, including in cases where the applicant uses a marriage occurring in the United States, or the birth of a child or children, to support the contention that the applicant's departure from this country would cause personal hardship.[16]

3. Decision

If the applicant cannot establish a prima facie case of exceptional hardship through the documentary evidence submitted, USCIS does not send the case to DOS-WRD, but, rather, denies the application. Applicants may appeal this determination to the AAO.

If the applicant establishes a prima facie case of exceptional hardship, but DOS-WRD does not recommend approval, USCIS denies the application. There is no appeal right from this type of denial because the unfavorable recommendation came from DOS-WRD, not from USCIS.

If the applicant establishes a prima facie case of exceptional hardship and DOS-WRD recommends approval, USCIS approves the waiver and notifies the applicant and the applicant's legal representative, if applicable, of the approval.

C. Persecution

J-1 exchange visitors subject to the foreign residence requirement may apply for a waiver if they would be subject to persecution in their respective home countries on account of race, religion, or political opinion. The persecutor may be either the government itself or a group that the government is unwilling or unable to control.

The standard for a J-1 persecution waiver requires the exchange visitor to show that they would be subject to persecution on account of race, religion, or political opinion.[17] This is a higher standard than persecution claims filed under the asylum provisions of the INA.[18] Notably, INA 212(e) requires the applicant to establish that the applicant would be subject to persecution upon a return to the home country, whereas an applicant under INA 208 must only establish a well-founded fear of persecution.

1. Evidence

To request a foreign residence requirement waiver based on persecution, applicants must file the waiver application with USCIS.[19] Applicants must submit evidence that they are in fact subject to the requirement and that they would be subject to persecution in their home country because of their race, religion, or political opinion.[20]

2. Adjudication

If USCIS determines that the applicant would be persecuted upon return to the home country, it then transmits the information to DOS. DOS may choose not to recommend an approval of a waiver based on program, policy, or foreign relations aspects of a case, even if USCIS finds that the J-1 exchange visitor would be subject to persecution.[21]

Burden of Proof

In all cases, applicants have the burden of proving eligibility for a waiver and must demonstrate by a preponderance of the evidence that they are fully qualified for the waiver.[22]

3. Decision

If the applicant cannot establish a prima facie case of persecution through the documentary evidence submitted, USCIS does not send the case to DOS-WRD, but, rather, denies the application. Applicants may appeal this determination to the AAO.

If the applicant establishes a prima facie case of persecution, but DOS-WRD does not recommend approval, USCIS denies the application. There is no appeal right from this type of denial because the unfavorable recommendation came from DOS-WRD, not from USCIS.

If the applicant establishes a prima facie case of persecution and DOS-WRD recommends approval, USCIS approves the waiver and notifies the applicant and the applicant's legal representative, if applicable, of the approval.

D. No Objection

With the exception of J exchange visitors who came to the United States for the purpose of receiving graduate medical training and those who changed to J-1 status for such purpose, J exchange visitors may request a waiver of the foreign residence requirement based on a statement by the government of the country of the applicant's nationality or last legal permanent residence that it has no objection if the applicant does not return to the country upon completion of the program.[23] This official statement is commonly known as a "no objection" letter.

A no objection letter is generally insufficient to warrant a favorable recommendation from the DOS-WRD when U.S. government funding was involved in the exchange program.

1. Requirements

Applicants may not submit a no objection letter directly to USCIS. USCIS rejects letters submitted directly to USCIS by the exchange visitor along with instructions on the proper channels for submission.[24] No objection letters must be sent directly from the J-1 exchange visitor's home country to the DOS-WRD through official diplomatic channels. DOS-WRD then sends its recommendation to USCIS.

2. Evidence

Upon receipt of the no objection letter and the DOS-WRD recommendation, officers should review the case to ensure that documentation is in order and that the waiver is appropriate for the exchange visitor's circumstances (for example, ensure that the applicant did not come to the United States as an exchange visitor, or later acquire such status, in order to receive graduate medical training or education). If the exchange visitor is eligible for the waiver, USCIS approves the waiver and notifies the applicant and the applicant's legal representative, if applicable, of the approval.[25]

E. Interested Government Agency

Any U.S. IGA may request a waiver if the IGA is able to demonstrate that either the J-1 exchange visitor's departure would be detrimental to one of its programs or the exchange visitor's stay in the United States is vital to one of its programs.[26] The rationale for an IGA waiver is that it is in the public interest to have the exchange visitor remain in the United States. The exchange visitor need not be an employee of the agency unless the agency has internal guidelines requiring that the exchange visitor be employed by it before it may recommend a waiver.

The head of the agency (or their designee) must sign the letter requesting the waiver and submit it to the DOS-WRD.[27] DOS-WRD forwards its recommendation to USCIS.

F. Foreign Medical Graduates – Federal, State, and Conrad 30 Programs

1. General Requirements

Upon completion of the J-1 exchange visitor's program, a foreign medical graduate (FMG) may obtain a waiver of the foreign residence requirement pursuant to INA 214(l) through a recommendation of a state or federal agency interested in facilitating the FMG's employment in a federally designated shortage area as an H-1B nonimmigrant.[28] To be eligible for the waiver, the FMG must:

- Agree to be employed full time[29] in H-1B nonimmigrant status at a health care facility located in an area designated by U.S. Department of Health and Human Services (HHS) as a Health Professional Shortage Area (HPSA), Medically Underserved Area (MUA), or Medically Underserved Population (MUP).
- Practice medicine at the health care facility named in the waiver application for at least 3 years, and generally in HHS-designated shortage areas.[30]
  - An FMG who fails to fulfill the 3-year contract is ineligible for an immigrant visa, lawful permanent resident status, or change of status to another nonimmigrant classification without meeting the 2-year foreign residence requirement unless the failure was due to extenuating circumstances, such as the closure of the facility or hardship to the FMG, and the FMG relocates to another qualifying area for the balance of the 3-year term.[31]
- Obtain a contract from the health care facility located in an area designated by HHS as an HPSA, MUA, or MUP. There are three exceptions to this requirement:
  - If the U.S. Department of Veteran's Affairs (VA) requests the waiver so that the FMG could practice medicine with the VA, the FMG must practice medicine with the VA for at least 3 years, but does not need to do so in an HHS-designated shortage area.
  - If an interested federal agency requests the waiver so that the agency can employ the FMG full time to practice clinical medicine, the FMG may fulfill the obligation by working for the agency for at least 3 years in that capacity, rather than by practicing medicine in an HHS-designated shortage area.
  - If an interested federal or state agency requests the waiver for an FMG who agrees to practice specialty medicine in a facility located in an HHS-designated geographic area, the FMG may fulfill the obligation by practicing specialty medicine in such a facility for at least 3 years.[32] In such a case, the request must demonstrate a shortage of health care professionals able to provide services in the appropriate medical specialty to the patients who will be served by the FMG
- Obtain a no objection letter from the FMG's home country if the home government funded the FMG's exchange program.
- Agree to begin employment at the health care facility within 90 days of receipt of the waiver, not the date the FMG's J-1 visa expires.
  - Employment is not required to begin within 90 days of receipt of the waiver. The FMG must agree to begin employment within this 90-day period.[33]

The maximum number of INA 212(e) waivers that may be granted under INA 214(l) at the request of each state is limited to 30 during each fiscal year (the Conrad 30 program). There is no limit to the number of waivers granted to FMGs under the federal program. An FMG who obtains a waiver under INA 214(l) may not obtain permanent residence, whether by an immigrant visa or by adjustment of status, until the FMG has satisfied the statutory service obligation.

To prevent claims that an FMG did not know the obligations that accompany a waiver under INA 214(l), the foreign residence requirement waiver application approval Notice of Action (Form I-797) contains an addendum. This addendum specifies the terms and conditions imposed on the waiver and identifies the appropriate public law number to indicate whether a state department of public health or an IGA made the request for a waiver. In addition, the applicable public law number is listed on the approval notice.

2. Evidence

Before FMGs may engage in employment, the petitioner must submit a Petition for a Nonimmigrant Worker (Form I-129) along with the DOS-WRD favorable recommendation letter, in order to request a change of the FMG's J-1 nonimmigrant status to H-1B nonimmigrant status.

If a spouse or child of the FMG waiver recipient wishes to change status in the United States from J-2 to H-4, then they must submit an Application to Extend/Change Nonimmigrant Status (Form I-539). The waiver recipient must practice medicine for at least 3 years in an area designated by HHS as a HPSA, MUA, or MUP.

Once the FMG waiver recipient has fulfilled the terms and conditions imposed on the waiver, including the 3-year period of employment with the health care facility, the waiver recipient (and any H-4 dependent family members) becomes eligible to apply for:

- An immigrant visa;
- Lawful permanent residence; or
- An H or L nonimmigrant visa or status.

If the FMG waiver recipient fails to fulfill the terms and conditions imposed on the waiver, the waiver recipient (and any H-4 spouse and child) once again becomes subject to the 2-year foreign residence requirement.

Footnotes

[^ 1] Occasionally, the foreign residence requirement is not correctly annotated on the Certificate of Eligibility for Exchange Visitor (J-1) Status (Form DS-2019) or on the visa foil or both. The absence or inclusion of such a notation on a DS-2019 or visa foil that the exchange visitor is subject to the requirement is not conclusive. Officers must look to the Exchange Visitor Skills List, funding, or other reasons that may make a J-1 exchange visitor subject to the requirement when making a determination as to whether the J-1 exchange visitor is eligible for change of status to certain classifications, or adjustment of status.

[^ 2] See 8 CFR 212.7(c)(11).

[^ 3] For more information about the DOS recommendation process, see the FAQs: Waiver of the Exchange Visitor Two-Year Home-Country Physical Presence Requirement website.

[^ 4] For more information on extreme hardship, see Volume 9, Waivers and Other Forms of Relief, Part B, Extreme Hardship [9 USCIS-PM B].

[^ 5] Compare the INA 212(e) exceptional hardship waiver standard with waivers of criminal grounds of inadmissibility involving violent or dangerous crimes. See 8 CFR 212.7(d), "[t]he Attorney General, in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act."

[^ 6] See 8 CFR 212.7(c)(5). If an applicant erroneously submits the foreign residence requirement waiver application requesting a waiver based on an exceptional hardship claim but submits documentation to establish persecution, or vice versa, officers should issue a request for evidence asking that the applicant either correct the basis for the waiver request indicated on the waiver application or submit documentation supporting the basis indicated.

[^ 7] Applicants should indicate the reason or reasons they are subject to the foreign residence requirement on the waiver application. Applicants may be subject to the requirement for multiple reasons. For example, an applicant whose exchange visitor program was financed by the government of the applicant's country may also have participated in graduate medical education or training. When applicable, USCIS evaluates whether multiple grounds apply.

[^ 8] See 8 CFR 212.7(c)(6). The foreign residence requirement waiver application contains fields to collect information on the qualifying relative (U.S. citizen or LPR spouse or child). If the application is based on exceptional hardship to the applicant's spouse or child, then the applicant must document the name, date, and place of birth, and the U.S. citizenship or LPR status of the qualifying relative. See information about specific documentation to establish family relationships and U.S. citizenship and LPR status in the instructions to Application for Waiver of the Foreign Residence Requirement (under Section 212(e) of the Immigration and Nationality Act, as Amended) (Form I-612).

[^ 9] See 8 CFR 212.7(c)(7).

[^ 10] See *Keh Tong Chen v. Attorney General of the United States*, 546 F. Supp. 1060 (D.D.C. 1982) ("Courts have effectuated Congressional intent by declining to find exceptional hardship unless the degree of hardship expected was greater than the anxiety, loneliness, and altered financial circumstances ordinarily anticipated from a two-year sojourn abroad."), and *Matter of Vicedo (PDF)*, 13 I&N Dec. 33 (Dist. Dir. 1968). Hardship was found for purposes of an INA 212(e) waiver where evidence showed that the two U.S. citizen children would be deprived of the love and care of their parents, and the father could not pay transportation to the Philippines or maintain the family there.

[^ 11] See *Matter of Gupta (PDF)*, 13 I&N Dec. 477 (Dep. Assoc. Comm. 1970). Exceptional hardship was found where a prior visit of the U.S. citizen child to India resulted in medical disorders due to climatic conditions and the unavailability of foods to which the child was accustomed.

[^ 12] See *Matter of Ambe (PDF)*, 13 I&N Dec. 3 (Dist. Dir. 1968). Exceptional hardship was found where the U.S. citizen child was allergic to the smallpox vaccine, and smallpox was endemic to the home country. Waivers were accordingly granted under INA 212(e). See *Matter of Amin (PDF)*, 13 I&N Dec. 209 (Reg. Comm. 1969). Exceptional hardship was not found where the mother's skin condition did not in the past impair her ability to care for her U.S. citizen children, and treatment for the condition was available in her home country.

[^ 13] See *Matter of Lai (PDF)*, 13 I&N Dec. 188 (Reg. Comm. 1969). Application was denied where the minor U.S. citizen child would suffer only the normal hardship of language difficulty, lesser educational opportunities, and hardship resulting from the parent's reduced earnings in Taiwan. Exceptional hardship was, therefore, not found for purposes of INA 212(e); *Matter of Vicedo (PDF)*, 13 I&N Dec. 33 (DD 1968) (exceptional hardship found where evidence showed that the two U.S. citizen children would be deprived of the love and care of their parents, and the father could not pay transportation to the Philippines or maintain the family there).

[^ 14] See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 4, Burden and Standards of Proof [1 USCIS-PM E.4]. This means that the applicant has come forward with the facts and evidence which show that, at a minimum, and without any further inquiry, the applicant has proven initial eligibility for the benefit sought.

[^ 15] See INA 291. See *Matter of Martinez (PDF)*, 21 I&N Dec. 1035, 1036 (BIA 1997), *Matter of Patel (PDF)*, 19 I&N Dec. 774 (BIA 1988), and *Matter of Soo Hoo (PDF)*, 11 I&N Dec. 151 (BIA 1965).

[^ 16] This standard is outlined in *Keh Tong Chen v. Attorney General of the United States*, 546 F. Supp. 1060, 1064 (D.D.C. 1982): "Courts deciding [section] 212(e) cases have consistently emphasized the Congressional determination that it is detrimental to the purposes of the program and to the national interests of the countries concerned to apply a lenient policy in the adjudication of waivers including cases where marriage occurring in the United States, or the birth of a child or children, is used to support the contention that the exchange alien's departure from this country would cause personal hardship." H.R. Rep. 87-721 (1961). Courts have declined to find exceptional hardship unless the degree of hardship expected was greater than the anxiety, loneliness, and altered financial circumstances ordinarily anticipated from a 2-year stay abroad. See *Mendez v. Major*, 340 F.2d 128, 132 (8th Cir. 1965), and *Talavera v. Pederson*, 334 F.2d 52, 58 (6th Cir. 1964).

[^ 17] See 8 CFR 212.7(c)(8).

[^ 18] See INA 208. See 8 CFR 209.2(b).

[^ 19] See 8 CFR 212.7(c)(5).

[^ 20] If an applicant erroneously submits the foreign residence requirement waiver application requesting a waiver based on an exceptional hardship claim but submits documentation to establish persecution, or vice versa, officers should issue an RFE asking that the applicant either correct the basis for the waiver request indicated on the waiver application or submit documentation supporting the basis indicated.

[^ 21] DOS may not change the type of filing (for example, persecution to exceptional hardship) at this stage.

[^ 22] See INA 291. See *Matter of Martinez (PDF)*, 21 I&N Dec. 1035, 1036 (BIA 1997), *Matter of Patel (PDF)*, 19 I&N Dec. 774 (BIA 1988), and *Matter of Soo Hoo (PDF)*, 11 I&N Dec. 151 (BIA 1965).

[^ 23] See 22 CFR 41.63(a)(3) and 22 CFR 62.27(g)(2). See 9 FAM 302.13-2(D)(1), No Objection Statement from Foreign Government.

[^ 24] To initiate the waiver process, the exchange visitor must follow the instructions provided by DOS to complete the Visa Waiver Recommendation Application. See the Apply for a Waiver of the Exchange Visitor Two-Year Home-Country Physical Presence Requirement webpage for more information about the process of requesting a no objection statement. In general, the applicant contacts their country's embassy in the United States to request the no objection statement. DOS reviews the application and forwards the recommendation to USCIS and sends a copy to the exchange visitor and the J-1 sponsor.

[^ 25] A no objection case is the only situation where USCIS allows the applicant to file an adjustment application concurrently with waiver request.

[^ 26] For information about IGA waiver requests from the U.S. Department of Veterans Affairs (VA) on behalf of an exchange visitor physician to serve in a VA hospital and IGA waiver requests for a foreign physician who agrees to serve in a medically under-served area, see Section 5, Foreign Medical Graduates – Federal, State, and Conrad 30 Programs [2 USCIS-PM D.4(F)].

[^ 27] To initiate the waiver process, the exchange visitor must follow the instructions provided by DOS to complete the Visa Waiver Recommendation Application. For more information about the IGA waiver process, see the Apply for a Waiver of the Exchange Visitor Two-Year Home-Country Physical Presence Requirement webpage.

[^ 28] See INA 214(l). See 22 CFR 41.63(e).

[^ 29] Officers may consider non-traditional schedules as full time for the purpose of meeting INA 214(l). Officers should review the totality of the circumstances when determining whether the non-traditional schedule is consistent with the requirement for full-time employment. If the evidence establishes that the physician averages, or will generally average, 40 hours per week, but a minimum of 35 hours per week, over the course of the year (or any iteration of this, for example, 160 hours per month), officers may conclude that the employment is full time.

[^ 30] There is a limited exception: states may fill up to 10 flex slots, where physicians may be selected to work in an area that is not a HPSA or MUA, or MUP, yet still serves patients who reside in underserved areas.

[^ 31] See 8 CFR 212.7(c)(9)(iv).

[^ 32] See 8 CFR 212.7(c)(9).

[^ 33] See INA 214(l)(1)(C)(ii). See 8 CFR 212.7(c)(9)(i)(C).

Chapter 5 - Change of Status, Extensions of Stay, Program Transfers, and Reinstatement

A. General

Section 248 of the Immigration and Nationality Act (INA) provides a nonimmigrant, lawfully admitted to the United States, who is continuing to maintain the status in which the nonimmigrant was admitted or previously changed to, the opportunity to change from one classification under INA 101(a)(15) to another, with certain restrictions.[1] The applicant must meet all eligibility criteria for the new category.[2]

A J-1 exchange visitor who is subject to the 2-year foreign residence requirement under INA 212(e), and who has not received a waiver of that requirement, can change only to A, G, T, or U status.[3]

B. Change of Status from J-1 to H-1B

Foreign medical graduates (FMGs) granted a waiver of the 2-year foreign residence requirement under either the state or federal program may change status from J-1 to H-1B.[4] To qualify, the FMG must be otherwise eligible to apply for a change of nonimmigrant status.[5] This includes the requirement for timely filing of the Petition for a Nonimmigrant Worker (Form I-129), requesting change of status.

However, FMGs who obtain a waiver based on exceptional hardship or persecution (under INA 212(e) itself, rather than INA 214(l)) are statutorily ineligible for change of status pursuant to INA 248.

If a J-1 exchange visitor applies for a change of status to H-1B and the H-1B cap has been reached, DHS may extend the applicant's duration of status until the next fiscal year when H-1B status can commence.[6] Additionally, a J-1 exchange visitor who has obtained a waiver based on INA 214(l) is not subject to the H-1B cap.

C. Change of Status from J-1 to J-2

Although an Application to Extend/Change Nonimmigrant Status (Form I-539) and fee are required, changing from J-1 to J-2 is not regarded as a change of status, therefore, it is not prohibited.[7] However, three important items should be noted regarding this type of change:

- Any nonimmigrant or nonimmigrants subject to the 2-year foreign residence requirement retains that obligation despite the change from J-1 to J-2 status or vice versa;
- The nonimmigrant or nonimmigrants involved may acquire a foreign residence requirement that they did not have previously (for example, a J-1 exchange visitor not subject to the requirement who becomes a J-2 accompanying spouse of someone who is subject acquires the same obligation as the (new) J-1 principal); and
- Before approving any such change, the officer should be satisfied that the applicant is requesting the change for legitimate exchange visitor purposes and not merely to extend the stay in the United States by flip-flopping the roles of the principal exchange visitor and the accompanying spouse.

D. Extension of Stay, Program Transfers, and Reinstatement Requests

A request for an extension of stay or a program transfer must be filed with the U.S. Department of State (DOS).[8] An exchange visitor's request for reinstatement must be filed with the DOS after consultation with the program sponsor.[9]

Footnotes

[^ 1] See INA 248.

[^ 2] See Volume 2, Nonimmigrants, Part A, Nonimmigrant Policies and Procedures, Chapter 4, Extension of Stay, Change of Status, and Extension of Petition Validity [2 USCIS-PM A.4].

[^ 3] See INA 248(b). See 8 CFR 248.2(b). Any J nonimmigrant who was admitted (or acquired such status) to pursue graduate medical education or training is ineligible to change status, even if the J nonimmigrant obtains a waiver of INA 212(e).

[^ 4] See INA 214(l)(2)A).

[^ 5] See INA 248.

[^ 6] See 8 CFR 214.2(j)(1)(vi).

[^ 7] See 8 CFR 248.2.

[^ 8] See 22 CFR 62.42 and 22 CFR 62.41(a)–(b). For information about J-1 program extensions, transfers, and reinstatements, see DOS' Adjustments and Extensions webpage.

[^ 9] See 22 CFR 62.45.

Chapter 6 - Family Members of J-1 Exchange Visitor

The J-1 exchange visitor's accompanying dependent family members may be admitted into the United States in J-2 classifications[1] if each applicant presents a Certificate of Eligibility for Exchange Visitor (J-1) Status (Form DS-2019), issued in the applicant's name by a program approved by the U.S. Department of State for participation by J-1 exchange visitors.

J-2 spouses of J-1 Conrad 30 waiver recipients cannot change status in the United States from J-2 to H-1B temporary worker status until the J-1 Conrad 30 waiver recipients have completed the requisite 3-year term of employment in a designated medically underserved area. Once the J-1 Conrad 30 waiver recipients have fulfilled all of the terms and conditions imposed on the waiver, including the 3-year period of employment with the health care facility, the J-1 Conrad 30 waiver recipients (and dependent family member or members) become eligible to change to another nonimmigrant status or adjust status to a lawful permanent resident.[2]

If the waiver recipients fail to fulfill the terms and conditions imposed on the waiver, they and their dependent family member or members will once again become subject to the 2-year foreign residence requirement under INA 212(e).[3]

J-2 nonimmigrants may be eligible for employment authorization;[4] however, they may not use their income to support the J-1 nonimmigrant. To apply for employment authorization as a J-2 nonimmigrant, the dependent family member must file an Application for Employment Authorization (Form I-765). USCIS may authorize the employment for the length of the J-1 exchange visitor's stay or 4 years, whichever is shorter.[5]

Footnotes

[^ 1] See INA 101(a)(15)(J).

[^ 2] See INA 214(l)(2)(B).

[^ 3] See 8 CFR 212.7(c)(9) and 8 CFR 248.2(a)(3).

[^ 4] See 8 CFR 274a.12(c)(5).

[^ 5] See 8 CFR 214.2(j)(1)(v).

Part E - Cultural Visitors (Q)

Chapter 1 - Purpose and Background

A. Purpose

The Immigration and Nationality Act (INA) provides a nonimmigrant classification for participants coming temporarily to the United States to participate "in an international cultural exchange program approved by the Secretary of Homeland Security for the purpose of providing practical training, employment, and the sharing of the history, culture, and traditions of the country of the alien's nationality and who will be employed under the same wages and working conditions as domestic workers."[1]

B. Background

In 1990, Congress created new immigration classification for cultural visitors, commonly known as the "Q" visa category.[2] The implementing regulation establishes the process by which DHS evaluates both the proposed international cultural exchange program and the prospective Q nonimmigrants.[3] The cultural exchange program must have a cultural component that "is an essential and integral part of the international cultural exchange visitor's employment or training."[4] The Q nonimmigrants must meet age, qualifications for the job, and communication requirements. Petitions seeking Q-1 status may be filed for up to 25 named participants.[5]

C. Legal Authorities

- INA 101(a)(15)(Q) – Definition of Q nonimmigrant classification
- 8 CFR 214.2(q) – Cultural visitors

Footnotes

[^ 1] See INA 101(a)(15)(Q).

[^ 2] See INA 101(a)(15)(Q).

[^ 3] See 8 CFR 214.2(q).

[^ 4] See 8 CFR 214.2(q)(3)(iii)(B).

[^ 5] See 8 CFR 214.2(q)(5)(ii).

Chapter 2 - Eligibility Requirements

A. Petitioner Requirements

1. Qualified Employer

A qualified employer is a United States or foreign firm, corporation, non-profit organization, or other legal entity, including its U.S. branches, subsidiaries, affiliates, and franchises,[1] which:

- Is actively doing business in the United States;[2] and
- Administers a DHS-designated international cultural exchange program.[3]

Doing business means the regular, systematic, and continuous provision of goods or services (including lectures, seminars and other types of cultural programs) by a qualified employer which has employees, and does not include the mere presence of an agent or office of the qualifying employer.[4]

To establish eligibility as a qualified employer, the petitioner must provide evidence that it maintains an established international cultural exchange program.[5]

2. Agent

A designated agent may file the petition if he or she is employed by the employer on a permanent basis in an executive or managerial capacity and is a U.S. citizen, a lawful permanent resident, or has temporary residence status under INA 210 or INA 245A.[6]

B. Program Requirements

1. Accessibility to the Public

The culture sharing must take place in a school, museum, business or other establishment where the American public, or a segment of the public sharing a common cultural interest, is exposed to aspects of a foreign culture as part of a structured program. A private home or an isolated business setting that is not open to direct access by the public would not qualify.[7]

2. Cultural Component

The program must have a cultural component that is an essential and integral part of the participant's employment or training, and is designed to exhibit or explain the attitude, customs, history, heritage, philosophy, or traditions of the participant's country of nationality.[8] The cultural component may include structured instructional activities, such as:

- Seminars;
- Courses;
- Lecture series; or
- Language camps.[9]

3. Work Component

The participant's employment or training in the United States may not be independent of the cultural component of the international cultural exchange program. The work component must serve as the vehicle to achieve the objectives of the cultural component of the program. In other words, the participant's work or training in the United States must be tied to the cultural component which is to exhibit or explain attitude, customs, history, heritage, philosophy or traditions of the participant's country of nationality.

The sharing of the culture of the participant's country of nationality must result from his or her employment or training with the qualified employer in the United States.[10]

4. Services in More than One Location

The participant may engage in employment or training in different locations for the same employer. If there are different locations, the petition must include an itinerary with the dates and locations of the services, labor, or training to be performed.[11] The employment occurring at each location must meet the requirements of an international exchange program.

C. Participant Requirements

1. Participant Requirements

Participants in Q-1 cultural exchange programs must:[12]

- Be at least 18 years of age at the time the petition is filed;
- Be qualified to perform the service or labor or receive the training stated in the petition; and
- Have the ability to communicate effectively about the cultural attributes of his or her country of nationality[13] with the American public.

In addition, participants who have previously spent 15 months in the United States as a Q-1 nonimmigrant must have resided and been physically present outside the United States for the immediate prior year.[14] Brief trips into the United States do not break the continuity of the 1-year foreign residency.[15]

2. Family Members

The Q-1 nonimmigrant classification does not have a provision for any spouse or children to accompany or follow to join a Q-1 nonimmigrant. Therefore, any spouse or children wishing to enter the United States must qualify independently for a nonimmigrant classification.

Footnotes

[^ 1] See 8 CFR 214.2(q)(1)(iii) (definition of qualified employer).

[^ 2] See 8 CFR 214.2(q)(4)(i)(C).

[^ 3] See 8 CFR 214.2(q)(1)(iii) (definition of qualified employer).

[^ 4] See 8 CFR 214.2(q)(1)(iii) (definition of doing business).

[^ 5] See 8 CFR 214.2(q)(4)(i)(A).

[^ 6] See 8 CFR 214.2(q)(1)(iii) (definition of petitioner).

[^ 7] See 8 CFR 214.2(q)(3)(iii)(A). See *Matter of R-C-C-S-D-*, Adopted Decision 2016-04 (AAO Oct. 24, 2016).

[^ 8] See 8 CFR 214.2(q)(3)(iii)(B). See *Matter of R-C-C-S-D-*, Adopted Decision 2016-04 (AAO Oct. 24, 2016).

[^ 9] See 8 CFR 214.2(q)(3)(iii)(B). See *Matter of R-C-C-S-D-*, Adopted Decision 2016-04 (AAO Oct. 24, 2016).

[^ 10] See 8 CFR 214.2(q)(3)(iii)(C). See *Matter of R-C-C-S-D-*, Adopted Decision 2016-04 (AAO Oct. 24, 2016).

[^ 11] See 8 CFR 214.2(q)(5)(iii).

[^ 12] See 8 CFR 214.2(q)(3)(iv).

[^ 13] The country of nationality is the country of which the participant was a national at the time of filing. See 8 CFR 214.2(q)(1)(iii).

[^ 14] See 8 CFR 214.2(q)(7)(iv).

[^ 15] See 8 CFR 214.2(q)(2)(ii).

Chapter 3 - Filing and Documentation

A. Filing Process

A qualified employer or its designated agent may file a Petition for a Nonimmigrant Worker (Form I-129), with the Q-1 Classification Supplement and required fee, generally within the 6-month period before the participant's employment begins. A petitioner may include up to 25 named participants on one petition.[1] A participant may provide services, labor, or training for more than one employer at a time, provided each employer files a separate petition.[2]

A petitioner must file a new petition on Form I-129, with the applicable fee, each time it wants to bring in additional international cultural exchange visitors. Each person named on an approved petition will be admitted only for the duration of the approved program. Replacement or substitution may be made for any person named on an approved petition, but only for the remainder of the approved program.[3]

B. Evidence

1. Evidence Relating to the Employer

The petitioner must provide evidence that demonstrates that the employer:

- Has designated a qualified employee as a representative who will be responsible for administering the program and will serve as a liaison with USCIS;
- Is actively doing business in the United States (for example, the regular, systematic and continuous provisions of goods or services, including lectures, seminars and other types of cultural programs);
- Will offer the participant(s) wages and working conditions comparable to those accorded local domestic workers similarly employed; and
- Has the financial ability to remunerate the participant(s).[4]

Evidence to demonstrate financial ability to remunerate the participants includes the organization's most recent annual report, business income tax return, or other form of certified accountant's report.

2. Evidence Relating to the Program

The petitioner must provide evidence that the employer maintains an established international exchange program that meets the factor listed in the Program Requirements section above.[5] In addition to the position description, evidence that can show the program has a cultural component which is an essential and integral part of the participant's employment or training may include:

- Catalogs;
- Brochures;
- Curriculum; or
- Any other evidence describing the program.

The program's cultural component must be designed, on the whole, to exhibit or explain the attitude, customs, history, heritage, philosophy, traditions, or other cultural attributes (arts, literature, language) of the participant's country of nationality.[6] If there are different locations, the petition must include an itinerary with the dates and locations of the services, labor, or training to be performed.[7]

Multiple Petitions in Same Calendar Year

When petitioning to repeat a previously approved international cultural exchange program, petitioners may submit a copy of the initial program approval notice in lieu of the documentation required with an initial filing.[8] Officers should request additional documentation only if clarification is needed.[9]

3. Evidence Relating to the Participants

The record must contain documentation of the following information for each participant:

- Date of birth;
- Country of nationality;
- Level of education;
- Position title; and
- Job description. [10]

The petitioner must verify and certify that the participants are qualified to perform the service or labor, or receive the type of training, described in the petition.[11] In addition, the petitioner must report the participants' wages and certify they are offered wages and working conditions comparable to those accorded to local domestic workers similarly employed.[12]

For petitions involving multiple participants, the petitioner must include the name, date of birth, nationality, and other identifying information required on the petition for each participant. The petitioner must also indicate the U.S. consulate at which each participant will apply for a Q-1 visa. For participants who are visa-exempt,[13] the petitioner must indicate the port of entry at which each participant will apply for admission to the United States.[14]

Finally, if the participant has spent an aggregate of 15 months in the United States as a Q-1 nonimmigrant, the petitioner must document that the participant has resided and been physically present outside the United States for the immediate prior year.[15]

Footnotes

[^ 1] See 8 CFR 214.2(q)(5)(ii).

[^ 2] See 8 CFR 214.2(q)(5)(iv).

[^ 3] See 8 CFR 214.2(q)(5)(i).

[^ 4] See 8 CFR 214.2(q)(4)(i)(B), (C), (D), and (E).

[^ 5] See 8 CFR 214.2(q)(4)(i)(A).

[^ 6] See 8 CFR 214.2(q)(3)(iii)(B).

[^ 7] See 8 CFR 214.2(q)(5)(iii).

[^ 8] See 8 CFR 214.2(q)(4)(i).

[^ 9] See 8 CFR 214.2(q)(4)(iii).

[^ 10] See 8 CFR 214.2(q)(4)(ii)(A).

[^ 11] See 8 CFR 214.2(q)(4)(ii)(A).

[^ 12] See 8 CFR 214.2(q)(4)(ii)(B). See 8 CFR 214.2(q)(11)(ii).

[^ 13] See 8 CFR 212.1(a).

[^ 14] See 8 CFR 214.2(q)(5)(ii).

[^ 15] See 8 CFR 214.2(q)(7)(iv).

Chapter 4 - Adjudication

A. Approvals

If the petitioner properly filed the Petition for a Nonimmigrant Worker (Form I-129) and the officer is satisfied that the petitioner has met the required eligibility standards, the officer should approve the petition. The approval period should not exceed the maximum period of stay allowed, which is the length of the approved program, or 15 months, whichever is shorter.[1] The petitioner must demonstrate that the program will run 15 straight months in order to obtain a validity period of that length.[2]

1. Substitution of Beneficiaries

A petitioner may substitute or replace a participant named on an approved petition for the remainder of the program without filing a new Form I-129.[3] The substituting cultural exchange visitor must meet the qualifications for a participant.[4]

Petitioners seeking to substitute a participant must submit a letter to the consulate at which the participant will apply for the visa or at the port of entry in the case of a visa-exempt alien, along with a copy of the approval notice and the participant's information.[5]

2. Revocation

The approval of any petition is automatically revoked if the qualifying employer:[6]

- Goes out of business;
- Files a written withdrawal of the petition; or
- Terminates the approved international cultural exchange program before its expiration date.

No further action or notice by USCIS is necessary in the case of automatic revocation.

A Notice of Intent to Revoke (NOIR) is necessary upon a determination that:[7]

- The international cultural exchange visitor is no longer employed by the petitioner in the capacity specified in the petition, or if the international cultural exchange visitor is no longer receiving training as specified in the petition;
- The statement of facts contained in the petition was not true and correct;
- The petitioner violated the terms and conditions of the approved petition; or
- USCIS approved the petition in error.

The Notice of Intent to Revoke should contain a detailed statement of the grounds for the revocation and the period of time allowed for the petitioner's rebuttal.[8] USCIS must consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition remains approved and USCIS sends a revised approval notice to the petitioner with the revocation notice.[9]

The petitioner may appeal the decision to revoke a petition (in whole or in part) to the Administrative Appeals Office (AAO) if USCIS revoked the petition on notice. Petitioners may not appeal an automatic revocation.[10]

B. Denials

If the petitioner does not meet the eligibility requirements, the officer must deny the petition.[11] The officer may deny a petition for multiple participants in whole or in part.[12] If the officer denies the petition, he or she must prepare a final notice of action, which includes information explaining why the petition is denied.[13] Additionally, officers should include information about appeal rights and the opportunity to file a motion to reopen or reconsider in the denial notice. The office that issued the decision has jurisdiction over any motion[14] and the AAO has jurisdiction over any appeal.[15]

Footnotes

[^ 1] See 8 CFR 214.2(q)(7)(iii).

[^ 2] See *Matter of R-C-C-S-D-*, Adopted Decision 2016-04 (AAO Oct. 24, 2016).

[^ 3] See 8 CFR 214.2(q)(6).

[^ 4] See Chapter 2, Eligibility Requirements, Section C, Participant Requirements [2 USCIS-PM E.2(C)].

[^ 5] See 8 CFR 214.2(q)(6).

[^ 6] See 8 CFR 214.2(q)(9)(ii).

[^ 7] See 8 CFR 214.2(q)(9)(iii).

[^ 8] For more information on timeframes for Notices of Intent to Revoke, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 10, Post-Decision Actions, Section D, Revocation, Rescission, or Termination [1 USCIS-PM E.10(D)].

[^ 9] See 8 CFR 214.2(q)(9)(iv).

[^ 10] See 8 CFR 214.2(q)(9)(v).

[^ 11] See 8 CFR 103.2(b)(8).

[^ 12] See 8 CFR 214.2(q)(8)(ii)

[^ 13] See 8 CFR 103.2(b)(19). See 8 CFR 103.3. See 8 CFR 214.2(q)(8)(i).

[^ 14] See 8 CFR 103.5(a)(1)(ii).

[^ 15] See 8 CFR 103.3(a)(2).

Chapter 5 - Admissions, Extensions of Stay, and Changes of Status

A. Admission and Limits on Extensions of Stay

If approved for nonimmigrant international cultural exchange visitor (Q-1) classification and found otherwise admissible, a beneficiary may be admitted as a Q-1 nonimmigrant for a period of up to 15 months from the date of initial admission.[1]

An officer should not approve petitions for participants who have an aggregate of 15 months in the United States as a Q-1 nonimmigrant, unless the participants have resided and been physically present outside the United States for the immediate prior year.[2]

B. Change of Status

Generally, a beneficiary in a current valid nonimmigrant status who has not violated his or her status is eligible to change status to a Q-1 nonimmigrant in the United States without having to return to his or her home country for a visa interview. USCIS may grant such a beneficiary Q-1 status for up to 15 months.[3]

To change nonimmigrant status, the petitioning employer or agent should file a Petition for a Nonimmigrant Worker (Form I-129) before the beneficiary's current status expires and indicate the request is for a change of status.[4] The beneficiary cannot work in the new Q-1 nonimmigrant classification until USCIS approves the petition and the change of status request.

If USCIS determines that the beneficiary is eligible for Q-1 classification, but not a change of status, the beneficiary must depart the United States, apply for a Q-1 nonimmigrant visa at a U.S. consular post abroad (unless visa-exempt) and then be readmitted to the United States as a Q-1 nonimmigrant.[5]

C. Change of Employer

Q-1 nonimmigrants may change employers without leaving the United States. A new employer must file a petition with all required evidence establishing the existence of an international cultural exchange program. The total period of stay in the United States, however, remains limited to 15 months.[6] The beneficiary cannot work for the new employer until USCIS approves the petition and the change of status request.

Footnotes

[^ 1] See 8 CFR 214.2(q)(7)(iii).

[^ 2] See 8 CFR 214.2(q)(7)(iv).

[^ 3] See 8 CFR 214.2(q)(7)(iii).

[^ 4] See 8 CFR 248.3(a).

[^ 5] There is no appeal from a change of status denial. See 8 CFR 248.3(g).

[^ 6] See 8 CFR 214.2(q)(5)(v).

Part F - Students (F, M)

Chapter 1 - Purpose and Background

A. Purpose

The F and M nonimmigrant visa categories are for aliens seeking to study in the United States. The nonimmigrant academic student (F-1) classification allows an alien to enter the United States as a full-time student at a U.S. college, university, seminary, conservatory, academic high school, private elementary school, other academic institution, or in a language training program.[1]

The nonimmigrant vocational student (M-1) classification includes students in established vocational or other recognized nonacademic programs, excluding language training programs.[2]

B. Background

The Immigration and Nationality Act (INA) is the primary body of law governing immigration and visa operations and provides for the admission of various classes of nonimmigrants, including foreign students.[3] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) created the requirement for a program to collect information for tracking and monitoring foreign students from approved institutions of higher education, other approved educational institutions, and designated exchange visitor programs in the United States.[4]

IIRIRA led to legacy Immigration and Naturalization Service (INS) initiating a pilot program in 1997 to monitor the academic progress and movement of foreign students and exchange visitors from entry into the United States to departure. This program was known as the Coordinated Interagency Partnership Regulating International Students (CIPRIS).

As part of reforms following September 11, 2001, legacy INS renamed CIPRIS to the Student and Exchange Visitor Information System (SEVIS). Legacy INS also established the U.S. Immigration and Customs Enforcement (ICE) Student and Exchange Visitor Program (SEVP) to manage SEVIS.[5]

IIRIRA, as amended by the Enhanced Border Security and Visa Entry Reform Act of 2002, required that legacy INS establish an electronic means to monitor and verify the acceptance of alien students by schools. The amended IIRIRA also mandated that schools notify legacy INS when a foreign student fails to enroll within 30 days after the end of a school's enrollment period.[6]

The Homeland Security Act of 2002 transferred the authority and functions of legacy INS into the newly created DHS.[7] Those functions relating to SEVIS and SEVP were placed within ICE.

In 2004, DHS published a final rule amending regulations requiring payment of a fee by certain aliens seeking status as F-1, F-3, M-1 or M-3 nonimmigrant students.[8]

In 2008, DHS again amended its regulations and adjusted application fees for that certain aliens who are seeking status as F-1, F-3, M-1, or M-3 nonimmigrant students.[9]

On December 14, 2010, President Obama signed the Accreditation of English Language Training Programs Act, which amended INA 101(a)(15)(F)(i) to state that F-1 nonimmigrant students intending to pursue an English language training course of study must enroll in an English language training program that has been accredited by a regional or national accrediting agency recognized by the Department of Education.[10]

C. Legal Authorities

- INA 101(a)(15)(F) - Academic student definition
- INA 101(a)(15)(M) - Vocational student definition
- INA 214(m) - Nonimmigrant elementary and secondary school students
- INA 248; 8 CFR 248 - Change of nonimmigrant classification
- 8 CFR 214.2(f) - Students in colleges, universities, seminaries, conservatories, academic high schools, elementary schools, other academic institutions, and in language training programs
- 8 CFR 214.2(m) - Students in established vocational or other recognized nonacademic institutions, other than in language training programs
- 8 CFR 214.3 - Approval of schools for enrollment of F and M nonimmigrants
- 8 CFR 214.13 - SEVIS fee for certain F, J, and M nonimmigrants

- 8 CFR 274a.12(c) - Aliens who must apply for employment authorization
- 22 CFR 41.61 - Students - academic and nonacademic

Footnotes

[^ 1] See INA 101(a)(15)(f).

[^ 2] See INA 101(a)(15)(m). See 22 CFR 41.61(b)(1).

[^ 3] According to INA 101(a)(15)(f), an alien is eligible for an F visa if they: have a residence in foreign country which they have no intention of abandoning, are a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study consistent with INA 214(l) at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in an accredited language training program in the United States. INA 101(a)(15)(m) provides that an alien who has a residence in a foreign country which they have no intention of abandoning who seeks to enter the United States temporarily and solely for the purpose of pursuing a full course at an established vocational or other recognized institution (other than in a language training program) in the United States is eligible for an M visa. The INA has been amended several times, including by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Division C, Title III of Pub. L. 104-208 (PDF) (September 30, 1996), the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. 107-56 (PDF) (October 26, 2001), the Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. 107-173 (PDF) (May 14, 2002), and the Homeland Security Act of 2002, Pub. L. 107-296 (PDF) (November 25, 2002).

[^ 4] See Section 641 of IIRIRA, Pub. L. 104-208 (PDF), 110 Stat. 3009, 3009–704 (September 30, 1996).

[^ 5] IIRIRA required the creation of a program to collect information relating to nonimmigrant foreign students and exchange visitor program participants during the course of their stay in the United States. See Section 641 of IIRIRA, Pub. L. 104–208 (PDF), 110 Stat. 3009, 3009–704 (September 30, 1996). The program became known as ICE SEVP and its core technology became known as SEVIS. A number of rules outline the requirements and procedures for SEVIS. They include: 67 FR 34862 (PDF) (May 16, 2002) (proposed rule for implementing SEVIS); 67 FR 44344 (PDF) (Jul. 1, 2002) (interim rule for schools to apply for preliminary enrollment in SEVIS); 67 FR 60107 (PDF) (Sept. 25, 2002) (interim rule for certification of schools applying for enrollment in SEVIS); 67 FR 76256 (PDF) (Dec. 11, 2002) (final DHS rule implementing SEVIS); 67 FR 76307 (PDF) (Dec. 12, 2002) (Department of State interim final rule implementing SEVIS); 69 FR 39814 (PDF) (Jul. 1, 2004) (final rule authorizing fee collection for F, J and M nonimmigrant classifications); and 73 FR 55683 (PDF) (Sept. 26, 2008) (final rule adjusting program fees and establishing procedures for out-of-cycle review and recertification of schools certified by the SEVP to enroll F and M nonimmigrant students).

[^ 6] See the Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. 107-173 (PDF) (May 14, 2002).

[^ 7] See the Homeland Security Act of 2002, Pub. L. 107-296 (PDF) (November 25, 2002).

[^ 8] See 69 FR 39814 (PDF) (Jul. 1, 2004) (final rule).

[^ 9] Section 641(e) of IIRIRA, Pub. L. 104–208 (PDF), 110 Stat. 3009, 3009–706 (September 30, 1996), requires that a fee be established and charged to students or exchange visitors tracked in SEVIS to fund the program and further requires that the fee be used only for ICE SEVP related purposes. SEVIS Remittance for Certain F, J and M Visa nonimmigrants (Form I-901) fees are deposited into a sub-account within the Immigration Examination Fee Account and maintained for ICE SEVP use. See 73 FR 55683 (PDF) (Sept. 26, 2008).

[^ 10] See the Accreditation of English Language Training Programs Act, Pub. L. 111-306 (PDF) (December 14, 2010).

Chapter 2 - Eligibility Requirements

A. Applicant Eligibility

To be eligible for F-1 or M-1 status, aliens must meet the following requirements:[1]

- Be bona fide students qualified to pursue a full course of study;
- Seek to enter the United States temporarily and solely for the purpose of pursuing such a course of study at an institution the U.S. Immigration and Customs Enforcement (ICE) Student and Exchange Visitor Program (SEVP) has certified to admit nonimmigrant students;
- Have a foreign residence, which they have no intention of abandoning;[2]
- Have a Certificate of Eligibility for Nonimmigrant Student Status (Form I-20) issued in their name by a Designated School Official (DSO) of a school that SEVP has certified to admit nonimmigrant students;[3]
- Have sufficient funds available for self-support during the entire proposed course of study;[4] and
- Provide proof that the alien has paid the Student and Exchange Visitor Information System (SEVIS) fee on Payment of Fee Remittance for Certain F, J, and M Nonimmigrants (Form I-901), if applicable.[5]

Intent to Depart

In order to be eligible for F-1 or M-1 classification, a student must intend to depart from the United States after their temporary period of stay (for example, upon completion of their program of study and any authorized practical training in this country or upon termination of their nonimmigrant status) and have a foreign residence that they have no intention of abandoning.[6]

The foreign residence requirement should be adjudicated differently for students than for other nonimmigrants.[7] Typically, students lack the strong economic and social ties of more established applicants, and they plan longer stays in the United States. INA 101(a)(15)(F)(i) assumes that the natural circumstances of being a student do not disqualify the student from qualifying for nonimmigrant status. Considerations should include the student's present intent, not what they might do after a lengthy stay in the United States.[8]

If a student had a foreign residence immediately prior to traveling to the United States, even if such residence was with parents or guardians, they may be considered to be maintaining a residence abroad if they have the present intent to depart the United States at the conclusion of their studies.[9] The fact that this intention may change is not a sufficient reason to deny them F classification. In addition, the present intent to depart does not imply the need to return to the country from which they hold a passport. It means only that they must intend to leave the United States upon completion of their studies. Given that most students are young, they are not expected to have a long-range plan and may not be able to fully explain their plans at the conclusion of their studies. The student must have the present intent to depart at the conclusion of their approved activities.[10]

A student may be the beneficiary of an approved or pending permanent labor certification application or immigrant petition and still be able to demonstrate their intention to depart after a temporary period of stay.[11] USCIS officers generally view the fact that a student is the beneficiary of an approved or pending permanent labor certification or an immigrant visa petition as not necessarily impacting their eligibility for the classification, so long as the student intends to depart at the end of their temporary period of stay. In all cases, the officer must consider all facts presented when determining whether a student is eligible for the F or M classification.

Sufficient Funds

F-1 students must have sufficient funds to successfully study in the United States without resorting to unauthorized U.S. employment for financial support. F-1 students must provide documentary evidence that sufficient funds are, or will be, available to defray all expenses during the entire period of anticipated study.[12]

M-1 students must establish that they have funds immediately available to them or assurances of support necessary to pay all tuition and living costs for the entire period of intended stay.

Evidence of financial ability for prospective F-1 and M-1 students includes, but is not limited to:

- Family bank statements;
- Documentation from a sponsor;
- Financial aid letters;
- Scholarship letters; and
- A letter from an employer showing annual salary.[13]

B. Program Eligibility

1. F-1 Students

The following schools may be approved for attendance by F-1 students:[14]

- A college or university;[15]
- A community college or junior college which provides instruction in the liberal arts or in the professions and which awards recognized associate degrees;[16]
- A seminary;[17]
- A conservatory;[18]
- An academic high school;[19]
- A private elementary school;[20] and
- An institution which provides language training, instruction in liberal arts or fine arts, instruction in the professions, or instruction or training in more than one of these disciplines.[21]

2. M-1 Students

The following schools may be approved for attendance by M-1 students:[22]

- A community college or junior college which provides vocational or technical training and which awards recognized associate degrees;[23]
- A vocational high school;[24] and
- A school which provides vocational or nonacademic training other than language training.[25]

3. Ineligible School Types

The following schools may not be approved for attendance by foreign students:[26]

- A home school;[27]
- A public elementary or middle school;[28] and
- Adult education programs that are funded in whole or in part by a grant under the Adult Education and Family Literacy Act, or by any other federal, state, county, or municipal funding.[29]

4. Designated School Official Responsibilities

One requirement for a school to be ICE SEVP-certified is that the school must have dedicated employees for assisting and overseeing enrolled F and M students. These dedicated employees are referred to as the DSO. Each instructional site location must have at least one DSO who also serves as the main point of contact related to the school's compliance for ICE SEVP.[30]

DSOs oversee and authorize foreign student activities, such as, but not limited to, reduced course loads, leaves of absence, employment endorsements such as for Curricular Practical Training and Optional Practical Training, and school transfers. DSOs are also responsible for fulfilling reporting requirements related to the activities of the school's foreign students. Federal law requires DSOs to update and maintain student records in the SEVIS.[31] The failure of a DSO to report student infractions properly and in a timely manner can result in disqualification of the individual as a DSO and withdrawal of the school's ICE SEVP certification.

C. Border Commuter Students

Nationals of Canada or Mexico who continue to reside in their home country while commuting to the United States to attend an approved F or M school are generally granted F-3 or M-3 nonimmigrant classification.[32] Such border commuter students are specifically permitted to engage in either full-time or part-time studies.[33] Unlike other foreign students who are admitted for duration of status, commuter students are admitted with a fixed period of admission through a specific date.[34]

Footnotes

[^ 1] See INA 101(a)(15)(f) and INA 101(a)(15)(m). See 8 CFR 214.2(f)(1) and 8 CFR 214.2(m)(1).

[^ 2] See 9 FAM 402.5-5(C), Qualifying for a Student Visa (F-1/M-1).

[^ 3] See 8 CFR 214.3(k). For more information about DSO requirements, see DHS's Designated School Officials webpage.

[^ 4] See 22 CFR 41.61(b)(1)(ii).

[^ 5] See ICE's I-901 SEVIS Fee webpage for information on the fee requirement and how to pay the fee.

[^ 6] See 9 FAM 402.5-5(E)(1)(b), Residence Abroad Required.

[^ 7] See 9 FAM 402.5-5(E)(1)(b), Residence Abroad Required.

[^ 8] See 9 FAM 402.5-5(E)(1)(b), Residence Abroad Required.

[^ 9] See 9 FAM 402.5-5(E)(1)(b), Residence Abroad Required.

[^ 10] See 9 FAM 402.5-5(E)(1)(b), Residence Abroad Required.

[^ 11] See 64 FR 29208, 29209 (PDF) (Jun. 1, 1999) ("So long as the alien clearly intends to comply with the requirements of his or her nonimmigrant status, the fact that the alien would like to become a permanent resident, if the law permits, this, does not bar the alien's continued holding of a nonimmigrant status."). See *Matter of Hosseinpour* (PDF), 15 I&N Dec. 191 (BIA 1975) (Filing for adjustment of status "…is not necessarily inconsistent with lawful nonimmigrant status.").

[^ 12] While this does not mean that the applicant must have cash immediately available to cover the entire period of intended study, which may last several years, it is generally required that that the applicant has enough readily available funds to meet all expenses for the first year of study, or the length of the program, whichever is shorter. Additionally, applicants must demonstrate that, barring unforeseen circumstances, adequate funds will be available for each subsequent year of study from the same source or from one or more other specifically identified and reliable financial sources.

[^ 13] See DHS's Financial Ability webpage.

[^ 14] See 8 CFR 214.3(a)(2).

[^ 15] See 8 CFR 214.3(a)(2)(i)(A). A college or university is an institution of higher learning which awards recognized bachelors, masters, doctors, or professional degrees.

[^ 16] See 8 CFR 214.3(a)(2)(i)(B).

[^ 17] See 8 CFR 214.3(a)(2)(i)(C).

[^ 18] See 8 CFR 214.3(a)(2)(i)(D).

[^ 19] See 8 CFR 214.3(a)(2)(i)(E).

[^ 20] See 8 CFR 214.3(a)(2)(i)(F).

[^ 21] See 8 CFR 214.3(a)(2)(i)(G).

[^ 22] See 8 CFR 214.3(a)(2)(ii).

[^ 23] See 8 CFR 214.3(a)(2)(ii)(A).

[^ 24] See 8 CFR 214.3(a)(2)(ii)(B).

[^ 25] See 8 CFR 214.3(a)(2)(ii)(C). Also, under Section 113 of the Aviation and Transportation Security Act, Pub. L. 107-71 (PDF), 115 Stat. 597, 622 (November 19, 2001), flight schools are required to provide to the Attorney General the identification of an alien who wishes to be trained on an aircraft with a maximum certified takeoff weight of 12,500 pounds or more so that officials can assess the security risk prior to the training. See 49 CFR 1552.3(a).

[^ 26] See 8 CFR 214.3(a)(2)(v).

[^ 27] See 8 CFR 214.3(a)(2)(v)(A).

[^ 28] See 8 CFR 214.3(a)(2)(v)(B).

[^ 29] See 8 CFR 214.3(a)(2)(v)(C) (excluding adult education programs from certification for attendance for foreign students). Adult education means academic instruction and education services below the post-secondary level that increase an individual's ability to: read, write, and speak in English and perform mathematics or other activities necessary for the attainment of a secondary school diploma or its recognized equivalent; transition to postsecondary education and training; and obtain employment. See 29 U.S.C. 3272.

[^ 30] See 8 CFR 214.3(l). The school's president, owner or head of a school or school system must nominate these officials by signing a Record of Designated School Officials (Form I-17A) or successor form.

[^ 31] See 8 CFR 214.2(f)(10)(i)(B). For more information about DSO responsibilities, see ICE's SEVIS Reporting Requirements for Designated School Officials webpage.

[^ 32] See INA 101(a)(15)(F)(iii) and INA 101(a)(15)(M)(iii).

[^ 33] See INA 101(a)(15)(F)(iii) and INA 101(a)(15)(M)(iii). See 8 CFR 214.2(f)(18)(ii) and 8 CFR 214.2(m)(19).

[^ 34] See 8 CFR 214.2(f)(18)(iii) and 8 CFR 214.2(m)(19)(iii). See Chapter 8, Change of Status, Extension of Stay, Length of Stay, Section E, Duration of Status [2 USCIS-PM F.8(E)].

Chapter 3 - Courses and Enrollment, Full Course of Study, and Reduced Course Load

A. Public High School

While F-1 and M-1 students may not attend a public elementary or middle school or a publicly funded adult education program, they may attend public high school.[1]

If F-1 or M-1 students are admitted for a fixed period of admission (not for duration of status) to attend a public high school and then apply to transfer schools or to attend a U.S. post-secondary school, they need to file an Application to Extend/Change Nonimmigrant Status (Form I-539) to request an extension of stay to remain in the United States beyond their fixed period of admission.

1. F-1 Students

F-1 students are limited to a cumulative period of 12 months to attend a public high school.[2] F-1 high school students are typically admitted for a specific period of time rather than duration of status.[3]

F-1 students must provide proof that they have reimbursed the local educational agency that administers the public high school for the full, unsubsidized per capita cost of providing education at the school for the period of the student's attendance.

2. M-1 Students

M-1 students are not subject to the same 12-month time limit on public high school attendance. However, M-1 students are admitted for a fixed time period that includes the period necessary to complete the course of study indicated on the Certificate of Eligibility for Nonimmigrant Student Status (Form I-20), plus practical training following completion of the course of study, plus an additional 30 days to depart the United States, but not to exceed a total period of 1 year.[4]

B. Online and Distance Education Courses

1. F-1 Students

An F-1 student enrolled in classes for credit or classroom hours may only count one class or three credits (or the equivalent) per academic session (or the equivalent) toward the full course of study requirement if the class is:

- Taken online; or
- Through distance education not requiring physical attendance for any purpose integral to completion of the class.[5]

If the F-1 student's course of study is in a language study program, no online or distance education classes count toward a student's full course of study program.[6] If the F-1 student needs only one course to finish the program of study, it cannot be taken through online or distance education. Courses must have a physical presence requirement.[7]

2. M-1 Students

No online or distance education classes are counted toward an M-1 student's full course of study requirement if such classes do not require the student's physical attendance for any purpose integral to completion of the class.[8] For purposes of the M classification, an online or distance education course is a course that is offered principally through the use of television, audio, or computer transmission including open broadcast, closed circuit, cable, microwave, or satellite, audio conferencing, or computer conferencing.[9]

C. Other Education Programs

1. Adult Education Programs

An F-1 or M-1 student may not enroll in an adult education program if it is funded in whole or in part by the Adult Education and Family Literacy Act or by any other federal, state, county, or municipal funding.[10]

2. English Language Training Programs

F-1 Students

F-1 students intending to pursue an English language training course of study must enroll in an English language training program that has been accredited by a regional or national accrediting agency recognized by the Department of Education.[11] English language training online or distance learning courses do not count towards the full course of study requirement.[12] Time spent in an English language training program also does not count towards the completion of one full academic year as an F-1 student.[13] However, if the student is receiving college credit for the language training at a Student and Exchange Visitor Program (SEVP)-certified college or university, then the time counts towards the one academic year required to participate in a practical training program.[14]

M-1 Students

M-1 students are only permitted to engage in English language training if their primary intent is to pursue vocational or technical training and they are taking English language training at the same school solely for the purpose of being able to understand the vocational or technical course of study.[15]

D. Concurrent Enrollment

An F-1 student may enroll in two different SEVP-certified schools at one time if the combined enrollment amounts to a full course of study.[16] In cases where a student is concurrently enrolled, the school from which the student will earn the student's degree or certification should issue the Form I-20, and conduct subsequent certifications and updates to the Form I-20.[17] M-1 students may not be enrolled in two different SEVP-certified schools.

E. Full Course of Study

DHS regulations require students to maintain a full course of study and that the successful completion of the full course of study leads to the attainment of a specific educational or professional objective.[18]

Full course of study requirements are different for F and M students.

1. F-1 Students

To qualify as a full course of study, the Designated School Official (DSO) must have previously certified as a full course of study one of the following, as appropriate:[19]

- Postgraduate or postdoctoral study at a college or university;[20]
- Undergraduate or postgraduate study at a conservatory or religious seminary;[21]
- Undergraduate study at a college or university consisting of at least 12 semester or quarter hours of instruction per academic term in those institutions using standard semester, trimester, or quarter hour systems, and where all students enrolled for a minimum of 12 semester or quarter hours are charged full-time tuition or considered full-time for other administrative purposes, or its equivalent (as determined by U.S. Immigration and Customs Enforcement (ICE) SEVP in the school certification process) unless those students will complete their course of study during the current term with fewer semester or quarter hours;[22]
- Postsecondary language, liberal arts, fine arts, or other non-vocational program for which a school must confer recognized associate or other degrees upon its graduates or establish that its credits have been and are accepted unconditionally by at least three institutions of higher learning meeting specific requirements;[23]
- Any other language, liberal arts, fine arts, or other non-vocational training program consisting of at least 18 clock hours of attendance a week if the dominant part of the course of study consists of classroom instruction, or consists of at least 22 clock hours a week if the dominant part of the course of study consists of laboratory work;[24] or
- Curriculum at an approved private elementary or middle school or public or private academic high school consisting of class attendance for not less than the minimum number of hours a week prescribed by the school for normal progress towards graduation.[25]

2. M-1 Students

To qualify as a full course of study, the DSO must have previously certified as a full course of study one of the following, as appropriate:

- Community college or junior college studies consisting of at least 12 semester or quarter hours of instruction per academic term in those institutions using standard semester, trimester, or quarter-hour systems, and where all students enrolled for a minimum of 12 semester or quarter hours are charged full-time tuition or considered full-time for other administrative purposes, or its equivalent (as determined by ICE SEVP in the school certification process) except when the students need a lesser course load to complete the course of study during the current term;[26]
- Postsecondary vocational or business school programs, other than in a language training program,[27] which confer upon their graduates recognized associate or other degrees or have established that their credits have been and are accepted unconditionally by at least three institutions of higher learning which are either: a school (or school system) owned and operated as a public educational institution by the United States or a state or political subdivision; or a school accredited by a nationally recognized accrediting body; and consisting of at least 12 hours of instruction a week, or its equivalent as determined by ICE SEVP in the school certification process;[28]
- Vocational or other nonacademic curriculum studies, other than in a language training program,[29] consisting of at least 18 hours of attendance a week if the main part of the course of study consists of classroom instruction, or at least 22 hours a week if the main part of the course of study consists of shop or laboratory work;[30] or
- Vocational or other nonacademic high school curriculum, consisting of class attendance for not less than the minimum number of hours a week prescribed by the school for normal progress towards graduation.[31]

3. Border Commuter Students

A border commuter student must be enrolled in a full course of study, even though on a part-time basis, leading to the attainment of a specific educational or professional objective. A DSO at the school may authorize an eligible border commuter student to enroll in a reduced course load below the requirements for a full course of study. The reduced course load must be consistent with the border commuter student's certified course of study.[32]

F. Reduced Course Load

1. F-1 Students

To maintain status while on a reduced course load, the F-1 student must first obtain authorization from the DSO before dropping to a reduced course load. A student who drops below a full course of study without the prior approval of the DSO is considered out of status.[33] A DSO may authorize an F-1 student for a reduced course load for one of the following reasons.

Specified Initial Academic Difficulties

A DSO may authorize a reduced course load due to academic difficulties once while the student is pursuing a course of study at that program level.[34] A student authorized to drop below a full course of study for academic difficulties while pursuing a course of study at a particular program level may still be authorized for a reduced course load due to an illness or medical condition.[35] The student must resume a full course at the start of the next available term or session, excluding a summer session.

An F-1 student taking a reduced course load must still be taking at least 6 semester or quarter hours or half the clock hours required for a full course of study.

Temporary Illness or Medical Condition

A DSO may authorize a reduced course load, or, if necessary, no course load, one or more times for medical reasons, even if the DSO had previously authorized the student to drop below a full course of study for academic difficulties.[36] The period of time cannot exceed an aggregate of 12 months while the student is pursuing a course of study at a particular program level.

The student must provide documentation of the illness or medical condition from a licensed medical doctor, psychiatrist, doctor of osteopathy, licensed psychologist, or clinical psychologist.

Completion of Course of Study

A DSO may authorize a reduced course load when a student needs fewer courses than a full course load in the student's last term to complete the program of study.[37]

2. M-1 Students

To maintain status while pursuing a reduced course load, an M-1 student must first obtain their DSO's authorization.[38] A DSO may authorize an M-1 student for a reduced course load only if the student provides documentation of an illness or medical condition from a licensed medical doctor, psychiatrist, doctor of osteopathy, licensed psychologist, or clinical psychologist. A DSO may authorize a reduced course load more than once, but the total period of reduced course load cannot exceed an aggregate of 5 months per course of study.

3. Border Commuter Student

A DSO may authorize a border commuter student to enroll in a reduced course load for the above listed reasons, provided that the reduced course load is consistent with the border commuter student's certified course of study.[39]

Footnotes

[^ 1] See 8 CFR 214.2(f)(6)(i)(E) (defining a full course of study, in part, for F-1 students as "study in a curriculum at a certified private elementary or middle school or public or private academic high school") and 8 CFR 214.2(m)(9)(iv) (defining a full course of study, in part, for M-1 students as "study in a vocational or other nonacademic high school curriculum").

[^ 2] See 8 CFR 214.2(f)(5)(i). There is no such limitation to an F-1's attendance at a private high school.

[^ 3] See 8 CFR 214.2(f)(5)(i).

[^ 4] See 8 CFR 214.2(m)(5).

[^ 5] See 8 CFR 214.2(f)(6)(i)(G).

[^ 6] See 8 CFR 214.2(f)(6)(i)(G).

[^ 7] See 8 CFR 214.2(f)(6)(i)(G). Beginning in March 2020, U.S. Immigration and Customs Enforcement (ICE) issued guidance related to online or distance learning, full course of study, and other student-related policy changes due to the COVID-19 public health emergency on its COVID-19 Guidelines and Protocols website. On May 11, 2023, ICE announced the termination of this guidance. Active F and M students were able to complete the 2022–23 academic year under the COVID-19 flexibilities through the 2023 summer semester. However, active F and M students will not be permitted to count online classes toward a full course of study in excess of the regulatory limits stated in 8 CFR 214.2(f)(6)(i)(G) and 8 CFR 214.2(m)(9)(v) for the 2023–24 academic year. Initial or re-entering students must enroll in programs complying with the regulatory limits for distance learning as stated in 8 CFR 214.2(f)(6)(i)(G). Designated School Officials (DSO) should not issue a Certificate of Eligibility for Nonimmigrant Student Status (Form I-20) for students in new or initial status who are outside of the United States and plan to take classes at an educational institution certified by the ICE Student and Exchange Visitor Program (SEVP) for a program of study that contains online components in excess of the regulatory limits. ICE's website should be consulted for the latest guidance.

[^ 8] See 8 CFR 214.2(m)(9)(v).

[^ 9] See 8 CFR 214.2(m)(9)(v).

[^ 10] See Section 203(1) of the Adult Education and Family Literacy Act, Pub. L. 105-220 (PDF), 112 Stat. 1059, 1060 (August 7, 1998). Adult education program is defined as a service or instruction below the post-secondary level for individuals who have attained 16 years of age; who are not enrolled or required to be enrolled in secondary school under state law; who lack sufficient mastery of basic educational skills to enable the individuals to function effectively in society; do not have a secondary school diploma or its recognized equivalent and have not achieved an equivalent level of education; or are unable to speak, read, or write the English language.

[^ 11] See Accreditation of English Language Training Programs Act, Pub. L. 111-306 (PDF) (December 14, 2010). The Act amended INA 101(a)(15)(F)(i) to state that F-1 nonimmigrant students intending to pursue an English language training course of study must enroll in an English language training program that has been accredited by a regional or national accrediting agency recognized by the Department of Education.

[^ 12] See 8 CFR 214.2(f)(6)(i)(G).

[^ 13] See 8 CFR 214.2(f)(6)(i)(G).

[^ 14] See 8 CFR 214.2(f)(6)(i)(G).

[^ 15] See 8 CFR 214.3(a)(2)(iv).

[^ 16] See 8 CFR 214.2(f)(6)(iv). The concurrent enrollment provision is applicable to those students who will be registered less than full-time at the school that issued their Form I-20, and who are relying on enrollment at another school to meet the requirement that they be enrolled for a full course of study. As long as a student is enrolled full-time at the institution that issued the student's Form I-20, the student does not need special permission to take an additional class at another school.

[^ 17] See 8 CFR 214.2(f)(6)(iv). The DSO from the school where the F-1 student will earn the student's degree is responsible for the reporting requirements to DHS. In instances where a student is enrolled in programs with different full course of study requirements (for example, clock hours vs. credit hours), the DSO is permitted to determine what constitutes a full course of study.

[^ 18] See 8 CFR 214.2(f)(6)(i). If the student fails to carry a full-course load unless authorized by DSO in accordance with 8 CFR 214.2(f)(6)(iii), the student has failed to maintain a valid F-1 status. This is not applicable during the student's summer (or other authorized) break if the student is eligible and intends to register for the next term.

[^ 19] See INA 101(a)(15)(F)(i). Beginning in March 2020, ICE issued guidance related to online or distance learning, full course of study, and other student-related policy changes due to the COVID-19 public health emergency on its COVID-19 Guidelines and Protocols website. On May 11, 2023, ICE announced the termination of this guidance. Active F and M students were able to complete the 2022–23 academic year under the COVID-19 flexibilities through the 2023 summer semester. However, active F and M students will not be permitted to count online classes toward a full course of study in excess of the regulatory limits stated in 8 CFR 214.2(f)(6)(i)(G) and 8 CFR 214.2(m)(9)(v) for the 2023–24 academic year. Initial or re-entering students must enroll in programs complying with the regulatory limits for distance learning as stated in 8 CFR 214.2(f)(6)(i)(G). DSOs should not issue a Certificate of Eligibility for Nonimmigrant Student Status (Form I-20) for students in new or initial status who are outside of the United States and plan to take classes at an educational institution certified by the ICE SEVP for a program of study that contains online components in excess of the regulatory limits. ICE's website should be consulted for the latest guidance.

[^ 20] See 8 CFR 214.2(f)(6)(i)(A).

[^ 21] See 8 CFR 214.2(f)(6)(i)(A).

[^ 22] See 8 CFR 214.2(f)(6)(i)(B).

[^ 23] See 8 CFR 214.2(f)(6)(i)(C). The institutions of higher learning must be either: “(1) a school (or school system) owned and operated as a public educational institution by the United States or a State or political subdivision thereof; or (2) a school accredited by a nationally recognized accrediting body and which has been certified by a designated school official to consist of at least 12 clock hours of instruction a week, or its equivalent as determined by SEVP in the school certification process.”

[^ 24] See 8 CFR 214.2(f)(6)(i)(D).

[^ 25] See 8 CFR 214.2(f)(6)(i)(E).

[^ 26] See INA 101(a)(15)(M)(i). See 8 CFR 214.2(m)(9)(i).

[^ 27] Postsecondary vocational or business school and vocational or other nonacademic curriculum exclude language training programs unless the student enrolled in vocational or technical training takes English language training at the same school solely for the purpose of understanding a course of study. See 8 CFR 214.3(a)(2)(iv).

[^ 28]See 8 CFR 214.2(m)(9)(ii).

[^ 29] Postsecondary vocational or business school and vocational or other nonacademic curriculum exclude language training programs unless the student enrolled in vocational or technical training takes English language training at the same school solely for the purpose of understanding a course of study. See 8 CFR 214.3(a)(2)(iv).

[^ 30] See 8 CFR 214.2 (m)(9)(iii).

[^ 31] See 8 CFR 214.2(m)(9)(iv).

[^ 32] See 8 CFR 214.2(f)(18)(ii) and 8 CFR 214.2(m)(19)(ii).

[^ 33] See 8 CFR 214.2(f)(6)(iii).

[^ 34] See 8 CFR 214.2(f)(6)(iii)(A). The DSO may authorize a reduced course load due to a student’s initial difficulty with the English language or reading requirements, unfamiliarity with U.S. teaching methods, or improper course level placement.

[^ 35] See 8 CFR 214.2(f)(6)(iii)(A).

[^ 36] See 8 CFR 214.2(f)(6)(iii)(B) and 8 CFR 214.2(f)(6)(iii)(A).

[^ 37] See 8 CFR 214.2(f)(6)(iii)(C).

[^ 38] See 8 CFR 214.2(m)(9)(vi).

[^ 39] See 8 CFR 214.2(f)(18)(ii) and 8 CFR 214.2(m)(19)(ii).

Chapter 4 - School Transfer

A. F-1 Students

An F-1 student who is maintaining status must notify the Designated School Official (DSO) at the student’s current school of the request to transfer to another school certified by the U.S. Immigration and Customs Enforcement’s (ICE) Student and Exchange Visitor Program (SEVP).[1] The F-1 student may start a transfer during the 60-day grace period following completion of the student’s studies since the student is considered to be maintaining status during this grace period.

An F-1 student who did not pursue a full course of study at the school the student was last authorized to attend is ineligible for school transfer and must apply for reinstatement,[2] or alternatively, may depart the country and return as an initial entry in a new F-1 nonimmigrant status.[3]

The Student and Exchange Visitor Information System (SEVIS) transfer procedures allow an F-1 student to transfer between SEVP-certified schools at the same educational level or move between educational levels, such as progressing from high school to a bachelor’s program or a bachelor’s program to a master’s program.[4]

1. Students Who Are Not Pursuing a Full Course of Study

With the exception of those who are authorized by the DSO to take less than a full load for valid academic, medical, or hardship reasons, DHS considers any student who is not pursuing a full course of study at the school the student is authorized to attend to be out of status. Such a student may not transfer to a different school without first requesting reinstatement.

While the request for reinstatement is pending, and if classes are in session, the student should be enrolled in school as the student will have to abide by the terms of the F-1 status as of the date of reinstatement, including being enrolled on a full time basis.[5] While there is no appeal of a denial of the application for reinstatement, a student may file a motion to reopen or reconsider according to the instructions on the USCIS denial notice. Otherwise, the student must depart the United States upon notification of the denial by USCIS.

2. Five-Month Limit

When transferring between schools or programs, a student may not remain in the United States unless the student is able to resume classes at the transfer school or program within 5 months of transferring out of the current school, or within 5 months of the program completion date as indicated on the Certificate of Eligibility for Nonimmigrant Student Status (Form I-20) issued by the current school, whichever date is earlier. For a student authorized to engage in post-completion Optional Practical Training (OPT), the student must be able to resume classes within 5 months of transferring out of the current school that recommended OPT or by the date the OPT authorization ends, whichever is earlier.

An F-1 student’s authorization to engage in OPT employment is automatically terminated when the student transfers to another school or begins study at another educational level.[6]

B. M-1 Students

1. Eligibility

A nonimmigrant admitted as an M-1 student or who changes status to M-1 may not transfer to another school after 6 months from the date of admission as or change of status to an M-1 student. However, there is an exception if the student was unable to remain at the school which initially admitted the student due to circumstances beyond the student’s control.

An M-1 student may be otherwise eligible to transfer to another school if the student:

- Is a bona fide nonimmigrant;
- Has been pursuing a full course of study at the school the student was last authorized to attend;
- Intends to pursue a full course of study at the school to which the student intends to transfer; and
- Is financially able to attend the school to which the student intends to transfer.

2. Procedure

An M-1 student must apply to USCIS on an Application to Extend/Change Nonimmigrant Status (Form I-539), for permission to transfer between schools. The student must first notify the student's current school (the transfer-out school) of the intent to transfer and indicate the school to which the student intends to transfer (the transfer-in school).

Upon notification by the student, the transfer-out school must update SEVIS to show the student is transferring out, indicate the transfer-in school, and input the release date for transfer. Once the transfer-out school updates SEVIS, the transfer-in school generates a Form I-20 for transfer. However, the transfer-in school will not gain access to the student's SEVIS record until the release date. Upon receipt of the Form I-20 from the transfer-in school, the student must submit a Form I-539.[7]

The student may enroll in the transfer-in school at the next available term or session and is required to notify the DSO of the transfer-in school immediately upon beginning attendance. The transfer-in school must update the student's registration record in SEVIS.[8]

If USCIS approves the application, the program start date listed on the Form I-20 is the approval transfer date, and the student is granted an extension of stay for the lesser of the period of time necessary to complete the new course of study plus 30 days, or for a total period of 1 year. If USCIS denies the Form I-539, the student is out of status.[9] A student who has not been pursuing a full course of study must apply for and be granted reinstatement to student status before being eligible to transfer to a new school.

Footnotes

[^ 1] See 8 CFR 214.2(f)(8)(i).

[^ 2] See 8 CFR 214.2(f)(16).

[^ 3] See 8 CFR 214.2(f)(8)(i).

[^ 4] See 8 CFR 214.2(f)(8).

[^ 5] See the DHS Reinstatement COE (Form I-20) webpage.

[^ 6] See 8 CFR 214.2(f)(10)(ii)(B).

[^ 7] See 8 CFR 214.2(m)(11).

[^ 8] See 8 CFR 214.3(g)(3).

[^ 9] See 8 CFR 214.2(m)(11)(ii).

Chapter 5 - Practical Training

A. General

Practical training (PT) is employment that is directly related to a student's major area of study.[1]

F-1 students may engage in three types of PT:

- Curricular Practical Training (CPT);
- Optional Practical Training (OPT) (pre-completion or post-completion); and
- Science, Technology, Engineering, and Mathematics Optional Practical Training extension (STEM OPT).

PT may be authorized for an F-1 student at a U.S. Immigration and Customs Enforcement (ICE) Student and Exchange Visitor Program (SEVP)-certified college, university, conservatory, or seminary, who has been lawfully enrolled, full-time, for one full academic year. Students may count time enrolled in a study abroad program toward the full academic year requirement, if the student spent at least one full academic term (that is, one semester, trimester, or quarter) enrolled in a full course of study in the United States prior to studying abroad.[2]

Students in English language training programs are ineligible for PT.[3]

M-1 students may engage in PT only after they complete their course of study.[4]

B. F-1 Student Curricular Practical Training

CPT is alternative work-study, cooperative education, or any other type of required internship or practicum that is offered by sponsoring employers through cooperative agreements with the school.[5] No application to USCIS for employment authorization or an Employment Authorization Document (EAD) (Form I-766) is required, but the student must request authorization for CPT from the student's Designated School Official (DSO). The CPT must be an integral part of an established curriculum.[6]

CPT occurs before the student's program end date on the Certificate of Eligibility for Nonimmigrant Student Status (Form I-20). CPT may be part-time or full-time.[7] An F-1 student who has received 1 year or more of full-time CPT is ineligible for post-completion OPT at the same educational level.[8]

To participate in CPT, students must:

- Have completed one full academic year and be lawfully enrolled on a full-time basis at an approved ICE SEVP-certified school;[9]
- Be enrolled in a full course of study;

- Obtain their DSO's endorsement on their Form I-20 and not begin CPT before the CPT start date indicated on the form;[10]
- Participate in an alternative work/study, internship, cooperative education or any other type of required internship or practicum that is offered by sponsoring employers through cooperative agreements with the students' respective schools;[11] and
- Not be English language training students.

C. F-1 Student Optional Practical Training

OPT can be authorized either prior to completion of the degree program (pre-completion OPT) or following the completion of the degree program (post-completion OPT). Pre-completion OPT can be completed while school is in session, provided that the training does not exceed 20 hours a week while school is in session. During the student's annual vacation and at other times when school is not in session, OPT can exceed 20 hours per week if the student is currently enrolled, is eligible for registration, and intends to register for the next term or session.[12]

A student may be authorized for 12 months of OPT and would become eligible for another 12 months of practical training if the student were to change to a higher educational level.[13]

A student who has not used any practical training and changes to a lower education level, where OPT would normally be available, may use the student's initial 12 months of practical training at the lower education level. Each period of OPT must be recommended by the DSO and authorized by USCIS, as shown by a valid EAD.[14] If an F-1 student applies for post-completion OPT at the same educational level at which the student had pre-completion OPT, the amount of time approved for pre-completion OPT is deducted from the post-completion OPT authorized period.

Overtime and periods of unemployment are not considered when calculating the amount of OPT used. Rather, OPT usage is calculated based on the period of OPT authorized. For example, if an F-1 student had already received 6 months of full-time pre-completion OPT during the same degree program, but with overtime the total number of hours worked was equivalent to 7 months, the total remaining OPT time still available would be reduced by 6 months, half of the previously authorized year.

An F-1 student who has completed an authorized period of post-completion OPT may remain in F-1 status for 60 days beyond the EAD expiration date.[15] This is commonly known as a grace period, during which the F-1 student may contact their DSO to change their education level, transfer to another SEVP-certified school,[16] or file an application or petition with USCIS to change to another nonimmigrant or immigrant status.

OPT, including STEM OPT, is automatically terminated if an F-1 student:

- Transfers to another school;
- Begins a new degree level at the same school;
- Changes to a different nonimmigrant status, such as H-1B;
- Fails to maintain F-1 status; or
- Is enrolled in a school that closes.

The effective termination date is the release date in the Student and Exchange Visitor Information System (SEVIS) for school transfer or change of program at a new degree level; the effective date of the new nonimmigrant status; the date the student violated F-1 status, as appropriate; or the date that ICE SEVP terminates the school in SEVIS upon the school's closure.

1. Pre-Completion OPT

A student enrolled at an ICE SEVP-certified college, university, conservatory, or seminary may apply to USCIS for authorization for pre-completion OPT by properly filing an Application for Employment Authorization (Form I-765) after obtaining the DSO's recommendation.

The student may not begin pre-completion OPT until the date indicated on the student's EAD. A student may submit a Form I-765 to engage in pre-completion OPT up to 90 days prior to being enrolled for one full academic year, provided that the period of employment will not begin until after the completion of the full academic year as indicated by the DSO. Students need an EAD for each period of pre-completion OPT.

Eligibility

Students must:[17]

- Obtain the DSO's recommendation and have their DSO's recommendation entered into the student's SEVIS record and annotated on their Form I-20;
- Be enrolled, on a full-time basis, at an ICE SEVP-certified college, university, conservatory, or seminary;
- Have completed one full-time academic year or be within 90 days of completing one full academic year at the time of filing Form I-765;[18]
- Properly file a Form I-765 with USCIS and receive a valid EAD;
- Not be an English language training student; and
- Maintain a full course of study.

Time Limitations on Pre-Completion OPT

Pre-completion OPT is incremental and cumulative, up to 12 months. It may be granted over the course of the degree program and must take place before the program end date. Any time used for pre-completion OPT impacts the amount of post-completion OPT that USCIS may authorize.

2. Post-Completion OPT

Eligibility

To be eligible to apply to USCIS for post-completion OPT[19] a student must:

- Have completed a course of study or be in an associate's, bachelor's, master's, or doctoral degree program and have completed all course requirements for the degree (excluding thesis or equivalent);
- Not be an English language training student;
- Obtain the DSO's recommendation and have the DSO's recommendation entered into the student's SEVIS record and annotated on their Form I-20;

- Properly file a Form I-765 and receive a valid EAD; and
- Not have completed 1 year or more of full-time CPT.

A student may work as a volunteer or unpaid intern, as long as this practice does not violate any labor laws, and the employment is related to the program of study. The student must work at least 20 hours per week.[20]

Time Limitations on Post-Completion OPT

Post-completion OPT begins on the date USCIS adjudicates the employment authorization request or the date the DSO requests, whichever is later.[21] A student may not request a start date that is more than 60 days after the student's program end date.[22] A student must complete all practical training within a 14-month period following the completion of study.[23]

An F-1 student may be authorized up to 12 months of practical training, and becomes eligible for another 12 months of practical training when they change to a higher educational level.[24] If an F-1 student applies for post-completion OPT at the same educational level in which the student had pre-completion OPT, the amount of time approved for pre-completion OPT is deducted from the post-completion OPT authorized period.

Overtime and periods of unemployment are not taken into consideration when calculating the amount of OPT used. For example, if an F-1 student had already received 1 year of part-time pre-completion OPT during the same degree program, the total remaining OPT time still available would be reduced by 6 months, half of the previously authorized year.

An F-1 student who has completed an authorized period of post-completion OPT may remain in F-1 status for 60 days beyond the EAD expiration date. During this grace period, an F-1 student may prepare for departure from the United States.[25] The F-1 student and any dependents must depart the United States by the end of the grace period if they do not either change the student's nonimmigrant status, or transfer to an ICE SEVP-certified school.[26]

An F-1 student may not accrue an aggregate of more than 90 days of unemployment during the period of post-completion OPT.

3. STEM OPT Extension

An F-1 student who meets certain qualifications may qualify for a 24-month STEM OPT extension.[27] An F-1 student approved for STEM OPT may not accrue an aggregate of more than 150 days of unemployment during a total OPT period. This includes the post-completion OPT period and subsequent 24-month STEM OPT extension period.[28]

F-1 students with a bachelor's degree, master's degree, or doctorate degree in a field with a Department of Education's Classification of Instructional Programs (CIP) code that appears on the DHS STEM Designated Degree Program List (PDF)[29] may apply to USCIS for authorization for a 24-month OPT extension (STEM OPT) by properly filing a Form I-765, after obtaining the DSO's recommendation. This 24-month extension can only be granted once per qualifying degree. If the F-1 students do not fully use the extension, they are ineligible for any subsequent STEM extension.

F-1 students may submit a properly filed Form I-765 up to 90 days before the expiration of the F-1 student's current post-completion OPT EAD and no more than 60 days after their DSO enters the STEM OPT recommendation into SEVIS.

Students who have timely and properly filed a Form I-765 for the 24-month OPT extension may continue working until the date of the USCIS written decision on the current Form I-765 or for up to 180 days after their current post-completion OPT expires, whichever is earlier.[30]

If USCIS approves the application, the F-1 student may continue working in accordance with the terms and conditions of the new EAD. If the extension is denied, employment authorization is immediately terminated and the F-1 student's status ends in 60 days from the date of denial. However, if the application was denied because the student failed to maintain their F-1 status, they must immediately depart the United States.

Eligibility Requirements - Student

To be eligible for a STEM OPT extension, an F-1 student must:

- Have been granted OPT and currently be in a valid period of post-completion OPT;
- Have earned a bachelor's, master's, or doctoral degree from a school that is accredited by a U.S. Department of Education-recognized accrediting agency and is certified by ICE SEVP when the student submits the STEM OPT extension application;
- Not be in a multiple employer arrangement, or employed by a sole proprietorship, through a temp agency, through a consulting firm arrangement that provides labor for hire, or other similar relationships, if such arrangements are not bona-fide employer-employee relationships;
- Be employed for no less than 20 hours per week by each qualifying STEM OPT employer; and
- Complete an individualized Training Plan for STEM OPT Students (Form I-983) which identifies goals for the STEM practical training opportunity, including specific knowledge, skills, or techniques that will be imparted to the F-1 student; explains how those goals will be achieved through the work-based learning opportunity with the employer; describes a performance evaluation process; and describes methods of oversight and supervision. The Form I-983 must explain how the training is directly related to the student's qualifying STEM degree.

Before the student's DSO at the educational institution of the student's most recent enrollment may recommend a 24-month OPT extension, the student must follow Form I-983 instructions, have an appropriate individual in the employer's organization sign the form, and submit Form I-983 to the DSO.

Previously Obtained STEM Degrees

To be eligible for a STEM OPT extension based on a previously earned degree, the following requirements at 8 CFR 214.2(f)(10)(ii)(C)(3) and (4) must be met:

- The prior degree must be from a U.S. educational institution that is accredited by a Department of Education-recognized accrediting agency and SEVP-certified at the time of the DSO recommendation;
- The prior degree must be on the DHS STEM Designated Degree List at the time of the DSO recommendation;
- The prior degree must have been conferred within the 10 years preceding the DSO recommendation;
- The prior degree must be directly related to the practical training opportunity; and
- The student may not have previously received a STEM OPT extension based on the prior degree.

For example, if the student is currently participating in OPT based on completion of a non-STEM master's degree, but previously received a bachelor's degree in a field that appears on the DHS STEM Designated Degree Program List at the time of the DSO recommendation, the student may be able to apply for a STEM OPT extension based on the bachelor's degree as long as it is from an accredited U.S. college or university and the OPT employment opportunity is directly related to the bachelor's STEM degree.

Future STEM Degrees

If, in the future, an F-1 student enrolls in a new academic program and earns another qualifying STEM degree at a higher educational level, the student may be eligible for one additional 24-month STEM OPT extension, for a total of two lifetime STEM OPT extensions.

For example, if the student receives a 24-month STEM OPT extension based on a qualifying bachelor's degree and the student later earns a qualifying STEM master's degree, the student may apply for an additional 24-month STEM OPT extension based on the qualifying master's degree.

Eligibility Requirements-Employer

An employer who wants to provide a practical training opportunity to a STEM OPT F-1 student during the student's extension must:

- Be enrolled in E-Verify, as evidenced by either a valid E-Verify company identification number or, if the employer is using an employer agent to create its E-Verify cases, a valid E-Verify client company identification number;[31]
- Remain a participant in good standing with E-Verify, as determined by USCIS;[32]
- Have a valid Employer Identification Number issued by the Internal Revenue Service for tax purposes;[33]
- Report material changes of the F-1 student's employment by submitting a modified Form I-983 to the DSO at the earliest available opportunity;[34]
- Implement a formal training program to augment the F-1 student's academic learning through practical experience;[35]
- Provide an OPT opportunity that is commensurate with those of similarly situated U.S. workers in duties, hours, and compensation;[36] and
- If applicable, report the F-1 student's termination of employment or departure to the DSO within 5 business days.[37]

To ensure the integrity of the program and provide safeguards for U.S. workers, any employer wishing to employ a student participating in the STEM OPT extension program must ensure that:

- The employer will maintain a bona fide employer-employee relationship with the F-1 student;[38]
- The employer has sufficient resources and personnel available to provide appropriate training in connection with the specified opportunity at the location or locations specified in the Form I-983;[39]
- The F-1 student will not replace a full or part-time, temporary, or permanent U.S. worker;[40] and
- The training opportunity will assist the F-1 student in attaining the student's training goals.[41]

To employ a STEM OPT F-1 student, an employer must have and maintain a bona fide employer-employee relationship with the student.[42] The employer must attest to this fact by signing the Form I-983. The employer that signs the Form I-983 must be the same entity that provides the practical training experience to the student.[43]

To establish a bona fide relationship, the employer may not be the F-1 student's employer in name only, nor may the F-1 student work for the employer on a volunteer basis.[44]

An employer must have sufficient resources and trained or supervisory personnel available to provide appropriate training in connection with the specified training opportunity. These personnel must be located where the F-1 student's practical training experience will take place, as specified in the Form I-983.

The personnel who may provide and supervise the training experience may be either employees of the employer, or contractors whom the employer has directly retained to provide services to the employer. However, employees or contractors of the employer's clients or customers may not provide and supervise the training experience of the STEM OPT F-1 student. An F-1 student with OPT or a STEM OPT extension (who is undergoing training in their own right) is never considered qualified to train another F-1 student with a STEM OPT extension.

Employers may rely on their existing training programs or policies to satisfy the performance evaluation, oversight, and supervision requirements, but the F-1 student's Form I-983 must nevertheless be customized for the individual F-1 student. Every Form I-983 must describe the direct relationship between the STEM OPT opportunity and the F-1 student's qualifying STEM degree, as well as the relationship between the STEM OPT opportunity and the F-1 student's goals and objectives for work-based learning.

A STEM OPT employer may not assign, or otherwise delegate its training responsibilities to a non-employer third party (for example, a client or customer of the employer, employees of the client or customer, or contractors of the client or customer).

DHS, at its discretion, may conduct a site visit of any STEM OPT employer to ensure that the employer possesses and maintains the ability, personnel, and resources to provide structured and guided work-based learning experiences consistent with the information provided on Form I-983.[45]

During a site visit, DHS may verify that the employer that signed the Form I-983 is the same entity that is providing the practical training experience to the F-1 student and ensure compliance.

For DHS to effectively conduct these site visits as part of its oversight responsibilities, it is important that employers report any change in an F-1 student's employment address. As indicated above and further explained below,[46] the employer and F-1 student must report such a material change by submitting a modified Form I-983 to the DSO at the earliest available opportunity.

Staffing and temporary agencies and consulting firms may employ F-1 students under the STEM OPT program if they will be the entity that provides the practical training experience to the F-1 student and have and maintain a bona fide employer-employee relationship with the F-1 student.

F-1 students may engage in a training experience that takes place at a site other than the employer's principal place of business as long as all of the training obligations are met, including that the employer has and maintains a bona fide employer-employee relationship with the student.

Certain types of arrangements, including multiple employer arrangements, sole proprietorships, employment through temp agencies, employment through consulting firm arrangements that provide labor for hire, and other similar relationships may not be able to demonstrate a bona fide employer-employee relationship and, therefore, may not meet the requirements of the STEM OPT extension.

F-1 students seeking STEM OPT extensions may be employed by new start-up businesses so long as all regulatory requirements are met, including that the employer adheres to the training plan requirements, remains in good standing with E-Verify, will provide compensation to the STEM OPT student commensurate to that provided to similarly situated U.S. workers, and has the resources to comply with the proposed training plan.[47] For instance, alternative compensation may be allowed during a STEM OPT extension as long as the F-1 student can show that they are a bona fide employee and that their compensation, including any ownership interest in the employer entity (such as stock options), is commensurate with the compensation provided to other similarly situated U.S. workers.[48]

As part of the STEM OPT extension, employers must complete the appropriate parts of Form I-983. In this form, employers attest that:

- They have enough resources and trained personnel available to appropriately train the F-1 student;
- The F-1 student will not replace a full or part-time, temporary, or permanent U.S. worker; and
- Working for them will help the F-1 student attain their training objectives.

DHS reviews on a case-by-case basis whether the F-1 student will be a bona fide employee of the employer signing the training plan and verify that the employer that signs the training plan is the same entity that employs the F-1 student and provides the practical training experience.[49]

Validity Period

If the F-1 student establishes eligibility, DHS grants the STEM OPT 24-month extension for a fixed and uninterrupted period of 24 consecutive months.

The STEM OPT extension begins the day after the initial post-completion OPT expires, not on the date of adjudication, and ends 24 months thereafter, regardless of the date the actual extension is approved.[50] Filing during the cap-gap extension does not change the STEM OPT extension start date. STEM OPT is not extended by periods of part-time employment or unemployment.

The 14-month limit on completing post-completion OPT does not apply to the STEM OPT extension.[51]

If the Form I-765 for the STEM OPT extension is denied and the student's post-completion OPT EAD is expired, OPT employment authorization ends on the date of the decision and the student's F-1 status ends 60 days after the date of denial. If the Form I-765 for the STEM OPT extension is denied and the student's post-completion OPT EAD is unexpired, the student will remain employment authorized until the expiration date of the EAD.

If the F-1 student's degree area is changed from a non-STEM degree to a STEM degree during the last semester, the adjudicating officer may, on a case-by-case basis, request evidence to support the basis of the change.

Evaluation Requirement

An F-1 student on a STEM OPT extension must submit a self-evaluation of the student's progress toward the training goals described in the Form I-983.[52] All required evaluations must be completed prior to the conclusion of a STEM practical training opportunity, and the F-1 student and an appropriate individual in the employer's organization must sign each evaluation to attest to its accuracy. All STEM practical training opportunities require an initial evaluation within 12 months of the approved starting date on the EAD granted pursuant to the F-1 student's 24-month OPT extension application, and a concluding evaluation. The F-1 student is responsible for ensuring the DSO receives the F-1 student's 12-month evaluation and final evaluation no later than 10 days following the conclusion of the reporting period or conclusion of the student's practical training opportunity, respectively.

Training Plan Modifications

An F-1 student on a STEM OPT extension also must:

- Submit a Form I-983 to the student's DSO within 10 days of beginning a new practical training opportunity with a new employer during the student's 24-month OPT extension and subsequently obtain a new DSO recommendation;
- Sign a modified Form I-983 reflecting any material changes or deviations from the training plan described in the Form I-983; and
- Ensure that that the modified Form I-983 is submitted to the F-1 student's DSO at the earliest available opportunity.[53]

4. OPT Reporting and Employment Requirements

Under 8 CFR 214.2(f)(12)(i), an F-1 student granted employment authorization by USCIS to engage in OPT must report to the DSO any change of name or address, or interruption of such employment for the duration of the student's OPT. A DSO who recommends a student for OPT is responsible for updating the student's record to reflect these reported changes for the duration of the time that practical training is authorized.

To maintain F-1 status, an F-1 student with an approved STEM OPT extension must also adhere to the following reporting requirements at 8 CFR 214.2(f)(10)(ii)(C)(7) and (9) and 8 CFR 214.2(f)(12)(ii):

- Report to the student's DSO a change of legal name, residential or mailing address, employer name, employer address, and loss of employment within 10 days of the change;[54]
- Complete a validation report every 6 months, confirming that the legal name, residential or mailing address, employer name, employer address, and loss of employment has not changed. (The requirement for validation reporting starts on the date the 24-month STEM OPT extension begins, and ends when the F-1 student's status expires or the 24-month STEM OPT extension concludes, whichever is first. The validation report is due to the F-1 student's DSO within 10 business days of each reporting date.[55] The student must report this information to the DSO even if it is unchanged from the prior report. The validation confirms that the required information is still true and accurate.);
- Submit an updated Form I-983 containing their self-evaluation of their progress toward the training goals described in the Form I-983.[56] (All required evaluations must be completed prior to the conclusion of a STEM practical training opportunity, and the F-1 student and an appropriate individual in the employer's organization must sign each evaluation to attest to its accuracy. All STEM practical training opportunities require an initial evaluation within 12 months of the approved starting date on the employment authorization document granted pursuant to the F-1 student's 24-month OPT extension application, and a concluding evaluation. The F-1 student is responsible for ensuring the DSO receives the F-1 student's 12-month evaluation and final evaluation no later than 10 days following the conclusion of the reporting period or conclusion of their practical training opportunity, respectively.);
- Submit a new Form I-983 to the student's DSO within 10 days of beginning of a new practical training opportunity with a new employer during their 24-month STEM OPT extension, and subsequently obtain a new DSO recommendation;[57] and
- Sign a modified Form I-983 reflecting any material changes or deviations from the training plan described in the Form I-983, and ensure that that the modified Form I-983 is submitted to the F-1 student's DSO at the earliest available opportunity.[58]

An F-1 student engaging in STEM OPT must complete and submit to the DSO an updated Form I-983 containing their annual self-evaluation describing the progress of the training experience 12 months after the STEM OPT start date, and a final assessment that recaps the training and knowledge acquired during the 24-month training period, signed by the STEM OPT employer. The student's employer must fill out a new Form I-983 to report to the DSO any material changes to, or material deviations from, the student's formal training plan.

5. OPT Filing

Eligible students may apply to USCIS for authorization of OPT employment by properly filing a Form I-765. Students need an EAD for each period of practical training.[59]

The student may not begin OPT until the date indicated on the student's employment authorization document.[60] Employment authorization begins on the date the DSO requests or the date USCIS adjudicates the Form I-765, whichever is later.[61]

Pre-completion OPT

A student may submit an application for pre-completion OPT no earlier than 90 days before being enrolled for one full academic year, provided that the period of employment will not start prior to the completion of the full academic year.[62] The student must file a properly completed Form I-765 after the student's DSO enters the OPT recommendation into SEVIS.

Post-completion OPT

A student may apply for post-completion OPT no earlier than 90 days prior to the student's program end date and no later than 60 days after the student's program end-date. Within this 150-day window, the student must file a properly completed application no more than 30 days after the student's DSO enters the OPT recommendation into SEVIS.

A student is maintaining lawful nonimmigrant status while they are engaging in post-completion OPT. To resume full-time studies in a new educational program after a period of post-completion OPT, the student has to complete the transfer procedure.[63]

If post-completion OPT is denied, the student's F-1 status expires 60 days from the date the degree program ends or the date of the denial, whichever is later. However, if the application is denied because the student failed to maintain F-1 status, they must immediately depart the United States.

STEM OPT

A student may apply for a 24-month STEM OPT extension up to 90 days before the expiration of the student's current post-completion OPT EAD and no more than 60 days after their DSO enters the STEM OPT recommendation into SEVIS.

A student who has timely and properly filed a Form I-765 for the 24-month STEM OPT extension may continue working until the date of the USCIS written decision on the current Form I-765 or for up to 180 days after the student's current post-completion OPT expires, whichever is earlier.[64]

If USCIS approves the application, the student may continue working in accordance with the terms and conditions of the new EAD. If the extension is denied and the student's post-completion OPT EAD is expired, employment authorization is immediately terminated and the student's status ends 60 days from the date of denial. If the extension is denied and the student's post-completion OPT EAD is unexpired, the student will remain employment authorized until the expiration date of the EAD. However, if the application was denied because the student failed to maintain F-1 status, the student must immediately depart the United States.

D. F-1 "Cap-gap" Extension

1. Automatic "Cap-gap" Extension

An F-1 student who is the beneficiary of an H-1B[65] petition subject to the numerical limitations identified in INA 214(g)(1)(A)[66] and who requests a change of status is automatically granted an extension of F-1 status and employment authorization if:

- The F-1 student is currently authorized for OPT employment;[67]
- The F-1 student has not violated the terms and conditions of the student's nonimmigrant status;[68]
- The H-1B petition was timely filed;[69] and
- The H-1B petition requested an H-1B employment start date of October 1 of the following fiscal year.[70]

The "cap-gap" period starts when an F-1 student's status and employment authorization expires and, unless terminated, ends on October 1, the start date of the H-1B cap-subject petition filed on their behalf.

Cap-gap occurs because an employer may not file, and USCIS may not accept, a cap subject H-1B petition submitted more than 6 months in advance of the date of actual need for the beneficiary's services or training. As a result, the earliest date that an employer can file an H-1B cap-subject petition is April 1 for the following fiscal year, which starts October 1. If USCIS approves the H-1B petition and the accompanying change of status request, the earliest date that the student may start the approved H-1B employment is October 1, but the beneficiary's OPT employment authorization may expire before the H-1B start date.

Current regulations allow certain F-1 students with a pending or approved cap-subject H-1B petition to remain in F-1 status during the cap-gap period. The regulations provide a way of filling the gap between the end of F-1 status and the beginning of H-1B status that might otherwise occur when F-1 status is not extended for qualifying students.

Once the listed requirements above are met, the automatic cap-gap extension begins and continues until October 1, or until the H-1B petition is rejected, denied, revoked, or withdrawn, or upon the denial or withdrawal of the request for change of nonimmigrant status, even if USCIS approves the H-1B petition filed on the F-1 student's behalf for consular processing.[71] The F-2 status of dependents is also extended if the F-1 student's status is extended. F-2s are not eligible for employment authorization.

F-1 students who do not qualify for a cap-gap extension because they do not meet the requirements noted above, and whose periods of authorized stay expire before October 1, are required to leave the United States, apply for an H-1B visa at a consular post abroad, and seek readmission to the United States in H-1B status for the dates reflected on the approved H-1B petition.

If an H-1B cap-subject petition is filed on the behalf of an F-1 student who has entered the 60-day grace period, the F-1 student will receive the automatic cap-gap extension of the student's F-1 status, but will not become employment-authorized (since the F-1 student was not employment-authorized at the time H-1B petition was filed, there is no employment authorization to be extended).

Unemployment during the cap-gap automatic extension counts toward the 90-day (post- completion OPT) or 150-day (for STEM OPT extension) cumulative maximum allowed unemployment.

2. Termination of Cap-gap Extension

If the student's H-1B petition is rejected, denied, withdrawn, or revoked, or if the student's change of status request is denied or withdrawn, the student has the standard 60-day grace period from the date of the rejection, denial, withdrawal, revocation notice, or the student's program or OPT end date, whichever is later, to prepare for and depart the United States.[72]

If USCIS denies the H-1B change of status request due to a status violation, misrepresentation, or fraud, the F-1 student is ineligible for the cap-gap extension of status and the 60-day grace period. If USCIS revoked the H-1B petition based on a finding of a status violation, fraud, or misrepresentation discovered following approval, the 60-day grace period and cap-gap extension of status does not apply. In both of these instances, students are required to immediately leave the United States.

3. Travel Outside the United States During the Cap-gap

An F-1 student may generally travel abroad and seek readmission to the United States in F-1 status during a cap-gap period if:

- USCIS has approved the student's H-1B petition and request for change of status;
- The student seeks readmission before the student's H-1B employment begins (normally at the beginning of the fiscal year on October 1); and
- The student is otherwise admissible.[73]

If an F-1 student travels abroad while the application for change of status to H-1B is still pending, the change of status portion of the petition is deemed abandoned. If the H-1B petition on behalf of the student is approved, the student may apply for an H-1B visa from abroad.

E. M-1 Practical Training

1. Application

PT is the only type of work authorization available to M-1 students. It allows M-1 students to get on-the-job training that is not available in their home country.[74] PT may only be authorized after the M-1 student completes their course of study. M-1 students must obtain the DSO's recommendation for PT. Prior to their program end date, but not more than 90 days before the program end date, M-1 students seeking PT must apply for permission to accept employment by filing a Form I-765 and an Application to Extend/Change Nonimmigrant Status (Form I-539), to extend their status to allow sufficient time to complete the PT plus a 30-day departure period.[75]

In some cases, the student finishes the course of study early or U.S. Customs and Border Protection gave the student more time than needed on the student's Arrival/Departure Record (Form I-94). These students do not need to file a Form I-539 if they have sufficient time left in status to complete their PT and depart. Students must submit a Form I-20 that has been endorsed for PT by the DSO with their Form I-539.

USCIS denies a Form I-765 if the M-1 student departs while the application is pending. An M-1 student may not be admitted to begin PT that was not authorized before the student's departure from the United States.[76]

2. Duration

USCIS grants 1 month of employment authorization for each 4 months of full-time study that the M-1 student has completed, not to exceed an aggregate of 6 months.[77] USCIS does not grant the student employment authorization if the student cannot complete the requested PT within 6 months. The M-1 student may not begin employment until USCIS has issued them an employment authorization document.

Footnotes

[^ 1] See 8 CFR 274a.12(b)(6)(iv), 8 CFR 214.2(f)(10), 8 CFR 214.2(f)(11), and 8 CFR 214.2(f)(12).

[^ 2] See 8 CFR 214.2(f)(10).

[^ 3] See 8 CFR 214.2(f)(10).

[^ 4] See 8 CFR 274a.12(c)(6) and 8 CFR 214.2(m)(14).

[^ 5] See 8 CFR 214.2(f)(10)(i).

[^ 6] See 8 CFR 214.2(f)(10)(i).

[^ 7] See 8 CFR 214.2(f)(10)(i)(B).

[^ 8] There is no maximum number of hours placed on CPT. Instead, the DSO indicates on the Form I-20 that training is authorized for full-time or part-time. See 8 CFR 214.2(f)(10)(i)(B).

[^ 9] See 8 CFR 214.2(f)(10). Students enrolled in master's degree or doctorate programs that require immediate participation in CPT are exempt from the one-academic-year eligibility rule. See 8 CFR 214.2(f)(10)(i).

[^ 10] See 8 CFR 214.2(f)(9)(ii)(D).

[^ 11] See 8 CFR 214.2(f)(10)(i).

[^ 12] See 8 CFR 214.2(f)(9).

[^ 13] See 8 CFR 214.2(f)(10).

[^ 14] For information concerning EAD requirements for F students, see Volume 10, Employment Authorization, Part A, Employment Authorization Policies and Procedures, Chapter 2, Eligibility Requirements [10 USCIS-PM A.2].

[^ 15] See 8 CFR 214.2(f)(10)(ii)(D).

[^ 16] See the DHS Change Education Level webpage.

[^ 17] See 8 CFR 214.2(f)(10).

[^ 18] See 8 CFR 214.2(f)(11)(i)(B)(1). USCIS regulations allow practical training for students enrolled for one full academic year, even if a portion of that qualifying period was in a valid nonimmigrant status other than F-1. The student must be in a valid F-1 nonimmigrant status when the pre-completion OPT application is filed. Students may count time enrolled in a study abroad program toward the full-academic-year requirement, as long as the student spent at least one full academic term (that is, one semester, trimester, or quarter) enrolled in a full course of study in the United States prior to studying abroad.

[^ 19] See 8 CFR 214.2(f)(10)(ii)(A)(3).

[^ 20] See ICE Policy Guidance 1004-03 – Update to Optional Practical Training (PDF), issued April 23, 2010.

[^ 21] See 8 CFR 214.2(f)(11)(i)(D).

[^ 22] See 8 CFR 214.2(f)(11)(i)(D).

[^ 23] See 8 CFR 214.2(f)(10)(ii)(A)(3).

[^ 24] See 8 CFR 214.2(f)(10).

[^ 25] See 8 CFR 214.2(f)(8).

[^ 26] See 8 CFR 214.2(f)(10)(ii)(E).

[^ 27] See 8 CFR 214.2(f)(10)(ii)(C).

[^ 28] See 8 CFR 214.2(f)(10)(ii)(E).

[^ 29] See the DHS Study in the States website.

[^ 30] See 8 CFR 274a.12(b)(6)(iv).

[^ 31] See 8 CFR 214.2(f)(10)(ii)(C)(5).

[^ 32] See 8 CFR 214.2(f)(10)(ii)(C)(5).

[^ 33] See 8 CFR 214.2(f)(10)(ii)(C)(5).

[^ 34] See 8 CFR 214.2(f)(10)(ii)(C)(9)(ii).

[^ 35] See 8 CFR 214.2(f)(10)(ii)(C)(7).

[^ 36] See 8 CFR 214.2(f)(10)(ii)(C)(8).

[^ 37] See 8 CFR 214.2(f)(10)(ii)(C)(6).

[^ 38] See the Students: Determining STEM OPT Extension Eligibility webpage.

[^ 39] See 8 CFR 214.2(f)(10)(ii)(C)(10)(i).

[^ 40] See 8 CFR 214.2(f)(10)(ii)(C)(10)(ii).

[^ 41] See 8 CFR 214.2(f)(10)(ii)(C)(10)(iii).

[^ 42] See the Students: Determining STEM OPT Extension Eligibility webpage.

[^ 43] See the Students: Determining STEM OPT Extension Eligibility webpage.

[^ 44] See the Reporting Volunteer Positions During OPT Employment webpage.

[^ 45] See 8 CFR 214.2(f)(10)(ii)(C)(11).

[^ 46] See Subsection 4, OPT Reporting and Employment Requirements [2 USCIS-PM F.5(C)(4)].

[^ 47] See 81 FR 13040 (PDF), 13079 (Mar. 11, 2016).

[^ 48] See 81 FR 13040 (PDF), 13079 (Mar. 11, 2016).

[^ 49] See the DHS STEM OPT Hub webpage for more information.

[^ 50] See 8 CFR 214.2(f)(11)(iii)(A).

[^ 51] See 8 CFR 214.2(f)(10)(ii)(A)(3).

[^ 52] See 8 CFR 214.2(f)(10)(ii)(C)(9)(i).

[^ 53] See 8 CFR 214.2(f)(10)(ii)(C)(9)(ii) (providing a non-exclusive list of material changes and deviations that would trigger this requirement). Additionally, the educational institution whose DSO is responsible for duties associated with the F-1 student's latest STEM OPT extension is responsible for ensuring that ICE SEVP has access to each individualized Form I-

983 and associated student evaluations (electronic or hard copy), including through SEVIS if technologically available, beginning within 30 days after the document is submitted to the DSO and continuing for a period of 3 years following the completion of each STEM practical training opportunity. See 8 CFR 214.2(f)(10)(ii)(C)(9)(iii).

[^ 54] See 8 CFR 214.2(f)(12)(ii)(A).

[^ 55] See 8 CFR 214.2(f)(12)(ii)(B).

[^ 56] See 8 CFR 214.2(f)(10)(ii)(C)(9)(i).

[^ 57] See 8 CFR 214.2(f)(10)(ii)(C)(7)(iv).

[^ 58] See 8 CFR 214.2(f)(10)(ii)(C)(9)(ii) (providing a non-exclusive list of material changes and deviations that would trigger this requirement). Additionally, the educational institution whose DSO is responsible for duties associated with the F-1 student's latest STEM OPT extension is responsible for ensuring that ICE SEVP has access to each individualized Form I-983 and associated student evaluations (electronic or hard copy), including through SEVIS if technologically available, beginning within 30 days after the document is submitted to the DSO and continuing for a period of 3 years following the completion of each STEM practical training opportunity. See 8 CFR 214.2(f)(10)(ii)(C)(9)(iii).

[^ 59] See 8 CFR 214.2(f)(11).

[^ 60] See 8 CFR 214.2(f)(11)(i)(D).

[^ 61] See 8 CFR 214.2(f)(11)(i)(D).

[^ 62] See 8 CFR 214.2(f)(11)(i)(B)(1).

[^ 63] See 8 CFR 214.2(f)(8)(ii).

[^ 64] See 8 CFR 274a.12(b)(6)(iv).

[^ 65] See INA 101(a)(15)(H)(i)(b). An H-1B beneficiary is a nonimmigrant worker coming to the United States temporarily to perform services in a specialty occupation.

[^ 66] See 8 CFR 214.2(f)(5)(vi)(A).

[^ 67] See 8 CFR 214.2(f)(5)(vi)(A).

[^ 68] See 8 CFR 214.2(f)(5)(vi)(C).

[^ 69] Timely filed means that the H-1B petition (indicating change of status rather than consular processing) was filed during the H-1B acceptance period, while the student's authorized F-1 duration of status admission was still in effect (including any period of time during the academic course of study, any authorized periods of post-completion OPT, any authorized periods of STEM OPT, and the 60-day departure preparation period).

[^ 70] See 8 CFR 214.2(f)(5)(vi).

[^ 71] See 8 CFR 214.2(f)(5)(vi)(B).

[^ 72] See 8 CFR 214.2(f)(5)(vi)(B).

[^ 73] See 81 FR 13040 (PDF) (Mar. 11, 2016) (final rule).

[^ 74] See 8 CFR 214.2(m)(14)(i)(C).

[^ 75] See 8 CFR 214.2(m)(14)(iii).

[^ 76] See 8 CFR 214.2(m)(14)(iv).

[^ 77] See 8 CFR 214.2(m)(14)(iii).

Chapter 6 - Employment

If authorized, F-1 students may engage in on-campus or off-campus employment. M-1 students may only engage in employment for purposes of practical training.[1]

A. On-Campus Employment

F-1 students may engage in on-campus employment subject to certain conditions and restrictions.[2] F-1 status permits students with Designated School Official (DSO) approval to work at an on-campus job for up to 20 hours per week when school is in session.[3] During vacation periods, students may work on-campus full-time.[4]

Employment may be performed at off-campus locations that are educationally affiliated with the school and the employment must be an integral part of the student's educational program.[5] Students working on campus may be employed by the school itself or by any independent companies serving the school's needs, such as the school bookstore or cafeteria suppliers providing food on campus premises. The employment must not displace U.S. residents.[6]

An F-1 student may be employed on-campus for duration of status, but may not begin more than 30 days before the start of classes.[7] F-1 students engaged in on-campus employment are not required to apply for employment authorization with USCIS.

B. Off-Campus Employment

USCIS may authorize an F-1 student to work off campus on a part-time basis after having been in F-1 status for one full academic year if the student is in good academic standing as determined by the DSO.[8]

1. Severe Economic Hardship

USCIS may authorize an eligible F-1 student to work off campus on a part-time basis if on-campus employment opportunities are not available or are otherwise insufficient. USCIS may also authorize an eligible F-1 student to work off campus on a part-time basis due to severe economic hardship caused by unforeseen circumstances beyond the student's control.[9]

Severe economic hardship may include a loss of financial aid or on-campus employment through no fault of the student; substantial fluctuations in the value of currency or exchange rate; inordinate increases in tuition or living costs; or unexpected changes in the financial condition of the student's source of support, medical bills, or other substantial and unexpected expenses.[10]

The DSO must recommend the F-1 student for off-campus employment on the Certificate of Eligibility for Nonimmigrant Student Status (Form I-20) and the student must properly file an Application for Employment Authorization (Form I-765), and receive an employment authorization document (EAD, Form I-766) from USCIS before starting off-campus employment.

USCIS may grant severe economic hardship EADs in 1-year intervals, not to extend past the expected date of completion of the student's current course of study.[11] Severe economic hardship EADs may be renewed while the student continues to maintain status and is in good academic standing.[12] Severe economic hardship employment authorization terminates when the student transfers from one school to another or when the need for employment ceases. If the student is maintaining status, beginning a new educational program at the same school does not terminate the student's employment authorization.

2. Severe Economic Hardship due to Emergent Circumstances (Special Student Relief)

DHS may suspend certain regulatory requirements for F-1 students experiencing severe economic hardship as a direct result of emergent circumstances.[13] This suspension, also known as special student relief (SSR), first appeared in the Code of Federal Regulations in 1998.[14]

Emergent circumstances are events that affect F-1 students from a particular region and create severe economic hardship. These events may include, but are not limited to, natural disasters, financial crises, and military conflicts.

The Secretary of Homeland Security may suspend duration of status, full course of study, and on-campus and off-campus employment regulatory requirements due to emergent circumstances. DHS designates SSR by publication of a Federal Register notice, which provides the start and end dates of the suspension of those requirements.

Lawful Status

Generally, DHS considers an F-1 student to be in lawful status if the student is pursuing a full course of study at an approved educational institution.[15] However, when DHS designates SSR by publication of a Federal Register notice, eligible students may reduce their full course of study as a result of accepting employment authorized by the Federal Register notice.

DHS considers an F-1 student to be in lawful status during the period of authorized employment, subject to any other conditions specified in the notice, provided that for the duration of the authorized employment, the student is:

- Registered for at least the minimum number of semester or quarter hours of instruction per academic term as specified in the Federal Register notice; and
- Is continuing to make normal progress toward completing the student's course of study.

When DHS designates SSR by publication of a Federal Register notice, the number of semester or quarter hours of instruction per academic term cannot be less than 6 semester or quarter hours if the student is at the undergraduate level or one half of the credit hours normally required under a full course of study if an undergraduate student is enrolled in a term of different duration. A student at the graduate level must remain registered in a minimum of 3 semester or quarter hours of instruction.[16]

Students enrolled in kindergarten through grade 12 at a private school or grades 9 through 12 at a public high school must maintain the minimum number of hours of class attendance per week prescribed by the academic institution for making normal progress toward graduation.[17]

Eligibility Criteria

For an F-1 student to be eligible for SSR, the DSO must certify in the Student and Exchange Visitor Information System (SEVIS) that the student:

- Is a citizen of a country specified in the Federal Register notice or, if such eligibility is specified in the SSR notice, a person having no nationality who last habitually resided in the specified country;
- Was lawfully present in the United States in F-1 status on the date of publication of the Federal Register notice;
- Is enrolled in a school certified by U.S. Immigration and Customs Enforcement's (ICE) Student and Exchange Visitor Program (SEVP);
- Is currently maintaining F-1 status; and
- Is experiencing severe economic hardship as a direct result of the emergent circumstances specified in the Federal Register notice.

The DSO should note any specifics, as ICE SEVP recommends, in the remarks section of the F-1 student's Certificate of Eligibility for Nonimmigrant Student Status (Form I-20).[18]

C. Documentation

1. On-Campus Employment

An F-1 nonimmigrant student authorized by the student's DSO to engage in on-campus employment by means of the Federal Register notice does not need to file an Application for Employment Authorization (Form I-765) with USCIS.[19]

To engage in on-campus employment more than 20 hours per week, consistent with a designation of SSR, the F-1 student must demonstrate to the DSO that the employment is necessary to avoid severe economic hardship resulting from the emergent circumstances, and the DSO must notate the student's Form I-20 in accordance with the Federal Register notice.[20]

2. Off-Campus Employment

An F-1 nonimmigrant student authorized by the student's DSO to engage in off-campus employment must file a Form I-765 with USCIS and include a copy of a properly endorsed Form I-20 with the filing. An F-1 student must receive employment authorization and an EAD from USCIS before engaging in off-campus employment.[21]

To engage in off-campus employment more than 20 hours per week consistent with a designation of SSR, the F-1 student must demonstrate to the DSO that the employment is necessary to avoid severe economic hardship resulting from the emergent circumstances, and the DSO must notate the student's Form I-20 in accordance with the Federal Register

notice.[22]

USCIS may only grant off-campus employment authorization due to severe economic hardship for up to 1 year,[23] unless the Secretary of Homeland Security suspends the applicability of this requirement through publication of a Federal Register notice. If the 1-year limitation is suspended, USCIS may grant SSR employment authorization for the duration of the Federal Register notice validity period, but the period of authorization may not exceed the F-1 student's academic program end date.

3. Existing Employment Authorization

If an F-1 student already has off-campus employment authorization, they may benefit from SSR without applying for a new EAD. To benefit from SSR in this context, the F-1 student must request that the student's DSO update the remarks field of the F-1 student's Form I-20, in accordance with the Federal Register notice.

An F-1 student authorized by a DSO for on-campus employment does not need to apply for an EAD solely because of publication of a Federal Register notice if the F-1 student does not seek to engage in off-campus employment. If consistent with the Federal Register notice, the F-1 student may drop below what would otherwise be the minimum course load. In such a case, the F-1 student must request that the DSO update the remarks field of the F-1 student's Form I-20, in accordance with the Federal Register notice.

D. F-1 Student Sponsored by an International Organization

An F-1 student who has been offered employment by a recognized international organization[24] must apply for employment authorization from USCIS.

A student seeking employment authorization under this provision is required to present a written certification from the international organization that the proposed employment is within the scope of the organization's sponsorship; a Form I-20 with the employment page completed by the DSO certifying eligibility for employment; and a completed Form I-765 with the required fee.

An F-1 student must receive employment authorization and an EAD from USCIS before engaging in off-campus employment.

Footnotes

[^ 1] See Chapter 5, Practical Training, Section E, M-1 Practical Training [2 USCIS-PM F.5(E)]. See 8 CFR 214.2(m)(13) and 8 CFR 214.2(m)(14).

[^ 2] See 8 CFR 214.2(f)(9)(ii)(A).

[^ 3] See 8 CFR 214.2(f)(9)(i).

[^ 4] See 8 CFR 214.2(f)(9)(i).

[^ 5] See 8 CFR 214.2(f)(9)(i).

[^ 6] See 8 CFR 214.2(f)(9)(i).

[^ 7] See 8 CFR 214.2(f)(9)(i).

[^ 8] See 8 CFR 214.2(f)(9)(ii)(A).

[^ 9] See 8 CFR 214.2(f)(9)(ii)(C). See Volume 1, General Policies and Procedures, Part H, Emergencies or Unforeseen Circumstances, Chapter 2, Emergencies or Unforeseen Circumstances-Related Flexibilities, Section A, Immigration Policy Flexibilities, Subsection 5, Employment Authorization for F-1 Students [1 USCIS-PM H.2(A)(5)].

[^ 10] See 8 CFR 214.2(f)(9)(ii)(C).

[^ 11] See 8 CFR 214.2(f)(9)(ii)(D).

[^ 12] See 8 CFR 214.2(f)(9)(ii)(F)(1).

[^ 13] See 8 CFR 214.2(f)(5)(v) and 8 CFR 214.2(f)(9).

[^ 14] See 63 FR 31872 (PDF) (June 10, 1998). For more information on special student relief (SSR), see DHS' Special Student Relief webpage.

[^ 15] See 8 CFR 214.2(f)(5)(i).

[^ 16] See 8 CFR 214.2(f)(5)(v).

[^ 17] As required under 8 CFR 214.2(f)(6)(i)(E).

[^ 18] For more information, see the DHS Special Student Relief webpage.

[^ 19] For more information regarding on-campus employment, including locations where it must be performed and application procedures, see 8 CFR 214.2(f)(9)(i).

[^ 20] See 8 CFR 214.2(f)(9)(i).

[^ 21] For general guidance on the adjudication of the Application for Employment Authorization (Form I-765), see Volume 10, Employment Authorization, Part A, Employment Authorization Policies and Procedures, Chapter 4, Adjudication [10 USCIS-PM A.4].

[^ 22] See 8 CFR 214.2(f)(9)(ii).

[^ 23] See 8 CFR 214.2(f)(9)(ii)(D). Employment authorization is automatically terminated whenever the student fails to maintain status. See 8 CFR 214.2(f)(9)(ii)(F)(2).

[^ 24] See 8 CFR 214.2(f)(9)(iii). The international organization must be recognized according to the International Organizations Immunities Act, Pub. L. 79-291, 59 Stat. 669 (December 29, 1945).

Chapter 7 - Absences From the United States

A. F-1 Students

An F-1 student returning to the United States from a temporary absence of 5 months or less may be readmitted for attendance at an educational institution certified by U.S. Immigration and Customs Enforcement (ICE) Student and Exchange Visitor Program (SEVP) if the F-1 student presents:

- A current Certificate of Eligibility for Nonimmigrant Student Status (Form I-20) properly endorsed by the Designated School Official (DSO) for reentry if there has been no substantive change to the most recent Form I-20 information;[1] or
- An updated Form I-20 if there has been a substantive change in the information on the F-1 student's most recent Form I-20, such as in the case of an F-1 student who has changed the major area of study, who intends to transfer to another SEVP-certified institution, or who has advanced to a higher level of study;[2] and
- A valid F nonimmigrant visa, unless otherwise exempt.[3]

If an F-1 student leaves the United States for more than 5 months and is not able to remain enrolled at the student's ICE SEVP-certified school, the student will not be able to maintain student status.[4] To resume the program of study in the United States, the student will need to seek readmission in initial status, which includes obtaining a new Form I-20.[5]

For information about requirements for F-1 student participation in study abroad programs, see DHS's Study in the States webpage.

Time spent outside of the United States does not extend the period of authorized Optional Practical Training (OPT). Time spent overseas counts towards the F-1 student's aggregate maximum allowed period of unemployment.[6] An F-1 student currently approved for OPT may re-enter the United States to engage in OPT if the student has a current visa (if applicable), a Form I-20 endorsed for travel by the student's DSO within the last 6 months, and an unexpired Employment Authorization Document (Form I-765).

B. M-1 Students

An M-1 student returning to the United States from a temporary absence to attend the school that the student was previously authorized to attend must present:[7]

- A properly endorsed Form I-20 if there has been no substantive change in the information on the student's most recent Form I-20 since the form was initially issued; or
- A new Form I-20 if there has been any substantive change in the information on the student's most recent Form I-20 since the form was initially issued; and
- A valid M nonimmigrant visa, unless otherwise exempt.[8]

If USCIS has authorized an M-1 student to transfer between schools and the student is returning to the United States from a temporary absence to attend the school to which the transfer was authorized as indicated on the student's Form I-20, the name of the transfer-in school does not need to be specified in the student's visa.[9]

If USCIS has authorized an M-1 student to engage in practical training and the student is returning to the United States from a temporary absence, the M-1 student may be readmitted for the remainder of the authorized period indicated on the student's Form I–20. The student must be returning to the United States to perform the authorized practical training.

An M-1 student may not be admitted to begin practical training that was not authorized before the student's departure.[10] As a result, if an M-1 student departs the United States while an Application for Employment Authorization (Form I-765) is pending, USCIS denies the Form I-765.

Footnotes

[^ 1] See 8 CFR 214.2(f)(4).

[^ 2] See 8 CFR 214.2(f)(4).

[^ 3] See 8 CFR 212.1.

[^ 4] See 8 CFR 214.2(f)(4).

[^ 5] See 8 CFR 214.2(f)(4).

[^ 6] See 8 CFR 214.2(f)(10)(ii)(E).

[^ 7] See 8 CFR 214.2(m)(4)(i).

[^ 8] See 8 CFR 212.1.

[^ 9] See 8 CFR 214.2(m)(4)(ii).

[^ 10] See 8 CFR 214.2(m)(14)(iv).

Chapter 8 - Change of Status, Extension of Stay, and Length of Stay

A. General Eligibility for Change of Status to F-1

1. Eligible Nonimmigrants

In general, nonimmigrants who have been lawfully admitted to the United States and maintain the status in which they were admitted (or previously changed to) may seek to change from one visa classification under INA 101(a)(15) to another, with certain restrictions.[1] The alien must meet all eligibility criteria for the new visa classification.[2]

Generally, a nonimmigrant may apply to change to F-1 status while remaining in the United States if:

- The alien was lawfully admitted to the United States in a nonimmigrant status;
- The alien's nonimmigrant status remains valid;
- The alien has not violated the conditions of the alien's nonimmigrant status;[3] and
- The alien merits a favorable exercise of discretion.[4]

The decision to grant a change of status request involves an exercise of discretion by USCIS. There are a number of factors or factual circumstances that USCIS officers consider when conducting a discretionary analysis.[5]

2. Timing and Effective Date

Academic Program Start Date

In general, upon approval of a change of status (COS) to F-1, F-1 students may not engage in any student activities (with certain exceptions)[6] until 30 days before their academic program start date.

Officers grant the COS with an effective date of the applicant's F-1 status as the day of final adjudication (approval), regardless of whether it falls within 30 days of the academic program start date.

If a COS to F-1 application is approved more than 30 days before the program start date, the nonimmigrant must ensure that they do not violate their F-1 status during that period of time. The student must ensure they maintain status by not engaging in impermissible activities.

For example, engaging in any employment, including on-campus employment and practical training more than 30 days before the program start date, is a violation of F-1 status.[7] In general, F-1 students admitted for duration of status who violate the terms of their status, begin to accrue unlawful presence on the day after USCIS or an immigration judge determines that they have violated their nonimmigrant status.[8]

In all cases, the student must fully comply with all applicable requirements of the Student and Exchange Visitor Program (SEVP).

Duration of Status

Regulations define the nonimmigrant student's "duration of status" as the time during which an F-1 nonimmigrant is "pursuing a full course of study" at the approved educational institution.[9] USCIS considers the period of time between the approval of the COS to F-1 classification and the F-1 program start date as falling within the provision of "pursuing a full course of study." This applies if the F-1 student continues to intend to pursue that course of study and does not otherwise violate their F-1 nonimmigrant status.

USCIS considers this period of time between the date of approval and the program start date as similar to the period of time and purpose a student is in the United States during summer vacation in F-1 status (such a break in classes does not interrupt status).

Deferring Program Start Date

If a COS to F-1 application is not approved before the program start date reflected on the initial "Certificate of Eligibility for Nonimmigrant Student Status" (Form I-20), the applicant must request that their Designated School Official (DSO) defer the program start date in the Student and Exchange Visitor Information System (SEVIS) before the current program start date has been reached.

The applicant can monitor the status of their pending COS application and, in accordance with instructions provided on the SEVP website, may contact the DSO if it appears that the program start date may need to be deferred. The applicant and the DSO are responsible for ensuring that the SEVIS record is not terminated while the COS is pending.

Background

USCIS historically only granted applications to change to F-1 status within 30 days of the program start date listed on the applicant's Form I-20. USCIS required nonimmigrants applying for COS to F-1 classification to continuously obtain nonimmigrant status up to 30 days before the start date of the program of study listed on the Form I-20, even if that required filing an initial extension and later a subsequent extension or extensions, or filing a COS and subsequent extension or extensions. This policy prevented students from incurring a "gap" in status prior to 30 days before the program's start date, but resulted in the potential filing and adjudication of multiple, duplicative COS or extension of stay (sometimes referred to as "bridging") applications.

In order to limit costs to applicants and the government, especially during periods of high volume and extended adjudication times, USCIS no longer requires the applicant to submit subsequent applications for extension or change of nonimmigrant status while the COS to F-1 application is pending with USCIS, provided that the applicant's nonimmigrant status is unexpired at the time of filing the initial COS to F-1 application, and the applicant otherwise remains eligible for a COS.

To avoid a "gap" in status in cases that are adjudicated more than 30 days prior to the academic program start date but are otherwise approvable, USCIS grants the COS to F-1 effective the day USCIS makes a final decision on the COS application, which may in some cases result in a student being granted F-1 status more than 30 days prior to the program start date.

3. Nonimmigrants Unable to Enroll in a Full Course of Study Seeking Change of Status to F-1 Classification

Certain nonimmigrants, including visitors for business or pleasure (B-1 or B-2), are prohibited from enrolling in a full course of study.[10] Nonimmigrants who wish to enroll in a full course of study but are unable to do so in their current nonimmigrant status must first submit a COS application and request nonimmigrant student (F-1) status. These nonimmigrants must do so while they are still in lawful status.

4. Other Nonimmigrants Seeking Change of Status to F-1 Classification

Some nonimmigrant classifications (PDF) permit applicants to enroll in a full course of study incidental to their primary purpose for being in the United States, while other classifications do not. COS applicants in nonimmigrant classifications that permit such enrollment and who enroll in a full course of study may continue their studies, even if their COS to F-1 is approved more than 30 days before their program start date as listed on their Form I-20.[11]

Nonimmigrants whose classifications do not permit enrolling in a course of study must first acquire F-1 status and may only enroll in a full course of study upon the program start date listed on Form I-20.

When an applicant applies for a COS to F-1 status, the applicant must wait until the COS is approved as well as 30 days before the new program start date before engaging in F status-specific activities (such as on-campus employment and practical training).[12]

5. Travel Abroad and Consular Processing

A nonimmigrant who obtains an F-1 nonimmigrant visa through consular processing may not be admitted more than 30 days before the report date or program start date listed on the Form I-20.[13] If a nonimmigrant travels abroad while their COS application is pending, USCIS considers that COS application abandoned.

If a nonimmigrant student travels abroad after USCIS has approved their F-1 COS application, regulations prohibit re-admission to the United States in F-1 status more than 30 days before the report date or program start date listed on the Form I-20.[14]

B. Vocational Student (M-1) [Reserved]

[Reserved]

C. Extension of Stay

1. F-1 Students

An F-1 student who is admitted for duration of status is not required to apply for an extension of stay with USCIS as long as the student is maintaining status and making normal progress toward completion of the student's educational objective.[15] An F-2 dependent is not required to seek an extension of stay as long as the principal maintains F-1 student status.

An F-1 student who continues from one educational level to another is considered to be maintaining status, provided that the transition to the new educational level is completed according to the transfer procedures.[16] F-1 students continuing their studies at another educational level must request that the DSO change the students' educational level within 60 days of their program end date.

An F-1 student who is maintaining status and making normal progress toward completing their educational objective, but is unable to complete their course of study by the program end date on the Form I-20, must request a program extension from their DSO before the program end date.

The F-1 student may be granted an extension if the DSO certifies that the student has continually maintained status and that the delay is caused by compelling academic or medical reasons, such as a change of major or research topics, unexpected research problems, or documented illnesses. Delays due to academic probation or suspension are not acceptable reasons for program extensions.

An F-2 dependent of an F-1 student unable to complete their course of study by the program end date on the Form I-20 does not need to apply separately for an extension of stay. If the DSO grants a program extension for the F-1 student, the DSO updates SEVIS for both the F-1 student and F-2 dependent.[17]

Failure to receive timely authorization for extension of stay results in the loss of student status.[18] An F-1 student who is unable to complete the educational program within the time listed on the Form I-20 and who is ineligible for a program extension is considered out of status as of the program end date.[19] In either case, the student must request to be reinstated to student status to continue studies.[20]

Reinstatement to F-1 Student Status

Generally, USCIS may reinstate a student's F-1 status if the student makes a request on an Application to Extend/Change Nonimmigrant Status (Form I-539).[21] The request must be accompanied by a properly completed Form I-20 indicating the DSO's recommendation for reinstatement from the school the student is attending.[22]

The student's application must show:

- The student filed the application no more than 5 months after being out of status, or exceptional circumstances resulted in the student's failure to file within 5 months and the request for reinstatement was filed as soon as possible under the circumstances;[23]
- The student does not have a record of repeated or willful violations of DHS regulations;[24]
- The student is currently pursuing or intending to pursue a full course of study in the immediate future at the school that issued the Form I-20;[25]
- The student has not engaged in unauthorized unemployment;[26]
- The student is not deportable on any ground other than as an alien whose nonimmigrant status has been revoked or an alien who has failed to maintain nonimmigrant status;[27] and
- A favorable exercise of discretion is warranted.[28]

The student's application must also show:

- The violation of status resulted from circumstances beyond the student's control;[29] or
- The violation relates to a reduction in the student's course load that would have been within a DSO's power to authorize, and that failure to approve reinstatement would result in extreme hardship to the student.[30]

Violations due to the student's actions, such as criminal activity, are not considered circumstances beyond the student's control.

The decision to grant a reinstatement request involves an exercise of discretion by USCIS. There are a number of factors or factual circumstances that USCIS officers consider when conducting a discretionary analysis.[31]

2. M-1 Students

The cumulative time of extensions, including extensions for practical training, that can be granted to an M-1 student is limited to a period of 3 years from the M-1 student's original start date, plus 30 days.

No extension can be granted to an M-1 student if the student is unable to complete the course of study within 3 years of the original program start date. This limit includes extensions that have been granted due to a drop below a full course of study, a transfer of schools, or reinstatement. M-1 students may be granted an extension of stay if they establish:

- They are currently maintaining M-1 status;
- Compelling educational or medical reasons have resulted in a delay to their course of study (delays caused by academic probation or suspension are not acceptable reasons for program extension); and

- They are able to, and in good faith intend to, continue to maintain that status for the period for which the extension is granted.[32]

Application

An M-1 student must apply to USCIS for an extension on Form I-539. The student must submit the application at least 15 days, but not more than 60 days, before the program end date on the student's Form I-20. A student's M-2 spouse and unmarried children under the age of 21 seeking an extension of stay may be included in the application. The application must also be accompanied by the student's Form I-20 and the Form I-94 of the student's spouse and unmarried children, if applicable.

Period of Stay

If USCIS grants an application for extension, the M-1 student and their spouse and unmarried children under the age of 21 are given an extension of stay for the period of time necessary to complete the course of study, plus 30 days within which to depart from the United States, or for a total period of 1 year, whichever is less.[33]

A student's M-2 spouse and unmarred children under the age of 21 are not eligible for an extension unless USCIS grants the M-1 student an extension of stay, and USCIS does not grant them a longer period than USCIS grants the M-1 student.[34]

Reinstatement to M-1 Student Status

USCIS may consider reinstating a student who makes a request for reinstatement on a Form I-539, accompanied by a properly completed Form I-20 indicating the DSO's recommendation for reinstatement. USCIS may consider granting the request only if the student:[35]

- Has not been out of status for more than 5 months at the time of filing the request for reinstatement (or demonstrates that the failure to file within the 5-month period was the result of exceptional circumstances and that the student filed the request for reinstatement as promptly as possible under these exceptional circumstances);
- Does not have a record of repeated or willful violations of DHS regulations;
- Is currently pursuing, or intends to pursue, a full course of study at the school that issued the Form I-20;
- Has not engaged in unlawful employment;
- Is not deportable on any ground other than INA 237(a)(1)(B) or INA 237(a)(1)(C)(i); and
- Provides evidence that the violation of status resulted from circumstances beyond the student's control[36] or the violation relates to a reduction in the student's course load that would have been within a DSO's power to authorize, and that failure to approve reinstatement would result in extreme hardship to the student.

D. Length of Stay

F-1 students may be admitted for a period of up to 30 days before the indicated report date or program start date listed on the Form I-20.[37] F-1 students are maintaining status if they are making normal progress toward completing a course of study. Admission, except for students enrolled in public high schools, is for duration of status.[38]

M-1 students may be admitted for a period of up to 30 days before the report date or start date of the course of study listed on the Form I-20.

M-1 students are admitted for a fixed time period, which is the period necessary to complete the course of study indicated on the Form I-20, plus any authorized practical training following completion of the course of study, plus an additional 30 days to depart the United States. However, the total time period may not exceed 1 year.[39]

M-1 students are maintaining status if they are making normal progress toward completing a course of study.

E. Duration of Status

F nonimmigrants[40] are admitted into the United States for an unspecified period of time to engage in activities authorized under this nonimmigrant classification. This unspecified period of time is referred to as duration of status.[41] This means that an F nonimmigrant may remain in the United States while maintaining their student status, including any authorized practical training following completion of studies, without being required to apply for an extension of stay with USCIS, or to depart and re-enter the United States in F-1 status.[42]

F. Departure Periods

1. F-1 Students

F-1 students who have completed their course of study and any authorized practical training following completion of studies are allowed an additional 60-day grace period to prepare for departure from the United States or to transfer to another SEVP-certified school.[43] During the grace period, the F-1 student is deemed to be maintaining nonimmigrant status and may apply for a change to another nonimmigrant or immigrant status.

F-1 students authorized by the DSO to withdraw from classes are allowed a 15-day period for departure from the United States.[44] However, F-1 students who fail to maintain a full course of study without the approval of the DSO or otherwise fail to maintain status are not eligible for an additional period for departure.[45]

2. M-1 Students

M-1 students who have completed their course of study and any authorized practical training following completion of their studies are allowed an additional 30-day grace period to prepare for departure from the United States.[46] During the grace period, the M-1 student is deemed to be maintaining nonimmigrant status and may apply for an extension of their stay or change to another nonimmigrant or immigrant status. M-1 students who fail to maintain a full course of study or otherwise fail to maintain status are not eligible for the additional 30-day period of stay.[47]

Footnotes

[^ 1] See INA 248.

[^ 2] According to INA 101(a)(15)(f), an alien is eligible for F nonimmigrant classification if the alien: has a residence in a foreign country which they have no intention of abandoning, is a bona fide student qualified to pursue a full course of study, and seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study consistent with

INA 214(m) at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in an accredited language training program in the United States.

[^ 3] Violations of status include, among others, engaging in unauthorized employment and certain criminal activity. See 8 CFR 214.1.

[^ 4] See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis [1 USCIS-PM E.8]. For a list of factors that should be considered in the discretionary analysis, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis, Section C, Adjudicating Discretionary Benefits, Subsection 2, Identifying Discretionary Factors [1 USCIS-PM E.8(C)(2)].

[^ 5] See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis [1 USCIS-PM E.8].

[^ 6] See Subsection 4, Other Nonimmigrants Seeking Change of Status to F-1 Classification [2 USCIS-PM F.8(A)(4)].

[^ 7] See 8 CFR 214.2(f)(9(i).

[^ 8] See Adjudicator's Field Manual Chapter 40.9.2. Students may be subject to 3-year or 10-year bars on their readmission to the country, respectively, if they accrue more than 180 days or 1 year of unlawful presence. See INA 212(a)(9)(B).

[^ 9] See 8 CFR 214.2(f)(5).

[^ 10] See 8 CFR 214.2(b)(7).

[^ 11] Under 8 CFR 214.2(f)(15)(ii), an F-2 is permitted to enroll in post-secondary or vocational study at an SEVP-certified school so long as any study remains less than a full course of study.

[^ 12] See 8 CFR 214.2(f)(9(i).

[^ 13] See 8 CFR 214.2(f)(5)(i).

[^ 14] See 8 CFR 214.2(f)(5)(i).

[^ 15] For a discussion of the extension of stay available to certain F-1 beneficiaries of an H-1B petition, under the “cap gap” provisions, see Chapter 5, Practical Training, Section D, F-1 “Cap-gap” Extension [2 USCIS-PM F.5(D)].

[^ 16] See 8 CFR 214.2(f)(8).

[^ 17] See 9 FAM 403.9-4(E), Maximum Initial Periods of Admission and Extension of Stay.

[^ 18] See 8 CFR 214.2(f)(7)(iii).

[^ 19] See 8 CFR 214.2(f)(7)(iii).

[^ 20] See 8 CFR 214.2(f)(7)(iii) (directing that the application for reinstatement would be under the provisions of 8 CFR 214.2(f)(16)).

[^ 21] See 8 CFR 214.2(f)(16).

[^ 22] See 8 CFR 214.2(f)(16)(i).

[^ 23] See 8 CFR 214.2(f)(16)(i)(A).

[^ 24] See 8 CFR 214.2(f)(16)(i)(B).

[^ 25] See 8 CFR 214.2(f)(16)(i)(C).

[^ 26] See 8 CFR 214.2(f)(16)(i)(D).

[^ 27] See 8 CFR 214.2(f)(16)(i)(E).

[^ 28] See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis [1 USCIS-PM E.8]. For a list of factors that should be considered in the discretionary analysis, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis, Section C, Adjudicating Discretionary Benefits, Subsection 2, Identifying Discretionary Factors [1 USCIS-PM E.8(C)(2)].

[^ 29] For example, serious injury or illness; closure of the institution; a natural disaster; or inadvertence, oversight, or neglect on the part of the school’s DSO. Situations caused by the student’s willful failure or by a pattern of repeated violations do not qualify. See 8 CFR 214.2(f)(16)(i)(F)(1).

[^ 30] See 8 CFR 214.2(f)(16)(i)(F)(2).

[^ 31] See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis [1 USCIS-PM E.8].

[^ 32] See 8 CFR 214.2(m)(10).

[^ 33] See 8 CFR 214.2(m)(10)(iii).

[^ 34] See 8 CFR 214.2(m)(10)(iii).

[^ 35] See 8 CFR 214.2(m)(16).

[^ 36] Circumstances beyond the student’s control might include serious injury or illness, closure of the institution, a natural disaster, or inadvertence, oversight, or neglect on the part of the DSO. They do not include instances where a pattern of repeated violations or a willful failure on the part of the student resulted in the need for reinstatement.

[^ 37] See 8 CFR 214.2(f)(5)(i).

[^ 38] An F-1 student who is admitted to attend a public high school is restricted to an aggregate of 12 months of study at any public high school. See 8 CFR 214.2(f)(5)(i).

[^ 39] See 8 CFR 214.2(m)(5).

[^ 40] Students traveling on M visas (students in vocational or other nonacademic institutions) generally are admitted for a fixed time period, rather than for duration of status, although extensions are possible. See 8 CFR 214.2(m)(5) and 8 CFR 214.2(m)(10).

[^ 41] See 8 CFR 214.2(f)(5)(i). Duration of status is defined as the time during which an F-1 student is pursuing a full course of study at an educational institution certified by U.S. Immigration and Customs Enforcement Student and Exchange Visitor Program for attendance by foreign students or engaging in authorized practical training following completion of studies. The student is considered to be maintaining status if the student is making normal progress toward completing a course of study.

[^ 42] See INA 214(m). See 8 CFR 214.2(f)(5)(i). Statutory and regulatory requirements restrict the duration of study for F-1 students to attend a public high school to an aggregate of 12 months of study at any public high school.

[^ 43] See 8 CFR 214.2(f)(5)(iv).

[^ 44] See 8 CFR 214.2(f)(5)(iv).

[^ 45] See 8 CFR 214.2(f)(5)(iv).

[^ 46] See 8 CFR 214.2(m)(5) and 8 CFR 214.2(m)(10).

[^ 47] See 8 CFR 214.2(m)(5).

Chapter 9 - Dependents

A. Accompanying the Student

An F-1 student's spouse and unmarried children under the age of 21 who are accompanying the F-1 student in the United States are eligible for admission in F-2 status as dependent family members.[1] An M-1 student's spouse and unmarried children under the age of 21 who are accompanying are eligible for admission in M-2 status.

At the time they seek admission, the dependent family members of a student with a Certificate of Eligibility for Nonimmigrant Student Status (Form I-20) must each present an original Form I-20 issued in the name of each F-2 or M-2 dependent and issued by a school certified by U.S. Immigration and Customs Enforcement (ICE) Student and Exchange Visitor Program (SEVP) to admit F or M students.

B. Following to Join the Student

An F-1 student's spouse and unmarried children under the age of 21 who are following to join the F-1 student in the United States are eligible for admission in F-2 status as dependent family members if they are able to demonstrate that the F-1 student has been admitted and is, or will be within 30 days, enrolled in a full course of study, or is engaged in approved practical training following completion of studies.

At the time they seek admission, the dependent family members of an F-1 student must individually present an original Form I-20 issued in the name of each F-2 dependent and issued by a school certified by ICE SEVP for attendance by F-1 students. A new Form I-20 is required for a dependent family member where there has been any substantive change in the F-1 student's current information.

An M-1 student's spouse and unmarried children under the age of 21 who are following to join the M-1 student in the United States are eligible for admission in M-2 status if they are able to demonstrate that the M-1 student has been admitted and is, or will be within 30 days, enrolled in a full course of study, or is engaged in approved practical training following completion of studies.

At the time they seek admission, the dependent family members of an M-1 student must individually present an original Form I-20 issued in the name of each M-2 dependent and issued by a school certified by ICE SEVP for attendance by M-1 students. A new Form I-20 is required for a dependent where there has been any substantive change in the M-1 student's current information.

C. Employment and Study

F-2 and M-2 dependents are not authorized to work in the United States. F-2 and M-2 nonimmigrants are permitted to attend elementary, middle, and high school on a full-time basis. F-2 and M-2 nonimmigrants are also permitted to engage in study that is avocational or recreational in nature, or less than full-time.[2] If a dependent wants to pursue a full course of study beyond the elementary, middle, or high school level, or beyond what is avocational or recreational, the dependent has the option to request a change of status to that of an F-1 or M-1 nonimmigrant.

D. Period of Stay

1. F-2 Dependents

F-2 dependents are generally admitted concurrently with the duration of status of the F-1 student. F-2 dependents are not required to seek an extension of stay as long as they were admitted for duration of status and the F-1 student maintains their student status.

F-2 dependents of an F-1 student who is unable to complete the student's course of study by the program end date on the Form I-20 do not need to apply for an extension of stay if they were admitted for duration of status. If the Designated School Official (DSO) grants an extension of stay for the F-1 student, the DSO updates the Student and Exchange Visitor Information System (SEVIS) for both the F-1 student and their F-2 dependents.

2. M-2 Dependents

M-2 dependents are admitted for the fixed period of stay for which M-1 students are admitted.[3] If USCIS grants an extension to members of a family group, all members are granted the same period of time, with the shortest period of time granted to any member applying to all.

If USCIS grants an application for an extension, the M-1 student and the student's M-2 dependent family members, if applicable, are given an extension of stay for the period of time necessary to complete the course of study, plus 30 days within which to depart from the United States. The period of stay may not exceed a total period of 1 year, or the date a dependent loses eligibility for M-2 status (for example, the date an M-2 child turns 21), whichever is less.

E. Change of Status

Any spouse and minor children of the student who wish to change their status to F-2 dependent status must file their change of status (COS) application on Form I-539 while their current nonimmigrant status is valid and unexpired. Officers must review the expiration date of the applicant's nonimmigrant status as indicated on the applicant's Arrival/Departure Record (Form I-94) or other relevant documents to make this determination.

If USCIS denies the principal nonimmigrant's COS application, officers must deny any dependent's COS application.

Footnotes

[^ 1] See 8 CFR 214.2(f)(3) and 8 CFR 214.2(m)(3).

[^ 2] See 8 CFR 214.2(f)(15)(ii)(A)(1) ("[S]tudy at an undergraduate college or university or at a community college or junior college is not a full course of study solely because the F-2 nonimmigrant is engaging in a lesser course load to complete a course of study during the current term. An F-2 spouse or F-2 child enrolled in less than a full course of study is not eligible to engage in employment."). See 8 CFR 214.2(m)(17)(ii)(A)(1) ("[S]tudy at an undergraduate college or university or at a community college or junior college is not a full course of study solely because the M-2 nonimmigrant is engaging in a lesser course load to complete a course of study during the current term. An M-2 spouse or M-2 child enrolled in less than a full course of study is not eligible to engage in employment.").

[^ 3] See 8 CFR 214.2(m)(10)(iii).

Part G - Treaty Traders and Treaty Investors (E-1, E-2)

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures.

See more

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures. We are working quickly to update and incorporate all of the AFM content into the USCIS Policy Manual, the agency's centralized online repository for immigration policies. Until then, we have moved any remaining AFM content to its corresponding Policy Manual Part. To the extent that a provision in the Policy Manual conflicts with remaining AFM content or Policy Memoranda, the updated information in the Policy Manual prevails. If you have questions or concerns about any discrepancies among these resources, contact PolicyFeedback@uscis.dhs.gov.

AFM Chapter 34 - Other Employment Authorized Nonimmigrants (E, I & R Classifications) (External)

Part H - Specialty Occupation Workers (H-1B, E-3)

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures.

See more

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AFM Chapter 31 - Petitions for Temporary Workers (H Classifications) (External)

AFM Chapter 34 - Other Employment Authorized Nonimmigrants (E, I & R Classifications) (External)

Part I - Temporary Agricultural and Nonagricultural Workers (H-2)

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See more

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AFM Chapter 31 - Petitions for Temporary Workers (H Classifications) (External)

Chapter 1 - Purpose and Background

A. Purpose

The temporary agricultural worker (H-2A) nonimmigrant visa classification applies to an alien seeking to perform agricultural labor or services of a temporary or seasonal nature in the United States.[1]

The temporary nonagricultural worker (H-2B) nonimmigrant visa classification applies to an alien seeking to perform temporary nonagricultural labor or services in the United States if U.S. workers are not available.[2]

B. Background [Reserved]

[Reserved]

C. Legal Authorities

- INA 101(a)(15)(H) – Aliens coming temporarily to the United States to perform services
- 8 CFR 214.2(h) – Temporary employees

Footnotes

[^ 1] USCIS defers to the U.S. Department of Labor's determination on the temporary labor certification for H-2A employment as to whether the position qualifies as agricultural.

[^ 2] The H-2B nonimmigrant visa classification does not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession.

Chapter 2 - Eligibility for Temporary Agricultural Worker (H-2A) Classification [Reserved]

Chapter 3 - Documentation and Evidence for Temporary Agricultural Worker (H-2A) Classification [Reserved]

Chapter 4 - Adjudication of Temporary Agricultural Worker (H-2A) Petitions [Reserved]

Chapter 5 - Post-Adjudication Issues related to Temporary Agricultural Worker (H-2A) Petitions [Reserved]

Chapter 6 - Temporary Agricultural Worker (H-2A) Petitions Requiring Special Handling [Reserved]

Chapter 7 - Eligibility for Temporary Nonagricultural Worker (H-2B) Classification [Reserved]

Chapter 8 - Documentation and Evidence for Temporary Nonagricultural Worker (H-2B) Classification [Reserved]

Chapter 9 - Adjudication of Temporary Nonagricultural Worker (H-2B) Petitions [Reserved]

Chapter 10 - Post-Adjudication Issues related to Temporary Nonagricultural Worker (H-2B) Petitions [Reserved]

Chapter 11 - Temporary Nonagricultural Worker (H-2B) Petitions Requiring Special Handling

A. Temporary Workers on Guam and in the Commonwealth of the Northern Mariana Islands

1. General Eligibility Requirements

Exemption from Statutory Numerical Limitations[1]

The Consolidated Natural Resources Act of 2008 (CNRA)[2] includes a provision exempting H-2B workers performing labor or services on Guam and in the Commonwealth of the Northern Mariana Islands (CNMI) from the H-2B numerical limitation (H-2B cap) from November 28, 2009 to December 31, 2014.[3] In 2014, Congress amended the CNRA to extend the transition period until December 31, 2019.[4] In 2018, Congress further extended the Guam and CNMI H-2B and H-1B visa cap exemptions from 2019 to 2029.[5]

The H-2B cap exemption does not apply to any employment to be performed outside of Guam or the CNMI. As such, to qualify for this cap exemption, the petition must include an approved temporary labor certification (TLC) for work locations on Guam or in the CNMI only. An H-2B worker granted H-2B status under this Guam or CNMI cap exemption who ceases to be employed in H-2B classification solely on Guam or in the CNMI is subject to the H-2B cap.

A subsequent petition filed for such an H-2B worker (for example, a change of employer petition with a request for an extension of stay) requesting employment located outside of Guam or the CNMI is also subject to the H-2B cap.

Exemption from H-2B Temporary Need Requirement Under the NDAA

The National Defense Authorization Act for Fiscal Year 2018 (FY 2018 NDAA) created an exemption from the temporary need requirement for certain H-2B workers directly connected to or associated with the military realignment on Guam through September 30, 2023.[6] The FY 2019 NDAA amended and extended this exemption.[7] The FY 2021 NDAA provided further expansion of the services or labor eligible under the temporary need exemption, and these standards for the temporary need exemption still apply today. Most recently, the FY 2024 NDAA extended its effectiveness through December 30, 2029.[8]

Eligible Services or Labor under the NDAA

Since the FY 2021 NDAA (effective as of January 1, 2021), the following services or labor are eligible for the temporary need exemption:[9]

- Services or labor provided under any agreement entered into by a prime contractor or subcontractor calling for services or labor required for performance of a contract or subcontract for construction, repairs, renovations, or facility services that are directly connected to, supporting, associated with, or adversely affected by, the military realignment occurring on Guam and the CNMI, with priority given to federally funded military projects; or
- Services or labor provided as a health care worker at a facility that jointly serves members of the U.S. armed forces, dependents, and civilians on Guam or in the CNMI.[10]

An employer who qualifies under any one of the above parameters is not required to demonstrate that the service or labor is temporary in nature if the employment start date is before December 31, 2029. Petitions with employment start dates on or after December 31, 2029, are subject to adjudication under the law and regulations that apply to the H-2B program at that time.

For H-2B petitions for employment on Guam and in the CNMI that do not qualify under the NDAA exemption, USCIS adjudicates the petitions according to existing DHS regulations and policy concerning the H-2B classification.

2. NDAA Exemption Eligibility Involving Military Realignment

H-2B Petition Eligibility Directly Connected to, Supporting, Associated with, or Adversely Affected by the Military Realignment on Guam or in the CNMI

With the exception of health care workers (discussed below), consistent with the FY 2021 NDAA, USCIS requires petitioners requesting the NDAA temporary need exemption to demonstrate that all services or labor to be performed by H-2B nonimmigrants on Guam or in the CNMI are:

- Performed as a result of an agreement entered into by a prime contractor or subcontractor;
- For services or labor required for performance of a contract or subcontract that is:
  - For construction, repairs, renovations, or facility services; and
  - Directly connected to, supporting, associated with, or adversely affected by the military realignment on Guam and in the CNMI.

As required by the FY 2021 NDAA, USCIS gives priority to services or labor performed under a contract or subcontract for federally funded military projects.[11]

The agreement may be a contract or subcontract. To qualify for the NDAA exemption, any contract or subcontract for labor or services for construction, repairs, renovations, or facility services must be supporting, associated with, directly connected to, or adversely affected by the military realignment. It cannot be only incidentally or tangentially related to the realignment. The claimed relationship to the military realignment, whether directly connected to, associated with, supporting, or adversely affected by, cannot be based on assertions with no documentation to support the claim, that is, it cannot be purely speculative. The claimed relationship must be demonstrated by a preponderance of the evidence.

If the petition includes multiple agreements or otherwise applies to multiple service or labor projects, all such agreements and projects must have at least one of the above-described relationships to the military realignment. If any of the included agreements or projects lack a required relationship to the military realignment, the petition does not qualify under the NDAA exemption and USCIS adjudicates the petition according to existing DHS regulations and policy concerning the H-2B classification. After filing a petition, a petitioner may not request to remove or add agreements and projects to cure a deficient filing.[12]

As stated above, while the H-2B temporary need exemption remains limited to contracts or subcontracts for labor or services for construction, repairs, renovations, or facility services, the FY 2021 NDAA language extends the previous exemption found in the FY 2019 NDAA to include those that are supporting or adversely affected by the military realignment, in addition to those that are directly connected to or associated with the realignment.

Eligibility for NDAA Exemption Must Relate to Military Realignment Occurring on Guam and CNMI

Under the FY 2021 NDAA, to qualify for the NDAA exemption, the direct connection, support, association, or adverse effect cannot relate to just any military activity on Guam or in the CNMI; rather, it must relate to the military realignment occurring on Guam and the [CNMI].[13]

Military realignment refers generally to the planned realignment of U.S. Marines from Okinawa, Japan to Guam, as well as other U.S. Department of War (DOW) force structure realignment in the Indo-Pacific region involving Guam and the CNMI stemming from then-Department of Defense Records of Decision occurring in 2010 and 2015.

Guam has a long-established U.S. military presence (including U.S. Air Force and U.S. Navy bases) that predates this military realignment, including ongoing activities that are not related to the military realignment, and therefore would not be covered by the NDAA.

While some military activity on Guam or in the CNMI that is not specifically related to the U.S. Marines may come under the military realignment, distinguishing U.S. military activity that is the realignment as compared to other military activity on Guam or in the CNMI may be complex for USCIS officers.

The distinction essentially requires a determination of general military function, and the broader strategic goal supported by a particular contract or subcontract is unlikely to be evident from the contract documents themselves. As such, input from the DOW is particularly important to support petitions claiming eligibility as supporting, associated with, or directly connected to the military realignment, as further described below.[14]

Furthermore, it is unlikely to be evident from the contract documents themselves how the military realignment negatively impacted a particular contract or subcontract. Therefore, input from the Guam Department of Labor (Guam DOL) describing the adverse effect is important, though not in itself determinative, to support petitions that claim that a contract or subcontract was negatively impacted, and that the adverse effect was due to the ongoing military realignment, as further described below.[15] In all cases, USCIS determines whether there is an adverse impact based on the totality of the facts and circumstances of the case, under the preponderance of the evidence standard.

Exemption for Contracts or Subcontracts Supporting, Associated with, or Directly Connected to the Military Realignment

The FY 2021 NDAA's addition of the term "supporting" to the terms "associated with" and "directly connected to" clarifies and emphasizes that the exemption may be granted with respect to agreements covering certain projects for construction, repairs, renovations, or facility services that do not have a specific contract or agreement with the military provided they support, are associated with, or are directly connected to the military realignment, as supported by documentation.

The FY 2021 NDAA's H-2B provision may apply, for example, to H-2B workers performing construction, repairs, renovations, or facility services or labor at a civilian parking garage, where evidence is presented that the garage was built near a U.S. military base specifically to accommodate increased parking demands related to military realignment projects, even though it is not likely directly connected to or associated with the military realignment. In such an instance, the performance of such services or labor may be considered to support the military realignment.

Conversely, a petitioner for labor or services performed at a civilian parking garage built to accommodate customers at local retail establishments may not be able to show a supporting relationship to the military realignment based solely on a claim that some of those retail customers could include military personnel. In this case, the claimed relationship between the labor or services and the military realignment could be considered merely incidental or tangential, even if there is a likelihood that some persons engaged in the military realignment project would, on a small island like Guam, use the parking garage on occasion.

Infrastructure improvements, such as utility or transportation systems, are likely to qualify for employment of H-2B workers under the NDAA exemption. In such cases, the petitioner must establish through presentation of facts and submission of supporting documentation that the contract or subcontract for such labor or services supports the military realignment on Guam or in the CNMI, given the small geographic areas of Guam and the CNMI and the inherent need for integrated utility and transportation system on the islands. This is the case even if the contract or subcontract for such improvements is not directly with the U.S. military.

Housing development projects are also likely to qualify for employment of H-2B workers under the NDAA exemption, given an inherent need for additional housing capacity to support the military realignment.[16]

Accordingly, a petitioner should obtain a letter from the DOW that provides the DOW's view regarding whether the contract or subcontract is supporting, directly connected to, or associated with the military realignment, as well as any other documentation the petitioner believes appropriate to support its claim.[17]

Exemption for Contracts or Subcontracts Adversely Affected by the Military Realignment

Contracts or subcontracts that are adversely affected by the military realignment might include, but are not limited to, projects for which the military realignment has caused a delay or cancellation of a contract or a negative impact on the availability of necessary labor or resources that are not based on assertions with no documentation to support the claim.

For projects occurring on Guam, a petitioner may obtain a letter from the Guam Department of Labor (Guam DOL)[18] that provides Guam DOL's description of the adverse effect and submit such letter together with any other documentation the petitioner believes will support its claim.[19]

There is significant evidence that the military realignment has had an impact on the availability of necessary construction labor on Guam.[20] If the petitioner submits the following evidence, USCIS would generally consider such evidence sufficient to demonstrate an adverse effect, by a preponderance of the evidence, in the absence of facts indicating otherwise:

- A signed letter from a Guam DOL official describing the adverse effect of the military realignment;[21] and
- A detailed explanation or other evidence that credibly demonstrates how unavailability of construction workers has resulted in:
  - The petitioner's contracts or subcontracts having been, or being likely to be, delayed, cancelled, or substantially scaled back; or
  - The petitioner's inability to pursue additional contracts.

On the other hand, if a petitioner generally asserts that its inability to find workers necessary to undertake its current contracts or fulfill new contracts relates to the military realignment and provides only its TLC with no independent supporting documentation (such as a statement from Guam DOL and a more detailed explanation of the adverse effect relevant to the petition), USCIS would not consider such assertion to be sufficient to demonstrate an adverse effect caused by the military realignment.

While an approved TLC is sufficient to show a general shortage of available and qualified U.S. workers on Guam or in the CNMI, it does not address the effect of the military realignment occurring on Guam and in the CNMI.

3. NDAA Exemption Eligibility for Health Care Workers

For health care workers, consistent with the FY 2021 NDAA, USCIS requires petitioners requesting the NDAA temporary need exemption to demonstrate that all services or labor to be performed by H-2B nonimmigrants on Guam or in the CNMI are:

- As a health care worker (such as a nurse, physician assistant, or allied health professional), but excluding graduates of medical schools coming to Guam or the CNMI to perform service or labor as members of the medical profession;[22] and
- At a facility that jointly serves members of the U.S. armed forces, dependents, and civilians on Guam or in the CNMI.

4. Documentation and Evidence

All petitioners that request their cases to be considered for eligibility under the NDAA H-2B temporary need exemption should submit a cover sheet indicating "NDAA Eligible" in large, bold letters along with their H-2B petition to facilitate efficient adjudication.

In addition, USCIS suggests petitioners submit the following documentation, if applicable.

If claiming eligibility directly connected to, supporting, or associated with the military realignment, petitioners should submit:

- A copy of any applicable agreement, contract, or subcontract for services or labor for construction, repairs, renovations, or facility services or other probative evidence that each requested H-2B position meets the requirement that the worker will perform services or labor on Guam or in the CNMI;[23]
- A signed statement from an official within the DOW (including a branch of the U.S. armed forces) providing the DOW view regarding whether the applicable agreement, contract, or subcontract is directly connected to, supporting, or associated with the military realignment. The DOW statement may also explain that the services or labor are performed under a federally funded agreement, if applicable. If this DOW statement is not provided, the petitioner should establish why it could not be obtained; and
- Any other relevant documentation demonstrating that services or labor will be performed under a federally funded agreement to support priority consideration of NDAA eligibility, if applicable, if that information is not included in the DOW statement.

If claiming eligibility due to an adverse effect related to the military realignment on Guam and in the CNMI, the petitioner should submit:

- A copy of any applicable agreement, contract, or subcontract for services or labor for construction, repairs, renovations, or facility services, as well as other probative evidence that each requested H-2B position meets the requirement that the worker will perform services or labor on Guam or in the CNMI;
- A detailed explanation, accompanied by any relevant supporting evidence, explaining how and why the project has been adversely affected by the military realignment;[24] and
- For services or labor on Guam, if a petitioner wishes to provide Guam DOL input on the adverse effect, a signed statement from an official with Guam DOL describing the adverse effect of the military realignment to the applicable agreement, contract, or subcontract.

If claiming eligibility directly connected to, supporting, or associated with, or due to an adverse effect related to, the military realignment, and the petition includes multiple agreements or otherwise applies to multiple projects, the petitioner must submit evidence demonstrating that all such agreements and projects are either directly connected to, supporting, associated with, or adversely affected by, the military realignment occurring on Guam or in the CNMI.

If claiming eligibility for healthcare workers, the petitioner should submit:

- A signed statement on company letterhead from a corporate officer or facility administrator having authority to speak on behalf of the company or facility providing its TRICARE or other applicable provider number and attesting to the fact that it jointly serves members of the U.S. armed forces, dependents, and civilians. The statement should, to the extent possible, also include the number of members of the U.S. armed forces, dependents, and civilians on Guam or in the CNMI that the petitioning facility has served in the preceding 12 months. USCIS uses this information to evaluate the use of the NDAA provision.

USCIS recognizes the limitations imposed upon health care facilities by patient confidentiality restrictions. Accordingly, USCIS does not expect and does not generally request that a petitioner submit facility records that would support that it is jointly serving members of the U.S. armed forces, dependents, and civilians on Guam or in the CNMI.

5. Adjudication

Petitioners bear the burden of establishing eligibility for the NDAA exemption.[25] USCIS officers determine whether the petitioner has met its burden of demonstrating eligibility under the NDAA based on the totality of the evidence. When applicable, officers should give appropriate weight to the signed statement from the DOW, particularly with respect to determining the

relationship between the services or labor and the military realignment, as opposed to other U.S. military activity. Similarly, when applicable, officers should review the contents of the signed letter from Guam DOL and give it appropriate weight. However, statements from the DOW and Guam DOL are not determinative. Again, the determination whether the NDAA exemption applies in a given case will be based on all of the facts presented, based on the preponderance of the evidence standard.

Under the FY 2021 NDAA, priority is given to contracts or subcontracts for services or labor for federally funded projects directly connected to, supporting, or associated with the military realignment on Guam and in the CNMI.[26]

Accordingly, a petition demonstrating that the applicable services or labor are performed under a federally funded agreement, contract, or subcontract has made a prima facie case that it qualifies for the NDAA exemption. This means that USCIS may accept, without any further evidence or inquiry, that the petitioner has established eligibility under the NDAA and is exempted from showing temporary need.

USCIS officers, however, still must determine whether the petition meets other H-2B requirements, such as an H-2B worker's eligibility for H-2B status, and in their discretion, may request additional evidence that the petition qualifies for the NDAA exemption.

If the USCIS officer determines that the case does not meet the NDAA exemption, then he or she should adjudicate the petition under existing H-2B policy and regulations, including the requirement that the petitioner establish temporary need.

For cases meeting the NDAA exemption regarding H-2B petitions for workers on Guam or in the CNMI, USCIS officers do not perform an analysis of whether the need for the H-2B position is temporary under otherwise applicable law and regulations.

USCIS officers, however, continue routine case processing, including reviewing whether the petition includes an approved TLC issued by the U.S. Department of Labor (DOL) or Guam DOL, as appropriate.[27] As provided by DHS regulations, DOL or Guam DOL may approve a TLC for a period of up to 1 year, with the possibility for extension, for H-2B employment on Guam or in the CNMI, respectively.[28]

6. Decision

If the officer determines that the petitioner has provided sufficient evidence to show that the beneficiary meets the applicable eligibility requirements, the officer should approve the petition. Otherwise, the officer should request additional evidence or deny the petition.[29] If USCIS denies a petition, the petitioner may appeal the decision to the USCIS Administrative Appeals Office.

Period of Admission for H-2B Workers on Guam or in the CNMI Under the NDAA

Before December 31, 2029,[30] an H-2B worker whose services or labor meets the NDAA exemption may be admitted for a consecutive period of up to 3 years, depending on the specific need stated in the H-2B petition.[31] Thereafter, the worker may again apply for admission under the NDAA exemption or as an H-2B worker in general after residing and being physically present outside the United States for the immediately preceding 3 months.[32]

Because the provisions of the NDAA end on December 30, 2029, petitions with employment start dates on or after December 31, 2029, are subject to adjudication under the law and regulations that apply to the H-2B program at that time.

B. Reserved

[Reserved]

Footnotes

[^ 1] The general statutory numerical limitations that apply to other H-2B workers are not applicable to special handling situations discussed in this section.

[^ 2] See Pub. L. 110-229 (PDF) (May 8, 2008).

[^ 3] See INA 214(g)(1)(B). See Section 702 of CNRA, Pub. L. 110-229 (PDF), 122 Stat. 754, 854 (May 8, 2008) (codified at 48 U.S.C. 1806(b)).

[^ 4] See Section 10 of the Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. 113-235 (PDF), 128 Stat. 2130, 2134 (December 16, 2014) (codified at 48 U.S.C. 1806(d)).

[^ 5] See Section 3 of the Northern Mariana Islands U.S. Workforce Act of 2018, Pub. L. 115-218 (PDF), 132 Stat. 1547, 1547 (July 24, 2018).

[^ 6] See Section 1049 of the FY 2018 NDAA, Pub. L. 115-91 (PDF), 131 Stat. 1283, 1558 (December 12, 2017) (amending 48 U.S.C. 1806(b)). To qualify for H-2B classification, the petitioner generally must establish its need for the prospective worker's services or labor is temporary, regardless of whether the underlying job can be described as temporary.

[^ 7] The FY 2019 NDAA took immediate effect on August 13, 2018, and made amendments to the H-2B workers provision as it relates to temporary need exemption eligibility for H-2B workers on Guam and in the CNMI, including in part: extending its effectiveness through December 30, 2023; eliminating a previous numerical limitation established by the FY 2018 NDAA by which not more than 4,000 H-2B workers could be admitted annually under the NDAA; and providing an initial expansion of the eligible services or labor on Guam or in the CNMI. See Section 1045 of the FY 2019 NDAA, Pub. L. 115-232 (PDF), 132 Stat. 1636, 1959 (August 13, 2018) (amending Section 6(b) of Pub. L. 94-241 (PDF)(March 24, 1976), as amended and codified at 48 U.S.C. 1806(b)).

[^ 8] See Section 1807 of the FY 2024 NDAA, Pub L. 118-31 (PDF), 137 Stat. 136, 688 (December 22, 2023) (amending Section 6(b)(1)(B) of Pub. L. 94-241 (PDF) (March 24, 1976), as amended and codified at 48 U.S.C. 1806(b)).

[^ 9] See Section 9502 of the FY 2021 NDAA, Pub. L. 116-283 (PDF) (January 1, 2021) (amending Section 6(b) of Pub. L. 94-241 (PDF) (March 24, 1976), as amended and codified at 48 U.S.C. 1806(b)).

[^ 10] The FY 2021 NDAA did not amend the exemption eligibility for health care workers, which was initially provided in the FY 2019 NDAA. Eligibility for the health care worker temporary need exemption does not extend to members of the medical profession, as outlined in the prohibition under INA 101(a)(15)(H)(ii)(b). USCIS interprets this prohibition to include physicians.

[^ 11] See Section 9502 of the FY 2021 NDAA, Pub. L. 116-283 (PDF) (January 1, 2021) (amending Section 6(b) of Pub. L. 94-241 (PDF) (March 24, 1976), as amended and codified at 48 U.S.C. 1806(b)). For more information about the priority given to services or labor performed under a contract or subcontract for federally funded military projects, see Subsection 4, Documentation and Evidence [2 USCIS-PM I.11(A)(4)] and Subsection 5, Adjudication [2 USCIS-PM I.11(A)(5)].

[^ 12] The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp. (PDF)*, 17 I&N Dec. 248 (Reg'l Comm'r 1978). See 8 CFR 103.2(b)(1).

[^ 13] See Section 9502 of the FY 2021 NDAA, Pub. L. 116-283 (PDF) (January 1, 2021) (amending Section 6(b) of Pub. L. 94-241 (PDF) (March 24, 1976), as amended and codified at 48 U.S.C. 1806(b)).

[^ 14] See Subsection 4, Documentation and Evidence [2 USCIS-PM I.11(A)(4)].

[^ 15] See Subsection 4, Documentation and Evidence [2 USCIS-PM I.11(A)(4)].

[^ 16] See Guam Construction Capacity Assessment - 2019 (PDF), prepared for the U.S. Department of the Navy (noting that the main workforce challenge in meeting anticipated construction industry growth is workforce housing.).

[^ 17] See Subsection 4, Documentation and Evidence [2 USCIS-PM I.11(A)(4)].

[^ 18] Guam DOL provides information for obtaining a Request for the DOW letter on directly connected, associated or supporting projects on its Alien Labor Processing and Certification Division webpage. Guam DOL intends to provide a similar process to request a letter describing the adverse effect of the military realignment to the applicable agreement, contract, or subcontract on its website.

[^ 19] See Subsection 4, Documentation and Evidence [2 USCIS-PM I.11(A)(4)].

[^ 20] See Guam DOL Bureau of Labor Statistics' Economic Outlook for Guam Fiscal Year 2022 (stating "[t]he effect of the ongoing Marine Corps Relocation projects on Guam's economy in FY 2022 will primarily be associated with substantial construction activity increases"). See Guam Construction Capacity Assessment - 2019 (PDF), prepared for the U.S. Department of the Navy (noting that DOW planned construction activities from 2018–2030 are expected to peak at $939M (in FY12 $s) in 2022 and that this report re-affirms that Guam lacks an adequate organic labor pool to support the construction effort.).

[^ 21] A letter from Guam DOL is only relevant for projects occurring on Guam, but the NDAA applies to services or labor on either Guam or in the CNMI. Petitioners may therefore submit other relevant documentation to establish, by a preponderance of the evidence, a claimed adverse effect on a project occurring in the CNMI.

[^ 22] USCIS interprets the NDAA limitation regarding the exclusion of graduates of medical schools coming to Guam or the Commonwealth to perform service or labor as members of the medical profession consistently with its long-standing interpretation of the general statutory limitation on the classification, to include physicians. See INA 101(a)(15)(H)(ii)(b) (explaining that this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession).

[^ 23] The contract or subcontract must be directly connected to, supporting, or associated with the military realignment occurring on Guam or in the CNMI. This must be under an agreement entered into by a prime contractor or subcontractor calling for services or labor required for performance of a contract or subcontract for construction, repairs, renovations, or facility services that is directly connected to, supporting, or associated with the military realignment occurring on Guam or in the CNMI. Contracts or subcontracts showing that the labor or services are performed under a federally funded agreement may qualify for priority treatment under the NDAA. For more information, see Subsection 2, NDAA Exemption Eligibility Involving Military Realignment [2 USCIS-PM I.11(A)(2)] and Subsection 5, Adjudication [2 USCIS-PM I.11(A)(5)].

[^ 24] An adverse effect may include, but is not limited to, a delay or cancellation of a contract or a negative impact on the availability of necessary labor or resources. Supporting documentation may include, but is not limited to, studies that specifically find the military realignment has had an adverse impact on availability of labor within the industry or occupation relevant to the petition, or evidence that workers have left the project to take work related to the military realignment.

[^ 25] See INA 291.

[^ 26] For eligibility information, see Subsection 2, NDAA Exemption Eligibility Involving Military Realignment [2 USCIS-PM I.11(A)(2)]. For information regarding documentation and evidence as it relates to the priority given to services or labor performed under a contract or subcontract for federally funded military projects, see Subsection 4, Documentation and Evidence [2 USCIS-PM I.11(A)(4)].

[^ 27] Routine case processing also includes adjudication of H-2B petitions filed on behalf of beneficiaries who are nationals of a country not listed on the H-2A or H-2B Eligible Countries List. See 8 CFR 214.2(h)(6)(i)(E)(2).

[^ 28] See 8 CFR 214.2(h)(6)(v).

[^ 29] For more information, see Chapter 9, Adjudication of Temporary Nonagricultural Worker (H-2B) Petitions [2 USCIS-PM I.9].

[^ 30] Because the NDAA exemption from the H-2B temporary need requirement expires on December 31, 2029, the last eligible requested employment start date is December 30, 2029.

[^ 31] Any single grant of a period of admission is limited to the validity period of the TLC, which may not exceed 1 year. If eligible, the worker may obtain extensions of stay for a total period of admission of up to 3 years.

[^ 32] See 8 CFR 214.2(h)(13)(iv).

Part J - Trainees (H-3)

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures.

See more

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures. We are working quickly to update and incorporate all of the AFM content into the USCIS Policy Manual, the agency's centralized online repository for immigration policies. Until then, we have moved any remaining AFM content to its corresponding Policy Manual Part. To the extent that a provision in the Policy Manual conflicts with remaining AFM content or Policy Memoranda, the updated information in the Policy Manual prevails. If you have questions or concerns about any discrepancies among these resources, contact PolicyFeedback@uscis.dhs.gov.

AFM Chapter 31 - Petitions for Temporary Workers (H Classifications) (External)

Chapter 1 - Purpose and Background

A. Purpose

The H-3 nonimmigrant visa category allows aliens to come temporarily to the United States as either a:

- Trainee who seeks to enter the United States at the invitation of an organization or person to receive training in any field of endeavor, other than graduate medical education or training;[1] or
- Special Education Exchange Visitor who seeks to participate in a structured special education exchange visitor training program that provides for practical training and experience in the education of children with physical, mental, or emotional disabilities.[2]

The H-3 nonimmigrant classification is not intended for productive employment. Rather, the H-3 program is designed to provide a person with job-related training that is not available in their country for work that will ultimately be performed outside the United States.

H-3 trainees generally cannot participate in training provided primarily at or by an academic or vocational institution.[3] However, so long as other H-3 requirements are met, training which happens to take place on the physical property of an academic or vocational institution may qualify if the training program is primarily created, offered, and sponsored by a government agency or other non-academic or non-vocational entity.

B. Background

The Immigration and Nationality Act (INA) of 1952 contained the precursor to today's H-3 nonimmigrant classification: "an alien having a residence in a foreign country which he has no intention of abandoning . . . who is coming temporarily to the United States as an industrial trainee[.]"[4]

In 1970, Congress expanded the class of aliens eligible for nonimmigrant classification by deleting the word "industrial" as a modifier of "trainee" in the statute.[5] However, Congress narrowed the H-3 classification in 1976 by inserting the following language into the statute: "other than to receive graduate medical education or training[.]"[6]

Finally, the Immigration Act of 1990[7] both limited and expanded the H-3 classification. Congress limited the H-3 nonimmigrant classification by adding the following language to the statute: "in a training program that is not designed primarily to provide productive employment[.]"[8] However, Congress indirectly expanded the classification by creating the Special Education Exchange Visitor Program,[9] which the legacy Immigration and Naturalization Service placed within the H-3 category.[10] Congress has not amended the statute since 1990.[11]

C. Legal Authorities

- INA 101(a)(15)(H)(iii) – H-3 definition
- 8 CFR 214.2(h)(1)(ii)(E) – H-3 definition
- 8 CFR 214.2(h)(7) – H-3 regulations
- 8 CFR 214.2(h)(8)(i)(D) – H-3 numerical limitations on special education exchange visitors
- 8 CFR 214.2(h)(9)(iii)(C) and 8 CFR 214.2(h)(9)(iv) – Validity of approved H-3 petitions and H-4 spouse and dependent(s)
- 8 CFR 214.2(h)(10) – Denial of petitions
- 8 CFR 214.2(h)(11) – Revocation of an approved H petition
- 8 CFR 214.2(h)(12) – Appeal of a denial or a revocation of a petition
- 8 CFR 214.2(h)(13) – Admission of H beneficiaries
- 8 CFR 214.2(h)(14) – Extension of H visa petition validity
- 8 CFR 214.2(h)(15)(ii)(D) – Extension of H-3 stay
- 8 CFR 214.2(h)(16)(ii) – Effect of approval of a permanent labor certification or filing of a preference petition on H classification
- 8 CFR 214.2(h)(17) – Effect of a strike

Footnotes

[^ 1] See INA 101(a)(15)(H)(iii). See 8 CFR 214.2(h)(7)(i).

[^ 2] See 8 CFR 214.2(h)(7)(iv).

[^ 3] See 8 CFR 214.2(h)(1)(ii)(E)(1).

[^ 4] See Section 101(a)(15)(H)(iii) of the INA, Pub. L. 82-414 (PDF), 66 Stat. 163, 168 (June 27, 1952).

[^ 5] See INA of April 7, 1970, Pub. L. 91-225, 84 Stat. 116, amending INA 101(a)(15)(H)(iii).

[^ 6] See Section 601(b)(3) of the Health Professions Educational Assistance Act of 1976, Pub. L. 94-484 (PDF), 90 Stat. 2243, 2301 (October 12, 1976).

[^ 7] See Immigration Act of 1990 (IMMACT 90), Pub. L. 101-649 (PDF), 104 Stat. 4978 (November 29, 1990).

[^ 8] See IMMACT 90, Pub. L. 101-649 (PDF), 104 Stat. 5022 (November 29, 1990).

[^ 9] See IMMACT 90, Pub. L. 101-649 (PDF), 104 Stat. 5028 (November 29, 1990).

[^ 10] See 56 FR 31553, 31554 (PDF) (Jul. 11, 1991) (proposed rule). See 56 FR 61111, 61119-61120 (PDF) (Dec. 2, 1991) (final rule).

[^ 11] See INA 101(a)(15)(H)(iii).

Chapter 2 - H-3 Categories

A. Trainees[1]

H-3 trainees are aliens who have been invited to participate in a training program in the United States by a person, a business, or an organization. The training must be unavailable in the person's home country. There are no numerical limits on the number of people who can be granted H-3 visas as trainees each year.

An H-3 trainee cannot engage in productive employment in the United States unless such work is incidental and necessary to the training and must not be placed in a position which is in the petitioning entity's normal operation and in which citizens and resident workers are regularly employed. Finally, the training must benefit the person pursuing a career outside the United States.

An H-3 trainee must be invited by a person or organization for the purpose of receiving training (except as a physician), in any field including:

- A purely industrial establishment
- Agriculture
- Commerce
- Communications
- Finance
- Government
- Transportation
- Other professions[2]

1. Externs[3]

A hospital approved by the American Medical Association (AMA) or the American Osteopathic Association (AOA) for either an internship or residency program may petition to classify a medical student attending a medical school abroad as an H-3 trainee if the student's training will be done as an extern during his or her medical school vacation. The hospital must also satisfy the H-3 trainee petition requirements.

2. Nurses[4]

A petitioner may seek H-3 classification for a nurse if:

- The nurse-beneficiary does not have H-1 status;
- Such training is designed to benefit both the nurse-beneficiary and the overseas employer upon the nurse's return to his or her country of origin; and
- The petitioner establishes that there is a genuine need for the nurse-beneficiary to receive a brief period of training that is unavailable in his or her native country.

Additionally, the petitioner must:[5]

- Satisfy the H-3 trainee requirements;
- Establish that the nurse-beneficiary has a full and unrestricted license to practice professional nursing in the country where the beneficiary obtained a nursing education[6] or that such education was obtained in the United States or Canada;[7] and
- Include a statement certifying that the nurse-beneficiary is fully qualified under the laws governing the place where the training will be received and that under those laws the petitioner is authorized to give the beneficiary the desired training.[8]

B. Special Education Exchange Visitors[9]

H-3 special education exchange visitors are participants in a structured special education program that provides practical training and experience in the education of physically, mentally, or emotionally disabled children. This category is limited to an 18-month period of stay and to 50 visas per fiscal year.[10]

Footnotes

[^ 1] The H-3 nonimmigrant classification is defined in INA 101(a)(15)(H)(iii) as, "an alien having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designated primarily to provide productive employment … " The regulations impose additional requirements on the extern and nurse subcategories that do not apply to the general trainee category. See 8 CFR 214.2(h)(7)(i).

[^ 2] See 8 CFR 214.2(h)(7).

[^ 3] See 8 CFR 214.2(h)(7)(i)(A).

[^ 4] See 8 CFR 214.2(h)(7)(i)(B).

[^ 5] See 8 CFR 214.2(h)(7)(i)(B)(1).

[^ 6] See 8 CFR 214.2(h)(7)(i)(B)(1).

[^ 7] See 8 CFR 214.2(h)(7)(i)(B)(1).

[^ 8] See 8 CFR 214.2(h)(7)(i)(B)(2).

[^ 9] See 8 CFR 214.2(h)(7)(iv).

[^ 10] See Section 223 of the Immigration Act of 1990 (IMMACT 90), Pub. L. 101-649 (PDF), 104 Stat. 4978, 5028 (November 29, 1990). See 8 CFR 214.2(h)(7)(iv) and 8 CFR 214.2(h)(8)(D). See 55 FR 2606, 2628 (PDF) (Jan. 26, 1990).

Chapter 3 - Trainee Program Requirements

A. Training Program Conditions

An H-3 petitioner is required to submit evidence demonstrating that:[1]

- The proposed training is not available in the trainee's own country;
- The trainee will not be placed in a position that is in the normal operation of the business and in which United States citizen and resident workers are regularly employed;
- The trainee will not engage in productive employment unless it is incidental and necessary to the training; and
- The training will benefit the trainee in pursuing a career outside the United States.[2]

B. Training Program Description

Each petition for a trainee must include a statement which:[3]

- Describes the type of training and supervision to be given, and the structure of the training program;
- Sets forth the proportion of time that will be devoted to productive employment;
- Shows the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training;
- Describes the career abroad for which the training will prepare the nonimmigrant;
- Indicates the reasons why such training cannot be obtained in the trainee's country and why it is necessary for the person to be trained in the United States; and
- Indicates the source of any remuneration received by the trainee and any benefit which will accrue to the petitioner for providing the training.[4]

C. Training Program Restrictions

A training program for a trainee may not be approved if it: [5]

- Deals in generalities with no fixed schedule, objectives, or means of evaluation;
- Is incompatible with the nature of the petitioner's business or enterprise;
- Is on behalf of a trainee who already possesses substantial training and expertise in the proposed field of training;[6]
- Is in a field in which it is unlikely that the knowledge or skill will be used outside the United States;
- Will result in productive employment beyond that which is incidental and necessary to the training;
- Is designed to recruit and train nonimmigrants for the ultimate staffing of domestic operations in the United States;
- Does not establish that the petitioner has the physical plant and sufficiently trained workforce to provide the training specified; or
- Is designed to extend the total allowable period of practical training previously authorized a nonimmigrant student.[7]

D. Filing

The petitioner files the H-3 petition on the Petition for a Nonimmigrant Worker (Form I-129). Up to 25 named trainees may be requested on a single petition if the trainees will be receiving the same training for the same period of time and in the same location.[8]

Officers will review each piece of evidence for relevance, probative value, and credibility to determine whether the petitioner submitted sufficient evidence establishing that the petition is approvable.[9] The table below serves as a quick, non-exhaustive reference guide listing the forms and evidence required when filing a petition for an H-3 trainee.

Trainee (H-3) Petition Forms and Documentation
Petition for a Nonimmigrant Worker (Form I-129), Including H supplement
If the beneficiary is outside the United States, a copy of his or her passport
Application To Extend/Change Nonimmigrant Status (Form I-539) for dependents of an H-3 who are also in the U.S. dependents should fill out and sign this form, not the petitioner for the H-3 beneficiary (one Form I-539 and fee covers all dependents)
Copies of each dependent's I-94 or other proof of lawful immigration status and proof of the family relationship with the primary H-3 beneficiary (such as marriage and birth certificates)
Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28) (if applicable)
All Trainees Except Special Education Exchange Visitors Must Provide:
A detailed written statement from the petitioner containing: • The overall schedule, including the type of training and supervision; • The structure of the training program; • The number of hours per week which will involve productive employment, if any; • The number of hours per week in classroom study; • The number of hours per week in on-the-job training; • What skills the beneficiary will acquire (and how these skills relate to pursuing a career abroad); and • The source of any remuneration.
Evidence that the beneficiary will not be placed in a position which, in the normal operation of the business, U.S. citizen and resident workers are regularly employed.
Proof that the petitioner has the physical facility and sufficiently trained staff to provide the training described in the petition.
An explanation from the petitioner regarding benefits it will obtain by providing the training, including why it is willing to incur the cost of the training.
An explanation as to why the training must take place in the United States, instead of in the beneficiary's country along with evidence that similar training is not available in beneficiary's home country.
A summary of the beneficiary's prior relevant training and experience, such as diplomas and letters from past employers.
If the beneficiary is a nonimmigrant student, evidence that the proposed training was not designed to extend the total allowable period of practical training.
Petitioners seeking H-3 status for a nurse must also provide proof:

Trainee (H-3) Petition Forms and Documentation
• That the beneficiary has a full and unrestricted nursing license to work in the country where his or her nursing education was obtained, or • That the education took place in the United States or Canada. In addition, petitioners seeking H-3 status for a nurse must also include a statement certifying: • That the beneficiary is qualified under the laws governing the place where the training will be received; • That under those laws the petitioner is authorized to provide the training; • That there is a genuine need for the nurse to receive the training; • That the training is designed to benefit the beneficiary upon returning to his or her country of origin; and • That the training is designed to benefit the beneficiary's overseas employer.
Hospitals petitioning for externs must also: • Provide proof that the hospital has been approved by the American Medical Association (AMA) or the American Osteopathic Association (AOA) for either an internship or residence program, and • Provide proof that the extern is currently attending medical school abroad.
If Requesting Premium Processing:
Request for Premium Processing Service (Form I-907) (see USCIS website for current fees)

Footnotes

[^ 1] See 8 CFR 214.2(h)(7)(ii)(A).

[^ 2] H-3 beneficiaries must also establish that they intend to return to their foreign residence upon the termination of their H-3 status. See INA 214(b) and INA 101(a)(15)(H)(iii).

[^ 3] See 8 CFR 214.2(h)(7)(ii)(B). See 55 FR 2628-29 (PDF) (Jan. 26, 1990).

[^ 4] See 8 CFR 214.2(h)(7)(ii)(B).

[^ 5] See 8 CFR 214.2(h)(7)(iii). Additionally, externs and nurses have further requirements. A hospital petitioning for an H-3 extern must also demonstrate that: It has been approved by either the American Medical Association (AMA) or the American Osteopathic Association (AOA) for either an internship or residency program; the beneficiary is currently attending medical school abroad; and that the beneficiary will engage in employment as an extern for the petitioner during his or her medical school vacation. See 8 CFR 214.2(h)(7)(i)(A). A petitioner seeking H-3 classification for a nurse must also provide a statement certifying that the beneficiary is fully qualified under the laws governing the place where the training will be received to engage in such training, and that under those laws the petitioner is authorized to give the beneficiary the desired training. See 8 CFR 214.2(h)(7)(i).

[^ 6] A trainee may already be a professional in his or her own right and possess substantial knowledge in a field; however, such person may be using a training to further his or her skills or career through company-specific training that is only available in the United States. As always, the totality of the evidence must be examined and all other requirements must be met.

[^ 7] For additional information about the training program and factors to consider during adjudications, see Chapter 6, Factors to Consider [2 USCIS-PM J.6(B)].

[^ 8] See 8 CFR 214.2(h)(2)(ii).

[^ 9] The standard of proof applied in most USCIS adjudications, including H-3 petitions, and administrative immigration proceedings is the "preponderance of the evidence" standard. Therefore, if the petitioner submits relevant, probative, and credible evidence that leads USCIS to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. See *INS v. Cardoza-Fonesca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the officer can articulate a material doubt, it is appropriate for the officer to either request additional evidence or, if that doubt leads the officer to believe that the claim is probably not true, deny the application or petition. See *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M*, 20 I&N Dec. 77, 79-80 (Comm. 1989)).

Chapter 4 - Special Education Exchange Visitor Program Requirements

There are requirements for H-3 petitions involving special education exchange visitors that are distinct from H-3 trainees. [1] An H-3 beneficiary in a special education training program must be coming to the United States to participate in a structured program which provides for practical training and experience in the education of children with physical, mental, or emotional disabilities. No more than 50 visas may be approved in a fiscal year, [2] and participants may remain in the United States for no more than 18 months. [3]

The petition must be filed by a facility which has: a professionally trained staff; and a structured program for providing:

- Education to children with disabilities; and
- Training and hands-on experience to participants in the special education exchange visitor program. [4]

The petition should include a description of:

- The training the applicant will receive;
- The facility's professional staff; and
- The beneficiary's participation in the training program. [5]

In addition, the petition must show that the special education exchange visitor:

- Is nearing the completion of a baccalaureate or higher degree program in special education;
- Has already earned a baccalaureate or higher degree in special education; or
- Has extensive prior training and experience teaching children with physical, mental, or emotional disabilities. [6]

Any custodial care of children must be incidental to the beneficiary's training.

Officers review each piece of evidence for relevance, probative value, and credibility to determine whether the petitioner submitted sufficient evidence establishing that the petition is approvable. [7] The table below serves as a quick, non-exhaustive, reference guide listing the forms and evidence required when filing a petition for an H-3 special education exchange visitor.

Special Education Exchange Visitor H-3 Petition Forms and Documentation
If Requesting Premium Processing:
Petition for a Nonimmigrant Worker (Form I-129), Including H supplement
If the beneficiary is in the United States, a copy of the I-94 or other proof of current lawful, unexpired immigration status (Note that Canadians who enter as a B-1 or a B-2 will not typically have an I-94)
Filing fee; see USCIS' website for current fees
Application To Extend/Change Nonimmigrant Status (Form I-539) for dependents of an H-3 who are also in the U.S. dependents should fill out and sign this form, not the petitioner for the H-3 beneficiary (one Form I-539 and fee covers all dependents)
Copies of each dependent's I-94 or other proof of lawful immigration status and proof of the family relationship with the primary H-3 beneficiary (such as marriage and birth certificates)
Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28) (if applicable)
A copy of his or her passport, if the beneficiary is outside the United States
A description of the structured training program for providing education to children with disabilities and for providing hands-on experience to participants in the special education program, including noting the professionally trained staff, facilities, and how the exchange visitor will participate in the program
Evidence that any custodial care of children will be incidental to the training program
Evidence that participant has nearly completed a baccalaureate or higher degree in special education, already has a baccalaureate degree or higher degree in special education, or has extensive prior training and experience in teaching children with disabilities
Request for Premium Processing Service (Form I-907) (see USCIS' website for current fees)

Footnotes

[^ 1] Requirements for trainee petitions are not applicable to petitions for special education exchange visitors. See 8 CFR 214.2(h)(7)(ii) and 8 CFR 214.2(h)(7)(iii). See 8 CFR 214.2(h)(7)(iv)(A)(3).

[^ 2] See 8 CFR 214.2(h)(8)(i)(D).

[^ 3] See 8 CFR 214.2(h)(13)(iv).

[^ 4] See 8 CFR 214.2(h)(7)(iv)(A)(2).

[^ 5] See 8 CFR 214.2(h)(7)(iv)(B)(1).

[^ 6] See 8 CFR 214.2(h)(7)(iv)(B)(2).

[^ 7] The standard of proof applied in most USCIS adjudications, including H-3 petitions, and administrative immigration proceedings is the "preponderance of the evidence" standard.

Chapter 5 - Family Members of H-3 Beneficiaries

An H-3 nonimmigrant's spouse and unmarried minor children may accompany the H-3 nonimmigrant to the United States as H-4 nonimmigrants. H-4 dependents of H-3 nonimmigrants are not permitted to work in the United States. [1]

Footnote

[^ 1] See 8 CFR 214.2(h)(9)(iv).

Chapter 6 - Adjudication

A. Adjudicative Issues

Officers must carefully review each petition for an H-3 trainee to ensure compliance with the intent of the H-3 category to train those who will return to their home countries. Unless specifically provided otherwise, officers should apply a "preponderance of the evidence" standard when evaluating eligibility for the benefit sought.[1] The burden of proving eligibility for the benefit sought rests entirely with the petitioner.[2]

B. Factors to Consider

1. Career Abroad

The description of the training program should include a specific explanation of the position and duties for which the training will prepare the trainee.[3] The trainee must demonstrate that the proposed training will prepare the beneficiary for an existing career outside the United States.

Trainings can be to prepare the trainee for something that is new and unavailable anywhere in the trainee's country. For instance, a trainee may already be a professional in his or her own right and possess knowledge in the field of proposed training, but will be using the training to further his or her skills or career through company-specific training that a corporate organization makes available in the United States. This could include cases of mid-level and senior-level employees who possess knowledge in their field, but seek to further develop their skills in the proposed field of training.[4] As always, the totality of the evidence is evaluated for each case and all other requirements must be met.[5]

Example: A U.S. company develops a new product for which training is unavailable in another country. The U.S. company may petition to train people to use that product, which will enable the trainees to train others to use the new product in their home country.

2. Instruction

Classroom-based Instruction

In cases where the program is entirely classroom-based, officers should review the evidence to ensure that the petitioner establishes by a preponderance of the evidence that the training cannot be made available in the beneficiary's home country.[6]

If a petitioner claims that the classroom training portion of their proposed training programs will take place online, the petition must provide an explanation as to why the training cannot take place in the beneficiary's own country. Officers should also investigate whether the online training would be provided by an academic or vocational institution.[7]

Online Instruction

In cases where the program is entirely online, officers must review each case and ensure that the petitioner has met their burden of proof (preponderance of the evidence) demonstrating that the training cannot be made available in the beneficiary's home country.[8]

3. Description of the Training Program

The petitioner must specify the type of training, the level of supervision, and the structure of the training program.[9] The petitioner should provide the officer with sufficient information to establish what the beneficiary will actually be doing, and should link the various tasks to specific skills that the beneficiary will gain by performing them.

On-The-Job Training Hours

The petitioner must specify the number of hours both supervised and unsupervised.[10] The unsupervised work should be minimal and the supervised work should always be oriented toward training.

Shadowing

There are limited circumstances where a proposed training program that consists largely or entirely of on-the-job training may be approved. Officers should carefully evaluate the totality of the evidence against a preponderance of the evidence standard, including whether a U.S. worker is being displaced and if the on-the-job training would allow the trainee to be placed into a position which is in the normal operation of the business and in which U.S. citizens and legal residents are regularly employed.[11]

4. Remuneration

The petitioner must indicate the source of remuneration received by the trainee, and explain any training program benefits accrued by the petitioning company.[12] Remuneration may come from any source, domestic or international. When assessing remuneration, the officer may consider whether the salary is in proportion to the training position.[13]

5. Placement into Normal Operation of Business[14]

Officers should consider whether the beneficiary will be placed in a position which is in the normal operations of the business, and U.S. citizens and residents are regularly employed. Factors to consider include:

- Whether training that familiarizes the beneficiary with the individual operations of the petitioning company is similar to the training that would be expected of any new employee,
- Indications that the beneficiary may remain in the United States working with the petitioner, and
- Training where the beneficiary is trained alongside U.S. workers.[15]

6. Practical Training

Petitioners frequently assert that beneficiaries will spend a certain amount of time in "practical training." This assertion needs to be supported with a clear explanation of the type and degree of supervision that the beneficiary will receive during such periods.[16] If the officer determines that the "practical training" would actually be productive employment, then the petitioner must establish that it would be incidental to and necessary to the training.[17]

7. Productive Employment

The proportion of time that will be devoted to productive employment must be specified.[18] Productive employment should be minimal because the beneficiary should be training and not performing productive work that displaces U.S. citizens or legal residents.[19] A training program which devotes a significant percentage of time to productive employment should be closely scrutinized.[20]

8. Substantial Training and Expertise in Field of Training

In order to establish that the beneficiary does not already possess substantial training and expertise in the proposed field of training,[21] the petitioner should submit as much information regarding the beneficiary's credentials as possible. If related to the proposed H-3 training program, copies of the beneficiary's diplomas and transcripts should be submitted, including any training and education received in the United States, copies of any relevant forms (for example, Certificate of Eligibility for Nonimmigrant (F-1) Student Status-For Academic and Language Students (Form I-20), Certificate of Eligibility for Exchange Visitor (J-1) Status(Form DS-2019)). If possible, letters from prior employers detailing the beneficiary's work experience should also be submitted.

9. Sufficiently Trained Staff

In order to establish that it has sufficiently trained staff to provide the training specified in the petition,[22] the petitioner should provide the names and credentials of the persons who will provide the training. The petitioner should specify the amount of time each trainer will spend training the beneficiary. The petitioner should also explain how the trainers' normal responsibilities will be performed while they are training the beneficiary (this is especially important in cases involving relatively small entities, as larger percentages of their workforces will presumably be diverted in order to provide the training).[23]

10. Unavailability of the Training in Beneficiary's Country

The petitioner must establish that the trainee cannot obtain the training in his or her country and demonstrate why it is necessary for the trainee to be trained in the United States.[24]

C. Approvals

If all documentary requirements have been met and the petition appears approvable, officers should endorse the action block on the petition. The approval period should coincide with the period of training requested by the petitioner, but only up to 2 years for trainees and up to 18 months for special education training program participants.[25]

When approving a special education training program participant, officers need to enter H-3B in CLAIMS and annotate H-3B on the petition. Because of the numerical limitations applicable to the H-3 Special Education Exchange Visitor category, officers must contact the USCIS Service Center Operations office to obtain authorization before approving an H-3 Special Education Exchange Visitor petition. The number assigned should be recorded on the front of the petition in the "Remarks" section. The approved petition should also be annotated "Approved Pursuant to Sec. 223 of Pub. L. 101-649."

D. Denials

If documentary requirements have not been met and the petition is not approvable, officers should prepare and issue a notice of denial and advise the petitioner of the right of appeal to the Administrative Appeals Office.

E. Transmittal of Petitions

USCIS sends all approved petitions to the Kentucky Consular Center (KCC). The KCC scans and uploads the documentation into the Consular Consolidated Database (CCD).[26] Consular officers and Customs and Border Protection officers have access to the CCD to verify and review documents.

Footnotes

[^ 1] See *INS v. Cardoza-Fonseca (PDF)*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). See *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M*, 20 I&N Dec. 77, 79-80 (Comm. 1989)).

[^ 2] See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

[^ 3] Generalized assertions that the proposed training will expand the trainee's skill set or make him or her more desirable to prospective employers are usually not sufficient to demonstrate the proposed training will prepare the beneficiary for an existing career abroad. See 8 CFR 214.2(h)(7)(iii).

[^ 4] Even if a new employee or current employee possesses knowledge in the proposed field of training, he or she could be considered a trainee if the company or organization decides he or she needs the training, so long as all other requirements are met (for example, so long as beneficiary does not possess substantial training and expertise in the proposed field of training).

[^ 5] Although 8 CFR 214.2(h)(7)(iii)(C) states that a training program may not be approved if it is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training, this provision does not automatically prohibit professionals from participating in a training program. It remains the petitioner's burden to demonstrate by a preponderance of the evidence that the training program is approvable.

[^ 6] See 8 CFR 214.2(h)(7)(ii)(A)(1).

[^ 7] See 8 CFR 214.2(h)(1)(ii)(E)(1).

[^ 8] If the petitioner does not meet the burden of demonstrating that the online training cannot be made available in the beneficiary's home country, officers may consider issuing a Request for Evidence (RFE).

[^ 9] See 8 CFR 214.2(h)(7)(ii)(B)(1). See *Matter of Miyazaki Travel Agency, Inc.*, 10 I&N Dec. 644 (Reg. Comm. 1964) (denying petition for a trainee where the training program was deemed "unrealistic"). See *Matter of Masauyama*, 11 I&N Dec. 157 (Reg. Comm. 1965) (noting that the statute contemplates the training of an person rather than giving him further experience by day-to-day application of his skills).

[^ 10] See 8 CFR 214.2(h)(7)(ii)(B)(3). See *Matter of Frigon*, 18 I&N Dec. 164, 166 (court noting that the number of hours devoted to on-the-job training without supervision is one of the factors to be considered).

[^ 11] See *Matter of St. Pierre*, 18 I&N Dec. 308 (Reg. Comm. 1982) (holding that even though training will consist primarily of on-the-job training, the subject matter by its very nature can only be learned in that setting and since the beneficiary will not receive any payment from the petitioner, and will merely be observing field tests and not actively conducting them, he will not be engaging in productive employment which would displace a resident worker).

[^ 12] See 8 CFR 214.2(h)(7)(ii)(B)(6). See *Matter of International Transportation Company*, 12 I&N Dec. 389 (Reg. Comm. 1967) (even though training will be 75% on-the-job training, any "productive gain" received by the company from such work will be "offset by the time spent by employees in the training of the beneficiary").

[^ 13] See *Matter of Kraus Periodicals, Inc.*, 11 I&N Dec. 63 (Reg. Comm. 1964) (H-3 petition was denied where the petitioner failed to set forth a training program, the specific position, duties, or skills in which the beneficiary is to be trained, and where the substantial salary the beneficiary would have received suggested that the training position was productive employment which may displace a U.S. citizen). See 8 CFR 214.2(h)(7)(ii)(B)(6).

[^ 14] See 8 CFR 214.2(h)(7)(ii)(A)(3) and 8 CFR 214.2(h)(7)(iii)(F).

[^ 15] See *Matter of Glencoe Press*, 11 I&N Dec. 764, 766 (Reg. Comm. 1966).

[^ 16] See 8 CFR 214.2(h)(7)(ii)(B)(1) and 8 CFR 214.2(h)(7)(ii)(B)(2).

[^ 17] See 8 CFR 214.2(h)(7)(ii)(A)(3) and 8 CFR 214.2(h)(7)(iii)(E).

[^ 18] If the job description and the proffered wage seem suspect, the officer may request more specific information from the petitioner as described in 8 CFR 214.2(h)(7)(ii)(B).

[^ 19] See 8 CFR 214.2(h)(7)(ii)(B)(2) and 8 CFR 214.2(h)(7)(iii)(E).

[^ 20] The regulations prohibit the approval of a petition involving a training program that will result in productive employment beyond that which is incidental and necessary to the training. See 8 CFR 214.2(h)(7)(iii)(E). Further, a significant percentage of time devoted to productive employment indicates that the beneficiary may be placed in a position which is in the normal operation of the business and in which U.S. workers are regularly employed. See 8 CFR 214.2(h)(7)(ii)(A)(3), 8 CFR 214.2(h)(7)(iii)(E), and 8 CFR 214.2(h)(7)(ii)(F). See *Matter of Miyazaki Travel Agency, Inc.*, 11 I&N Dec. 424, 425 (Reg. Comm. 1964) ("An industrial trainee shall not be permitted to engage in productive employment if such employment will displace a United States resident"). See *Matter of Sasano*, 11 I&N Dec. 363, 364 (Reg. Comm. 1965) ("[I]t is concluded [that] the beneficiary would be involved in full-time productive employment and that any training received would be incidental thereto"). See *Matter of St. Pierre*, 18 I&N Dec. 308, 310 (Reg. Comm. 1982) ("The petitioner has established that the beneficiary will not be engaged in productive employment that might displace a resident worker").

[^ 21] See 8 CFR 214.2(h)(7)(iii)(C). See *Matter of Masauyama*, 11 I&N Dec. 157, 158 (Reg. Comm. 1965) ("It is conceded that practical day-to-day experience will increase proficiency in any line of endeavor. However, the statute involved here is one that contemplates the training of a person rather than giving him further experience by day-to-day application of his skills"). See *Matter of Koyama*, 11 I&N Dec. 424, 425 (Reg. Comm. 1965) ("While it is conceded that practical experience will increase a person's efficiency in any line of endeavor, the intent of the statute involved here is to train rather than to gain experience").

[^ 22] See 8 CFR 214.2(h)(7)(iii)(G).

[^ 23] There are, of course, situations where allocation of a significant percentage of the company's resources to train a single person would be reasonable and credible. As noted above, the regulation at 8 CFR 214.2(h)(7)(ii)(B)(6) requires the petitioner to describe "any benefit that will accrue to [it] for providing the training."

[^ 24] See 8 CFR 214.2(h)(7)(ii)(B)(5). See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972) (rejecting petitioner's argument that he only needs to go on record as stating that training is not available outside the United States).

[^ 25] See 8 CFR 214.2(h)(9)(iii)(C) and 8 CFR 214.2(h)(13)(v).

[^ 26] See 9 FAM 402.10-9(A), Evidence Forming Basis for H Visa Issuance.

Chapter 7 - Admissions, Extensions of Stay, and Change of Status

A. Admissions

H-3 trainees and externs should be admitted for the length of the training program, but for no longer than 2 years.[1] H-3 visa special education exchange visitors should be admitted for the length of the training program, but for no longer than 18 months.

H-3 trainees and special education exchange visitors who respectively, have spent 2 years or 18 months in the United States, in either H-visa or L-visa classifications may not seek extension of, change of status to, or be readmitted in, either H-visa or L-visa status unless they have resided outside the United States for the previous six months.[2]

There are limited exceptions to this rule. For example, the limitation does not apply to an H-3 nonimmigrant whose H or L status was seasonal, intermittent, or lasted for an aggregate of 6 months or less per year.[3]

Additionally, time spent as an H-4 dependent does not count against the maximum allowable periods of stay available to principals in H-3 status (or vice-versa). Thus, a person who was previously granted H-4 dependent status and subsequently is granted H-3 classification, or a person who was previously granted H-3 classification and subsequently is granted H-4 dependent status, may be eligible to remain in the United States for the maximum period of stay applicable to the classification.

For example, a husband and wife who come to the United States as a principal H-3 and dependent H-4 spouse may maintain status for one year, and then change status to H-4 and H-3 respectively, as long as the change of status application is properly filed before the principal H-3 has spent the maximum allowable period of stay in the United States.[4]

B. Extensions of Stay

H-3 trainees and externs can only extend their stay if their original stay was less than 2 years, and the total period of stay, together with the extension period, does not exceed 2 years. H-3 special education exchange visitors can extend their stay in the United States only if their total period of stay does not exceed 18 months.[5]

To file for an extension, the petitioner must file another Petition for a Nonimmigrant Worker (Form I-129) and H Classification Supplement to Form I-129, fully documented in the same manner as the first petition, and also include:

- A letter from the petitioner requesting an extension of status for the trainee, with an explanation of why the training has not yet been completed;
- A copy of the beneficiary's Arrival/Departure Record (Form I-94); and
- A copy of the beneficiary's first Notice of Action (Form I-797).

If the H-3 beneficiary has a dependent (a spouse, or unmarried child under the age of 21) in the United States, those dependents will need to submit an Application To Extend/Change Nonimmigrant Status (Form I-539).

C. Change of Status

Certain categories of nonimmigrants are eligible to change status to that of an H-3 nonimmigrant, including certain students and other temporary visa holders.[6] Such change of status requests must establish that:

- The beneficiaries entered the United States legally;
- The beneficiaries have never worked in the United States illegally, or otherwise violated the terms of their visa; and
- The expiration date on the beneficiary's I-94 has not passed.[7]

Footnotes

[^ 1] See 8 CFR 214.2(h)(9)(iii)(C)(1).

[^ 2] See 8 CFR 214.2(h)(13)(iv).

[^ 3] See 8 CFR 214.2(h)(13)(v).

[^ 4] Maintenance of H-4 status continues to be tied to the principal's maintenance of H status. Thus, H-4 dependents may only maintain such status as long as the principal maintains the relevant principal H status.

[^ 5] See 8 CFR 214.2(h)(15)(ii)(D).

[^ 6] Certain categories generally cannot change status if they are in the United States, including nonimmigrants who entered the United States with the following visas: C, Travel without a Visa, D, K-1 or K-2, J-1, or M-1. Other nonimmigrants, such as B-1 and B-2, may change status to H-3.

[^ 7] See 8 CFR 248.1(b) for information on timely filing and maintenance of status, and circumstances when failure to file timely may be excused in the discretion of USCIS.

Part K - Media Representatives (I)

Chapter 1 - Purpose and Background

A. Purpose

The foreign information media representative nonimmigrant visa classification, commonly known as the "I" visa category, is intended to be used by representatives of the foreign media, including members of the following industries:

- Press;
- Radio;
- Film; and
- Print.

In addition, certain employees of independent production companies may also be eligible for a foreign information media representative visa classification under certain conditions.

B. Background

The foreign information media representative visa classification was created by the Immigration and Nationality Act (INA) of 1952[1] in order to facilitate the exchange of information among nations. Foreign information media representatives do not require a visa petition approved by USCIS. Consular officers with the U.S. Department of State primarily adjudicate benefit requests for foreign information media representatives during the nonimmigrant visa application process. USCIS generally only receives a request for this visa classification when a nonimmigrant applies for a change of status or an extension of stay as a foreign information media representative.

C. Legal Authorities

- INA 101(a)(15)(I) – Representatives of foreign media
- 8 CFR 214.2(i) – Representatives of information media

Footnote

[^ 1] See Pub. L. 82-414 (PDF), 66 Stat. 163, 168-169 (June 27, 1952).

Chapter 2 - Eligibility

A foreign media representative is an alien who:

- Is a bona fide representative of the foreign press, radio, film, or other foreign information media;
- Has a home office in a foreign country whose government grants reciprocity for similar privileges to representatives with home offices in the United States; and
- Seeks to enter or remain in the United States solely to engage in such a vocation.[1]

Aliens who meet the above definition may be eligible for classification as a foreign information media representative. Foreign information media representative nonimmigrants are admitted for the duration of their employment with the same foreign media organization in the same information medium. Foreign information media representatives must obtain authorization from USCIS to change employers or work in a different medium.[2]

Independent Production Companies[3]

Employees of independent production companies may also be eligible for foreign information media representative nonimmigrant status if, in addition to the above:

- The employee holds a credential issued by a professional journalistic association;
- The film or video footage produced will be used by a foreign-based television station or other media to disseminate information or news to a foreign audience; and
- The film or video footage will not be used primarily for a commercial entertainment or advertising purpose.

Footnotes

[^ 1] See 9 FAM 402.11, Information Media Representatives - I Visas. See Department of State's website, indicating that "[a]ctivities in the United States must be informational in nature and generally associated with the news gathering process and reporting on current events." See Chapter 3, Distinction between News and Entertainment [2 USCIS-PM K.3].

[^ 2] See 8 CFR 214.2(i).

[^ 3] See 9 FAM 402.11-6, Film/Video Work, for information on employees of independent production companies.

Chapter 3 - Distinction between News and Entertainment

A. Entertainment and Advertising

Camera persons and other workers engaged in producing films for entertainment or advertising purposes do not qualify under the foreign information media representative visa classification and should seek another visa classification for which they may qualify. For example, an alien intending to work on entertainment-oriented materials may be better suited to apply for nonimmigrant status on the basis of extraordinary ability or achievement; as an entertainer; or, if applicable, on the basis of providing essential support to certain O or P nonimmigrants.[1]

Even if a camera person or other workers receive no payment from sources in the United States and the film or video footage produced is solely for foreign distribution as entertainment or advertisement, applicants under such circumstances may not qualify under the foreign information media representative visa classification.

B. Nonfiction Documentaries

Increasingly, because of the growing popularity of documentary-type biographies and similar nonfiction film productions, the distinction between commercial filmmaking for entertainment and genuine news gathering is less clear. For example, filmed biographies may be regarded as documentary filmmaking or as news gathering. In adjudicating such cases, the officer should consider whether the intended use is journalistic, informational, or educational, as opposed to entertainment. The officer should also consider the foreign distribution of the film or video footage in addition to other factors, including the timeliness of the project relative to the subject event.

C. Intended Use

An officer should examine the type of organization that employs the foreign information media representative and the proposed foreign distribution of the film or other produced material. Applicants should not use the foreign information media representative visa classification as a way of avoiding mandatory consultation required to obtain visa classification on the basis of extraordinary ability or achievement or as an entertainer.[2]

Footnotes

[^ 1] See INA 101(a)(15)(O) for visa classification based on extraordinary ability or achievement (O visa category). See INA 101(a)(15)(P) for visa classification based on being an entertainer (P visa category).

[^ 2] See 8 CFR 214.2(o)(5). See 8 CFR 214.2(p)(7).

Chapter 4 - Family Members

A foreign information media representative's spouse and unmarried children (under age 21) may accompany the foreign media representative and be admitted under the "I" nonimmigrant visa classification.[1] If approved, such dependents may attend school in the United States without changing to F-1 nonimmigrant student status. However, the dependents are not authorized to work in the United States while in the foreign information media representative dependent status.

Footnote

[^ 1] Note that there is no separate classification for dependents of foreign media representative nonimmigrants (for example, there is no I-2 classification). See codes of admission in Chapter 5, Adjudication, Section B, Approvals [2 USCIS-PM K.5(B)].

Chapter 5 - Adjudication

A. Extension of Stay or Change of Status

USCIS officers may receive an application for a change of status to that of a foreign information media representative nonimmigrant, or a request from a foreign information media representative nonimmigrant to change employers or information medium.

The applicant applies for a change of status or extension of stay by filing an Application To Extend/Change Nonimmigrant Status (Form I-539) together with evidence of current status and evidence from the employing media organization describing the employment and establishing that the applicant is a bona fide representative of that foreign media organization.

When reviewing a Form I-539 application involving a foreign information media representative, the officer must ensure the applicant:

- Meets or continues to meet all the eligibility requirements for the foreign information media representative visa classification;
- Is admissible to the United States;[1] and
- Has not violated any terms or conditions of his or her current nonimmigrant status.[2]

B. Approvals

If the applicant properly filed the Form I-539 application, meets all the eligibility requirements, and satisfies all the admission requirements, the officer may approve the application.

The table below provides a list of the classifications for foreign information media representatives. The code of admission is "I-1" for all eligible classes of applicants.

Classes of Applicants and Corresponding Codes of Admission

Applicant	Code of Admission
Foreign Information Media Representative (Principal)	I-1
Spouse of a Principal Foreign Information Media Representative	I-1
Child of a Principal Foreign Information Media Representative	I-1

C. Denials, Motions to Reopen, and Motions to Reconsider

If the applicant does not provide sufficient evidence to establish eligibility for status as a foreign information media representative, the officer prepares a denial notice explaining the specific reasons for the denial. If USCIS denies an application, the applicant may file a Motion to Reopen and/or Reconsider (Form I-290B).

There is no appeal from a denial of an application to change status or extend stay as a foreign information media representative.[3] In certain situations, USCIS may certify the matter to the Administrative Appeals Office.[4]

Footnotes

[^ 1] See INA 248(a). See 8 CFR 214.1(a)(3)(i). See Volume 8, Admissibility [8 USCIS-PM].

[^ 2] See 8 CFR 214.2(i). See 8 CFR 214.1(c)(4) and 8 CFR 248.1(b).

[^ 3] See 8 CFR 214.1(c)(5). See 8 CFR 248.3(g).

[^ 4] See 8 CFR 103.4.

Part L - Intracompany Transferees (L)

Chapter 1 - Purpose and Background

A. Purpose

The L-1 nonimmigrant visa classification enables a U.S. employer that is part of an international organization to temporarily transfer employees from one of its related foreign offices to locations in the United States.[1] Specifically, the L-1A classification applies to intracompany transfers of managers and executives, while the L-1B classification applies to intracompany transfers of employees with specialized knowledge relating to the organization's interests.

B. Background

1. 1970 Amendments to the Immigration and Nationality Act

In 1970, Congress created the L-1 program after concluding that existing immigration laws had restricted the transfer and development of personnel from abroad who were vital to the interests of U.S. businesses.[2] Congress created the L-1 visa classification for aliens who:

"Immediately preceding the time of [their] application for admission into the United States, [had] been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who [seek] to enter the United States temporarily in order to continue to render [their] services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge…"[3]

Congress believed that the L-1 classification would enable companies to freely transfer managerial, executive, and specialized knowledge personnel within their organizations (intracompany transferees), but the legislative history indicates that Congress intended for the class of eligible persons to be narrowly drawn and carefully regulated. Congress anticipated that the L-1 petition process would be administered speedily and efficiently, so that while the review would be thorough, it would not hinder international companies with undue delays.[4]

2. Immigration Act of 1990

The Immigration Act of 1990 (IMMACT 90) created the L-1 visa classification as it substantially exists today.[5] It increased the maximum period of admission for executives and managers from 6 to 7 years, while limiting persons possessing specialized knowledge to a maximum period of 5 years. IMMACT 90 also allowed aliens to qualify for L-1 classification by serving the organization abroad for 1 of the 3 years preceding admission. The 1970 amendments had required that the employment abroad occur within the year immediately preceding admission.

IMMACT 90 also codified the blanket petition process first created by legacy Immigration and Naturalization Service regulation in 1983[6] meant to streamline the admission of L-1 beneficiaries.[7] Further, it eliminated the presumption of immigrant intent within the L classification.[8] IMMACT 90 also provided definitions of managerial capacity, executive capacity, and specialized knowledge, and expanded the definition of affiliate to include the international partnership agreements used by international accounting firms.[9]

3. Nursing Relief for Disadvantaged Areas Act of 1999

The Nursing Relief for Disadvantaged Areas Act of 1999 expanded the definition of affiliate to include the international partnership agreements used by international management consulting firms.[10]

4. L-1 Visa Reform Act of 2004

Congress established further requirements for the adjudication of L-1B petitions when it enacted the L-1 Visa and H-1B Visa Reform Act of 2004 (VRA).[11] This legislation addressed the outsourcing of L-1B beneficiaries to third-party work sites as labor for hire. The VRA requires that any beneficiary with specialized knowledge who will be primarily located offsite must be controlled and supervised by the petitioning company. Additionally, the beneficiary must be working at the offsite location in connection with an exchange of products or services between the petitioning company and the unaffiliated company for which specialized knowledge specific to the petitioning company is required.

In addition, the VRA requires petitioners to pay a fraud prevention and detection fee of $500 for certain L-1 petitions, in addition to the filing fee required for all L-1 petitions.[12] The L-1 petitioner must pay this fee when petitioning for an initial L-1 grant for the beneficiary or when the beneficiary is already an L-1 nonimmigrant and is changing employers.

5. Emergency Supplemental Appropriations for Border Security for Fiscal Year 2010

The Emergency Supplemental Appropriations for Border Security for the Fiscal Year Ending September 30, 2010 required certain L-1 petitioners to pay a fee of $2,250 in addition to the filing fee for all L-1 petitions and the fraud prevention and detection fee.[13] This fee only applied to petitioners who employed at least 50 employees in the United States, and more than 50 percent of these U.S. employees were L-1 or H-1B nonimmigrants. If the petitioner met these criteria, then it was required to pay this fee when petitioning for an initial L-1 grant for the

beneficiary or when the beneficiary already was an L-1 nonimmigrant and was changing employers. Initially due to sunset on October 1, 2014, Congress extended collection of this fee through September 30, 2015.[14]

6. The Consolidated Appropriations Act of 2016

The Consolidated Appropriations Act of 2016[15] increases fees for certain H-1B and L-1 petitioners. These petitioners must submit an additional fee of $4,000 for certain H-1B petitions and $4,500 for certain L-1A and L-1B petitions postmarked on or after December 18, 2015. The additional fees apply to petitioners who employ 50 or more employees in the United States, with more than 50 percent of those employees in H-1B or L-1 (including L-1A and L-1B) nonimmigrant status. These petitioners must submit the additional fees with an H-1B or L-1 petition filed:

- Initially to grant status to a nonimmigrant described in subparagraph (H)(i)(b) or (L) of section 101(a)(15) of the Immigration and Nationality Act; or
- To obtain authorization for a nonimmigrant in such status to change employers.

The Consolidated Appropriations Act of 2016 fee increases are in addition to the base processing fee, fraud prevention and detection fee, and the premium processing fee, if applicable. The Consolidated Appropriations Act of 2016 fees remain effective through September 30, 2027.[16]

C. Legal Authorities

- INA 101(a)(15)(L) – Definition of L nonimmigrant classification
- INA 101(a)(44) – Definition of managerial capacity and executive capacity
- INA 214(c)(2) – Petition of importing employer for L nonimmigrant
- INA 214(c)(12) – Fraud prevention and detection fee
- 8 CFR 214.2(l) – Intracompany transferees

Footnotes

[^ 1] The term L-1 is used for visa issuance and admission purposes. USCIS uses the "A" and "B" distinctions internally for statistical and other purposes.

[^ 2] See H.R. Rep. 91-851 (1970).

[^ 3] See Pub. L. 91-225 (PDF), 84 Stat. 116 (April 7, 1970), amending INA 101(a)(15)(L).

[^ 4] See H.R. Rep. 91-851 (1970).

[^ 5] See Pub. L. 101-649 (PDF), 104 Stat. 4978 (November 29, 1990).

[^ 6] See 48 FR 41142 (PDF) (Sept. 14, 1983).

[^ 7] See INA 214(c)(2)(A).

[^ 8] This allowed aliens to seek temporary classification as an L nonimmigrant while also intending to reside permanently in the United States. Therefore, the approval of a permanent labor certification or the filing of an immigrant visa petition on behalf of an alien beneficiary cannot be the basis for denying an L-1 petition or the beneficiary's application for admission as an L nonimmigrant. See 8 CFR 214.2(l)(16).

[^ 9] See 8 CFR 214.2(l)(1)(ii)(L)(3).

[^ 10] See Pub. L. 106-95 (PDF), 113 Stat. 1312 (November 12, 1999).

[^ 11] See Division J, Title IV of the Consolidated Appropriations Act of 2005, Pub. L. 108-447 (PDF), 118 Stat. 2813, 3351 (December 8, 2004).

[^ 12] For more information on the current L-1 filing fee, see the H and L Filing Fees for Form I-129, Petition for a Nonimmigrant Worker webpage.

[^ 13] See Title IV of Pub. L. 111-230 (PDF), 124 Stat. 2485, 2487 (August 13, 2010).

[^ 14] See James Zadroga 9/11 Health and Compensation Act of 2010, Pub. L. 111-347 (PDF), 124 Stat. 3623 (January 2, 2011).

[^ 15] See the Consolidated Appropriations Act of 2016, Pub. L. 114-113 (PDF), 129 Stat. 2242 (December 18, 2015).

[^ 16] For comprehensive information on relevant fees, see the Filing Fees webpage.

Chapter 2 - General Eligibility

An alien may qualify as an L-1 intracompany transferee if:

- He or she was employed abroad continuously for 1 of the 3 years preceding the application for admission to the United States;
- The 1 year of continuous employment abroad was in a managerial or executive capacity or in a position that involved specialized knowledge;
- He or she is seeking to enter the United States temporarily to render their services to the same employer (which includes a branch of the foreign employer) or its parent, affiliate, or subsidiary; and
- The position in the United States will be in a managerial or executive capacity or will involve specialized knowledge.[1]

In addition, the qualifying employer who intends to temporarily transfer an employee to work in the United States must demonstrate that:

- There is a qualifying relationship between the entity in the United States and the foreign operation that employs the beneficiary abroad;
- The petitioning employer will continue to do business both in the United States and in at least one other country, either directly or through a parent, branch, subsidiary, or affiliate for the duration of the beneficiary's stay in the United States;
- The beneficiary has been employed abroad continuously by the foreign office for at least 1 of the last 3 years;[2] and

- The beneficiary's prior year of employment abroad was in a managerial, executive, or specialized knowledge capacity[3] and that the prospective employment in the United States will be in a managerial, executive, or specialized knowledge capacity.[4]

In addition, the petitioner must establish that the beneficiary's duties in the U.S meet the criteria for either specialized knowledge or managerial or executive capacity and the beneficiary engaged in either specialized knowledge or managerial or executive duties for at least 1 year. However, the beneficiary does not have to be transferred to the United States in the same capacity in which they were employed abroad. For example, a manager abroad could be transferred to the United States in a specialized knowledge capacity or vice versa.[5]

If the beneficiary will be in a specialized knowledge capacity and primarily be working at a location other than the petitioner's, then the beneficiary must be:

- Under the primary control and supervision of the petitioner; and
- Providing a product or service for which specialized knowledge specific to the petitioner is necessary.

A. L-1 Blanket Petitions

The blanket petition program allows a petitioner to seek continuing approval of itself, its parent, and its branches, subsidiaries, and affiliates as qualifying organizations and, later, classify under the L nonimmigrant category any number of beneficiaries employed by itself, its parent, or some of its branches, subsidiaries, and affiliates. USCIS adjudicates blanket L petitions based on the same general principles used in adjudicating the qualifying relationship of individual L-1 petitions. However, some differences exist.

Who May File Blanket Petition

The blanket L-1 procedure is intended for larger international organizations. Only entities involved in commercial trade or services may use the blanket petition.[6] Therefore, noncommercial organizations, like churches, may not use the blanket petition.

A U.S. petitioner may file a blanket petition to receive continuing approval of itself and its parent, branches, specified subsidiaries, and affiliates as qualifying organizations.

B. Blanket Petitioner Requirements

The petitioner must show that:

- The petitioner and each of the entities included are engaged in commercial trade or services;
- The petitioner has an office in the United States that has been doing business for 1 year or more;
- The petitioner has three or more domestic and foreign branches, subsidiaries, or affiliates; and
- The petitioner and the other qualifying organizations have obtained approval of petitions for at least 10 "L" managers, executives, or specialized knowledge workers during the previous 12 months; or have U.S. subsidiaries or affiliates with combined annual sales of at least $25 million; or have a U.S. work force of at least 1,000 employees.[7]

C. Qualifying Organizations Under the Blanket Petition

The petitioner must list all the foreign entities and all the U.S. entities that it wants to have approved and establish who has ownership and control of all the entities. USCIS can only approve those entities meeting the definition of a qualifying organization.[8]

If there is a question about ownership or control for any of the petitioned entities (or both), officers should issue a Request for Evidence to make a determination. USCIS names all approvable entities on a list included with the approval notice of the blanket petition.

D. Beneficiaries of L-1 Blanket Petitions

Once a blanket petition is approved, individual beneficiaries may receive L-1 classification under the approved blanket petition. The focus of the adjudication is the individual beneficiary's qualifications and eligibility, as the approved blanket petition will have already resolved issues relating to the organization's qualifications. Petitioners seeking to classify the individual beneficiary under the approved blanket petition must establish that the beneficiary was employed abroad for 1 of the 3 years prior to the individual petition filing in a qualifying capacity and must establish that the beneficiary will be employed in a qualifying capacity in the United States. For blanket L-1 purposes, a qualifying capacity is:

- Managerial;
- Executive; or
- Specialized knowledge professional.

E. Family Members of L-1 Beneficiaries

The spouse and unmarried dependent children (under the age of 21) of an L-1 beneficiary may, if eligible, be granted L-2 classification and be given the same validity dates as the L-1 principal.[9] L-2 dependents are not included on the L-1 petition. Although a separate petition is not required of L-2 dependents, such persons must apply for an L-2 visa at the U.S. consulate based on the L-1 principal's petition, or they can file an Application to Extend/Change Nonimmigrant Status (Form I-539).

As of November 12, 2021, USCIS considers certain L-2 nonimmigrant dependent spouses employment authorized incident to status[10] who are no longer required to obtain employment authorization before engaging in employment.[11] Notwithstanding this change, L-2 spouses may continue to apply for an Employment Authorization Document to obtain evidence of identity and employment authorization by properly filing an Application for Employment Authorization (Form I-765), with the appropriate fee, if applicable. L-2 dependent children may be given the same validity dates as the L-1 principal until the day they marry or reach the age of 21, whichever comes first. L-2 dependent children may not accept employment in the United States but may attend school.[12]

The continued validity of the L-1 principal's status and the L-2 dependent's status depends on the L-1 principal's qualifying employment with the petitioning employer. When the employer-employee relationship is terminated, or the nature of the employment no longer qualifies for L-1 purposes, the L status is no longer valid.

Footnotes

[^ 1] See INA 101(a)(15)(L). See 8 CFR 214.2(l)(1)(ii)(A).

[^ 2] See *Matter of Kloeti (PDF)*, 18 I&N Dec. 295 (Reg. Comm. 1982).

[^ 3] A beneficiary need not have worked exclusively in one of these three types of positions during the entire qualifying period of employment. As long as the beneficiary was primarily employed in an executive, managerial, or specialized knowledge capacity, USCIS considers the petitioner to have sufficiently met the regulatory requirement at 8 CFR 214.2(l)(3)(iv).

[^ 4] In the case of an L-1A beneficiary who is coming to the United States to set up a new office, the 1 year of experience abroad must have been in an executive or managerial capacity. See Chapter 8, Documentation and Evidence, Section B, Evidence for Beneficiary (New Office) [2 USCIS-PM L.8(B)].

[^ 5] See *Matter of Vaillancourt (PDF)*, 13 I&N Dec. 654 (Reg. Comm. 1970).

[^ 6] See 8 CFR 214.2(l)(4)(i)(A).

[^ 7] See 8 CFR 214.2(l)(4)(i).

[^ 8] See 8 CFR 214.2(l)(4)(iv)(B) and 8 CFR 214.2(l)(1)(ii)(G).

[^ 9] See 8 CFR 214.2(l)(17)(v).

[^ 10] See Volume 10, Employment Authorization, Part B, Specific Categories, Chapter 2, Employment-Based Nonimmigrants [10 USCIS-PM B.2].

[^ 11] USCIS issues an Employment Authorization Document (Form I-766) as evidence of employment authorization.

[^ 12] See 8 CFR 214.2(l)(17)(v) and 8 CFR 248.3(e).

Chapter 3 - Managers and Executives (L-1A)

The L-1A classification is reserved for certain managers and executives.[1] Executive or managerial capacity requires a certain level of authority and can consist of a mix of job duties.[2] There are two main types of managers, function managers and personnel managers.[3] Managers and executives plan, organize, direct, and control an organization's major functions and work through other employees to achieve the organization's goals. First-line supervisors, such as those who plan, schedule, and supervise the day-to-day work of nonprofessional employees, are not employed in an executive or managerial capacity, even though they may be referred to as managers in their organization.

In addition, persons who primarily perform the tasks necessary to produce the product or provide the service of an organization are not employed in an executive or managerial capacity.[4]

The same managerial and executive capacity definitions apply to the nature of the beneficiary's position abroad and in the United States. However, the beneficiary need not perform the same work in the United States that they performed abroad.[5] In addition, the work abroad may have been in more than one capacity.

A. Determining Managerial or Executive Job Duties

To determine managerial or executive capacity, officers must look first to the petitioner's description of the job duties to determine that the duties are primarily of an executive or a managerial nature. This standard ensures that a beneficiary not only has the requisite authority, but that a majority of their duties relate to operational or policy management, not to the supervision of nonprofessional employees, performance of the duties of another type of position, or other involvement in the operational activities of the company.

This does not mean that the executive or manager cannot apply their technical or professional expertise to a particular problem. Certain positions necessarily require a manager to apply their technical or professional expertise on an incidental basis from time to time, and that is permissible. That said, the regulations specifically require that the beneficiary be engaged primarily in a managerial or executive capacity. Accordingly, officers should focus on the primary duties of the beneficiary in determining whether the beneficiary qualifies as a manager or executive.

To determine whether a beneficiary's job duties will be primarily managerial or executive, an officer must consider the totality of the evidence in the record and weigh all relevant factors. Such factors may include:

- The nature and scope of the petitioner's business;
- The petitioner's organizational structure, staffing levels, and the beneficiary's position within the petitioner's organization;
- The scope of the beneficiary's authority;
- The work performed by other staff within the petitioner's organization, including whether those employees relieve the beneficiary from performing operational and administrative duties; and
- Any other factors that contribute to understanding a beneficiary's actual duties and role in the business.[6]

B. Determining Whether Job Duties are Primarily Managerial or Executive

USCIS does not consider a beneficiary to be acting in a managerial or executive capacity (as previously defined) merely based on the number of employees that they:

- Supervise or have supervised; or
- Direct or have directed.

If staffing levels are used as a factor in determining whether a beneficiary is acting in a managerial or executive capacity, officers should consider the reasonable needs of the:

- Organization;
- Component; or
- Function.

L-1 Beneficiary May Own the Organization

The beneficiary may own the foreign or U.S. organization in whole or in part. However, maintaining a ceremonial title and position, such as Director or President, without being primarily engaged in the management of the organization, is not qualifying for L-1 purposes.[7]

Footnotes

[^ 1] For the definitions of L-1 executives and managers, see INA 101(a)(44), 8 CFR 214.2(l)(1)(ii)(B), and 8 CFR 214.2(l)(1)(ii)(C). Notably, in the legal construction of the L-1A regulations, there is no clause of “and” or “in addition to” or any other qualifier between 8 CFR 214.2(l)(1)(ii)(B) governing L-1A managerial beneficiaries and 8 CFR 214.2(l)(1)(ii)(C) governing L-1A executive beneficiaries that requires beneficiaries to meet the regulatory criteria of both discreet subcategories for L-1A beneficiaries. Therefore, a beneficiary is either an L-1A manager under 8 CFR 214.2(l)(1)(ii)(B) or an L-1A executive under 8 CFR 214.2(l)(1)(ii)(C), meeting either one criteria or the other. A beneficiary does not have to meet both.

[^ 2] For definitions of executive and managerial capacity, see Chapter 6, Key Concepts [2 USCIS-PM L.6].

[^ 3] For more information on function managers, see Chapter 6, Key Concepts, Section C, Managerial Capacity, Subsection 2, Function Manager [2 USCIS-PM L.6(C)(2)].

[^ 4] See *Matter of Church Scientology Int’l (PDF)*, 19 I&N Dec. 593 (Comm. 1988).

[^ 5] For example, someone who had specialized knowledge abroad could enter the United States as a manager or executive. See 9 FAM 402.12-12(F), Beneficiary Need Not Perform Same Work in the United States as Abroad.

[^ 6] See *Matter of Z-A-, Inc. (PDF)*, Adopted Decision 2016-02 (AAO Apr. 14, 2016). While the case does not address whether a beneficiary will be working primarily as a manager of personnel or as an executive, and the analysis should not be used in those cases, officers should continue to analyze L-1A petitions where the position is for a personnel manager or an executive as they were doing before *Matter of Z-A-, Inc.* was designated as an adopted decision.

[^ 7] See *Matter of Aphrodite Investments (PDF)*, 17 I&N Dec. 530 (Comm. 1980).

Chapter 4 - Specialized Knowledge Beneficiaries (L-1B)

The L-1B classification is reserved for certain aliens having specialized knowledge and, in the case of aliens seeking L-1B classification under an approved blanket petition specialized knowledge professionals.[1]

A. Specialized Knowledge Capacity

To establish eligibility for approval, the L-1B petitioner must show that:

- The beneficiary possesses specialized knowledge;
- The position offered involves the specialized knowledge held by the beneficiary; and
- The beneficiary has at least 1 continuous year of employment abroad in a managerial, executive, or specialized knowledge capacity with the petitioning employer or any qualifying organization (collectively referred to as the petitioning organization) within the preceding 3 years. If the beneficiary will be located primarily at the workplace of an unaffiliated company, the petitioner also must establish that the beneficiary is eligible for L-1B classification under the requirements of the Visa Reform Act.[2]

B. Application of Specialized Knowledge

1. Special or Advanced Knowledge

A beneficiary may establish specialized knowledge by possessing either special or advanced knowledge, or both. Determining whether a beneficiary has special knowledge requires review of the beneficiary’s knowledge of how the petitioning organization manufactures, produces, or develops its products, services, research, equipment, techniques, management, or other interests (or in brief, its products or services).

Determinations concerning advanced knowledge, on the other hand, require review of the beneficiary’s knowledge of the specific petitioning organization’s processes and procedures. With respect to either special or advanced knowledge, the petitioner ordinarily must demonstrate that the beneficiary’s knowledge is not commonly held throughout the industry. As discussed in detail below, however, a beneficiary’s knowledge need not be proprietary in nature, unique, or narrowly held within the petitioning organization to be considered specialized.

Determining whether knowledge is special or advanced inherently requires a comparison of the beneficiary’s knowledge against that of others. The petitioner bears the burden of establishing such a favorable comparison. Because special knowledge concerns knowledge of the petitioning organization’s products or services and its application in international markets, the petitioner may meet its burden through evidence that the beneficiary has knowledge that is distinct or uncommon in comparison to the knowledge of other similarly employed workers in the particular industry.

Alternatively, because advanced knowledge concerns knowledge of a petitioning organization’s processes and procedures that is not commonly found in the relevant industry, the petitioner may meet its burden through evidence that the beneficiary has knowledge of or expertise in the petitioning organization’s processes and procedures that is greatly developed or further along in progress, complexity, and understanding in comparison to other workers in the employer’s operations.

2. Factors to Consider

It is not sufficient to demonstrate that the beneficiary has general knowledge of processes and procedures common to the industry; the focus here is primarily on whether the beneficiary’s knowledge of the processes and procedures used specifically by the petitioning organization is advanced. Evidence must support that such knowledge is apart from the elementary or basic knowledge possessed by others in the petitioning organization and the relevant industry.

The following is a non-exhaustive list of factors that officers may consider when determining whether a beneficiary’s knowledge is specialized:

- The beneficiary possesses knowledge of foreign operating conditions that is of significant value to the petitioning organization’s U.S. operations;
- The beneficiary has been employed abroad in a capacity involving assignments that have significantly enhanced the employer’s productivity, competitiveness, image, or financial position;
- The beneficiary’s claimed specialized knowledge is normally gained only through prior experience with the petitioning organization;
- The beneficiary possesses knowledge of a product or process that cannot be easily transferred or taught to another person without significant economic cost or inconvenience (because, for example, such knowledge may require substantial training, work experience, or education);[3]
- The beneficiary has knowledge of a process or a product that either is sophisticated or complex, or of a highly technical nature, although not necessarily unique to the petitioning organization; or
- The beneficiary possesses knowledge that is particularly beneficial to the petitioning organization’s competitiveness in the marketplace.

The presence of one or more of these (or similar) factors, when assessed in the totality of the circumstances, may be sufficient to establish, by a preponderance of the evidence, that a beneficiary has specialized knowledge. As noted above, this list of factors is meant to be illustrative, not exhaustive, and it does not impose requirements that a petitioner must meet.

Specialized Knowledge Generally Cannot Be Commonly Held, Lacking in Complexity, or Easily Imparted to Others

One of the several factors that may be considered in determining whether knowledge is specialized is the amount and type of training, work experience, or education required to develop that knowledge.[4] Knowledge generally may not be considered special or advanced if it is commonly held, lacks some complexity, or can be easily imparted from one person to another.

On the other hand, knowledge generally may be considered specialized if a petitioner can demonstrate through credible and relevant evidence that the knowledge possessed by the beneficiary would be difficult to impart to another person without significant economic cost or inconvenience to the petitioning organization.[5]

Depending on the totality of the circumstances, significant economic cost or inconvenience may be a relevant factor. However, USCIS does not require a petitioner to establish significant economic cost or inconvenience if it can otherwise establish specialized knowledge.

Specialized Knowledge Need Not Be Proprietary or Unique

Although specialized knowledge ordinarily cannot be knowledge generally possessed or easily transferrable, it need not be proprietary or unique to the petitioning organization. A petitioner is not required to demonstrate that it is the only company where the beneficiary could have acquired the knowledge, or that it is the only company that trades in the technologies, techniques, products, services, or processes that are the subject of the beneficiary's knowledge.

Although a petitioner may provide evidence that knowledge is proprietary or unique in support of its claim that the knowledge is also special or advanced, and therefore specialized, the L-1B classification does not require such a finding.

L-1B Classification Does Not Involve Test of U.S. Labor Market

The petitioner must ordinarily demonstrate that the beneficiary's knowledge is not generally or commonly held in the relevant industry. Such a determination, however, does not involve a test of the U.S. labor market. A petitioner is not required to demonstrate the lack of readily available workers to perform the relevant duties in the United States.[6]

The relevant inquiry is not whether U.S. workers with the beneficiary's knowledge are available to the employer; rather, it is whether there are so many such workers that the knowledge is generally or commonly held in the relevant industry, and therefore not specialized. If there are numerous workers in the United States who possess knowledge that is generally like the beneficiary's, it is the petitioner's burden to establish that the beneficiary's knowledge nevertheless is truly specialized.

Specialized Knowledge Need Not Be Narrowly Held Within Petitioning Organization

Although comparisons with other employees of the petitioning organization may be useful in determining whether the beneficiary's knowledge is special or advanced, such knowledge need not be narrowly held within the petitioning organization. Multiple employees within a company may have obtained the experience, training, or education necessary to possess the same type of specialized knowledge. Some companies may use technologies or techniques that are so advanced or complex that nearly all employees working on the relevant products or services possess specialized knowledge.

The mere existence of other employees with similar knowledge should not, in and of itself, be a ground for denial. Depending on the facts of the case, where there are already a significant number of employees in the U.S. organization with the same claimed specialized knowledge as that of the beneficiary, a question may arise as to whether the relevant position needs to be filled by a person having specialized knowledge. Accordingly, officers should consider, as in other L-1B cases, whether the evidence of record demonstrates the organization's need to transfer the beneficiary to the United States. Further factors to consider may include:

- Whether the petitioner has shown the need for another person with similar knowledge in the organization's U.S. operations and the difficulty in transferring or teaching the relevant knowledge to a person other than the beneficiary;
- How the duties to be performed by the beneficiary that require their claimed specialized knowledge may or may not differ from those already employed in the organization's U.S. operations;
- The extent to which the petitioning organization would suffer economic inconvenience or disruption to its U.S. or foreign-based operations if it were unable to transfer the beneficiary;[7]
- Whether and to what degree the beneficiary's claimed specialized knowledge would be beneficial to the successful conduct of the petitioner's operations; and
- Whether the total compensation[8] provided to the beneficiary is comparable in dollar value to similarly situated peers in such U.S. operations.[9]

Specialized Knowledge Workers Need Not Occupy Managerial or Similar Positions or Command Higher Compensation

Unlike the L-1A nonimmigrant classification, the L-1B nonimmigrant classification does not require that the beneficiary be a manager or executive. Nor does the L-1B classification require that the beneficiary be an officer or supervisor or hold any other similar position within the petitioning organization. Although rank and compensation are factors that may be considered when analyzing whether a beneficiary possesses specialized knowledge, there is no requirement that the beneficiary be of a certain rank within the organization or that the beneficiary's compensation be elevated compared to their peers within the organization or the particular industry.

There may be valid business reasons that one employee may be earning more or less than their peers. A company in its early development, for example, may not yet have generated sufficient income to pay the beneficiary a greater salary. In creating the L-1B classification, Congress focused on the beneficiary's knowledge, not their position on a company's organizational chart or pay scale.

Beneficiaries Must Have Required Specialized Knowledge at Time of Filing

As with all eligibility criteria, the petitioner must show that the beneficiary meets the requisite criteria and is eligible for the benefit at the time of filing.

The beneficiary may have acquired specialized knowledge while working for the foreign organization either in a specialized knowledge, executive, or managerial capacity. The petitioner bears the burden to show that the beneficiary has the required specialized knowledge at the time of filing.

Eligibility for Another Nonimmigrant Classification is Not a Bar to Eligibility for L-1B Classification

The requirements for L-1B classification are distinct from other visa classifications. Eligibility for one classification does not preclude eligibility for another. A beneficiary may possess characteristics that make him or her potentially qualified for two or more distinct nonimmigrant classifications, but may only hold one classification at a time while in the United States.

For example, the beneficiary may have characteristics that make him or her eligible as a nonimmigrant specialized knowledge worker (L-1B) and a nonimmigrant specialty occupation worker (H-1B). Similarly, a beneficiary may qualify for L-1B nonimmigrant status while at the same time possessing the extraordinary ability or achievement necessary for O-1 nonimmigrant status. Possession of such dual qualifications does not render the beneficiary ineligible for either classification. Officers should only consider the requirements for the classification sought in the petition, without considering eligibility requirements for other classifications.

Beneficiaries Working at a Worksite Outside the Petitioning Organization – The Visa Reform Act

L-1B status is not permitted if the beneficiary will be stationed primarily at the worksite of an employer other than the petitioner or an affiliate, subsidiary, or parent and will be principally under the control and supervision of the unaffiliated employer.[10] The officer must conduct the Visa Reform Act analysis if the beneficiary will be stationed offsite as described above.

If a beneficiary's work-related activities will be physically performed at the petitioner's or its affiliates' locations, to the extent that such time can be considered to be down time rather than time actually performing the services described in the petition, a beneficiary might be subject to the bar (since, in this example, the majority of the beneficiary's actual work time is spent at an unaffiliated company or companies' work site).

The number of non-affiliated worksite locations where the beneficiary might be stationed, by itself, is not relevant; what is relevant is the location where the beneficiary will be employed as specified in the underlying petition. To remain eligible for L-1B classification, any beneficiary with specialized knowledge who will be stationed primarily at the worksite of another employer must:

- Be controlled and supervised by the petitioning employer; and
- Be provided in connection with an exchange of products or services between the petitioning employer and the unaffiliated employer for which specialized knowledge specific to the petitioning employer is necessary, as opposed to an arrangement that is essentially to provide labor for hire to the unaffiliated employer.[11]

Even if the beneficiary is to be stationed primarily outside the petitioning organization, that fact alone does not establish ineligibility for L classification. For the ground of ineligibility to apply, control and supervision of the beneficiary at the non-affiliated worksite must be principally by the unaffiliated employer. Officers should use the common dictionary meaning of the term principally. The adjective principal means "most important, consequential, or influential."[12]

Therefore, even if the non-affiliated entity exercises some control or supervision over the work performed, if such control and supervision lie first and foremost within the petitioning organization, and the petitioning organization retains ultimate authority over the worker, the ground of ineligibility does not apply.

The unaffiliated employer may provide input, feedback, or guidance as to their needs and goals, and may even direct specific tasks and activities. So long as the ultimate authority over the L-1 worker's daily duties remains within the petitioning organization, however, the fact that there may be some intervening third-party supervision or input between the worker and the petitioning organization does not render the worker ineligible for L-1B classification.

A beneficiary is ineligible for L classification if the placement at the unaffiliated worksite is essentially an arrangement to provide labor for hire for the unaffiliated employer rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary.

Whether an arrangement is essentially to provide labor for hire is inherently a factual inquiry. Officers therefore must look at all aspects of the activity or activities in which the beneficiary will be engaged away from the petitioner's worksite. In general, if the off-site activity or activities require specialized knowledge of the petitioner's product or services, if such knowledge bears a reasonable relationship to the performance of the off-site activities, the activities are not prohibited.

For example, a beneficiary would be ineligible for L classification if a petitioner is essentially in the business of placing beneficiaries with various unaffiliated companies, irrespective of the beneficiary's specialized knowledge of the petitioner's particular product or service, where the off-site activities to be performed do not require specialized knowledge specific to the worker placement industry.

On the other hand, if the petitioner is primarily engaged in providing a specialized service, and typically sends its specialized knowledge personnel on projects located on the work site of its unaffiliated clients to perform such services, then, assuming the beneficiary remains under the principal control and supervision of the petitioning employer, and otherwise meets the basic requirements for L classification, the beneficiary would not be subject to the bar. In such cases, the petitioning employer must show they retain ultimate authority over the L-1B beneficiary, and the L-1B beneficiary must provide a product or service to the offsite employer for which specialized knowledge specific to the petitioner is necessary.

Footnotes

[^ 1] For the definition of L-1 specialized knowledge professional, see INA 214(c)(2)(B), 8 CFR 214.2(l)(1)(ii)(D), and 8 CFR 214.2(l)(1)(ii)(E). For the definition of specialized knowledge, see Chapter 6, Key Concepts, Section E, Specialized Knowledge [2 USCIS-PM L.6(E)].

[^ 2] See Division J, Title IV of the Consolidated Appropriations Act of 2005, Pub. L. 108-447 (PDF), 118 Stat. 2813, 3351 (December 8, 2004).

[^ 3] One factor that may be relevant in weighing economic inconvenience is the time-sensitivity of the petitioning organization's need in its U.S. operations for an employee with the particular type of specialized knowledge, and the harm the organization would suffer if it could not fulfill its time-sensitive personnel need through transfer of the beneficiary. See *Fogo de Chao (Holdings) Inc. v. DHS*, 769 F.3d 1127, 1142 (D.C. Cir. 2014) (observing that a "natural prox[y] for economic inconvenience" is "the amount of in-house training a company's employees would have to receive to acquire the knowledge in question").

[^ 4] See 8 CFR 214.2(l)(3)(v) (requiring petitioner to submit evidence of the beneficiary's prior education, training, and employment).

[^ 5] See *Fogo de Chao (Holdings) Inc. v. DHS*, 769 F.3d 1127, 1142 (D.C. Cir. 2014).

[^ 6] In *Fogo de Chao (Holdings) Inc. v. DHS*, 769 F.3d 1127, 1145 (D.C. Cir 2014), the D.C. Circuit noted that the Immigration Act of 1990 precludes USCIS from requiring evidence establishing that the specialized knowledge in question is not readily available in the U.S. labor market. An inquiry into whether knowledge is generally or commonly held in a given industry—and therefore not special, as that term is naturally understood—is separate from an inquiry into whether there are U.S. workers available to perform a given job.

[^ 7] See *Fogo de Chao (Holdings) v. DHS*, 769 F.3d 1127, 1142-43 (D.C. Cir 2014).

[^ 8] For this limited purpose, what constitutes total compensation is fact-dependent, but may include, besides wages or salary, other guaranteed forms of payment made to an employee for services rendered for the petitioner. The petitioner may pay such compensation in the form of money, a commodity, a service, or a privilege, including food, transportation, and housing

allowances, as well as guaranteed bonuses. Any such payment, however, must principally be for the convenience or benefit of the employee and agreed upon by the petitioner and beneficiary before filing the petition. The petitioner bears the burden of establishing the actual value of any claimed compensation.

[^ 9] Evidence that a significant number of employees within the petitioning organization's U.S. operations share the beneficiary's knowledge, yet the petitioner will pay the beneficiary substantially less than those similarly situated employees, may indicate that the beneficiary lacks the requisite specialized knowledge. As described, however, there may be valid business reasons for the wage discrepancy. Officers should generally evaluate justification for the variance in consideration of the skills, experience, and other factors pertinent to the entire spectrum of employees in the U.S. operations who possess the requisite specialized knowledge.

[^ 10] The L-1 Visa and H-1B Visa Reform Act added anti-job shopping provisions. See Section 412(a) of Division J, Title IV of the Consolidated Appropriations Act of 2005, Pub. L. 108-447 (PDF), 118 Stat. 2813, 2905 (December 8, 2004). See INA 214(c)(2)(F).

[^ 11] See Division J, Title IV of the Consolidated Appropriations Act of 2005, Pub. L. 108-447 (PDF), 118 Stat. 2813, 3351 (December 8, 2004).

[^ 12] See Merriam-Webster Dictionary's definition of "principal." See Oxford English Dictionary's definition of "principal."

Chapter 5 - Ownership and Control

The petitioner for an intracompany transferee must be a qualifying organization seeking to transfer a foreign employee to the United States temporarily from one of its operations outside the United States. Accordingly, to be eligible for L-1 nonimmigrant classification, there must be a qualifying relationship between the foreign and U.S. entities. In the United States, business entities usually take the form of a sole proprietorship, partnership, corporation, or limited liability company (LLC). State law generally governs the formation, operation, and dissolution of such business entities. Since each state has its own rules for business entities, officers should refer to the relevant state authority's website if there is a specific question about a business entity.

An organization cannot transfer someone to work in the United States as an L-1 nonimmigrant, unless the organization has a qualifying U.S. entity to employ the L-1 beneficiary.[1] The source of the beneficiary's salary and benefits while in the United States (for example, whether the beneficiary will be paid by the United States or foreign affiliate of the petitioning company) is generally not controlling in determining eligibility for L status.[2]

The Business Structures overview provides more information on the most common business forms or structures, including information on formation, fundamental characteristics, and the tax forms submitted to the Internal Revenue Service.

Evidence of Ownership and Control, Generally

Depending on the nature of the petitioner, USCIS may require different types of evidence to demonstrate ownership and control for purposes of establishing the qualifying L-1 relationship. USCIS considers ownership of more than 50 percent of an organization as evidence of control. Control based on ownership of more than 50 percent is called de jure control.[3] However, it is possible for an owner of 50 percent or less of a company to exercise de facto control over the organization.[4]

Large, established organizations may submit a statement by the entity's president, corporate attorney, corporate secretary, or other authorized official describing the ownership and control of each qualifying organization, accompanied by other evidence such as a copy of its most recent annual report, U.S. Securities and Exchange Commission filings, or other documentation that lists the parent and its subsidiaries.

In addition to a statement of an authorized official regarding ownership and control of each qualifying organization, organizations should submit other evidence of ownership and control, which may include but is not limited to: records of stock ownership, partnership agreements, operating or LLC agreements, member certificates, audited financial statements, profit and loss statements or other accountant's reports, tax returns, or articles of incorporation, by-laws, and minutes of board meetings.

Not-for-profit Entities – Ownership and Control and Doing Business

Not-for-profit or nonprofit entities are eligible to use the L classification if all requirements are met.[5] These entities sometimes have difficulty demonstrating ownership and control, because their ownership and organizational structure does not perfectly align with the for-profit entities that are more commonly seen in the L context. Often a non-profit will indicate that they have a branch relationship in which they demonstrate that the employing entity is the same organization operating in another location. However, there may be some regional or country-specific requirement that the entity register as a separate entity.

In these cases, or any other claims of a qualifying relationship, ownership and control must be established. In the case of a nonprofit, there may be no traditional evidence of ownership such as equity certificates. Accordingly, to establish the existence of a qualifying relationship involving a nonprofit organization, a petitioner must demonstrate that the relevant person, group, or entity owns or manages sufficient assets to directly or indirectly control both the U.S. and foreign entities involved. Factors considered may include a person, entity, or group's obligation to fund capital needs of the nonprofit, any rights to receive distribution of assets on liquidation, or any rights to direct how the assets of the nonprofit may be used, purchased, or sold. Control of a nonprofit entity means the direct or indirect legal right and authority to direct the establishment, management, and operation of the nonprofit organization. In determining what constitutes 'control' with respect to nonprofit organizations, USCIS takes into consideration the structure of the organization's management and governance including the authority of the organization's senior officers, board members and trustees.

Generally, to demonstrate a qualifying relationship, non-profit petitioners may submit, as applicable, Internal Revenue Service (IRS) filings, state filings, annual reports, and audited financial statements to demonstrate the relevant relationship between entities. As applicable, petitioners may also submit proof of a qualifying relationship by the submission of articles of incorporation or similar organizational documents, bylaws or similar operating documents, meeting minutes, or other appropriate documentation. These examples are illustrative and not exhaustive.

In addition, demonstrating that a non-profit entity is doing business may look different in comparison to a for-profit entity. USCIS considers an entity may also qualify if it is providing such goods or services in a regular, systematic, and continuous way to others within its organization, if the record demonstrates how that activity generates revenue or otherwise facilitates the organization's purpose. USCIS recognizes that many non-profit organizations do not generate revenue by providing goods or services. In these cases, doing business refers to performing the activities that serve to advance the underlying goals and purpose of the organization.

Opening New Office in United States

If the beneficiary is coming to the United States to open a new office, USCIS requires proof of ownership and control, in addition to financial viability. The petitioners' statement of ownership and control should therefore be accompanied by appropriate evidence such as evidence of capitalization of the company or evidence of financial resources committed by the

foreign company, operating or LLC agreements, partnership agreements, articles of incorporation, by-laws, and minutes of board of directors' meetings, corporate bank statements, profit and loss statements, accountant's reports, or tax returns.[6]

The following sections discuss some aspects of different business structures as they relate to L adjudications.

A. Sole Proprietorships

A sole proprietorship is a business in which an individual owns all the assets, owes all the liabilities, and operates the business in the individual's personal capacity.[7] Unlike a corporation or other separate and distinct legal entity that may have a single owner or shareholder, a sole proprietorship does not exist as a distinct legal entity separate from the individual owner.

By statute, an L-1 beneficiary must have been "employed continuously… by a firm or corporation or other legal entity or an affiliate or subsidiary thereof..."[8] This means that there must be separation between the employing entity and the beneficiary. A sole proprietorship therefore may not file an L-1 petition on behalf of the owner, as it is not a distinct legal entity separate from the owner.[9]

Such a petition where the sole-proprietor owner and beneficiary are the same would be considered an impermissible self-petition.

While an L-1 petition filed by a sole proprietorship on behalf of its sole owner is not approvable, because a sole proprietorship may have employees, USCIS may approve an L-1 petition filed by a sole proprietorship on behalf of an otherwise eligible employee, depending on the facts presented. A qualifying L-1 relationship can exist between a sole proprietorship and a related entity if the common ownership and control of both legal entities can be established.[10] For instance, a person may be the sole proprietor of an entity abroad and also of one in the United States, and may, depending on the facts presented, transfer an otherwise eligible employee to the United States entity.

Generally, no special documents are executed when a sole proprietorship is created and commences doing business. In the United States, a sole proprietorship is not required to execute or file any documents of creation and may use the owner's own social security number as its Employer's Identification Number.

The most common document provided as evidence of the ownership and control of a sole proprietorship is the owner's individual federal tax return. In addition, the petitioner may submit contracts, such as leases, employment contracts, or sales agreements that the owner executed on behalf of the sole proprietorship.

In cases where the business is not a separate legal entity from the owner, the petitioner must also provide other evidence that identifies the owner of the business. This evidence may include, but is not limited to, a license to do business, record of registration as an employer with the IRS, business tax returns, or other evidence that identifies the owner of the business.

There is a difference between a sole proprietorship and a self-incorporated petitioner (such as a corporation or a limited liability company with a single owner). Although a self-incorporated or self-organized petitioner may only have one owner, the corporation or the single member limited liability company is a separate and distinct legal entity from its owners, stockholders or members and therefore may petition for that owner.[11]

B. Joint Venture

A joint venture is a business relationship wherein two or more parties agree to share funds, resources, and skills to undertake a particular business project. There are two general types of joint venture business enterprises: equity joint ventures and non-equity joint ventures.

An equity joint venture is created under corporate law and exists when two or more companies create a separate entity and contribute capital to that entity in furtherance of the joint venture. A qualifying L-1 relationship can exist between a contributing company and the resulting venture if the contributing company owns at least 50 percent of the venture and exercises control over the venture.

A non-equity joint venture, on the other hand, is typically a contractual arrangement in which no separate entity is formed. In a non-equity joint venture, cooperative agreements are entered into between the contributing companies to provide noncapital resources (such as manufacturing processes, patents, trademarks, managerial know-how, or other essential services). A non-equity joint venture does not establish a qualifying L-1 relationship, because no separate entity is formed. Therefore, the requisite common ownership and control will not be present in a non-equity joint venture, as the joint venture stands alone outside the two parties that entered into the contractual arrangement.[12]

C. Partnerships

A partnership is the shared ownership of a business, that is, a relationship existing between two or more persons who join to carry on a trade or business.[13] A partnership may meet the requirements for a qualifying organization if it meets one of the regulatory definitions of a parent, branch, subsidiary, or affiliate.[14] When submitting evidence of ownership and control of a partnership, the petitioner must submit a copy of the partnership agreement. To establish what the partnership owns and controls, other evidence may be necessary. For example, petitioners generally provide partnership agreements and the partnership's IRS Form 1065 to establish who owns and controls a partnership.

By law, international partnerships that provide accounting services or management consulting services may meet the criteria as qualifying organizations for L-1 purposes. USCIS does not require extensive documentation in such cases.

D. Corporations

A corporation is a separate legal entity, owned by its shareholders. It is an association of individual natural persons or organizations created by state law that exists as an entity with powers and liabilities that are independent of its owners.[15] Corporations may meet the requirements for a qualifying organization if it meets one of the regulatory definitions of a parent, branch, subsidiary, or affiliate.[16] A corporation may file an L-1 on behalf of an alien stockholder, as the corporation is a distinct legal entity.

E. Limited Liability Companies

An LLC is a hybrid entity. Earnings and losses pass through to the owners, who include those earning and losses on their personal tax returns. An LLC may file an L-1 petition on behalf of a member (owner), as an LLC is deemed to be a distinct legal entity.

F. Franchises

In order to establish a qualifying relationship in an L-1 visa petition that involves franchises, the petitioner must show that the required relationship exists between the foreign entity and the petitioner, not the franchise owned and operated by the petitioner.

USCIS regulations indicate that a petitioner can establish a qualifying relationship by showing ownership and control of the entities.[17] If a franchise agreement only outlines how two independently owned companies can use or license a name or a product, then such agreement does not generally create a qualifying relationship between franchisor and franchisee. A contractual agreement of this nature can be terminated, as opposed to the more permanent association that is created through common ownership.[18]

Claims made by the foreign entity's shareholder and franchisor statements alone are not sufficient to establish the beneficiary's claimed employee status. A petitioner's unsupported statements are of very limited weight and are normally insufficient to carry its burden of proof, particularly when supporting documentary evidence would reasonably be available.[19] The petitioner must support its assertions with relevant, probative, and credible evidence.[20]

Footnotes

[^ 1] See *Matter of Penner (PDF)*, 18 I&N Dec. 49 (Comm. 1982). *Penner* also discusses the obsolete proprietary knowledge requirement not contained in the current regulations; that portion of the *Penner* decision therefore is therefore not binding on officers.

[^ 2] See 9 FAM 402.12-12(b), Intracompany Transferees - L Visas.

[^ 3] De jure means by law and is a straightforward form of control.

[^ 4] De facto means in fact. See *Matter of Hughes (PDF)*, 18 I&N Dec. 289 (Comm. 1982).

[^ 5] See *Matter of Church Scientology Int'l (PDF)*, 19 I&N Dec. 593 (Comm. 1988).

[^ 6] See documentary requirements for new office cases in 8 CFR 214.2(l)(3)(v) and the discussion in *Matter of Leblanc (PDF)*, 13 I&N Dec. 816 (Reg. Comm. 1971).

[^ 7] See Black's Law Dictionary (11th Ed. 2019).

[^ 8] See INA 101(a)(15)(L).

[^ 9] See *Matter of Aphrodite Investments Limited (PDF)*, 17 I&N Dec. 530 (Comm. 1980).

[^ 10] See 8 CFR 214.2(l)(1)(ii)(G). See the Business Structures overview.

[^ 11] See *Matter of M- (PDF)*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958). See *Matter of Tessel (PDF)*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

[^ 12] See *Matter of Siemens Medical Systems, Inc. (PDF)*, 19 I&N Dec. 362, 364 (BIA 1986).

[^ 13] See the U.S. Small Business Administration's Choose a business structure webpage.

[^ 14] See 8 CFR 214.2(l)(1)(ii).

[^ 15] See Internal Revenue Service's (IRS) Forming a Corporation webpage. See IRS's Definition of a Corporation webpage.

[^ 16] See 8 CFR 214.2(l)(1)(ii).

[^ 17] See 8 CFR 214.2(l)(1)(ii)(I)-(L).

[^ 18] See *Matter of Schick (PDF)*, 13 I&N Dec. 647, 649 (Reg. Comm. 1970).

[^ 19] See *Matter of Soffici (PDF)*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California (PDF)*, 14 I&N Dec. 190 (Reg. Comm. 1972)). See *Matter of Chawathe (PDF)*, 25 I&N Dec. 369, 376 (AAO 2010).

[^ 20] See *Matter of Chawathe (PDF)*, 25 I&N Dec. 369, 376 (AAO 2010).

Chapter 6 - Key Concepts

A. Qualifying Organization

A qualifying organization for L-1 purposes is a U.S. or foreign firm, corporation, or other legal entity which:

- Meets exactly one of the qualifying relationships specified in the definitions of parent, branch, affiliate, or subsidiary;
- Is or will be doing business[1] as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the L-1 beneficiary's stay in the United States as an intracompany transferee; and
- Otherwise meets the statutory definition of a nonimmigrant intracompany transferee.[2]

1. Qualifying Relationship

A qualifying relationship exists when the U.S. employer is a branch, affiliate, parent or a subsidiary of the foreign firm, corporation, or other legal entity. To establish a qualifying relationship, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are either the same employer (for example, a U.S. entity with a foreign branch office) or related as a parent and subsidiary or as affiliates.

In situations where the petitioner has submitted documentation of a qualifying relationship through possession of proxy votes, the petitioner must show that the proxy votes are irrevocable from the time of filing through the time of adjudication.

Further, any approval is conditioned on evidence demonstrating that the qualifying relationship will continue to exist during the approval period requested. Any changes of ownership and control of the organization post-adjudication require the petitioner to file an amended petition, as such changes may constitute a material change in circumstances or represent new, material information.[3]

Stock certificates or other evidence of ownership interests, standing alone, generally are not sufficient to establish that a qualifying relationship exists. For instance, in the case of a corporation, documents such as the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings when appropriate, should also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control.

When appropriate, officers should ask a petitioning company to provide all agreements relating to the voting rights of owners, the distribution of profits, the management and direction of the petitioning company, and any other factor affecting actual control of the entity. Without full disclosure of all relevant documents, officers may be unable to determine the elements of ownership and control.[4] Officers may require evidence of the acquisition of the actual ownership interest (such as capital investment, wire transfers, stock purchase agreements, or others) as additional supporting evidence.[5]

The most common types of business relationships that are not qualifying under the L category are those based on contractual, licensing, and franchise agreements. Additional non-qualifying relationships include arrangements such as less than 50-50 joint ventures and charter membership arrangements.[6]

Publicly traded companies regulated by the U.S. Securities and Exchange Commission (SEC) may submit copies of annual reports, where probative, as evidence of their affiliates and subsidiaries. Most annual reports list the company's foreign affiliates and subsidiaries, along with the company's ownership interest (for example, controlling, not controlling, and joint venture). Annual reports are frequently prepared by major accounting firms and include audited financial statements. Evidence may also include copies of SEC Forms 10K and 10Q.

Where one or both of the qualifying entities has undergone or will undergo a corporate reorganization (such as merger, spin-off, or acquisition), officers must determine whether the qualifying relationship between the entities will exist following the reorganization. Officers should therefore review standard documents from the merger, including but not limited to: the letter of intent, minutes from shareholder meetings, the Hart-Scott-Rodino antitrust filings (if applicable), as well as the ultimate merger agreement. Unless the company is publicly traded, officers may encounter privacy concerns regarding proprietary or confidential transactional and financial information. In such a case, if a petitioner is unable or unwilling to provide information, adjudicators should determine whether the existing record leads to a finding that the petitioner's burden has been met.

2. Parent and Subsidiary

A parent is a firm, corporation, or other legal entity that owns another firm, corporation, or other legal entity that qualifies as its subsidiary.[7] A parent owns a subsidiary when it:

- Owns more than 50 percent (directly or indirectly) of the entity and controls the entity;
- Owns 50 percent (directly or indirectly) of the entity and controls the entity;
- Owns 50 percent (directly or indirectly) of the entity that is a 50-50 joint venture and has equal control and veto power over the entity; or
- Owns less than 50 percent (directly or indirectly) of the entity but in fact controls the entity.[8]

Therefore, ownership and control are two of the factors that officers must examine in determining whether a qualifying L-1 relationship exists between the foreign employer and the U.S. employer.

Ownership means the legal right of possession with full power and authority to control. Control means the right and authority to direct the management and operations of the business entity.[9]

3. Affiliate

An affiliate meets one of the following:

- One of two or more subsidiaries, all of which are owned and controlled[10] by the same parent;
- One of two or more legal entities owned and controlled by the same person;
- One of two or more legal entities owned and controlled by the same group of persons, each person owning and controlling approximately the same share or proportion of each entity;[11] or
- In the case of a partnership organized to provide accounting or management consulting services, an entity inside the United States is an affiliate of an entity outside the United States if:
  - The entities market their accounting or management consulting services (directly or indirectly) using the same internationally recognized name, under an agreement with the same worldwide coordinating organization; and
  - The worldwide coordinating organization is collectively owned and controlled by the member accounting or management consulting entities or by their elected members (that is, partners, shareholders, members, employees).

Once these entities meet this definition of affiliate, they continue to be affiliates even if they subsequently enter a plan of association with a successor worldwide coordinating organization that is not collectively owned and controlled by its member entities or their elected members.

4. Branch

Branch means an operating division or office of the same organization housed in a different location.[12] Probative evidence that the U.S. employer is a branch office may include but is not limited to one or more of the following:[13]

- A state or territorial business license establishing that the foreign corporation is authorized to engage in business activities in the United States;
- Copies of the U.S. Income Tax Return of a Foreign Corporation (IRS Form 1120-F);
- Copies of the Employer's Quarterly Federal Tax Return (IRS Form 941) listing the branch office as the employer;
- Copies of the Wage and Tax Statement (IRS Form W-2) listing the branch office as the employer; or
- Copies of a lease for office space in the United States.

If the petitioner seeks to transfer the beneficiary from a foreign branch office, the petition should include comparable evidence to establish that the foreign employer is a branch office of a qualifying entity.

B. Doing Business

Doing business is the regular, systematic, and continuous provision of goods or services by a qualifying organization. Therefore, the mere presence of an organization's office or agent in the United States does not, in and of itself, constitute doing business.[14] Both the U.S. employer and at least one qualifying organization abroad must be doing business for the entire duration of the beneficiary's stay in the United States as an intracompany transferee.[15] Doing business requires activity, not just registration of the business or office or presence of an agent.[16]

An exception exists for petitioners filing for an L-1 beneficiary coming to be employed by a U.S. organization that has been doing business for less than 1 year. Such a petitioner does not have to be actively engaged in doing business at the time of filing the petition. Instead, the petitioner must submit evidence that it has secured sufficient physical premises to house the new office, and the intended U.S. operation, within 1 year of the approval of the petition, will support an executive, managerial, or specialized knowledge position.[17]

1. Foreign Employer Must Continue to Do Business

There must be a qualifying organization abroad that continues to engage in the regular, systematic, and continuous provision of goods and services for the entire duration of the L-1 beneficiary's stay for a qualifying relationship to exist.[18]

The presence of a dormant corporation, an agent, or a holding company abroad is not sufficient to establish a qualifying relationship for L-1 purposes. However, the organization does not have to be the same organization that employed the beneficiary abroad.

2. Determination of Doing Business

While the petitioner must show the organization is involved in the continuous provision of goods or services, there is no statutory or regulatory minimum level of business activity that must be conducted for the U.S. and the foreign organizations to meet this eligibility requirement.

However, the organization must be conducting business in a manner that would require the services of a person primarily engaged in a managerial, executive, or specialized knowledge capacity.[19]

In order to make a determination that the organization is conducting sufficient business to require the services of a managerial capacity, executive capacity, or specialized knowledge employee, the organization's personnel structure and the beneficiary's stated duties must be placed in the context of the level of business that is being conducted by the organization.

C. Managerial Capacity

Managerial capacity means an assignment within an organization in which the employee primarily:[20]

- Manages the organization, or a department, subdivision, function, or component of the organization;
- Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization or a department or subdivision of the organization;
- If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organization hierarchy or with respect to the function managed; and
- Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.[21]

This means that the definition of managerial capacity has two parts:

- The petitioner must show that the beneficiary will perform certain high-level responsibilities;[22] and
- The petitioner must prove that the beneficiary will be primarily engaged in managerial duties, as opposed to ordinary operational activities alongside the petitioner's other employees.[23]

The statutory definition of managerial capacity allows for both personnel managers and function managers.[24]

1. Personnel Manager

Personnel managers must primarily supervise and control the work of other supervisory, professional, or managerial employees. A first line supervisor is not acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.[25]

If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions for HR personnel to take, and take other personnel actions.[26]

If staffing levels are to be used as a factor in determining whether the beneficiary has acted or will be acting in a managerial capacity, officers must consider the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function.[27]

Officers should evaluate a position that is primarily supervisory in nature as a personnel manager.[28]

2. Function Manager

As noted above, an L-1 beneficiary may qualify for L-1A classification as a manager based upon their management of an essential function or a core activity.[29] This is known as a function manager.

If a petitioner claims that a beneficiary will manage an essential function, the petitioner must clearly describe the duties to be performed in managing the essential function. That includes identifying the function with specificity, articulating the essential nature of the function, and establishing the proportion of a beneficiary's daily duties dedicated to managing the essential function.[30]

In addition, the petitioner's description of a beneficiary's daily duties must demonstrate that the beneficiary will manage the function rather than perform the duties related to the function.

To qualify as a function manager, the petitioner must demonstrate that:[31]

- The function is a clearly defined activity;

- The function is essential (that is, core to the organization);
- The beneficiary will primarily manage, as opposed to perform, the function;
- The beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and
- The beneficiary will exercise discretion over the function's day-to-day operations.

D. Executive Capacity

Executive capacity means an assignment within an organization in which the employee primarily:

- Directs the management of the organization or a major component or function of the organization;
- Establishes the goal and policies of the organization, component, or function;
- Exercises wide latitude in discretionary decision; and
- Receives only general supervision or direction from higher level executives, the board of directors, or stockholder of the organization.[32]

All four criteria must be met to qualify as an executive.[33]

An L-1 beneficiary is not acting in an executive capacity merely based on the number of employees that the beneficiary directs or has directed. However, if staffing levels are used as a factor in determining whether an L-1 beneficiary has acted or will be acting in an executive capacity, officers must consider the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function.[34]

An executive directs the management of the organization, major component, or essential function of a given organization by controlling the work of managerial or lower-level executive employees. This control could either take the form of direct supervision of those managers or executives or could be more indirect under some circumstances. For example, a chief financial officer may not have managerial or executive subordinates, but still may have authority over the company's financial function that is binding on managers elsewhere in the company and affects their work.

Like managerial capacity, the definition of executive capacity has two parts. To demonstrate executive capacity, the petitioner must:

- Show that the beneficiary will perform certain high-level responsibilities;[35] and
- Prove that the beneficiary will be primarily engaged in executive duties, as opposed to ordinary operational activities alongside the petitioner's other employees.[36]

Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient – the petitioner must provide a detailed description of the beneficiary's daily job duties. The actual duties themselves will reveal the true nature of the employment.[37]

E. Specialized Knowledge

Specialized knowledge means:

- Special knowledge of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets; or
- An advanced level of knowledge or expertise in the organization's processes and procedures.[38]

The corresponding regulation similarly defines specialized knowledge in terms of special or advanced knowledge: "[S]pecial knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures."[39]

Because the statute and regulations do not define the terms special or advanced, USCIS refers to their common dictionary definitions, as well as the agency's practice and experience in this context. The term special is defined in leading dictionaries as "surpassing the usual," "distinct among others of a kind," "distinguished by some unusual quality," "uncommon," or "noteworthy."[40]

The term advanced is defined in various dictionaries as "greatly developed beyond an initial stage," or "ahead or far or further along in progress, complexity, knowledge, skill, etc."[41]

Applying these definitions to the statutory and regulatory text, a beneficiary seeking L-1B classification for certain specialized knowledge persons and professionals[42] should, as a threshold matter, possess:

- Special knowledge, which is knowledge of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets that is distinct or uncommon in comparison to that generally found in the industry; or
- Advanced knowledge, which is knowledge of or expertise in the petitioning organization's specific processes and procedures that is not commonly found in the relevant industry and is greatly developed or further along in progress, complexity, and understanding than that generally found within the employer.

F. New Office

A new office is an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than 1 year.[43]

Because the term organization in the definition of new office is not separately defined, it can be either a U.S. or foreign corporation or other legal entity.[44] The requisite less than 1 year limitation applies to the new offices that meet any of the four individual entity types – parent, branch, subsidiary, or affiliate.[45] Among the factors to be considered are the amount of investment, intended personnel structure, product or service to be provided, physical premises, and viability of the foreign operation.

G. One-Year Foreign Employment Requirement

To qualify for L-1 nonimmigrant classification, among other requirements, the L-1 beneficiary must have been employed abroad by the qualifying organization for 1 continuous year out of the preceding 3 years.

1. Qualifying Employment Must Occur Outside the United States

The 1-year foreign employment requirement is only satisfied by the time a beneficiary spends physically outside the United States working full-time for the petitioner or a qualifying organization.[46] A petitioner cannot use any time that the beneficiary spent in the United States to meet the 1-year foreign employment requirement, even if the qualifying foreign entity paid the beneficiary and continued to employ the beneficiary while the beneficiary was in the United States. Furthermore, the continuous year of foreign employment must be qualifying; that is, the petitioner must demonstrate that the beneficiary worked abroad during that period in a managerial, executive, or specialized knowledge capacity.

2. Requirement Must be Satisfied When Petitioner Files L-1 Petition

The beneficiary must meet the 1-year foreign employment requirement at the time that the petitioner files the L-1 petition.

The 1-year foreign employment requirement ensures the continuity of a beneficiary's lawful employment with the same international qualifying organization, consistent with the purpose of the intracompany transferee nonimmigrant classification. Therefore, the proper reference point for determining the 1-year foreign employment requirement is the date the petitioner files the initial L-1 petition on the beneficiary's behalf, the starting point in the alien's application for admission in L-1 status.

When the petitioner requests an extension of L-1 status (including a change from L-1A to L-1B status, or a change from L-1B to L-1A status), the 1-year requirement must have been met at the time of the filing of the initial L-1 petition.

3. Brief Visits to United States and Tolling of 1-Year Period

Brief visits for business or pleasure in B-1 or B-2 status do not interrupt the 1-year foreign employment requirement. While a qualifying foreign entity employs a beneficiary abroad, brief trips to the United States for business or pleasure in B-1 or B-2 status toll[47] the one continuous year of employment abroad. Therefore, in such cases, officers should subtract the number of days the beneficiary spent in the United States from the time the qualifying foreign entity employed the beneficiary abroad.

For example, if the qualifying foreign entity began employing the beneficiary on January 1, 2016, and the beneficiary made brief trips to the United States that year for a total of 60 days, the beneficiary would need to accrue at least an additional 60 days of qualifying employment abroad after January 1, 2017 to meet the 1-year foreign employment requirement.

4. Working in United States for Qualifying Organization Results in Adjustment of 3-Year Period

Time a beneficiary spent working in the United States for a qualifying organization does not count towards the 1-year foreign employment requirement; however, this time does result in an adjustment of the 3-year period, in that the running of the 3-year period is tolled during that period.

USCIS considers a nonimmigrant in the United States to have come to this country to work for the qualifying organization if the nonimmigrant is employed by that organization as a principal beneficiary of an employment-based nonimmigrant petition or application, such as H-1B or E-2 executive, supervisory, or essential employee. If the beneficiary was admitted to work for the qualifying organization, their U.S. employment for the qualifying organization need not be in a managerial, executive, or specialized knowledge capacity to affect the dates of the relevant 3-year period used to determine whether the 1-year foreign employment requirement has been satisfied.

For example, if a beneficiary worked in the United States in valid H-1B status for a qualifying organization from January 2, 2017 through January 2, 2018, and the petitioner filed for L-1 nonimmigrant status for the employee on January 2, 2018, the relevant 3-year period is from January 1, 2014 to January 1, 2017.

On the other hand, the time a beneficiary spent working while in a dependent status does not result in an adjustment of the 3-year period. For example, time spent by a beneficiary in L-2 status does not result in an adjustment of the 3-year period, because the beneficiary was admitted as an L-2 to join the L-1 principal and not to work for a qualifying organization.

Likewise, if a beneficiary was admitted as an F-1 nonimmigrant and later applies for optional practical training (OPT) employment with the qualifying organization, the time spent in F-1 nonimmigrant status does not result in an adjustment to the 3-year period, because the purpose of admission was for study and not to work for the qualifying organization.

The time a beneficiary spent in the United States working for an unrelated employer, or not working at all, also does not result in an adjustment of the 3-year period. A break longer than 2 years in employment with the qualifying organization during the 3 years preceding the filing of the L-1 petition renders the beneficiary unable to meet the 1-year foreign employment requirement.

Periods the beneficiary spent in the United States without working (except for brief visits for business or pleasure in B-1 or B-2 status), or while working for an unrelated employer, interrupt the 1-year continuous foreign employment requirement, and officers should not adjust the 3-year period.

An otherwise eligible beneficiary may again qualify for the L-1 classification following a new 1-year period during which the beneficiary is employed by the qualifying organization abroad in a managerial, executive, or specialized knowledge capacity.

The relevant point in time for an officer to determine whether a beneficiary satisfies the 1-year foreign employment requirement is the date on which the petitioner filed the initial L-1 petition, regardless of when the beneficiary was, or will be, admitted to the United States.

5. Calculating 1-Year Period

Officers should take the following steps when determining whether the petitioner has established the 1-year foreign employment requirement. Officers should always look back 3 years from the date the initial L-1 petition was filed and then follow the steps listed in the table below.

Determining Whether Petitioner Established 1-Year Foreign Employment Requirement
Step 1: Determine the dates the beneficiary worked for the qualifying organization abroad.
Step 2: Determine lengths of any breaks in the beneficiary's qualifying employment during the 3-year period immediately before petitioner filed the L-1 petition. If the beneficiary has lawfully worked for a qualifying organization in the United States as a principal beneficiary of an employment-based nonimmigrant petition or application, adjust the 3-year period accordingly.
Step 3: Subtract the total length of all the breaks identified in Step 2 from the relevant 3-year period. If the result is a continuous 1-year period within the relevant 3-year period, then the petitioner has met the 1-year foreign employment requirement.

Footnotes

[^ 1] For more information about doing business, see Section B, Doing Business [2 USCIS-PM L.6(B)].

[^ 2] See INA 101(a)(15)(L). See 8 CFR 214.2(l)(1)(ii)(G).

[^ 3] See 8 CFR 214.2(l)(7)(i)(C).

[^ 4] See *Matter of Siemens Medical Systems, Inc. (PDF)*, 19 I&N Dec. 362 (Comm. 1986).

[^ 5] See 8 CFR 214.2(l)(3)(viii).

[^ 6] See discussions of various qualifying and non-qualifying relationships in *Matter of Schick (PDF)*, 13 I&N Dec. 647 (Reg. Comm. 1970); *Matter of Del Mar Ben, Inc. (PDF)*, 15 I&N Dec. 5 (Reg. Comm. 1974); *Matter of Aphrodite Investments, Ltd. (PDF)*, 17 I&N Dec. 530 (Comm. 1980); *Matter of Tessel, Inc. (PDF)*, 17 I&N Dec. 631 (Acting Assoc. Comm. 1981); *Matter of Barsai (PDF)*, 18 I&N Dec. 13 (Reg. Comm. 1981); *Matter of Hughes (PDF)*, 18 I&N Dec. 289 (Comm. 1982); and *Matter of Siemens Medical Systems, Inc. (PDF)*, 19 I&N Dec. 362 (Comm. 1986).

[^ 7] See 8 CFR 214.2(l)(1)(ii)(I).

[^ 8] See 8 CFR 214.2(l)(1)(ii)(K).

[^ 9] See *Matter of Church Scientology International (PDF)*, 19 I&N Dec. 593 (Comm. 1988). See *Matter of Siemens Medical Systems, Inc. (PDF)*, 19 I&N Dec. 362 (Comm. 1986). See *Matter of Hughes (PDF)*, 18 I&N Dec. 289 (Comm. 1982).

[^ 10] Ownership and control are two of the factors that officers must examine in determining whether an affiliated relationship exists.

[^ 11] See 8 CFR 214.2(l)(1)(ii)(L).

[^ 12] See 8 CFR 214.2(l)(1)(ii)(J).

[^ 13] No single piece of evidence listed, or lack thereof, necessarily establishes the existence or non-existence of a branch office in all cases. Accordingly, the probative value of the evidence submitted varies on a case-by-case basis.

[^ 14] See 8 CFR 214.2(l)(1)(ii)(H).

[^ 15] See 8 CFR 214.2(l)(1)(ii)(G). See *Matter of Chartier (PDF)*, 16 I&N Dec. 284 (BIA 1977).

[^ 16] See 8 CFR 214.2(l)(1)(ii)(H).

[^ 17] See 8 CFR 214.2(l)(3)(v). See Chapter 8, Documentation and Evidence, Section B, Evidence for Beneficiary (New Office) [2 USCIS-PM L.8(B)].

[^ 18] See 8 CFR 214.2(l)(1)(ii)(G). See *Matter of Chartier (PDF)*, 16 I&N Dec. 284 (BIA 1977).

[^ 19] See *Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006). See *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision).

[^ 20] See Chapter 3, Managers and Executives (L-1A) [2 USCIS-PM L.3].

[^ 21] See INA 101(a)(44)(A). See 8 CFR 214.2(l)(1)(ii)(B).

[^ 22] See *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision).

[^ 23] See *Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006). See *Champion World*, 940.F.2d 1533 (9th Cir. 1991) (unpublished table decision).

[^ 24] See INA 101(a)(44)(A)(i) and INA 101(a)(44)(A)(ii).

[^ 25] See INA 101(a)(44)(A)(iv). See 8 CFR 214.2(l)(1)(ii)(B)(4).

[^ 26] See 8 CFR 214.2(l)(1)(ii)(B)(3).

[^ 27] See INA 101(a)(44)(C).

[^ 28] See INA 101(a)(44)(A)(ii).

[^ 29] An organization may have more than one core activity.

[^ 30] See 8 CFR 214.2(l)(3)(ii).

[^ 31] See *Matter of G- Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

[^ 32] See INA 101 (a)(44)(B). See 8 CFR 214.2(l)(1)(ii)(C).

[^ 33] See INA 101 (a)(44)(B). See 8 CFR 214.2(l)(1)(ii)(C).

[^ 34] See INA 101(a)(44)(C).

[^ 35] See *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision).

[^ 36] See *Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006). See *Champion World, Inc. v. INS*, 940.F.2d 1533 (9th Cir. 1991) (unpublished table decision).

[^ 37] See *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2nd Cir. 1990).

[^ 38] See INA 214(c)(2)(B). See 8 CFR 214.2(l)(1)(ii)(D).

[^ 39] See 8 CFR 214.2(l)(1)(ii)(D).

[^ 40] See Merriam-Webster Dictionary's definition of "special." See Oxford English Dictionary's definition of "special."

[^ 41] See Merriam-Webster Dictionary's definition of "advanced." See Oxford English Dictionary's definition of "advanced."

[^ 42] See Chapter 4, Specialized Knowledge Professionals (L-1B) [2 USCIS-PM L.4].

[^ 43] See 8 CFR 214.2(l)(1)(ii)(F). See Chapter 8, Documentation and Evidence, Section B, Evidence for Beneficiary (New Office) [2 USCIS-PM L.8(B)].

[^ 44] For the definition of qualifying organization, see Section A, Qualifying Organization [2 USCIS-PM L.6(A)].

[^ 45] The regulations separately define parent, branch, subsidiary, and affiliate in 8 CFR 214.2(l)(1)(ii) (8 CFR 214.2(l)(1)(ii)(I), (J), (K), and (L), respectively). The regulations define a branch as "an operating division or office of the same organization housed in a different location," illustrating that the organization is not limited to only one location in the United States.

[^ 46] For the definition of qualifying organization, see Subsection 1, Qualifying Organization [2 USCIS-PM L.7(D)(1)].

[^ 47] The term toll means that the beneficiary's time in the United States will count neither towards nor against the 1-year foreign employment requirement.

Chapter 7 - Filing

A. General

USCIS requires a petitioning employer to file a Petition for a Nonimmigrant Worker (Form I-129) with the required fee in order to classify a beneficiary as an L-1 nonimmigrant.[1] Form I-129 must be filed in accordance with DHS regulations and the Form I-129 instructions.[2] To properly submit an L-1 petition on Form I-129, the petitioner should designate the filing as either a:

- Petition for a nonimmigrant worker; or
- Nonimmigrant petition based on blanket petition.

When petitioning USCIS to classify the beneficiary as an L-1 nonimmigrant either individually or under an approved blanket petition, the petitioner must file Form I-129 with USCIS at the proper filing location, with the correct fee and signature.[3] This petition must be filed with the service center that has jurisdiction over L-1 petitions in the geographic area of intended employment.[4]

Nonimmigrant Petition Based on Blanket Petition

If a currently valid L-1 blanket approval is in place,[5] a petitioner may seek to classify the beneficiary as an L-1 nonimmigrant under the approved L-1 blanket petition (but may also file a regular individual L petition for the beneficiary). This is done by filing the Nonimmigrant Petition Based on Blanket L Petition (Form I-129S) either with USCIS at the service center that approved the L-1 blanket petition, with the U.S. Department of State (DOS) at a U.S. embassy or consulate abroad, or with U.S. Customs and Border Protection (CBP) at a port-of-entry.

In most cases, the L-1 beneficiary submits the Form I-129S to DOS when applying for an L-1 visa at a U.S. embassy or consulate. If the beneficiary is exempt from the visa requirement, the petitioner may file the Form I-129S with USCIS at the proper filing location.[6]

When the temporary employment will be in different locations, the state or territory where the petitioning company or organization's primary office is located determines the appropriate service center to send the Form I-129S package, regardless of where in the United States the various worksites are located.[7]

The filing location for a petition seeking an extension of stay may be different from the location for a petition requesting original classification.

Time of Filing

A petitioner may not file the L-1 petition with USCIS more than 6 months before the beneficiary's start date. The petitioner indicates the start date on the Form I-129. In general, USCIS should process L petitions within 30 days of receipt.[8] The petitioner must fulfill all eligibility requirements as of the filing date of the petition.[9]

B. Fees

The appropriate filing fees must accompany an L-1 petition. In addition to the base filing fee, there are additional fees imposed by statute.

Base Filing Fee

There is a base filing fee for petitions filed on a Form I-129. There is no base filing fee for a Form I-129S. USCIS posts current fee information on the Filing Fees webpage.

Fraud Prevention and Detection Fee

In addition to the base filing fee, the L-1 petitioner must pay a Fraud Prevention and Detection Fee of $500 when:

- The petition is for an initial grant of L-1 classification for the beneficiary;
- The petition is for a change of status to L-1 classification; or
- The petition is to obtain authorization for an L-1 beneficiary to change employers.[10]

If one of the above scenarios applies, the petitioner must pay the fee regardless of the type of petition filed or where or with which agency it is filed.

If the beneficiary is changing status from H-1B with the same employer, the $500 fraud fee is required because such a change is considered an initial grant of L-1 classification.

Consolidated Appropriations Act of 2016

On December 18, 2015, the Consolidated Appropriations Act of 2016 (referred to as Public Law 114-113) became law.[11] Public Law 114-113 imposes an additional fee of $4,500 for certain L-1A and L-1B petitions beyond the base fee, Fraud Prevention and Detection Fee, as well as any premium processing fee, if applicable. This Public Law 114-113 fee is in effect until September 30, 2027.

A nonimmigrant petition for L-1 status postmarked on or after December 18, 2015, through September 30, 2027, must include this fee if the petition requests:

- An initial grant of L-1A or L-1B status or authorization to change employers; and
- The petitioner employs 50 or more employees in the United States, and more than 50 percent of those employees are in H-1B or L-1 status.

USCIS requires this fee when the petitioner requests a change of status from H-1B to an initial grant of L-1 for the same beneficiary to perform essentially the same job.

All the petitioner's employees in the United States should be counted when determining whether it is subject to the Public Law 114-113 fee. If a petitioner claims exemption from this fee based on a combination of employees within a controlled group of corporations, a Request for Evidence may be appropriate to request clarification about the number of the petitioner's employees in the United States.

When determining the total number of employees in the United States for the purpose of the Public Law 114-113 fee, petitioners should not include:

- Employees from partnerships, proprietorships (or others), which are under common control;
- Employees from affiliated service groups; and
- Leased employees.

Footnotes

[^ 1] See 8 CFR 103.2(a)(1).

[^ 2] See 8 CFR 103.2(a)(1). In addition, see the Direct Filing Addresses for Form I-129, Petition for a Nonimmigrant Worker webpage.

[^ 3] See 8 CFR 103.2.

[^ 4] See the Direct Filing Addresses for Form I-129, Petition for a Nonimmigrant Worker webpage. Canadian L-1 beneficiaries seeking admission under the blanket petition L process have the option of applying for L-1 classification in conjunction with their application for L-1 admission to the United States. In these cases, the beneficiary presents the signed petition, fees, and supporting documentation to a CBP officer at certain ports-of-entry (POEs) on the United States-Canada land border or at a U.S. pre-clearance or pre-flight inspection station in Canada (pre-flight station).

[^ 5] Once a petitioner meets the filing requirements for L-1 blanket petitions and USCIS determines there are qualifying entities, USCIS prepares a list of all qualifying entities. USCIS sends the list with the approval notice for the petition. The approval notice means that it is permissible for any of the qualifying entities to petition to transfer an employee from any approved foreign entity to any approved U.S. entity.

[^ 6] Canadian L-1 beneficiaries have the option of applying for L-1 classification under the approved blanket in conjunction with an application for L-1 admission to the United States. In these cases, the beneficiary presents the signed Form I-129, applicable fees, and supporting documentation to a CBP officer at certain POEs or certain pre-flight inspection stations.

[^ 7] For example, if the beneficiary will work in Arizona and Texas, and the petitioning company's primary office is in New York, then USCIS treats New York as the workplace for filing location purposes. If the beneficiary will work in Florida and Georgia, and the petitioning company's primary office is in California, then USCIS treats California as the workplace for filing purposes. USCIS requires the petitioner to provide certain evidence if an L-1B beneficiary is to be stationed in the United States primarily at a worksite outside that of the petitioner (or its parent, branches, affiliates, or subsidiaries). The offsite placement must be in connection with an exchange of products or services between the petitioning company and the unaffiliated company for which specialized knowledge specific to the petitioning company is required.

[^ 8] See INA 214(c)(2)(C). See 8 CFR 214.2(l)(7)(i).

[^ 9] See 8 CFR 103.2(b)(1) and 8 CFR 103.2(b)(12).

[^ 10] See INA 214(c)(12)(A).

[^ 11] See Pub. L. 114-113 (PDF) (December 18, 2015).

Chapter 8 - Documentation and Evidence

Eligibility at Time of Filing

USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit sought at the time the petitioner files the petition.[1] A petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts.[2]

Named Beneficiary

The petitioner must name the beneficiary of an L-1 petition on the petition.

Multiple Beneficiaries on a Petition Not Permitted

A petitioner may not file for multiple beneficiaries on an L-1 petition. USCIS permits only one beneficiary on an L-1 petition.

Signature

An authorized signatory of the petitioner must sign the petition.[3] USCIS may deny an L-1 petition for failing to establish eligibility for the benefit sought if the petition was accepted as signed, but it was not signed by an authorized signatory.

Burden of Proof[4]

It is the petitioner's burden to provide the documentation required to establish eligibility for L classification. The regulations do not require submission of extensive evidence of business relationships or of the beneficiary's prior and proposed employment. In some cases, completion of the items on the petition and supplementary explanations by an authorized official of the petitioning company may be sufficient. In doubtful or marginal cases, officers may require other appropriate evidence which they deem necessary to establish eligibility in a particular case.

Amended Petition

An amended petition requires the same base filing fee, if applicable, as a new petition. USCIS may not require certain additional fees. Because the amended petition supplements the original petition, USCIS does not require duplicate documents submitted with the original filing. However, a petitioner must provide evidence addressing the change that led to the filing of the amended petition. Changes requiring amended petitions include:

- Changes in approved relationships;
- Additional qualifying organizations under a blanket petition;
- Change in capacity of employment (for example, from specialized knowledge position to a managerial or executive position); or
- Any information that would affect the beneficiary's eligibility under INA 101(a)(15)(L).[5]

A. Evidence for Beneficiary (Non-New Office)

When seeking L-1 classification on behalf of a beneficiary, the petitioner must submit the following:

- Evidence that the petitioner is a qualifying organization. If the petitioner is included on an L-1 blanket approval, then the petitioner must submit evidence that the approved blanket petition included this evidence and meets this requirement. If there is no L-1 blanket approval, the petitioner must provide the following evidence to demonstrate that it is a qualifying organization:
    - Evidence that the petitioner is a U.S. or foreign firm, corporation, or other legal entity;
    - Evidence that the petitioner is a parent, branch, affiliate, or subsidiary;
    - Evidence that the petitioner is doing business as an employer in the United States and at least one other country directly or through a parent, branch, affiliate, or subsidiary and will be doing such business for the duration of the beneficiary's stay in the United States as an L-1 nonimmigrant;
    - Evidence that the beneficiary's prospective L-1 employment in the United States will be primarily in a managerial or executive capacity, or will involve specialized knowledge; and
    - Evidence that the beneficiary was employed abroad by the petitioner, or its parent, branch, affiliate, or subsidiary, on a full-time basis for at least 1 of the last 3 years in a managerial, executive, or specialized knowledge capacity.[6] The company does not have to transfer the beneficiary to the United States in the same capacity in which the beneficiary was employed abroad. For example, a company may transfer a manager abroad to the United States as an L-1 beneficiary to work in a position that primarily involves specialized knowledge.[7]

Evidence of Doing Business

Primary documentary evidence of an organization's business activities includes, but is not limited to:

- Annual reports, containing audited or reviewed financial statements;
- Audited financial statements;
- Reviewed financial statements; and
- Federal tax returns.

However, the petitioner may submit a variety of documents to establish that the U.S. and foreign organizations are doing business. For example, a petitioner may submit a letter that describes the nature and level of business activity conducted by the organization. If requesting a beneficiary to perform duties that are primarily managerial or executive in nature, the petitioner may provide a statement that clearly describes the organization's manner of doing business, such as:

- The business activities in which the employing organization engages.
- How the beneficiary's position is, or was, related to the organization's strategic or operational goals.
- The records may also contain various documents as evidence of the organizations' business activities. The documentary evidence the petitioner submitted should corroborate the petitioner's statements. Depending on the totality of the evidence, a descriptive letter may meet the petitioner's burden of proof.

Annual Reports

All publicly traded corporations in the United States publish annual reports. Many foreign organizations also publish annual reports. Annual reports provide information describing the organization's:

- Products and services;
- Management and personnel structure;
- Ownership and control;
- Subsidiaries, affiliates, joint ventures, and branch offices; and
- Current and long-term objectives.

In addition, annual reports should include audited or reviewed financial statements for the past year.

Federal Tax Returns

In general, organizations conducting business in the United States must file federal tax returns each year. Federal tax returns are designed to present information in a manner that is similar to the income statement and balance sheet format.

Internal Revenue Service (IRS) Tax Returns: Form Numbers and Corresponding Information Provided

If organization is a…	Tax return is Form…	Tax return provides a modified income statement	Tax return provides a modified balance sheet
Corporation	1120 or 1120EZ	X	X
S Corporation	1120S or 1120EZ	X	X
Partnership	1065	X	X
Sole Proprietorship	1040, with Schedule C	X	
Non-Profit	990 or 990EZ	X	X
Limited Liability Company (LLC)	1120 or 1065 (may be 1040 with Schedule C for a single member LLC owned by a person)	X	

Foreign Tax Documentation

Officers should consider the following regarding foreign tax documentation:

- The petitioner may provide copies of foreign tax returns as evidence of the business activities of the foreign entity;
- Canada and most Western European countries require tax returns that are very similar to the United States' tax returns and are usually credible; and
- Many other countries rely on hand-written tax returns and receipts that are less reliable.

Calendar or Fiscal Year

Organizations publish annual reports and financial statements, and file tax returns based on either a calendar or fiscal year.

Annual Reporting Timelines

If reporting year is a…	Then the year starts on…	And ends on…
Calendar year	January 1st	December 31st
Fiscal Year	The 1st day of any month other than January	The last day of any month other than December

Change of Year for Tax Purposes

An organization cannot change its year for tax purposes (for example, from a fiscal year to a calendar year) without permission from the IRS. Tax returns for consecutive years that have different reporting years may be an indication that the documents are fraudulent. In addition, the ending balances on the balance sheet for 1 year should match the beginning balances for the next year.

B. Evidence for Beneficiary (New Office)

Officers may grant an otherwise eligible petitioner a request for classification as a new office in cases where an established company opens a new office in a new location in the United States, provided it meets the definition of a new office.[8] The petition must clearly indicate that the petitioner is requesting adjudication under the new office provisions and explain how the new office meets the applicable requirements discussed below.[9] A petition submitted for what would otherwise appear to be a new office, but that does not contain this request, may be adjudicated under the same standards and requirements applicable to a typical (non-new office) petition.

Special Consideration: L-1A New Office Petitions

The L-1A new office petitioner must establish that the intended operation, within 1 year of petition approval, will support an executive or managerial position.[10] Therefore, the petitioner must provide information regarding:

- The proposed nature of the office describing the scope of the entity as well as its organizational structure and financial goals;
- The size of the U.S. investment and the financial ability of the foreign entity to remunerate the beneficiary; and
- The organizational structure of the foreign entity.

If coming to the United States to fill a managerial or executive capacity role, the beneficiary's qualifying experience abroad must have been in a managerial or executive capacity.[11] Unlike other L-1 petitions, eligibility for L-1A new office approval may not be established through qualifying experience involving specialized knowledge.[12]

A manager or executive who is required to open a new business or office may be more actively involved in day-to-day operations during the initial phases of the business, but the manager or executive must also have authority and intent to hire staff and have wide latitude in making decisions about the goals and management of the organization.

In addition, the petitioner must demonstrate that sufficient physical premises to house the new office have been secured.[13]

Special Consideration: L-1B New Office Petitions

If the U.S. entity has been doing business for 1 year or less, the beneficiary, as is the case of other L-1B beneficiaries, must have specialized knowledge. Additionally, the petitioner must demonstrate that sufficient physical premises to house the new office have been secured and that it has the financial ability to remunerate the beneficiary and to commence doing business in the United States.[14]

Extension of L-1 New Office Petitions

The initial approval of a new office individual petition is limited to a period not to exceed 1 year.[15] After the first year, the validity of the new office petition may be extended for the same beneficiary for a period of up to 2 years. Extension of the new office petition requires that the petitioner provide the following:[16]

- Evidence that the United States and foreign entities are still qualifying organizations;[17]
- Evidence that the United States entity has been doing business;[18]
- A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- Evidence of the financial status of the U.S. operation. As an example, evidence may include, but is not limited to, evidence of capitalization of the company or evidence of financial resources committed by the foreign company, articles of incorporation, by-laws, minutes of board of directors' meetings, corporate bank statements, profit and loss statements or other accountant's reports, or tax returns.

Following approval of the initial extension of a new office petition, the petitioner is no longer subject to the new office extension provisions; any future extension filing is treated as a regular individual L extension.[19]

C. Special Considerations

Attestations for L-1A Petitions

An attestation that foreign staff will support a position in the United States without supporting evidence generally is not enough to demonstrate eligibility. It is the petitioner's burden to meet the preponderance of the evidence standard. Types of evidence submitted include, but are not limited to:

- Organizational charts (U.S. and foreign);
- A roster of employees;
- Position descriptions;
- Payroll records with job titles of the staff supporting the U.S. entity; and
- Invoices for services provided by the foreign entity to U.S. entity, other accounting records between the entities (or both).

A petitioner may submit any evidence it believes will prove its case, and officers must consider the totality of all the evidence submitted.[20]

Evidence Related to Managerial or Executive Positions for L-1A Petitions

The employing organization must be doing business in a manner that would require the beneficiary to perform duties that are primarily managerial or executive in nature. The petitioner may provide a statement that clearly describes:

- The business activities in which the employing organization engages; and
- How the beneficiary's position relates to organization's strategic or operational goals.

The record may also contain various documents as evidence of the organizations' business activities. The documentary evidence submitted should corroborate the petitioner's statements.

To make an accurate determination of the eligibility of the beneficiary's position, either in or outside the United States, the petitioner must provide a description of the beneficiary's duties placed in the context of:

- The personnel structure of the organization; and
- The nature and scope of the business that it conducts.

Where an organization employs only a few people yet claims that the majority of its employees are primarily engaged as managers or executives, officers may request complete position descriptions and hourly breakdowns for the duties performed by all of the people employed by the organization, including one for the beneficiary, as well as copies of corroborative payroll documentation.

Officers may use the position descriptions and payroll documentation to determine who is performing the non-qualifying, operational duties of the business. The entity may be substantial in size, but the department or division where the beneficiary is, or will be, employed may be top-heavy with managers and executives. If the employer is a large organization, officers should limit detailed staffing inquiries to the department or division where the beneficiary has been or will be employed.

On the other hand, the evidence may indicate that the business employs only one or two people, including the beneficiary. In such cases, officers may find it helpful to try to determine who is performing the non-managerial operational duties of the business. The business may not directly employ people to perform the non-managerial services of the business. Instead, the business may contract out some of its functions such as accounting, sales, warehousing, and personnel.

When evaluating the nature of a claimed managerial or executive position, the officer must review the petition and supporting evidence to establish that the beneficiary's employment qualifies for L-1 purposes.

The evidence must demonstrate the employer's business activities in a manner that allows for a clear understanding of the products and services that it provides, and how the beneficiary's position fits into its organizational hierarchy.

A petitioner may not claim to employ a beneficiary as a hybrid executive-manager and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive and a manager, it must still establish that the beneficiary is engaged in duties that are primarily either managerial or executive and that the beneficiary meets all four criteria of that definition.

L-1B Petitions

Officers can perform their adjudicatory function most effectively when the petitioner explains in detail the specific nature of the industry or field involved, the nature of the petitioning organization's products or services, the nature of the specialized knowledge required to perform the beneficiary's duties, and the need for the beneficiary's specialized knowledge. To show that the offered position in the United States involves specialized knowledge, the petitioner must submit a detailed description of the services to be performed.[21]

A petitioner's statement may be persuasive evidence if detailed, specific, and credible. Officers may, in appropriate cases, however, request further evidence to support a petitioner's statement, bearing in mind that there may be cases involving circumstances that may be difficult to document other than through a petitioner's own statement.

The petitioner must also submit evidence that the beneficiary's prior education, training, and employment qualifies the beneficiary to perform the intended services in the United States.[22] While the petitioner is required in all cases to compare the beneficiary's knowledge to that of others, the petitioner may also be able to demonstrate the nature of the claimed specialized knowledge by, among other things, indicating how and when the beneficiary gained such knowledge or explaining the difficulty of imparting such knowledge to others without significant cost or disruption to its business.

Other evidence that a petitioner may submit to demonstrate that a person's knowledge is special or advanced, includes, but is not limited to:

- Documentation of training, work experience, or education establishing the number of years the beneficiary has been using or developing the claimed specialized knowledge as an employee of the petitioning organization or in the industry;
- Evidence of the impact, if any, the transfer of the beneficiary would have on the petitioning organization's U.S. operations;
- Evidence that the beneficiary is qualified to contribute significantly to the U.S. operation's knowledge of foreign operating conditions as a result of knowledge not generally found in the petitioning organization's U.S. operations;
- Contracts, statements of work, or other documentation that shows that the beneficiary possesses knowledge that is particularly beneficial to the petitioning organization's competitiveness in the marketplace;
- Evidence, such as correspondence or reports, establishing that the beneficiary has been employed abroad in a capacity involving assignments that have significantly enhanced the petitioning organization's productivity, competitiveness, image, or financial position;
- Personnel or in-house training records that establish that the beneficiary gained the claimed specialized knowledge through prior experience or training with the petitioning organization;
- Curricula and training manuals for internal training courses, financial documents, or other evidence that may demonstrate that the beneficiary possesses knowledge of a product or process that the organization cannot transfer or teach to another person without significant economic cost or inconvenience;
- Evidence of patents, trademarks, licenses, or contracts awarded to the petitioning organization based on the beneficiary's work, or similar evidence that the beneficiary has knowledge of a process or a product that either is sophisticated or complex, or of a highly technical nature, although not necessarily proprietary or unique to the petitioning organization; and
- Payroll documents, federal, state, or other governmental wage statements, documentation of other forms of compensation, resumés, organizational charts, or similar evidence documenting the positions held and the compensation provided to the beneficiary and parallel employees in the petitioning organization.

Knowledge that is commonly held, lacking in complexity, or easily imparted to others is not specialized knowledge. A petitioner may submit any other evidence it chooses. In all cases, USCIS reviews the entire record to determine whether the petitioner has established, by a preponderance of the evidence, that the beneficiary has specialized knowledge under the totality of the circumstances, in accordance with the standards set forth in the relevant statutes and regulations.

Merely stating that a beneficiary's knowledge is somehow different from others or greatly developed does not, in and of itself, establish that the beneficiary possesses specialized knowledge. Ultimately, it is the weight and type of evidence that establishes whether the beneficiary possesses specialized knowledge.

L-1 Blanket Petitions

A petitioner may seek continuing approval of itself and some or all its parent, branches, subsidiaries, and affiliates as qualifying organizations by filing an L-1 blanket petition. A blanket petition is not filed on behalf of a beneficiary, but, rather, to obtain preapproval of related entities. In support of a blanket petition, the petitioner must submit evidence:

- That each of the entities included in the requested list of entities are engaged in commercial trade or services;
- That the petitioning organization has an office in the United States that has been doing business for 1 year or more;

- That the petitioning organization has three or more domestic and foreign branches, subsidiaries, or affiliates;
- That the petitioner and the other qualifying organizations have:
  - Obtained approval of petitions for at least 10 “L” managers, executives, or specialized knowledge workers during the previous 12 months;
  - U.S. subsidiaries or affiliates with combined annual sales of at least $25 million; or
  - A U.S. workforce of at least 1,000 employees;[23]
- That each entity is doing business; and
- Of the ownership and control of all the entities as USCIS can only approve those entities meeting the definition of a qualifying organization.

The petitioner should list all the foreign entities and all the U.S. entities for which it seeks blanket preapproval.[24]

Footnotes

[^ 1] See 8 CFR 103.2(b)(1).

[^ 2] See *Matter of Michelin Tire Corp. (PDF)*, 17 I&N Dec. 248 (Reg. Comm. 1978). See *Matter of Katigbak (PDF)*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

[^ 3] See 8 CFR 103.2(a)(2). See Volume 1, General Policies and Procedures, Part B, Submission of Benefit Requests, Chapter 2, Signatures [1 USCIS-PM B.2].

[^ 4] The burden of evidence is a preponderance, which means it is more likely than not. See *INS v. Cardoza-Fonseca* (PDF), 480 U.S. 421 (1987) (defining more likely than not as a greater than 50 percent probability of something occurring). See *Matter of Chawathe (PDF)*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M (PDF)*-, 20 I&N Dec. 77, 79-80 (Comm. 1989)). See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 4, Burden and Standards of Proof [1 USCIS-PM E.4].

[^ 5] See 8 CFR 214.2(l)(7)(i)(C).

[^ 6] For more information on the 1-year foreign employment requirement, see Chapter 6, Key Concepts, Section G, One-Year Foreign Employment Requirement [2 USCIS-PM L.6(G)].

[^ 7] See *Matter of Vaillancourt (PDF)*, 13 I&N Dec. 654 (Reg. Comm. 1970).

[^ 8] See 8 CFR 214.2(l)(1)(ii)(F). For the definition of new office, see Chapter 6, Key Concepts, Section F, New Office [2 USCIS-PM L.6(F)].

[^ 9] Ideally, this should include an affirmative response to the corresponding question on the Petition for Nonimmigrant Worker (Form I-129). However, if no response is given, but it is clear to the officer based on the materials submitted that the petitioner seeks approval for a new office, the officer may proceed accordingly.

[^ 10] See 8 CFR 214.2(l)(3)(v)(C).

[^ 11] See 8 CFR 214.2(l)(3)(v)(B).

[^ 12] In contrast to the L-1A new office beneficiary, a beneficiary of an L-1B new office petition may qualify for such classification through employment in a managerial, executive, or specialized knowledge capacity.

[^ 13] See 8 CFR 214.2(l)(3)(v)(A).

[^ 14] See 8 CFR 214.2(l)(3)(vi).

[^ 15] See 8 CFR 214.2(l)(7)(i)(A)(3).

[^ 16] See 8 CFR 214.2(l)(14)(ii).

[^ 17] See 8 CFR 214.2(l)(1)(ii)(G).

[^ 18] See 8 CFR 214.2(l)(1)(ii)(H).

[^ 19] See 8 CFR 214.2(l)(14)(i).

[^ 20] *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016), does not change the fact that it is the petitioner’s burden to demonstrate by a preponderance of evidence standard that the duties of the beneficiary’s position will be primarily managerial in nature.

[^ 21] See 8 CFR 214.2(l)(3)(ii).

[^ 22] See 8 CFR 214.2(l)(3)(iv).

[^ 23] See 8 CFR 214.2(l)(4)(i).

[^ 24] See 8 CFR 214.2(l)(4)(iv)(B) and 8 CFR 214.2(l)(1)(ii)(G).

Chapter 9 - Adjudication

A. General Issues

Officers must carefully review each petition for an L-1 intracompany transferee to ensure compliance with the intent of the L-1 category to allow foreign businesses to transfer certain employees to their U.S. operations. Unless specifically provided otherwise, officers should apply a preponderance of the evidence standard when evaluating eligibility for the benefit sought.[1] It is the petitioner’s burden to prove eligibility for the benefit sought.[2]

B. Evaluating Primary Evidence

There are various categories of evidence routinely submitted to document an organization's business activities. The submission of what USCIS considers to be credible evidence is not equivalent to meeting the eligibility criteria. In other words, the petitioner may submit a tax return and it may be considered credible evidence, but the information provided on the tax return may fail to establish that the eligibility requirement has been met.

Primary evidence of an organization's business activities should corroborate the statements made in the petitioner's letter. In the instance where documentation conflicts with the petitioner's statements, the officer should request further clarification, along with corroborative documentary evidence.

Requests for Evidence

A Request for Evidence (RFE) may be appropriate when the initial review of the record does not establish that the petitioner has met all the eligibility requirements.[3] In addition, an RFE[4] should be sent where:

- The record contains evidence of material fraud or misrepresentation; or
- The officer has knowledge of previous mala fide petitions from the same petitioner.

The RFE should:

- Identify each of the areas of eligibility the petitioner has not met;
- Discuss what is deficient with any evidence already provided; and
- Provide examples of evidence that the petitioner could provide to meet the area of eligibility.

C. Special Adjudicative Issues

1. Iran Sanctions

Executive Order 12959[5] imposed economic sanctions against Iran that prohibit, among other things, the importation of Iranian services where the alien is performing such service as an agent, employee, or contractor of the Iranian government or a business or other organization in Iran. However, a Petition for a Nonimmigrant Worker (Form I-129) for an Iranian citizen may be approved if the Iranian is:

- Not normally a resident of Iran; and
- Not working in a way connected to:
  - The Iranian government (excluding diplomatic and consular services);
  - An Iranian business;
  - An Iranian organization; or
  - Any person located in Iran.[6]

2. USMCA (formerly NAFTA) Petitions

Petitions filed pursuant to the North American Free Trade Agreement (NAFTA) were forwarded, and U.S.-Mexico-Canada Agreement (USMCA) L-1 petitions from ports of entry (POEs) continue to be forwarded, from U.S. Customs and Border Protection (CBP) to USCIS.[7] These petitions have already been adjudicated, all the information on the petitions (including the approval stamp) has been completed, and the beneficiaries have already entered the country.[8]

The U.S.-Mexico-Canada Agreement

USMCA is a trade agreement between the three countries named in the agreement and replaces NAFTA. The USMCA entered into force on July 1, 2020.[9] The USMCA does not make any changes to the immigration chapter of NAFTA. Even though the USMCA replaces NAFTA, the USMCA retains all substantive elements of the former NAFTA, as well as all other classifications.[10]

D. Decision

1. Approvals

An approval is appropriate if the necessary supporting documents are present, and the petition appears to be approvable in all respects. The initial approval period is up to 3 years, except that, if the petitioner is a new office, the approval period is limited to 1 year.[11]

A blanket petition may be approved for an initial period of 3 years and may be extended indefinitely afterwards if the qualifying organizations have complied with the program requirements.[12]

Extensions of stay are granted in 2-year increments. The dates of employment (admission and extension periods), however, must be within the statutory limits for the L nonimmigrant classification: 7 years for executive and managerial employment (L-1A nonimmigrants), and 5 years for specialized knowledge (L-1B nonimmigrants).

2. Revocations

USCIS may revoke a petition at any time, even after the expiration of a petition.[13] USCIS must send the petitioner a notice of intent to revoke the petition based on one or more of the following grounds of revocation:

- One or more entities are no longer qualifying organizations;
- The beneficiary is no longer eligible under INA 101(a)(15)(L);
- A qualifying organization violated the requirements of INA 101(a)(15)(L) and 8 CFR 214.2(l);
- The statement of facts contained in the petition was not true and correct;
- Approval of the petition involved gross error;[14] or
- None of the qualifying organizations in a blanket petition have used the blanket petition procedure for 3 consecutive years.[15]

USCIS must consider all relevant evidence in deciding whether to revoke the petition.[16]

3. Denials

Notice of Intent to Deny

When an adverse decision is proposed based on the evidence submitted by the petitioner, USCIS may notify the petitioner of the intent to deny the petition and the basis for the denial.[17] In that situation, the Notice of Intent to Deny (NOID) specifies the basis for the proposed denial sufficient to give the petitioner adequate notice and sufficient information to respond.[18]

When an adverse decision is based on derogatory information considered by USCIS and of which the petitioner is unaware, USCIS must notify the petitioner of the intent to deny the petition and the basis for the denial.[19]

USCIS provides exactly 30 days from the date of the NOID for the petitioner to inspect and rebut the derogatory evidence.[20] Any explanation, rebuttal, or information presented by or on behalf of the petitioner shall be included in the record of proceeding.[21]

The NOID should contain:

- A statement that identifies the specific areas of eligibility that the petitioner does not appear to have met;
- A description of the specific reasons for the determination that the areas of eligibility have not been met; and
- A discussion of the most persuasive evidence the petitioner could submit to overcome the reasons for denial.

Denial Notices

If USCIS denies the petition, USCIS provides a notice that includes the reasons for denial and any rights to appeal the denial.[22]

The denial order should discuss all areas of eligibility not met by the petitioner and include a description of the reason or reasons for the determination.

In cases involving an extension of stay or change of status request, USCIS may find the nonimmigrant petition warrants approval, but the evidence of record reveals that the beneficiary is ineligible to extend or change their nonimmigrant status. In these instances, a separate denial notice must be prepared that addresses the ineligibility of the beneficiary for the requested change or extension of stay.[23]

Footnotes

[^ 1] See *INS v. Cardoza-Fonseca (PDF)*, 480 U.S. 421 (1987) (defining more likely than not as a greater than 50 percent probability of something occurring). See *Matter of Chawathe (PDF)*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M- (PDF)*, 20 I&N Dec. 77, 79-80 (Comm. 1989)).

[^ 2] See *Matter of Brantigan (PDF)*, 11 I&N Dec. 493 (BIA 1966).

[^ 3] For a full discussion on RFEs, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 4] Officers may issue a Notice of Intent to Deny (NOID) consistent with USCIS guidance.

[^ 5] See Prohibiting Certain Transactions with Respect to Iran (PDF), 60 FR 24757 (May 6, 1995).

[^ 6] See 31 CFR 560.306(d).

[^ 7] Filing of L-1 petitions for Canadian citizens under NAFTA may be made at a class A POE located on the United States-Canada land border or United States pre-flight station in Canada. See 8 CFR 214.2(l)(17)(ii).

[^ 8] From April 30, 2018 to April 30, 2020, the California Service Center and the CBP Blaine, Washington POE participated in a joint agency pilot program for Canadian citizens seeking L-1 nonimmigrant status under NAFTA.

[^ 9] See the United States-Mexico-Canada Agreement Implementation Act, Pub. L. 116-113 (PDF) (January 29, 2020).

[^ 10] For example, the TN designation continues to be used for NAFTA-USMCA professionals. TN admissions under NAFTA were governed by the list of professionals in Appendix 1603.D.1 to Annex 1603 of NAFTA. Under the USMCA, TN admissions are governed by the (identical) list of professionals in USMCA, Chapter 16, Appendix 2.

[^ 11] See 8 CFR 214.2(l)(7)(i)(A).

[^ 12] See 8 CFR 214.2(l)(7)(i)(B).

[^ 13] See 8 CFR 214.2(l)(9)(i).

[^ 14] See 8 CFR 214.2(l)(9)(iii)(A).

[^ 15] See 8 CFR 214.2(l)(9)(iii)(A).

[^ 16] See 8 CFR 214.2(l)(9)(iii)(B).

[^ 17] See 8 CFR 103.2(b)(8)(iii) (explaining that USCIS may deny the petition, issue an RFE, or notify the petitioner of the intent to deny). For more information, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 9, Rendering a Decision, Section B, Denials [1 USCIS-PM E.9(B)].

[^ 18] See 8 CFR 103.2(b)(8)(iv).

[^ 19] See 8 CFR 103.2(b)(16)(i).

[^ 20] The applicant has up to 3 more days after the 30-day period for responding to a NOID in cases where USCIS has mailed the request. See 8 CFR 103.8(b). For more information on timeframes and responses to Requests for Evidence and Notices of Intent to Deny, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 21] See 8 CFR 214.2(l)(9)(iii)(B).

[^ 22] See 8 CFR 214.2(l)(8)(ii).

[^ 23] There is no appeal from the denial of an application for extension of stay. See 8 CFR 214.1(c)(5).

Chapter 10 - Period of Stay

A. Limitations on Periods of Stay

A beneficiary who has spent the maximum period of 5 years in the United States in a specialized knowledge capacity or 7 years in the United States in a managerial or executive capacity, or as a temporary worker (H nonimmigrant) or intracompany transferee (L nonimmigrant),[1] may not be readmitted to the United States as a temporary worker or intracompany transferee, and USCIS may not approve a new individual petition for such classification, unless and until the beneficiary has resided and been physically present outside the United States for the immediate prior year.[2] Brief trips to the United States for business or pleasure do not interrupt the required 1 year outside the United States, but do not count towards fulfillment of that requirement.[3]

The limitations on periods of stay do not apply to beneficiaries:

- Who do not reside continually in the United States; and
- Whose employment in the United States is seasonal, intermittent, or consists of an aggregate of 6 months or less per year.[4]

In addition, the limitations do not apply to beneficiaries who reside abroad and regularly commute to the United States to engage in part-time employment. The burden is on the petitioner and the beneficiary to establish that the beneficiary qualifies for an exception.[5]

Maximum Periods of Stay

If Classification is ...	The Maximum Period of Stay is ...
Manager or executive (L-1A nonimmigrant)	7 years
Specialized knowledge (L-1B nonimmigrant)	5 years
L-1 blanket petition	3 years for initial petition, with an extension for an indefinite period possible

B. Extensions of Stay

Extensions can be granted in up to 2-year increments until the maximum period of stay is reached.[6] Officers should combine periods of stay in the H and L categories in determining whether the beneficiary has reached the 5- or 7-year limitation, including periods of H or L stay for previous employers and not just the current employer.[7]

An initial blanket petition is approvable for 3 years.[8] Approving an amended blanket petition during this validity period does not affect a beneficiary's period of stay; the validity period end date of the amended petition remains the same as the end date of the original approval. Requests to extend a blanket petition on a Petition for a Nonimmigrant Worker (Form I-129) may be filed up to 6 months before the expiration of the initial 3-year validity period, and the petitioner may request that such validity be extended indefinitely.[9] If USCIS approves the blanket petition extension, the validity period begins the day after the expiration of the initial approval and continues indefinitely. If USCIS denies the extension request, the petitioner and its qualifying organizations must wait 3 years to file another blanket petition. In the interim, organizations must file individual petitions for beneficiaries.[10]

The expiration of the blanket petition does not adversely affect an L-1 beneficiary's status if the U.S. entity continues to have at least one foreign qualifying organization. If the petitioner fails to timely file a blanket petition extension, it may not transfer new employees or file a request to extend a beneficiary's expiring L-1 status under the expired blanket petition. In that case the petitioner must file an individual petition. If the blanket extension is later approved, then the organization may resume transferring individuals under the blanket petition.[11]

If a petitioner is requesting an extension of the L-1 blanket petition, the petitioner must provide the following evidence:[12]

- A list of the beneficiaries admitted under the blanket petition during the preceding 3 years, with the following information for each beneficiary:
  - Positions held during that period;
  - The employing entity; and
  - The dates of initial admission and final departure, if applicable, of each beneficiary;
- A statement from the petitioner indicating whether it still meets the blanket petition criteria; and
- Documentation to support any changes in approved relationships and additional qualifying organizations.

C. Change from Specialized Knowledge Capacity to Manager or Executive (or vice versa)

When a beneficiary is initially admitted to the United States in a specialized knowledge capacity and is later promoted to a managerial or executive position, the beneficiary must have been employed in the managerial or executive position for at least 6 months to be eligible for the total period of stay of 7 years.[13]

If the 6-month rule is met, and the beneficiary qualifies as a manager or executive, then USCIS may approve the extension of stay request. However, if the beneficiary travels outside the United States and seeks readmission, the beneficiary must consular process and obtain the appropriate visa to be readmitted to the United States.

Extensions for managers or executives where the prior approval was limited to a short period could be an indicator that the beneficiary was not eligible to extend beyond the 5-year mark due to the regulatory requirement. The beneficiary must qualify to be classified as a manager or executive at the time of filing.[14]

The change to managerial or executive capacity must have been approved by USCIS in an amended, new, or extended petition at the time that the change occurred.[15]

D. Change of Status

In addition to all the requirements governing the L classification, change of status requests to the L classification from another nonimmigrant classification must establish that:

- The beneficiary entered the United States legally;
- The beneficiary has never worked in the United States illegally, or otherwise violated the terms of their visa or nonimmigrant status; and
- The expiration date on the beneficiary's I-94 has not passed.[16]

Footnotes

[^ 1] Under INA 101(a)(15)(H) or INA 101(a)(15)(L).

[^ 2] See 8 CFR 214.2(l)(12)(i).

[^ 3] See 8 CFR 214.2(l)(12)(i).

[^ 4] See 8 CFR 214.2(l)(12)(ii).

[^ 5] See 8 CFR 214.2(l)(12)(ii).

[^ 6] See 8 CFR 214.2(l)(15).

[^ 7] For example, a beneficiary is present in the United States in L-1B nonimmigrant status for 3 years; the beneficiary was in H-1B nonimmigrant status for the 2-year period immediately preceding the change to L-1B status. The beneficiary is subject to the 5-year limit because the combined H and L stay in the United States is 5 years. As a result, the beneficiary cannot obtain an extension of L status.

[^ 8] See 8 CFR 214.2(l)(11).

[^ 9] See 8 CFR 214.2(l)(7)(i)(B)(2).

[^ 10] See 8 CFR 214.2(l)(14)(iii)(B).

[^ 11] See 8 CFR 214.2(l)(7)(i)(B)(2).

[^ 12] See 8 CFR 214.2(l)(4)(iii)(A).

[^ 13] See 8 CFR 214.2(l)(15)(ii).

[^ 14] See 8 CFR 214.2(l)(15)(ii).

[^ 15] See 8 CFR 214.2(l)(15)(ii).

[^ 16] See 8 CFR 248.1(b) for information on timely filing and maintenance of status, and circumstances when failure to file timely may be excused in the discretion of USCIS.

Part M - Nonimmigrants of Extraordinary Ability or Achievement (O)

Chapter 1 - Purpose and Background

A. Purpose

The Immigration and Nationality Act (INA) and implementing regulations provide that certain employers or agents may petition in the O-1 visa category for nonimmigrants who have extraordinary ability in the sciences, arts, education, business, or athletics, which has been demonstrated by sustained national or international acclaim.[1] The O-1 visa category may also include those who have a demonstrated a record of extraordinary achievement in the motion picture and television industry.[2]

The INA and implementing regulations also provide that certain employers or agents may petition for accompanying aliens (O-2 classification) who seek to enter the United States temporarily and solely for the purpose of accompanying and assisting in the artistic or athletic performance by the O-1 artist or athlete.[3]

B. Background

The Immigration Act of 1990 added the O nonimmigrant classification, providing for the admission of aliens of extraordinary ability.[4] However, because of the passage of the Armed Forces Immigration Adjustment Act, implementation of certain O classification provisions were delayed until April 1, 1992.[5] Before Congress enacted these laws, artists, athletes, and other performers were admitted under the H-1 (distinguished merit and ability), H-2, or B-1 visa categories.

C. Legal Authorities

- INA 101(a)(15)(O) - Definition of O nonimmigrant classification
- INA 101(a)(46) - Definition of extraordinary ability in the arts

- INA 214 - Admission of nonimmigrants
- 8 CFR 214.2(o) - Special requirements for admission, extension, and maintenance of status ("Aliens of extraordinary ability or achievement")

Footnotes

[^ 1] See INA 101(a)(15)(O)(i).

[^ 2] See INA 101(a)(15)(O)(i).

[^ 3] See INA 101(a)(15)(O)(ii).

[^ 4] See Pub. L. 101-649 (PDF), 104 Stat. 4978 (November 29, 1990).

[^ 5] See Pub. L. 102-110 (PDF), 105 Stat. 555 (October 1, 1991).

Chapter 2 - Eligibility for O Classification

A. General

The O nonimmigrant classification allows the following aliens to enter the United States or change status from another nonimmigrant category:

- Nonimmigrants of extraordinary ability in the sciences, arts, education, business, or athletics (O-1 nonimmigrants);
- Nonimmigrants of extraordinary achievement in the motion picture or television industry (O-1 nonimmigrants); and
- Certain nonimmigrants accompanying and assisting an O-1 nonimmigrant (O-2 nonimmigrants).

B. Eligibility Requirements

In general, the beneficiary of a petition for O nonimmigrant classification must meet certain eligibility requirements, among others, as applicable:

O-1 Extraordinary Ability in Sciences, Education, Business, or Athletics (commonly referred to as O-1A)

- The beneficiary has extraordinary ability in the sciences, education, business, or athletics, which has been demonstrated by sustained national or international acclaim; and
- The beneficiary seeks to enter the United States to continue work in the area of extraordinary ability.[1]

O-1 Extraordinary Ability in Arts (commonly referred to as O-1B (Arts))

- The beneficiary has extraordinary ability in the arts, which has been demonstrated by sustained national or international acclaim; and
- The beneficiary seeks to enter the United States to continue work in the area of extraordinary ability.[2]

O-1 Extraordinary Achievement in Motion Picture or Television Industry (commonly referred to as O-1B (MPTV))

- The beneficiary has a demonstrated record of extraordinary achievement in motion picture or television productions; and
- The beneficiary seeks to enter the United States to continue work in the area of extraordinary achievement.[3]

O-2 Accompanying Principal O-1 Beneficiary (Essential Support Personnel)

- The O-2 beneficiary seeks to enter the United States temporarily and solely for the purpose of accompanying and assisting in the artistic or athletic performance by an O-1 beneficiary who is admitted for a specific event or events;
- Is an integral part of such actual performance(s) or event(s);
- Has critical skills and experience with the O-1 beneficiary, which are not of a general nature and are not possessed by a U.S. worker; and
- Has a foreign residence which the O-2 has no intention of abandoning.

In cases involving a motion picture or television production, the O-2 beneficiary must also have skills and experience with the O-1 beneficiary that are not of a general nature and are critical either:

- Based on a pre-existing longstanding working relationship; or
- With respect to a specific production because significant production (including pre- and post-production work) will take place both inside and outside the United States and the continuing participation of the O-2 beneficiary is essential to the successful completion of the production.[4]

Footnotes

[^ 1] See INA 101(a)(15)(O)(i). See 8 CFR 214.2(o)(1)(ii)(A)(1).

[^ 2] See INA 101(a)(15)(O)(i). See 8 CFR 214.2(o)(1)(ii)(A)(1).

[^ 3] See INA 101(a)(15)(O)(i). See 8 CFR 214.2(o)(1)(ii)(A)(2).

[^ 4] See INA 101(a)(15)(O)(ii). See 8 CFR 214.2(o)(1)(ii)(B).

Chapter 3 - Petitioners

A. Eligible Petitioners

A U.S. employer may file an O-1 or O-2 Petition for a Nonimmigrant Worker (Form I-129). A U.S. agent may also file such a petition when it involves workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act in its behalf. A U.S. agent may be:

- The actual employer of the beneficiary;
- The representative of both the employer and the beneficiary; or
- A person or entity authorized by the employer to act for, or in place of, the employer as its agent.[1]

O beneficiaries may not petition for themselves.[2] However, a separate legal entity owned by the beneficiary, such as a corporation or limited liability company, may file the petition on their behalf.

B. Petitioner Obligations

In the case of an O-1 or O-2 beneficiary whose employment terminates for reasons other than voluntary resignation, the employer whose offer of employment formed the basis of such nonimmigrant status and the petitioner (if different from the employer) are jointly and severally liable for the reasonable cost of return transportation of the beneficiary to his or her last place of residence prior to his or her entry into the United States.[3]

A petitioner must immediately notify USCIS of any changes in the terms and conditions of employment of a beneficiary that may affect eligibility under INA 101(a)(15)(O) and 8 CFR 214.2(o). The petitioner should file an amended petition when the petitioner continues to employ the beneficiary. If the petitioner no longer employs the beneficiary, the petitioner must send a letter explaining the change(s) to the USCIS office that approved the petition.[4]

C. Agents

A U.S. agent[5] may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act in its behalf. A U.S. agent may be:

- The actual employer of the beneficiary;
- The representative of both the employer and the beneficiary; or
- A person or entity authorized by the employer to act for, or in place of, the employer as its agent.[6]

A petition filed by an agent is subject to several conditions. A petition involving multiple employers may be filed by a person or company in business as an agent that acts as an agent for both the employers and the beneficiary, if:

- The supporting documentation includes a complete itinerary of the event or events;
- The itinerary specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishments, venues, or locations where the services will be performed;
- The contracts between the employers and the beneficiary are submitted; and
- The agent explains the terms and conditions of the employment and provides any required documentation.[7]

An agent may be the actual employer of the beneficiary. In order to be eligible to file a petition on behalf of the beneficiary as his or her agent and on behalf of other (multiple) employers of the beneficiary, the petitioner must meet the conditions described above and establish that it is "in business as an agent" (as described below).

The regulations do not specify the evidence for establishing that the petitioner of multiple employers is "in business as an agent." Officers consider evidence that shows that it is more likely than not that the petitioner is in business as an agent for the series of events, services, or engagements that are the subject of the petition. The focus is on whether the petitioner can establish that it is authorized to act as an agent for the other employers for purposes of filing the petition. This means that the petitioner does not have to demonstrate that it normally serves as an agent outside the context of the petition.

The petitioner seeking to serve as an agent for the beneficiary or for other employers must establish that it is duly authorized to act as their agent. An officer may determine that this requirement has been satisfied if, for example, the petitioner presents a document signed by the beneficiary's other employer(s) that states that the petitioner is authorized to act in that employer's place as an agent for the limited purpose of filing the petition with USCIS.[8]

Other examples of probative evidence that may demonstrate that the petitioner "is in business as an agent" may include:

- A statement confirming the relevant information (itinerary, names and addresses of the series of employers) signed by the petitioner and the series of employers;
- Other types of agency representation contracts;
- Fee arrangements; or
- Statements from the other employers regarding the nature of the petitioner's representation of the employers and beneficiary.

While evidence of compensation could help establish that the petitioner is in business as an agent, compensation is not a requirement to establish an agency. Again, the officer must evaluate each case based on the facts presented.

Assuming that the petition is approvable and the petitioner has established that it is authorized to act as an agent in order to file the petition on behalf of the other employers, the validity period should last for the duration of the qualifying events, not to exceed the maximum allowable validity period for the classification being sought.[9] If the petition is approvable but the petitioner has not established that it is authorized by the other employers to file the petition on behalf of the other employers (including after responding to a Request for Evidence), the validity period should be limited to the qualifying events for which the petitioner will be directly employing the beneficiary. The validity period cannot exceed the maximum allowable validity period for the classification being sought.

Footnotes

[^ 1] See 8 CFR 214.2(o)(2)(iv)(E).

[^ 2] See 8 CFR 214.2(o)(2)(i).

[^ 3] See 8 CFR 214.2(o)(16).

[^ 4] See 8 CFR 214.2(o)(8)(i)(A).

[^ 5] Much of the USCIS policy relating to agents derives from USCIS Memorandum, PM HQ 70/6.2.18, HQ 70/6.2.19, "Requirements for Agents and Sponsors Filing as Petitioners for the O and P Visa Classifications," issued on November 20, 2009.

[^ 6] See 8 CFR 214.2(o)(2)(iv)(E). For more information on agents, see the O Nonimmigrant Classifications: Question and Answers webpage.

[^ 7] See 8 CFR 214.2(o)(2)(iv)(B) and 8 CFR 214.2(o)(2)(iv)(E)(2). All O petitions must include contracts between the employers and the beneficiary. See 8 CFR 214.2(o)(2)(iv)(E)(2).

[^ 8] No particular form or specific language is required to be submitted with a petition to establish agency. Officers should not issue Requests for Evidence requiring a particular form or specific language in the agency agreement, but should focus on whether the petitioning agent has shown that it has obtained authorization from the other employer(s) to file a petition on their behalf.

[^ 9] See 8 CFR 214.2(o)(6)(iii) and 8 CFR 214.2(o)(12)(ii). See Chapter 9, Admission, Extension of Stay, Change of Status, and Change of Employer [2 USCIS-PM M.9].

Chapter 4 - O-1 Beneficiaries

A. Standard for Classification

In order to qualify as an alien of "extraordinary ability" in the sciences, education, business, or athletics (commonly referred to as O-1A), or in arts (commonly referred to as O-1B (Arts)), a beneficiary must have "sustained national or international acclaim."[1] With regard to classification to work in motion picture and television productions (commonly referred to as O-1B (MPTV)), a beneficiary must have a demonstrated record of extraordinary achievement.[2] In all cases, an O-1 beneficiary's achievements must have been recognized in the field through extensive documentation.[3]

The regulations define "extraordinary ability" as applied to the O-1 classification as follows:

- In the field of science, education, business, or athletics: a level of expertise indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor.[4]
- In the field of arts: distinction, defined as a high level of achievement in the field of arts, as evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts.[5]

"Extraordinary achievement" in reference to aliens in the motion picture or television industry (including both performers and others) means a very high level of accomplishment in the motion picture or television industry, as evidenced by a degree of skill and recognition significantly above that ordinarily encountered to the extent that the person is recognized as outstanding, notable, or leading in the motion picture or television field.[6]

Determining the Relevant Standard for Artists with Some Connection to MPTV

Some petitions may have elements of both O-1B (Arts) and O-1B (MPTV) classifications and it may not be clear which O-1B classification and definitional standard an officer should apply. For instance, if the beneficiary would be coming to the United States to work as an artist, but some of the artist's work will be in the motion picture or television industry, it might be unclear whether an officer should apply the requirements for O-1B (Arts) or O-1B (MPTV).[7] In addition, as new forms of media productions, including various types of internet content, emerge, it can be more difficult for officers to determine which productions constitute motion picture or television productions.

Analysis of whether a production is within the motion picture or television industry is not limited to whether it will air on a television screen or in a movie theater, as the industry has grown to encompass some online content. While static web materials and self-produced video blogs and social media content generally do not fall into the MPTV category, USCIS considers streaming movies, web series, commercials, and other programs with formats that correspond to more traditional motion picture and television productions to generally fall within the MPTV industry's purview. This interpretation of whether a beneficiary is working on a motion picture or television production, and is therefore subject to the O-1B MPTV requirements, generally aligns with that of industry organizations.[8] Accordingly, USCIS may properly consider work on such productions to fall under the O-1B (MPTV) classification.

USCIS interprets the eligibility requirements for O-1B (MPTV) to apply if the beneficiary will perform services for motion picture or television productions while in the United States regardless of other prospective services outside the MPTV industry.[9] If, however, an artist's work or appearance on an MPTV production is incidental to their non-MPTV work as an artist, the O-1B (MPTV) classification may not be appropriate, and the person may instead seek classification under O-1B (Arts). For example, USCIS does not necessarily consider artists who will be interviewed or will otherwise appear discussing, demonstrating, or promoting their work as an artist in an MPTV production to be working in the MPTV industry.[10] This interpretation reflects USCIS' longstanding practice, and is consistent with the statute, which includes more stringent consultation requirements for aliens "seeking entry for a motion picture or television production," and describes eligibility for aliens in this industry separately from those in the "arts," notwithstanding the artistic nature of their work.[11]

USCIS generally does consider the people employed by the production company to conduct the interview, film the broadcasts, or otherwise perform as paid professionals, to be working in the MPTV industry. Similarly, USCIS considers persons such as hosts or judges cast in a reality-based production to be working in the MPTV industry whereas USCIS does not consider the contestants to be working in the MPTV industry.

B. Determining Eligibility for O-1 Classification

For an O-1 Petition for a Nonimmigrant Worker (Form I-129), the officer must determine whether the beneficiary meets the relevant standard outlined in the statute and regulations."[12] The regulations describe the various types of evidence the petitioner must submit in support of a petition for each type of O-1 beneficiary. In general, the petition must be accompanied by either evidence of receipt of (or in some categories nomination for) a qualifying award, or at least three alternate forms of evidence. However, an officer cannot make a favorable determination simply because the petitioner has submitted the forms of documentation described in the regulations.

As explained in the preamble to the final rule, the evidentiary requirements are not the standard for the classification, but are instead the mechanism for establishing whether the standard is met.[13] Accordingly, the fact that the petitioner has produced evidence satisfying at least three evidentiary criteria does not necessarily establish that the beneficiary is eligible for the O-1 classification.[14] Rather, USCIS must determine eligibility based on whether the totality of the evidence submitted demonstrates that the beneficiary meets the relevant standard.

More specifically, an officer first determines whether the petitioner has submitted evidence meeting the minimum number of criteria or submitted evidence that the beneficiary received a qualifying award (or nomination, if applicable). If the petitioner meets the evidentiary requirements, the officer must then consider all the evidence in the record in its totality to determine if the beneficiary is an alien of extraordinary ability or achievement as defined in INA 101(a)(15)(O)(i) and 8 CFR 214.2(o).

Satisfying the Evidentiary Requirements

The analysis in this step is limited to determining whether the evidence submitted is comprised of either a qualifying award (or nomination, if applicable), or at least three of the applicable alternate criteria. In determining whether an evidentiary criterion is met, an officer should evaluate the evidence to determine if it falls within the parameters of the applicable regulation. While an officer should consider whether the submitted evidence meets the language of the regulations to determine whether a particular regulatory criterion has been met, no determination is made during this step as to whether or not the evidence is indicative that the beneficiary meets the applicable definitional standard for the classification.[15]

Totality Determination

Providing required evidence does not, in itself, establish that the beneficiary meets the standard for classification as an alien of extraordinary ability or extraordinary achievement. Accordingly, when the evidentiary requirements specified above are satisfied, an officer proceeds to evaluate the totality of all the evidence in the record to determine whether it establishes that the:

- O-1A beneficiary has sustained national or international acclaim and is one of the small percentage who have arisen to the very top of his or her field;[16]
- O-1B (Arts) beneficiary has sustained national or international acclaim and has achieved distinction in the field of arts;[17] or
- O-1B (MPTV) beneficiary has a record of extraordinary achievement in the motion picture and television industry such that he or she has a very high level of accomplishment in the motion picture or television industry evidenced by a degree of skill and recognition significantly above that ordinarily encountered to the extent that the person is recognized as outstanding, notable, or leading in the field.[18]

If the officer determines that the petitioner has failed to meet these standards, the officer should articulate the specific reasons as to why the petitioner, by a preponderance of the evidence, has not demonstrated that the beneficiary is a person of extraordinary ability or achievement based on the relevant statutory and regulatory language.

C. O-1A Beneficiaries in Sciences, Education, Business, or Athletics

1. Establishing Eligibility

In support of an O-1A Petition for a Nonimmigrant Worker (Form I-129), the petitioner must establish that the beneficiary:

- Has extraordinary ability in the sciences, education, business, or athletics, which has been demonstrated by sustained national or international acclaim;
- Has achievements that have been recognized in the field through extensive documentation; and
- Is coming to continue work in the area of extraordinary ability (but not necessarily that the particular duties to be performed require someone of such extraordinary ability).[19]

2. Supporting Documentation

The supporting documentation for an O-1A petition must include evidence that the beneficiary has received a major internationally recognized award (such as the Nobel Prize)[20] or satisfies at least three[21] of the following evidentiary criteria:

Criterion 1: Documentation of the beneficiary's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor.[22]

First, USCIS determines whether the person was the recipient of prizes or awards in the field of endeavor.[23] A person may rely on a team award, provided the person is one of the recipients of the award.[24]

Second, USCIS determines whether the award is a lesser nationally or internationally recognized prize or award which the beneficiary received for excellence in the field of endeavor. This criterion does not require an award or prize to have the same level of recognition and prestige associated with the Nobel Prize or another award that would qualify as a one-time achievement, nor does it require an award or prize to be received at an advanced stage of the beneficiary's career.

Examples of relevant evidence may include, but are not limited to:

- Awards from well-known national institutions and well-known professional associations;
- Certain doctoral dissertation awards and scholarships; and
- Certain awards recognizing presentations at nationally or internationally recognized conferences.

Considerations:

Relevant considerations include, but are not limited to:

- The criteria used to grant the awards or prizes;
- The national or international significance of the awards or prizes in the field;
- The number of awardees or prize recipients; and
- Limitations on eligible competitors.

While many scholastic awards do not demonstrate the requisite level of recognition, there may be some that are nationally or internationally recognized as awards for excellence such that they may satisfy the requirements of this criterion.

For example, an award available only to persons within a single locality, employer, or school may have little national or international recognition, while an award open to members of a well-known national institution (including an R1 or R2 doctoral university)[25] or professional organization may be nationally recognized.

Criterion 2: Documentation of the beneficiary's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.[26]

USCIS determines if the association for which the person claims present or past membership requires that members have outstanding achievements in the field as judged by recognized experts in that field.

Examples of relevant evidence may include, but are not limited to:

- Membership in certain professional associations; and

Criterion 2: Documentation of the beneficiary's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.[26]

- Fellowships with certain organizations or institutions.

Considerations:

The petitioner must show that membership in the association requires outstanding achievements in the field for which classification is sought, as judged by recognized national or international experts.

Associations may have multiple levels of membership. The petitioner must show that in order to obtain the level of membership afforded to the beneficiary, the beneficiary was judged by recognized national or international experts as having attained outstanding achievements in the field for which classification is sought.

As a possible example, membership in the Institute of Electrical and Electronics Engineers (IEEE) at the IEEE fellow level requires, in part, that a nominee have "accomplishments that have contributed importantly to the advancement or application of engineering, science and technology, bringing the realization of significant value to society," and nominations are judged by an IEEE council of experts and a committee of current IEEE fellows.[27] As another possible example, membership as a fellow in the Association for the Advancement of Artificial Intelligence (AAAI) is based on recognition of a nominee's "significant, sustained contributions" to the field of artificial intelligence, and is judged by a panel of current AAAI fellows.[28]

Relevant factors that may lead an officer to a conclusion that the person's membership in one or more associations was not based on outstanding achievements in the field include, but are not limited to, instances where the person's membership was based:

- Solely on a level of education or years of experience in a particular field;
- On the payment of a fee or by subscribing to an association's publications; or
- On a requirement, compulsory or otherwise, for employment in certain occupations, such as union membership.

Criterion 3: Published material in professional or major trade publications or major media about the beneficiary, relating to the beneficiary's work in the field for which classification is sought. This evidence must include the title, date, and author of such published material and any necessary translation.[29]

First, USCIS determines whether the published material was related to the person and the person's specific work in the field for which classification is sought.

Examples of relevant evidence may include, but are not limited to:

- Professional or major print publications (newspaper articles, popular and academic journal articles, books, textbooks, or similar publications) regarding the beneficiary and the beneficiary's work;
- Professional or major online publications regarding the beneficiary and the beneficiary's work; and
- Transcript of professional or major audio or video coverage of the beneficiary and the beneficiary's work.

Considerations:

Published material that includes only a brief citation or passing reference to the beneficiary's work is not "about" the beneficiary, relating to the beneficiary's work in the field, as required under this criterion. However, the beneficiary and the beneficiary's work need not be the only subject of the material; published material that covers a broader topic but includes a substantial discussion of the beneficiary's work in the field and mentions the beneficiary in connection to the work may be considered material "about" the beneficiary relating to their work.

Moreover, officers may consider material that focuses solely or primarily on work or research being undertaken by the beneficiary or by a team of which the beneficiary is a member, provided that the material mentions the beneficiary in connection with the work, or other evidence in the record documents the beneficiary's significant role in the work or research.

Second, USCIS determines whether the publication qualifies as a professional publication, major trade publication, or major media publication.

In evaluating whether a submitted publication is a professional publication, major trade publication, or major media, relevant factors include the intended audience (for professional and major trade publications) and the relative circulation, readership, or viewership (for major trade publications and other major media).

Criterion 4: Evidence of the beneficiary's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization for which classification is sought.[30]

USCIS determines whether the person has acted as the judge of the work of others in the same or an allied field of specialization.

Examples of relevant evidence may include, but are not limited to:

- Reviewer of abstracts or papers submitted for presentation at scholarly conferences in the respective field;
- Peer reviewer for scholarly publications;
- Member of doctoral dissertation committees; and
- Peer reviewer for government research funding programs.

Considerations:

The petitioner must show that the beneficiary has not only been invited to judge the work of others, but also that the beneficiary actually participated in the judging of the work of others in the same or allied field of specialization.

For example, a petitioner might document a beneficiary's peer review work by submitting a copy of a request from a journal to the beneficiary to do the review, accompanied by evidence confirming that the beneficiary actually completed the review.

Criterion 5: Evidence of the beneficiary's original scientific, scholarly, or business-related contributions of major significance in the field.[31]

First, USCIS determines whether the person has made original contributions in the field.

Second, USCIS determines whether the original contributions are of major significance to the field.

Examples of relevant evidence may include, but are not limited to:

- Published materials about the significance of the beneficiary's original work;
- Testimonials, letters, and affidavits about the beneficiary's original work and its significance in the field;
- Documentation that the beneficiary's original work was cited at a level indicative of major significance in the field;
- Documentation that the beneficiary's original work was published in a scholarly journal of distinguished reputation in the field;
- Patents or licenses deriving from the beneficiary's work;
- Evidence of commercial use of the beneficiary's work, such as commercialization of a research innovation;
- Contributions to repositories of software, data, designs, protocols, or other technical resources with evidence of significant scientific, scholarly, or business-related impact in the field; and
- A letter or other documentation from an interested government agency, including a quasi-governmental entity, that explains in detail the significance of the individual's original work to the field, especially as related to the funding interests and mission of the agency or entity.

Considerations:

Analysis under this criterion focuses on whether the beneficiary's original work constitutes major, significant contributions to the field.

Evidence that the beneficiary's work was funded, patented, or published, while potentially demonstrating the work's originality, will not necessarily establish, on its own, that the work is of major significance to the field. However, published research that has provoked widespread commentary on its importance from others working in the field, and documentation that it has been highly cited relative to other works in that field, may be probative of the significance of the beneficiary's contributions to the field of endeavor.

Similarly, evidence that the beneficiary developed a patented technology that has attracted significant attention or commercialization may establish the significance of the beneficiary's original contribution to the field. If a patent remains pending, USCIS will likely require additional supporting evidence to document the originality of the beneficiary's contribution.

Detailed letters from experts in the field explaining the nature and significance of the beneficiary's contribution(s) may also provide valuable context for evaluating the claimed original contributions of major significance, particularly when the record includes documentation corroborating the claimed significance.

Submitted letters should specifically describe the beneficiary's contribution and its significance to the field and should also set forth the basis of the writer's knowledge and expertise.

Criterion 6: Evidence of the beneficiary's authorship of scholarly articles in the field, in professional journals, or other major media.[32]

First, USCIS determines whether the person has authored scholarly articles in the field.

Examples of relevant evidence may include, but are not limited to:

- Publications in professionally-relevant journals; and
- Published conference presentations at nationally or internationally recognized conferences.[33]

Considerations:

In order to meet this criterion, the beneficiary must be a listed author of the submitted article or articles but need not be the sole or first author. A petitioner need not provide evidence that the beneficiary's published work has been cited to meet this criterion.[34]

In addition, the articles must be scholarly. In the academic arena, a scholarly article reports on original research, experimentation, or philosophical discourse. It is written by a researcher or expert in the field who is often affiliated with a college, university, or research institution. The article is normally peer-reviewed.

In general, it should have footnotes, endnotes, or a bibliography, and may include graphs, charts, videos, or pictures as illustrations of the concepts expressed in the article. In non-academic arenas, a scholarly article should be written for learned persons in that field.

Second, USCIS determines whether the publication qualifies as a professional publication, major trade publication, or major media publication.

In evaluating whether a submitted publication is a professional publication, major trade publication, or major media, relevant factors include the intended audience (for professional and major trade publications)[35] and the relative circulation, readership, or viewership (for major trade publications and other major media).

Criterion 7: Evidence that the beneficiary has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation.[36]

First, USCIS determines whether the person has performed in a leading or critical role for an organization, establishment, or a division or department of an organization or establishment.

Examples of relevant evidence may include, but are not limited to:

- Faculty or research position for a distinguished academic department or program;
- Research position for a distinguished non-academic institution, government or quasi-governmental entity, or company;
- Principal or named investigator for a department, institution, or business that received a merit-based government award, such as an academic research or Small Business Innovation Research (SBIR) grant;[37]
- Member of a key committee or high-performing team within a distinguished organization;
- Founder or co-founder of, or contributor of intellectual property to, a startup business that has a distinguished reputation; and

Criterion 7: Evidence that the beneficiary has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation.[36]

- Critical or essential supporting role for a distinguished organization or a distinguished division of an institution, government or quasi-governmental entity, or company, as explained in detail by the director or a principal investigator of the relevant organization or division.

Considerations:

To show a critical role, the evidence should establish that the beneficiary has contributed in a way that is of significant importance to the organization or establishment's activities. To show an essential role, the evidence should establish that the beneficiary's role is (or was) integral to the entity. A leadership role in an organization often qualifies as critical or essential.

For a supporting role to be considered critical or essential, USCIS considers other factors, such as whether the beneficiary's performance in the role is (or was) integral or important to the organization or establishment's goals or activities, especially in relation to others in similar positions within the organization.

It is not the title of the beneficiary's role, but rather the beneficiary's duties and performance in the role that determines whether the role is (or was) critical or essential. Detailed letters from persons with personal knowledge of the significance of the beneficiary's role can be particularly helpful in analyzing this criterion. The organization need not have directly employed the beneficiary.

Similarly, a letter or other documentation from an interested government agency, including a quasi-governmental entity, can serve as relevant evidence if it demonstrates that the agency or entity either funds the beneficiary or funds work in which the beneficiary has a critical or essential role, and explains this role in the funded work.

Second, USCIS determines whether the organization or establishment, or the department or division for which the person holds or held a leading or critical role, has a distinguished reputation.

Relevant factors for evaluating the reputation of an organization or establishment can include the scale of its customer base, longevity, or relevant media coverage.

For academic departments, programs, and institutions, officers may also consider national rankings and receipt of government research grants as positive factors in some cases.

For a startup business, officers may consider evidence that the business has received significant funding from government entities, venture capital funds, angel investors, or other such funders commensurate with funding rounds generally achieved for that startup's stage and industry, as a positive factor regarding its distinguished reputation.

Criterion 8: Evidence that the beneficiary has either commanded a high salary or will command a high salary or other remuneration for services as evidenced by contracts or other reliable evidence.[38]

USCIS determines whether the person has commanded or will command a high salary or other remuneration.

Examples of relevant evidence may include, but are not limited to:

- Tax returns, pay statements, or other evidence of past salary or remuneration for services;
- Contract, job offer letter, or other evidence of prospective salary or remuneration for services; and
- Comparative wage or remuneration data for the beneficiary's field, such as geographical or position-appropriate compensation surveys.

Considerations:

If the petitioner is claiming to meet this criterion, then the burden is on the petitioner to provide appropriate evidence establishing that the beneficiary's compensation is high. Such evidence may include documentation demonstrating the beneficiary is highly compensated in relation to others in the field. Evidence regarding whether the person's compensation is high relative to that of others working in the field may take many forms. Examples may include, but are not limited to, geographical or position-appropriate compensation surveys and organizational justifications to pay above the compensation data.

The following webpages, among others, may be helpful in evaluating the relative compensation for a given field:

- The U.S. Bureau of Labor Statistics (BLS) Overview of BLS Wage Data by Area and Occupation webpage; and
- The U.S. Department of Labor's Career One Stop webpage.

Officers should evaluate persons working outside of the United States based on the wage statistics or comparable evidence for that locality, rather than by simply converting the salary to U.S. dollars and then viewing whether that salary would be considered high in the United States.

For entrepreneurs or founders of startup businesses, officers consider evidence that the business has received significant funding from government entities, venture capital funds, angel investors, or other such funders in evaluating the credibility of submitted contracts, job offer letters, or other evidence of prospective salary or remuneration for services.

3. Comparable Evidence

If the listed criteria are not readily applicable to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.[39]

When a Petitioner May Use Comparable Evidence

Petitioners should submit evidence outlined in the evidentiary criteria if the criteria readily apply to the beneficiary's occupation.[40] However, if the petitioner establishes that a particular criterion is not readily applicable to the beneficiary's occupation, the petitioner may then submit evidence that is not specifically described in that criterion but is comparable to that criterion.[41]

A petitioner is not required to show that all or a majority of the criteria do not readily apply to the beneficiary's occupation before USCIS will accept comparable evidence. Instead, for comparable evidence to be considered, the petitioner must explain why a particular evidentiary criterion listed in the regulations is not readily applicable to the beneficiary's occupation, as well as why the submitted evidence is "comparable" to that criterion. A general unsupported assertion that the listed criterion does not readily apply to the beneficiary's occupation is not probative. However, a statement alone can be sufficient if it is detailed, specific, and credible.

Although officers do not consider comparable evidence if the petitioner submits evidence in lieu of a particular criterion that is readily applicable to the beneficiary's occupation simply because the beneficiary cannot satisfy that criterion, a criterion need not be entirely inapplicable to the beneficiary's occupation. Rather, comparable evidence is allowed if the petitioner shows that a criterion is not easily applicable to the beneficiary's job or profession.[42]

As with all O-1A petitions, officers may consider comparable evidence in support of petitions for beneficiaries working in STEM fields. Specifically, if a petitioner demonstrates that a particular criterion does not readily apply to the beneficiary's occupation, the petitioner may submit evidence that is of comparable significance to that criterion to establish sustained acclaim and recognition.

For instance, if the publication of scholarly articles is not readily applicable to a beneficiary whose occupation is in an industry rather than academia, a petitioner might demonstrate that the beneficiary's presentation of work at a major trade show is of comparable significance to that criterion. As another example, if the petitioner demonstrates that receipt of a high salary is not readily applicable to the beneficiary's position as an entrepreneur, the petitioner might present evidence that the beneficiary's highly valued equity holdings in the startup are of comparable significance to the high salary criterion.

Establishing Eligibility with Comparable Evidence

A petitioner relying on evidence that is comparable to one or more of the criteria listed at 8 CFR 214.2(o)(3)(iii)(B) must still meet at least three separate evidentiary criteria to satisfy the evidence requirements, even if one or more of those criteria are met through evidence that is not specifically described in the regulation but is comparable.[43] While a petitioner relying on comparable evidence is not limited to the kinds of evidence listed in the criteria, the use of comparable evidence does not change the standard for the classification. It remains the petitioner's burden to establish that the beneficiary has extraordinary ability in the beneficiary's field of endeavor.

4. Evaluating the Totality of the Evidence

When the evidentiary requirements specified above are satisfied, an officer proceeds to evaluate the totality of all the evidence in the record to determine whether the beneficiary has extraordinary ability with sustained national or international acclaim, as described in the O statute and regulations.[44]

At this step, officers may consider any potentially relevant evidence, even if such evidence does not fit one of the above regulatory criteria or was not presented as comparable evidence.

The following are examples of situations where evidence might not directly correspond to the above regulatory criteria or might not be presented as comparable evidence, but would nonetheless be potentially relevant towards demonstrating, in the totality of the evidence, that an O-1A beneficiary is among the small percentage at the top of the field and that the beneficiary has sustained national or international acclaim:[45]

- The record demonstrates that the beneficiary has published articles in particularly highly-ranked journals relative to other journals in the field, as demonstrated by, for example, evidence the petitioner provides regarding the journal's impact factor.[46] Depending on the level of recognition of the journals in question, as demonstrated by evidence in the record, there may be particular prestige or acclaim associated with publication in such journals, especially if the beneficiary is the most significant contributor to the publication, a senior author, or the sole author of the article or articles.
- The petitioner provides evidence demonstrating that the total rate of citations to the beneficiary's body of published work is high relative to others in the field, or the beneficiary has a high h-index[47] for the field. Depending on the field and the comparative data the petitioner provides, such evidence may indicate a beneficiary's high overall standing for the purpose of demonstrating that the beneficiary is among the small percentage at the top of the field.[48]
- The petitioner documents the beneficiary's employment or research experience is with leading institutions in the field (such as U.S. universities that have been recognized as having high or very high research activity by the Carnegie Classification of Institutions of Higher Education,[49] foreign universities with comparably high research activity, or a university that is highly regarded according to a widely recognized metric such as the QS World University Rankings[50]). Such employment or experience can be a positive factor toward demonstrating that the beneficiary is among the small percentage at the top of the field.
- The record establishes that the beneficiary has received unsolicited invitations to speak or present research at nationally or internationally recognized conferences in the field. Although such a role for the conference may not rise to the level of a critical or essential capacity, this type of invitation is generally indicative of a person's high standing and recognition for achievements in the field.
- The record establishes that the beneficiary is named as an investigator, scientist, or researcher on a peer-reviewed and competitively funded U.S. government grant or stipend for STEM research. This type of evidence can be a positive factor indicating a beneficiary is among the small percentage at the top of the beneficiary's field.
- The record includes a letter or other documentation from an interested government agency, including a quasi-governmental entity, that attests in detail to the beneficiary's sustained national or international acclaim.

In all cases, the petitioner has the burden of providing sufficient context regarding the above evidence and considerations to demonstrate that the evidence meets the relevant criteria and to establish the beneficiary's extraordinary ability in the totality of the circumstances.

With respect to demonstrating extraordinary ability in athletics, USCIS considers the fact that a male athlete has been competing against women as a negative factor in determining whether the alien is among the small percentage at the very top of the field.[51]

D. O-1B Beneficiaries in the Arts

1. Establishing Eligibility

In support of an O-1B (Arts) Petition for a Nonimmigrant Worker (Form I-129), the petitioner must establish that the beneficiary:

- Has extraordinary ability in the arts which has been demonstrated by sustained national or international acclaim;
- Has achievements that have been recognized in the field through extensive documentation; and
- Is coming to work in the area of extraordinary ability (but not necessarily that the particular duties to be performed require someone of such extraordinary ability).[52]

2. Supporting Documentation

The supporting documentation for an O-1B (Arts) petition must include evidence that the beneficiary has received, or been nominated for, a significant national or international award or prize in the particular field (such as an Academy Award, Emmy, Grammy, or Director's Guild Award)[53] or at least three[54] of the following evidentiary criteria:

Criterion 1: Evidence that the beneficiary has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, contracts, or endorsements.[55]

This criterion differs from the third criterion, which is specific to organizations and establishments.[56]

This criterion requires evidence of:

- The beneficiary's past lead or starring participation in distinguished productions or events; and
- The beneficiary's prospective lead or starring participation in distinguished productions or events.

Evidence may demonstrate a lead role by establishing that the person has a principal role in the event or production. A starring role means a position of great prominence relative to others in the event or production.[57]

In evaluating the distinguished reputation of a past production or event, officers may consider factors such as favorable critical reception, high attendance levels, commercial success, or another indicator that the petitioner establishes would tend to distinguish the reputation of an event or production in the relevant field.

With regard to demonstrating the distinguished reputation of a prospective event, a petitioner may submit documentation such as advance publicity, endorsements, or other evidence regarding the level of anticipation of the relevant event or production. However, as the available evidence relating to the reputation of a prospective production or event will often be limited, officers may also consider factors such as the reputation of similar past events or productions by the same individuals or entities.

In evaluating whether the beneficiary's participation in a past or future event or production qualifies as lead or starring, officers may consider, for example, whether the beneficiary's role is highlighted or featured in advertisements, publicity releases, critical reviews, or other materials. The contractual terms offered to the beneficiary may also be relevant to establishing the lead or starring nature of the beneficiary's participation, especially with regard to a prospective event or production.

This criterion does not require that the beneficiary will have a lead or starring role in the specific U.S. events or productions for which O-1 classification is sought, or that such events or productions have a distinguished reputation. It is sufficient for the petitioner to otherwise demonstrate that the beneficiary has performed and will perform a qualifying role in a qualifying production within or outside of the United States.

To meet this criterion, the petitioner must submit evidence in the form of critical reviews, advertisements, publicity releases, publications, contracts, or endorsements. Advertisements, publicity releases, and endorsements are promotional materials. Endorsements are public facing and serve a marketing purpose. This exhaustive list does not include unpublished testimonial or recommendation letters.

Criterion 2: Evidence that the beneficiary has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the beneficiary in major newspapers, trade journals, magazines, or other publication.[58]

To meet this criterion, the petitioner must provide evidence that demonstrates the beneficiary is recognized for achievements nationally or internationally, in the form of:

- Critical review(s) or other published material(s) in a major newspaper(s), trade journal(s), magazine(s), or other publication(s) (which may include online publications or a transcript of radio or video coverage); and
- That are by or about the beneficiary.

The beneficiary and the beneficiary's achievements need not be the only subject of the material in order to qualify as published material about the individual as described in this criterion. For example, published material that covers a broader production, exhibition, or topic, but includes a discussion of the beneficiary, or includes a discussion of the beneficiary's work or achievement and mentions the beneficiary in connection to the work, may be considered material about the beneficiary. Material may be considered by the beneficiary even if the beneficiary is one of multiple authors.

In determining whether the submitted evidence demonstrates that the beneficiary has achieved national or international recognition for achievements, officers consider both the content of the published material and the level of recognition enjoyed by the publication in which it appears. For example, favorable coverage or publication of the beneficiary's work in major media, as demonstrated by high relative circulation, readership, or viewership figures, could establish national or international recognition of the beneficiary's achievements.

Criterion 3: Evidence that the beneficiary has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials.[59]

This criterion differs from the first criterion, which is specific to productions or events.[60]

This criterion requires evidence of:

- The beneficiary's current or past lead, starring, or critical role for a distinguished organization or establishment, including a distinguished division or department of such an entity; and
- The beneficiary's prospective lead, starring, or critical role for a distinguished organization or establishment, including a distinguished division or department of such an entity.

Evidence may demonstrate a lead role by establishing that the person has a principal role in the organization or establishment. A starring role means a position of great prominence relative to others in the organization.[61]

To show a critical role, the evidence should establish that the beneficiary has contributed or will contribute in a way that is of significant importance to the organization or establishment's activities. Officers consider factors such as whether the beneficiary's performance in the role has been or will be integral or important to the organization or establishment's goals or activities, especially in relation to others in similar positions within the organization.

Detailed letters from persons with personal knowledge of the significance of the beneficiary's role can be particularly helpful in addressing this criterion. Letters and testimonials should provide as much detail as possible about the beneficiary's role and the reputation of the organization or establishment and give the credentials of the author, including the basis of the author's knowledge of the beneficiary's role.

Criterion 3: Evidence that the beneficiary has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials.[59]

In addition, the organization or establishment, or the relevant division or department within the entity, must be recognized as having a distinguished reputation. Relevant factors for evaluating the reputation of an entity or its department or division include, but are not limited to, the scale of its customer base, longevity, or relevant media coverage. The organization need not have directly employed the beneficiary.

Criterion 4: Evidence that the beneficiary has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion pictures or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications.[62]

This criterion requires evidence in the form of publications establishing the beneficiary's record of major commercial or critically acclaimed success. The publications may include print or online publications or transcripts of radio or video coverage.

A submitted publication does not have to be primarily about the beneficiary and may be about a production in which the beneficiary performed. However, the record should demonstrate how the production's major commercial or critically acclaimed success represents the beneficiary's success. For instance, a petitioner might establish that a production's success is in some way attributable to the beneficiary based on the significance of the beneficiary's contributions.

A publication reporting the commercial success of the beneficiary or the beneficiary's work should reflect that the ratings, receipts, sales, revenue, standing, or other occupational achievement represent major successes in the relevant field. If demonstrating critically acclaimed success, the evidence should demonstrate that the beneficiary's work has received public-facing praise or positive reviews in the relevant field, such as from professional art, television, or film critics.

Criterion 5: Evidence that the beneficiary has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the beneficiary is engaged. Such testimonials must be in a form which clearly indicates the author's authority, expertise, and knowledge of the beneficiary's achievements.[63]

To meet this criterion, the evidence must establish the beneficiary has received significant recognition for one or more achievements from an organization, critic, government agency, or other recognized expert in the field. The word significant in this criterion modifies recognition rather than achievements. Accordingly, although the beneficiary must have one or more achievements, the significance of the recognition is based on who is recognizing the achievements.

A testimonial written on behalf of an organization or government agency should explain the basis for the author's knowledge including the author's connection to the organization or agency, and the significance of the organization or agency within the relevant field. Likewise, a testimonial from a critic or a recognized expert should explain the basis of the author's knowledge and describe the author's credentials including the author's expertise in the relevant field.[64] The author should also describe and explain the significance of the achievements the author is recognizing.

In all cases, a submitted testimonial should detail any achievements that are being recognized by the organization, agency, or individual. However, the testimonial need not describe other types of recognition that the beneficiary has received for a noted achievement. Instead, the testimonial itself may qualify as significant recognition under this criterion when the significance of the recognizing organization, agency, or individual is established.

Criterion 6: Evidence that the beneficiary has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence.[65]

To demonstrate that the petitioner meets this criterion, the petitioner should provide appropriate evidence establishing that the beneficiary's past or future compensation is or will be high relative to others working in the field.

When evaluating assertions regarding future compensation, officers may consider the credibility of submitted contracts, job offer letters, or other evidence of prospective salary or remuneration for services.

Petitioners often submit wage surveys to show a comparison. Wage survey data, including but not limited to government wage survey data such as the Bureau of Labor Statistics' Occupational Employment and Wage Statistics, may be helpful in evaluating the relative compensation for a given field. When evaluating whether an accurate comparison is being made between the beneficiary's documented remuneration and the remuneration in the survey, the following considerations, among others, may be relevant:

- The description of the occupation. Broad descriptions that include multiple occupations or multiple industries may not provide an accurate comparison to others in the field. For example, directors and producers might be listed as a single category across industries, but evidence that a film director receives high remuneration based on a broad range of occupational data that include disparate occupations such as film director and radio show producer, may not be sufficiently probative.
- The validity of the survey. Some websites provide user-reported salary data, which may not be a valid comparison if, for example, too few users reported their salaries or the data is otherwise not credible or reliable.
- Location and currency. Officers evaluate persons working outside of the United States based on the wage statistics or comparable evidence relevant to the applicable work location, rather than by simply converting the salary to U.S. dollars and then viewing whether that salary would be considered high in the United States.

Salary rate being measured. Officers consider whether the comparison data measures an hourly rate or an annual salary. Another consideration is how that information compares to the beneficiary's pay. Many artists (including MPTV) are not paid an hourly rate but instead are paid a daily rate (which may not be equivalent to 8 hours) or are paid a certain amount for a project (involving an unknown number of hours). However, hourly wage data may still be probative if the petitioner submits documentation regarding the number of hours worked. Such documentation can include, but is not limited to, pay statements, personnel records, or testimonial evidence from the relevant employer.

3. Comparable Evidence

If the criteria are not readily applicable to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.[66]

When a Petitioner May Use Comparable Evidence

Petitioners should submit evidence outlined in the evidentiary criteria if the criteria readily apply to the beneficiary's occupation.[67] However, if the petitioner establishes that a particular criterion is not readily applicable to the beneficiary's occupation, the petitioner may then use the comparable evidence provision to submit additional evidence that is not specifically described in that criterion but is comparable to that criterion.

A petitioner is not required to show that all or a majority of the criteria do not readily apply to the beneficiary's occupation before USCIS will accept comparable evidence. Instead, for comparable evidence to be considered, the petitioner must explain why a particular evidentiary criterion listed in the regulations is not readily applicable to the beneficiary's occupation as well as why the submitted evidence is "comparable" to that criterion. A general unsupported assertion that the listed criterion does not readily apply to the beneficiary's occupation is not probative. However, a statement alone can be sufficient if it is detailed, specific, and credible.

Although officers do not consider comparable evidence if the petitioner submits evidence in lieu of a particular criterion that is readily applicable to the beneficiary's occupation simply because the beneficiary cannot satisfy that criterion, a criterion need not be entirely inapplicable to the beneficiary's occupation. Rather, comparable evidence is allowed if the petitioner shows that a criterion is not easily applicable to the beneficiary's job or profession.[68]

Establishing Eligibility with Comparable Evidence

A petitioner relying on evidence that is comparable to one or more of the criteria listed at 8 CFR 214.2(o)(3)(iv)(B) must still meet at least three separate evidentiary criteria to satisfy the evidence requirements, even if one or more of those criteria are met through evidence that is not specifically described in the regulation but is comparable.[69] While a petitioner relying on comparable evidence is not limited to the kinds of evidence listed in the criteria, the use of comparable evidence does not change the standard for the classification. It remains the petitioner's burden to establish that the beneficiary has extraordinary ability in the beneficiary's field of endeavor.

4. Evaluating the Totality of the Evidence

When the evidentiary requirements specified above are satisfied, an officer proceeds to evaluate the totality of all the evidence in the record to determine whether the beneficiary has extraordinary ability with sustained national or international acclaim, as described in the O statute and regulations.[70]

At this step, officers may consider any potentially relevant evidence, even if such evidence does not fit one of the above regulatory criteria or was not presented as comparable evidence.

E. O-1B Beneficiaries in Motion Picture or Television

1. Establishing Eligibility

In support of an O-1B (MPTV) Petition for a Nonimmigrant Worker (Form I-129), the petitioner must establish that the beneficiary has demonstrated a record of extraordinary achievement in motion picture or television productions and is coming to continue to work in such productions.[71] However, the productions need not require someone with a record of extraordinary achievement.

2. Supporting Documentation

The supporting documentation for an O-1B (MPTV) petition must include evidence that the beneficiary has received, or been nominated for, a significant national or international award or prize in the particular field (such as an Academy Award, Emmy, Grammy, or Director's Guild Award)[72] or at least three[73] of the evidentiary criteria described above.[74]

Petitioners for beneficiaries working in motion picture or television productions must submit evidence that applies evidentiary criteria described above; they may not rely on comparable evidence.[75]

3. Evaluating the Totality of the Evidence

When the evidentiary requirements mentioned above are satisfied, an officer proceeds to evaluate the totality of all the evidence in the record in order to determine whether the beneficiary has extraordinary achievement in the motion picture and television industry as described in the O statute and regulations.[76]

At this step, officers may consider any potentially relevant evidence, even if such evidence does not fit one of the above regulatory criteria.

F. Continuing to Work in the Area of Extraordinary Ability or Achievement

1. O-1A Beneficiaries in Sciences, Education, Business, or Athletics and O-1B Beneficiaries in the Arts

In addition to demonstrating the beneficiary's extraordinary ability and recognition in the field, a petitioner must demonstrate that an O-1A or O-1B (Arts) beneficiary is coming to the United States to continue work in the "area of extraordinary ability."[77]

When considering a petition for a beneficiary who is transitioning to a new occupation (for instance, an acclaimed athlete coming to be a coach, a renowned STEM professor or academic researcher coming to work for a private company, an engineer coming to start a technology company, or an acclaimed dancer coming to be a dance teacher or choreographer), it can be unclear whether the proposed work in the United States is within the "area of extraordinary ability," as required.

There is no statutory or regulatory definition of the term "field" or the phrase "area of extraordinary ability." For purposes of evaluating an O-1A or O-1B (Arts) beneficiary's extraordinary ability in the field, USCIS interprets the term "field" to allow consideration of acclaim and recognition for achievements in multiple related occupations (that is, those involving shared skillsets, knowledge, or expertise). Similarly, in the O-1A or O-1B (Arts) context, USCIS interprets the phrase "area of extraordinary ability" broadly to include not only the specific occupation(s) in which the beneficiary has garnered acclaim, but also other occupations that involve shared skillsets, knowledge, or expertise.[78]

Accordingly, when determining whether the beneficiary is coming to work in the beneficiary's "area of extraordinary ability," officers focus on whether the prospective work or services involve skillsets, knowledge, or expertise shared with the occupation(s) in which the beneficiary has garnered acclaim. In evaluating whether occupations involve shared skillsets, knowledge, or expertise to an extent that they may be considered within the same area of extraordinary ability, officers evaluate the totality of information and evidence presented. Relevant factors include, but are not limited to:

- Whether the past and prospective occupations are in the same industry or are otherwise related based on shared duties or expertise;
- Whether the prospective occupation is a supervisory, management, or other leadership position that oversees the beneficiary's previous position or otherwise requires shared knowledge, skills, or expertise; and
- Whether it is common for persons in one occupation to transition to the other occupation(s) based upon their experience and knowledge.

USCIS does not consider a male athlete who has gained the necessary acclaim in men's sports and seeks to compete in women's sports in the United States to be seeking to continue work in his area of extraordinary ability.[79]

2. O-1B Beneficiaries in Motion Picture or Television

In addition to demonstrating the beneficiary's extraordinary achievement in MPTV productions and recognition in the field, a petitioner must demonstrate that an O-1B (MPTV) beneficiary is coming to the United States to continue work in the "area of extraordinary achievement."[80]

For a beneficiary with a record of extraordinary achievement in motion picture or television (MPTV) productions, USCIS interprets the beneficiary's "area of extraordinary achievement" to include any proposed work within the MPTV industry.[81] In addition to being consistent with longstanding agency practice, USCIS believes this industry-focused interpretation for the O-1B (MPTV) classification is consistent with statute and regulations, which discuss MPTV petitions separately from other types of O petitions and specifically focus on achievement in MPTV "productions" and the "industry."[82]

Footnotes

[^ 1] See INA 101(a)(15)(O)(i). "Sustained" national or international acclaim means that a beneficiary's acclaim must be maintained. (According to Black's Law Dictionary (11th ed. 2019), the definition of sustain is "(1) to support or maintain, especially over a long period of time; … (6) To persist in making (an effort) over a long period.") However, the word "sustained" does not imply an age limit on the beneficiary. A beneficiary may be very young in his or her career and still be able to show sustained acclaim. There is also no definitive time frame on what constitutes "sustained." If a person was recognized for a particular achievement, the officer should determine whether the person continues to maintain a comparable level of acclaim in the field of expertise since the person was originally afforded that recognition. A person may have achieved national or international acclaim in the past but then failed to maintain a comparable level of acclaim thereafter.

[^ 2] See INA 101(a)(15)(O)(i).

[^ 3] See INA 101(a)(15)(O)(i).

[^ 4] See 8 CFR 214.2(o)(3)(ii).

[^ 5] See INA 101(a)(46). See 8 CFR 214.2(o)(3)(ii).

[^ 6] See 8 CFR 214.2(o)(3)(ii).

[^ 7] Other non-exhaustive examples include actors, writers, composers, or set designers seeking to come to the United States to do some work within the MPTV industry while also seeking to work in live theater or perform other work as an artist outside the MPTV industry.

[^ 8] This is consistent with the Academy of Television Arts & Sciences' consideration of series, commercials, and other programs that air by "broadband" to be among the productions eligible for Primetime Emmy Awards. See 73rd Primetime Emmy Awards 2020-2021 Rules and Procedures (PDF) (accessed on January 5, 2022). In addition, the Alliance of Motion Picture and Television Producers discusses beneficiaries working on a "web series/program" and a "web commercial" among those for whom it provides opinions, but lists "static web content" as an example of a project that is "not part of motion picture and television production." See AMPTP Guidelines for O-1 Visa Advisory Opinion Letter Requests (PDF) (accessed on January 5, 2022).

[^ 9] USCIS provided this interpretation in its policy guidance on January 13, 2022, to provide increased clarity for officers, to promote consistent adjudications, and to increase transparency for prospective petitioners.

[^ 10] Other non-exhaustive examples of artists whose MPTV work is incidental to their artistic work include musicians or other artists performing live on television or filmed for television "specials," persons appearing as themselves in documentaries, and composers or musicians who license their music to films or television. In contrast, composers who are engaged to score MPTV productions are directly working in the MPTV industry.

[^ 11] See INA 101(a)(15)(O)(i). See INA 214(c)(3).

[^ 12] See INA 101(a)(15)(O)(i). See 8 CFR 214.2(o)(3)(ii).

[^ 13] See 59 FR 41818 (PDF), 41820 (Aug. 15, 1994).

[^ 14] See *Matter of Chawathe (PDF)*, 25 I&N Dec. 369, 376 (AAO 2010) ("[T]ruth is to be determined not by the quantity of evidence alone but by its quality. Therefore, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true").

[^ 15] For example, authorship of scholarly articles in the field in professional journals or other major media, alone, regardless of caliber, would satisfy the criterion at 8 CFR 214.2(o)(3)(iii)(B)(6). Analysis of whether those publications are consistent with a finding that the beneficiary has sustained acclaim and is among the small percentage at the top of the field would be addressed and articulated in the totality determination.

[^ 16] See INA 101(a)(15)(O)(i). See 8 CFR 214.2(o)(3)(ii).

[^ 17] See INA 101(a)(15)(O)(i) and INA 101(a)(46). See 8 CFR 214.2(o)(3)(ii) ("Distinction means a high level of achievement in the field of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts").

[^ 18] See INA 101(a)(15)(O)(i). See 8 CFR 214.2(o)(3)(ii).

[^ 19] See INA 101(a)(15)(O)(i). See Section F, Continuing to Work in the Area of Extraordinary Ability or Achievement [2 USCIS-PM M.4(F)] for more information.

[^ 20] See 8 CFR 214.2(o)(3)(iii)(A).

[^ 21] See 8 CFR 214.2(o)(3)(iii)(B).

[^ 22] See 8 CFR 214.2(o)(3)(iii)(B)(1).

[^ 23] USCIS does not interpret the phrase "field of endeavor" to mean that the work being recognized by the prize or award must correspond precisely to the type of prospective work that the person will undertake. Rather, USCIS considers whether the prize or award relates to the individual's asserted area of extraordinary ability. For information about how USCIS determines whether a person will "continue to work in the area of extraordinary ability," see Section F, Continuing to Work in the Area of Extraordinary Ability or Achievement [2 USCIS-PM M.4(F)].

[^ 24] In general, qualifying awards include team awards where each member receives a trophy, certification, or medal; appears on the podium or stage; or is specifically named in the awarding organization's announcement of the award selection. Examples include members of a musical group who receive an award and relay team members who appear together on the medal podium. Mere acknowledgment from the award recipient does not constitute receiving the award from the awarding authority.

[^ 25] The Carnegie Classification of Institutions of Higher Education recognizes R1 and R2 doctoral universities as having "very high" or "high" research activity, respectively, based on publicly available federal government data regarding the number of doctoral degrees awarded and the amount of total research expenditures. See the Carnegie Classification of Institutions of Higher Education's Basic Classification Description webpage.

[^ 26] See 8 CFR 214.2(o)(3)(iii)(B)(2).

[^ 27] See the IEEE's Steps to Become an IEEE Fellow webpage.

[^ 28] See the AAAI Fellows Program webpage.

[^ 29] See 8 CFR 214.2(o)(3)(iii)(B)(3).

[^ 30] See 8 CFR 214.2(o)(3)(iii)(B)(4).

[^ 31] See 8 CFR 214.2(o)(3)(iii)(B)(5).

[^ 32] See 8 CFR 214.2(o)(3)(iii)(B)(6).

[^ 33] While many articles accepted for presentation at conferences do not result in publication, there are conferences that peer review and publish accepted presentations in professional journals (sometimes called proceedings), such that they may qualify as scholarly articles under this criterion.

[^ 34] Instead, officers may consider citation evidence relating to the published work as part of the totality analysis to evaluate whether the record establishes that the beneficiary has sustained national or international acclaim and is among the small percentage at the top of the field. For instance, documentation regarding the total rate of citations to the beneficiary's body of published work relative to others in the field may indicate a beneficiary's high overall standing for the purpose of demonstrating that the beneficiary is among the small percentage at the top of the field.

[^ 35] Evidence of a publication's reputation in the field is not required to satisfy this criterion. However, such evidence may be relevant in ultimately determining whether the totality of the evidence in the record establishes that the beneficiary has sustained national or international acclaim and is among the small percentage at the top of the field. Relevant evidence of a publication's reputation may include rankings, impact factors, and selectivity. For example, publishing an article in a journal which allows any contributor to pay a fee for the service of peer review or publishing an individual's work may meet the plain requirements of the criterion, but would not necessarily contribute to a finding of sustained acclaim. However, some authors who publish in competitive or otherwise highly-ranked journals may pay a fee to provide open access to their work for the public upon publication, and such a fee would not detract from a finding of sustained acclaim.

[^ 36] See 8 CFR 214.2(o)(3)(iii)(B)(7).

[^ 37] See SBIR America's Seed Fund webpage.

[^ 38] See 8 CFR 214.2(o)(3)(iii)(B)(8).

[^ 39] See 8 CFR 214.2(o)(3)(iii)(C).

[^ 40] See 8 CFR 214.2(o)(3)(iii).

[^ 41] The comparable evidence provision was intended as a "catch-all" to allow for additional evidence to be considered when the other enumerated criteria do not readily apply, in whole or in part, when evaluating whether the beneficiary has extraordinary ability. See 59 FR 41818 (PDF), 41820 (August 15, 1994). While alternative interpretations of the regulation are possible, USCIS believes that the best interpretation as a matter of policy is to allow for consideration of comparable evidence on a criterion-by-criterion basis. This interpretation is supported by the fact that the O regulations do not explicitly mandate a showing that a certain number of criteria do not apply before a petitioner may submit comparable evidence. These provisions do not include a qualifier such as "all" or "the majority of" before "criteria." It is unclear if the use of the term "criteria" was intended to require a showing that all or a majority of the criteria do not readily apply, or if the use of the word "criteria" was merely a reference to the multiple evidentiary options listed in the regulations. This interpretive policy resolves that ambiguity.

[^ 42] Consistent with a plain language reading, "readily" means "easily" or "without much difficulty." See Merriam-Webster Dictionary's definition of "readily." The term "occupation" is defined as "the principal business of one's life."

[^ 43] For example, a petitioner who establishes that 8 CFR 214.2(o)(3)(iii)(B)(2) is not readily applicable to the beneficiary's occupation may submit evidence showing that two other criteria under 8 CFR 214.2(o)(3)(iii)(B) have been met, along with an additional form of evidence of comparable significance to that in 8 CFR 214.2(o)(3)(iii)(B)(2), to establish sustained acclaim and recognition.

[^ 44] See Section B, Determining Eligibility for O-1 Classification [2 USCIS-PM M.4(B)]. The same totality analysis described in Section B applies regardless of whether comparable evidence was relied upon to satisfy the evidentiary requirements.

[^ 45] Not all cases have such evidence, nor does a case need such evidence for the petitioner to demonstrate eligibility. Additionally, the list in this subsection is a non-exhaustive list of examples, and while the listed factors may be especially relevant to beneficiaries in STEM fields, the guidance applies to all O-1A petitions.

[^ 46] Impact factor is commonly used as a measure of a journal's influence; it represents the average number of citations received per article published in that journal during the 2 preceding years. See Garfield, E, The History and Meaning of the Journal Impact Factor, *Journal of the American Medical Association*, Vol. 295, Iss. 1, p. 90 (2006).

[^ 47] The h-index is a tool for measuring a researcher's output and impact. It is based on the highest number of the researcher's publications that have been cited at least that same number of times. For example, if a researcher has an h-index of 10, it means the researcher has 10 publications that have 10 or more citations each (but not 11 publications with at least 11 citations each). See Hirsch, J, An Index to Quantify an Individual's Scientific Research Output (PDF), *Proceedings of the National Academy of Sciences of the United States of America*, Vol. 102, Iss. 46, p. 16569 (2005). Other indices for measuring output and impact are also used. When relying on any of these tools, a petitioner should explain its methodology and significance with supporting documentation because the sources for the data and the duration of time involved in the calculation can impact the actual h-index value.

[^ 48] This factor is less relevant for beneficiaries early in their career, as such persons have had less time to accumulate citations but may nevertheless have garnered acclaim and risen to the small percentage at the top of the field as demonstrated by other evidence in the record. As stated above, none of the listed factors are required to demonstrate eligibility.

[^ 49] The Carnegie Classification of Institutions of Higher Education uses the R1 and R2 doctoral university designations to recognize institutions as having "very high" or "high" research activity, respectively, based on publicly available federal government data regarding the number of doctoral degrees awarded and the amount of total research expenditures. See the Carnegie Classification of Institutions of Higher Education's Basic Classification Description webpage. While the designations to recognize an institution's research activity may be based on doctoral degrees, the beneficiary is not required to have a doctoral degree.

[^ 50] The QS World University Rankings annually evaluate universities according to a methodology based on six consistent and empirical metrics: academic reputation (40 percent), employer reputation (10 percent), faculty to student ratio (20 percent), citations per faculty (20 percent), international faculty ratio (5 percent), and international student ratio (5 percent). These metrics are used to rank universities, as well as capture and assess university performance. See the QS World University Rankings Methodology webpage.

[^ 51] See Executive Order 14201, Keeping Men Out of Women's Sports, 90 FR 9279 (Feb. 11, 2025), and Executive Order 14168, Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, 90 FR 8615 (Jan. 20, 2025). For more information on evidence of biological sex and the role of biological sex in immigration benefit requests, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 5, Verification of Identifying Information, Section B, Personal Information, Subsection 2, Sex [1 USCIS-PM E.5(B)(2)].

[^ 52] See INA 101(a)(15)(O)(i). For more information, see Section F, Continuing to Work in the Area of Extraordinary Ability or Achievement [2 USCIS-PM M.4(F)]. For information about determining whether an O-1B beneficiary falls under the arts or MPTV classification, see Section A, Standard for Classification [2 USCIS-PM M.4(A)].

[^ 53] See 8 CFR 214.2(o)(3)(iv)(A).

[^ 54] See 8 CFR 214.2(o)(3)(iv)(B).

[^ 55] See 8 CFR 214.2(o)(3)(iv)(B)(1) and 8 CFR 214.2(o)(3)(v)(B)(1).

[^ 56] See 8 CFR 214.2(o)(3)(iv)(B)(3) and 8 CFR 214.2(o)(3)(v)(B)(3). A production or event includes examples such as: an art show or exhibit, concert, or theatrical production (for O-1B (arts)); or a film or television show (for O-1B (MPTV)). In contrast, an organization or establishment includes examples such as: a company, collective, or other entity, including but not limited to entities that produce artistic productions or events (for O-1B (arts)); or the production company or studio producing the film or television show (for O-1B (MPTV)).

[^ 57] Consistent with a plain language reading, a "lead" role generally refers to a principal role, while to "star" means to feature in the most prominent or important role. See Merriam-Webster Dictionary's definition of "lead" and definition of "starring."

[^ 58] See 8 CFR 214.2(o)(3)(iv)(B)(2) and 8 CFR 214.2(o)(3)(v)(B)(2).

[^ 59] See 8 CFR 214.2(o)(3)(iv)(B)(3) and 8 CFR 214.2(o)(3)(v)(B)(3).

[^ 60] See 8 CFR 214.2(o)(3)(iv)(B)(1) and 8 CFR 214.2(o)(3)(v)(B)(1). A production or event includes examples such as: an art show or exhibit, concert, or theatrical production (for O-1B (arts)); or a film or television show (for O-1B (MPTV)). In contrast, an organization or establishment includes examples such as: a company, collective, or other entity, including but not limited to entities that produce artistic productions or events (for O-1B (arts)); or the production company or studio producing the film or television show (for O-1B (MPTV)).

[^ 61] Consistent with a plain language reading, a "lead" role generally refers to a principal role, while to "star" means to feature in the most prominent or important role. See Merriam-Webster Dictionary's definition of "lead" and definition of "starring."

[^ 62] See 8 CFR 214.2(o)(3)(iv)(B)(4) and 8 CFR 214.2(o)(3)(v)(B)(4).

[^ 63] See 8 CFR 214.2(o)(3)(iv)(B)(5) and 8 CFR 214.2(o)(3)(v)(B)(5).

[^ 64] The regulation at 8 CFR 214.2(o)(2)(iii)(B) provides that affidavits written by recognized experts certifying to the recognition and extraordinary ability or extraordinary achievement of the beneficiary shall specifically describe the beneficiary's recognition and ability or achievement in factual terms and set forth the expertise of the affiant and the manner in which the affiant acquired such information.

[^ 65] See 8 CFR 214.2(o)(3)(iv)(B)(6) and 8 CFR 214.2(o)(3)(v)(B)(6).

[^ 66] See 8 CFR 214.2(o)(3)(iv)(C). See the discussion of comparable evidence in Section C, O-1A Beneficiaries in Sciences, Education, Business, or Athletics [2 USCIS-PM M.4(C)] for more information.

[^ 67] See 8 CFR 214.2(o)(3)(iv).

[^ 68] Consistent with a plain language reading, "readily" means "easily" or "without much difficulty." See Merriam-Webster Dictionary's definition of "readily." The term "occupation" is defined as "the principal business of one's life."

[^ 69] For example, a petitioner who establishes that 8 CFR 214.2(o)(3)(iv)(B)(2) is not readily applicable to the beneficiary's occupation may submit evidence showing that two other criteria under 8 CFR 214.2(o)(3)(iv)(B) have been met, along with an additional form of evidence of comparable significance to that in 8 CFR 214.2(o)(3)(iv)(B)(2), to establish sustained acclaim and recognition.

[^ 70] See Section B, Determining Eligibility for O-1 Classification [2 USCIS-PM M.4(B)]. The same totality analysis described in Section B applies regardless of whether comparable evidence was relied upon to satisfy the enumerated evidentiary requirements.

[^ 71] See INA 101(a)(15)(O)(i). See Section F, Continuing to Work in the Area of Extraordinary Ability or Achievement [2 USCIS-PM M.4(F)] for more information. For information about determining whether an O-1B beneficiary falls under the arts or MPTV classification, see Section A, Standard for Classification [2 USCIS-PM M.4(A)].

[^ 72] See 8 CFR 214.2(o)(3)(v)(A).

[^ 73] See 8 CFR 214.2(o)(3)(v)(B).

[^ 74] See Section D, O-1B Beneficiaries in the Arts, Subsection 2, Supporting Documentation [2 USCIS-PM M.4(D)(2)].

[^ 75] See 8 CFR 214.2(o)(3)(v).

[^ 76] See Section B, Determining Eligibility for O-1 Classification [2 USCIS-PM M.4(B)].

[^ 77] See INA 101(a)(15)(O)(i). See 8 CFR 214.2(o)(1)(ii)(A)(1).

[^ 78] USCIS updated its policy guidance to provide this interpretation on January 21, 2022, to promote clarity, consistency, and transparency in O-1 adjudications. USCIS notes that this policy guidance relates only to the adjudication of O-1 nonimmigrant petitions. For policy guidance on eligibility determinations in E11 (immigrant of extraordinary ability) petitions, which, while similar to O-1, require that the beneficiary's entry will "substantially benefit prospectively the United States," see Volume 6, Immigrants, Part F, Employment-Based Classifications, Chapter 2, Extraordinary Ability [6 USCIS-PM F.2].

[^ 79] See Executive Order 14201, Keeping Men Out of Women's Sports, 90 FR 9279 (Feb. 11, 2025), and Executive Order 14168, Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, 90 FR 8615 (Jan. 20, 2025). For more information on evidence of biological sex and the role of biological sex in immigration benefit requests, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 5, Verification of Identifying Information, Section B, Personal Information, Subsection 2, Sex [1 USCIS-PM E.5(B)(2)].

[^ 80] See 8 CFR 214.2(o)(1)(ii)(A)(2).

[^ 81] USCIS updated its policy guidance to provide this interpretation on January 21, 2022, to promote clarity, consistency, and transparency in O-1 adjudications. USCIS notes that this policy guidance relates only to the adjudication of O-1B (MPTV) petitions.

[^ 82] See INA 101(a)(15)(O)(i). See 8 CFR 214.2(o)(1), 8 CFR 214.2(2)(iii)(B), and 8 CFR 214.2(3).

Chapter 5 - O-2 Beneficiaries

A. General

USCIS may classify beneficiaries who are essential to an O-1 beneficiary's artistic or athletic performance and are coming solely to assist in that performance as O-2 accompanying beneficiaries.[1] The O-2 beneficiary must be an integral part of the actual performance or event and possess critical skills and experience with the O-1 that are not of a general nature and that U.S. workers do not possess.[2]

If the O-2 beneficiary is accompanying an O-1 beneficiary in the television or motion picture industry, he or she must have skills and experience with the O-1 beneficiary that are not of a general nature and skills that are critical, due to a pre-existing or long-standing working relationship with the O-1 beneficiary. If he or she is accompanying the O-1 beneficiary for a specific production only, the person may be eligible for an O-2 classification because significant production (including pre- and post-production work) will take place both inside and outside the United States and the continuing participation of the O-2 beneficiary is essential to the successful completion of the production.

USCIS may not grant O-2 classification for beneficiaries to support O-1 beneficiaries with extraordinary ability in fields of business, education, or science.[3]

The O-2 beneficiaries may not work separate or apart from the O-1 beneficiaries they support and may change employers only in conjunction with a change of employer by the O-1 beneficiary. Although multiple beneficiaries may be included on a single O-2 Petition for a Nonimmigrant Worker (Form I-129), they cannot be included on the O-1 beneficiary's petition.

B. Documentation and Evidence

A petition for an O-2 beneficiary who will accompany an O-1A (athlete) or O-1B (artist) of extraordinary ability must be supported by evidence that the O-2 beneficiary is coming to the United States to assist in the performance of the O-1 beneficiary. The O-2 beneficiary must be an integral part of the actual performance and have critical skills and experience with the O-1 beneficiary that are not of a general nature and not possessed by a U.S. worker.[4]

A petition for an O-2 beneficiary who will accompany an O-1B (MPTV) beneficiary of extraordinary achievement must be supported by:

- Evidence of the current essentiality, critical skills, and experience of the O-2 beneficiary with the O-1 beneficiary and evidence that the O-2 beneficiary has substantial experience performing the critical skills and essential support services for the O-1 beneficiary; or
- In the case of a specific motion picture or television production, evidence that significant production has taken place outside the United States and will take place inside the United States, and that the continuing participation of the O-2 beneficiary is essential to the successful completion of the production.[5]

Footnotes

[^ 1] See INA 101(a)(15)(O)(1)(ii).

[^ 2] See 8 CFR 214.2(o)(4)(ii).

[^ 3] See 8 CFR 214.2(o)(4).

[^ 4] See 8 CFR 214.2(o)(4)(ii)(A).

[^ 5] See 8 CFR 214.2(o)(4)(ii)(C).

Chapter 6 - Family Members

The spouse and unmarried children under 21 years old of a principal O-1 or O-2 nonimmigrant may qualify for dependent O-3 nonimmigrant status if they are accompanying or following to join the O-1 or O-2 in the United States.[1] The O-3 spouse and unmarried children under 21 receive nonimmigrant status for the same period of time and subject to the same

conditions as the O-1 or O-2 principal.[2] An O-3 dependent may not accept employment in the United States pursuant to such status.[3]

Footnotes

[^ 1] See 8 CFR 214.2(o)(6)(iv).

[^ 2] See 8 CFR 214.2(o)(6)(iv).

[^ 3] See 8 CFR 214.2(o)(6)(iv).

Chapter 7 - Documentation and Evidence

A. General

USCIS requires a petitioning employer or agent to file the Petition for a Nonimmigrant Worker (Form I-129) and required fee for all beneficiaries seeking classification as an O-1 or O-2 nonimmigrant.[1] The petition must be filed in accordance with DHS regulations and the form instructions, and with the required fees.[2] The petitioner may not file the petition more than 1 year before the actual need for the beneficiary's services.[3]

An O-1 or O-2 beneficiary may work for more than one employer at the same time.[4] When the beneficiary works for more than one employer, each employer must properly file a separate petition along with the required documentation and fees unless an established agent files the petition.[5]

Up to 25 O-2 accompanying beneficiaries may be included on a petition if they are assisting the same O-1 beneficiary for the same events or performances, during the same period of time, and in the same location.[6] An employer or agent may not include multiple O-1 beneficiaries on the same petition.[7]

B. Documentation and Evidence

1. Required Evidence

A petitioner must include the following with the petition:

- Evidence specific to the particular classification sought;[8]
- Copies of any written contracts between the petitioner and the beneficiary or, if there is no written contract, a summary of the terms of the oral agreement under which the beneficiary will be employed;
- An explanation of the nature of the events or activities, the beginning and ending dates for the events or activities, and a copy of any itinerary for the events or activities;[9] and
- A written advisory opinion(s) from the appropriate consulting entity or entities.[10]

2. Form of Evidence

The evidence submitted with the petition must conform to the following:

- Affidavits, contracts, awards, and similar documentation must reflect the nature of the beneficiary's achievement and be executed by an officer or responsible person employed by the institution, firm, establishment, or organization where the work was performed.
- Affidavits written by present or former employers or recognized experts certifying to the recognition and extraordinary ability or extraordinary achievement of the beneficiary must specifically describe the beneficiary's recognition and ability or achievement in factual terms and set forth the expertise of the affiant and the manner in which the affiant acquired such information.
- The petitioner may submit a legible photocopy of a document in support of the petition in lieu of the original. However, the original document must be submitted if requested by USCIS.[11]

3. Contracts

The regulation requires the submission of any written contracts between the petitioner and the beneficiary but allows for the submission of a summary of the terms of an oral agreement where there is no written contract.[12] Evidence of an oral agreement may include, but is not limited to, emails between the contractual parties, a written summation of the terms of the agreement, or any other evidence that demonstrates that an oral agreement was created.

The summary of the oral agreement must contain:

- The terms offered by the petitioner (employer); and
- The terms accepted by the beneficiary (employee).

The summary does not have to be signed by both parties to establish the oral agreement.[13]

4. Consultations

A statutorily mandated consultation process exists for all O nonimmigrant petitions.[14] The source and contents of the consultation vary, depending upon the type of O petition.

Consultation Process for O Nonimmigrants

Petition Type	Source and Contents of Consultations
O-1A and O-1B (Arts)	The petitioner must provide a consultation in the form of an advisory opinion from a U.S. “peer group” in the area of the beneficiary’s ability (which may include a labor organization) or a person or persons with expertise in the area of the beneficiary’s ability. The contents should, if favorable, describe the beneficiary's ability and achievements in the field of endeavor, describe the nature of the duties to be performed, and state whether the position requires the services of an alien of extraordinary ability, or may state “no objection.” If the advisory opinion is not favorable to the petitioner, the advisory opinion must set forth a specific statement of facts which supports the conclusion reached in the opinion. If an advisory opinion is submitted from a group other than a labor organization, USCIS must submit a copy of the petition and supporting documents to the

Petition Type	Source and Contents of Consultations
	national office of the appropriate union (if any exists). If the labor organization does not respond, USCIS renders a decision on the evidence of record.[15] If the petitioner establishes that no appropriate peer group exists, including a labor organization, USCIS renders a decision on the evidence of record.[16]
O-1B (MPTV)	The petitioner must provide consultations in the form of advisory opinions from both the union representing the beneficiary's occupational peers and a management organization in the area of the beneficiary's ability. The contents may include statements describing the beneficiary's achievements in motion picture or television productions and whether the proposed position requires the services of an alien of extraordinary achievement, or may state "no objection." If an advisory opinion is not favorable to the petitioner, the advisory opinion must set forth a specific statement of facts which supports the conclusion reached in the opinion. If the petitioner establishes that no appropriate group exists, including a labor organization, USCIS renders a decision on the evidence of record.[17]
O-2	The petitioner must provide a consultation in the form of an advisory opinion from the labor organization having expertise in the skill area. If the O-2 is sought for employment in the motion picture or television industry, opinions must be provided from both a labor union and a management organization.[18] The opinion may include information regarding the beneficiary's particular skills, his or her experience working with the O-1 beneficiary, and whether the project involves a situation that includes work both inside and outside the United States (if applicable), or may state "no objection." If an advisory opinion is not favorable to the petitioner, the advisory opinion must set forth a specific statement of facts which supports the conclusion reached in the opinion. Generally, if the petitioner establishes that an appropriate labor organization does not exist, USCIS renders a decision on the evidence of record.[19]

USCIS maintains a list of organizations that provide advisory opinions on O-1 and O-2 beneficiaries.

The O regulations specify mandatory response times for advisory opinions requested by USCIS in routine and expedited cases and prescribe action to be taken when a requested opinion is not received.[20] The consultations are advisory in nature only and are not binding on USCIS. A negative advisory opinion does not automatically result in the denial of the petition, as decisions must be based on the totality of the evidence. Accordingly, USCIS may favorably consider evidence submitted by the petitioner to overcome a negative advisory opinion.

Use of Prior Consultation

USCIS may waive the consultation requirement for aliens of extraordinary ability in the field of arts if the beneficiary seeks readmission to the United States to perform similar services within 2 years of the date of a previous advisory opinion. After USCIS grants the waiver, USCIS forwards a copy of the petition and documentation to the national office of an appropriate labor organization within 5 days.[21] Petitioners desiring to avail themselves of the waiver should submit a copy of the prior consultation with the petition.

Footnotes

[^ 1] See 8 CFR 103.2(a)(1). See Chapter 3, Petitioners [2 USCIS-PM M.3].

[^ 2] See 8 CFR 103.2(a)(1). For information on filing, see the USCIS website.

[^ 3] See 8 CFR 214.2(o)(2)(i).

[^ 4] See 8 CFR 214.2(o)(2)(iv)(B).

[^ 5] See 8 CFR 214.2(o)(2)(iv)(B). For information on fees, see Fee Schedule (Form G-1055).

[^ 6] See 8 CFR 214.2(o)(2)(iv)(F). Although multiple beneficiaries may be included on a single O-2 petition, they cannot be included on the O-1 beneficiary's petition.

[^ 7] See 8 CFR 214.2(o)(2)(i).

[^ 8] See Chapter 4, O-1 Beneficiaries, Section C, O-1A Beneficiaries in Sciences, Education, Business, or Athletics [2 USCIS-PM M.4(C)]; Section D, O-1B Beneficiaries in the Arts [2 USCIS-PM M.4(D)]; and Section E, O-1B Beneficiaries in Motion Picture or Television [2 USCIS-PM M.4(E)]; and Chapter 5, O-2 Beneficiaries [2 USCIS-PM M.5].

[^ 9] A petition which requires the beneficiary to work in more than one location must include an itinerary with the dates and locations of work. See 8 CFR 214.2(o)(2)(iv)(A). There are no exceptions to the itinerary requirement when the petition is filed by an agent performing the function of an employer. However, USCIS does give some flexibility to how detailed the itinerary must be and does take into account industry standards when determining whether the itinerary requirement has been met. As such, the itinerary should at a minimum indicate what type of work the beneficiary will be engaged, where, and when this work will take place.

[^ 10] See 8 CFR 214.2(o)(2)(ii).

[^ 11] See 8 CFR 214.2(o)(2)(iii).

[^ 12] See 8 CFR 214.2(o)(2)(ii)(B).

[^ 13] For specific requirements relating to petitioning agents, see Chapter 3, Petitioners, Section C, Agents [2 USCIS-PM M.3(C)].

[^ 14] See INA 214(c)(3).

[^ 15] See 8 CFR 214.2(o)(5).

[^ 16] See 8 CFR 214.2(o)(5).

[^ 17] See 8 CFR 214.2(o)(5).

[^ 18] See 8 CFR 214.2(o)(5)(iv).

[^ 19] See 8 CFR 214.2(o)(5).

[^ 20] See 8 CFR 214.2(o)(5)(i)(E)-(F).

[^ 21] See 8 CFR 214.2(o)(5)(ii)(B).

Chapter 8 - Adjudication

Officers must carefully review each Petition for a Nonimmigrant Worker (Form I-129) to determine whether the petitioner has established eligibility based on the applicable requirements for the type of O classification being sought. Officers must apply a "preponderance of the evidence" standard when evaluating eligibility for the O nonimmigrant classification.[1] The burden of proving eligibility for the benefit sought rests entirely with the petitioner.[2]

A. Decision

Approvals

If the petitioner properly filed the petition and the officer is satisfied that the petitioner has met the required eligibility standards, the officer approves the petition. The approval period must not exceed the maximum period of stay allowed.[3] Furthermore, USCIS should not deny a petition on the basis of the approval of a permanent labor certification or the filing of a preference petition for the O-1 beneficiary.[4]

The table below provides a list of the classifications for nonimmigrant of extraordinary ability or achievement, those accompanying and assisting the principal O-1 beneficiary's artistic or athletic performance, and dependents.

Classes of Beneficiaries and Corresponding Codes of Admission

Beneficiary	Code of Admission
Nonimmigrant of extraordinary ability in the sciences, education, business, or athletics (principal)	O-1A
Nonimmigrant of extraordinary ability in the arts (principal)	O-1B
Nonimmigrant of extraordinary achievement in the motion picture or television industry (principal)	O-1B
Accompanying alien who is coming to the United States to assist in the performance of certain O-1s	O-2
Spouse or child of an O-1 or O-2	O-3

Once USCIS approves the petition, USCIS notifies the petitioner of the approval using a Notice of Action (Form I-797).[5]

Denials

If the petitioner does not meet the eligibility requirements, the officer denies the petition.[6] If the officer denies the petition, he or she must notify the petitioner of the denial in writing. The written decision must explain why USCIS denied the petition and must include information about appeal rights and the opportunity to file a motion to reopen or reconsider.[7] The office that issued the decision has jurisdiction over any motion and the Administrative Appeals Office (AAO) has jurisdiction over any appeal.[8]

B. Revocation

USCIS may revoke an approved petition at any time, even after the validity of the petition has expired. USCIS automatically revokes the petition if the petitioner ceases to exist or files a written withdrawal of the petition.[9]

USCIS may also revoke an O petition approval on notice. USCIS sends the petitioner a Notice of Intent to Revoke (NOIR) if it is determined that:

- The beneficiary is no longer employed by the petitioner in the capacity specified in the petition;
- The statement of facts contained in the petition was not true and correct;
- The petitioner violated the terms and conditions of the approved petition;
- The petitioner violated the statute or regulations; or
- The approval of the petition violated the regulations or involved gross error.[10]

The NOIR must contain a detailed statement of the grounds for the revocation and the period allowed for the petitioner's rebuttal.[11] USCIS considers all relevant evidence presented in deciding whether to revoke the petition.[12]

The petitioner may appeal the decision to revoke a petition to the AAO if USCIS revoked the petition on notice. Petitioners may not appeal an automatic revocation.[13]

Footnotes

[^ 1] See *INS v. Cardoza-Fonseca* (PDF), 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). See *Matter of Chawathe (PDF)*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M- (PDF)*, 20 I&N Dec. 77, 79-80 (Comm. 1989)).

[^ 2] See *Matter of Brantigan (PDF)*, 11 I&N Dec. 493 (BIA 1966).

[^ 3] See Chapter 9, Admissions, Extensions of Stay, and Changes of Status [2 USCIS-PM M.9].

[^ 4] See 8 CFR 214.2(o)(13).

[^ 5] See 8 CFR 103.2(b)(19).

[^ 6] See 8 CFR 103.2(b)(8).

[^ 7] See 8 CFR 103.2(b)(19). See 8 CFR 103.3. See 8 CFR 214.2(o)(7).

[^ 8] See 8 CFR 103.3(a)(2).

[^ 9] See 8 CFR 214.2(o)(8)(ii). See Chapter 9, Admission, Extension of Stay, Change of Status, and Change of Employer [2 USCIS-PM M.9].

[^ 10] See 8 CFR 214.2(o)(8)(iii).

[^ 11] For more information on timeframes for Notices of Intent to Revoke, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 10, Post-Decision Actions, Section D, Revocation, Rescission, or Termination [1 USCIS-PM E.10(D)].

[^ 12] See 8 CFR 214.2(o)(8)(iii)(B).

[^ 13] See 8 CFR 214.2(o)(9)(ii).

Chapter 9 - Admission, Extension of Stay, Change of Status, and Change of Employer

A. Admission

If approved for classification as an O nonimmigrant and found otherwise admissible, a beneficiary may be admitted for a period determined to be necessary to accomplish the event or activity, not to exceed 3 years.[1]

Validity Period

If approved after the date the petitioner indicated services would begin, the validity period generally commences with the date of approval. The validity period must not exceed the period determined by USCIS to be necessary to complete the event or activity and must not exceed 3 years.

A beneficiary may be admitted to the United States for the validity period of the petition, plus a period of up to 10 days before the validity period begins and 10 days after the validity period ends. The beneficiary may engage in employment only during the validity period of the petition.[2]

Nonimmigrants described in the O classification are "seek[ing] to enter the United States to continue to work in the area of extraordinary ability," and may be authorized for a period of stay necessary "to provide for the event (or events) for which the nonimmigrant is admitted."[3] The O classification is for a beneficiary coming to the United States "to perform services relating to an event or events."[4]

The O regulations define an event as an activity such as, but not limited to: a scientific project, conference, convention, lecture, series, tour, exhibit, business project, academic year, or engagement.[5] In addition, a job that may not have a specific engagement or project may also fall under this definition if the job is the "activity" within the beneficiary's area of extraordinary ability. Such activities may include short vacations, promotional appearances, and stopovers that are incidental or related to the event. Therefore, the regulations clearly indicate that USCIS may approve a petition to cover not only the actual event or events but also services and activities in connection with the event or events.

There is no statutory or regulatory authority for the proposition that a gap of a certain number of days automatically indicates a “new event,” nor is there a requirement for a "single event." Rather, the focus is on whether the beneficiary will work in the area of extraordinary ability.[6]

The regulations define the evidentiary standard for identifying the services or activities relating to the event(s) by requiring "an explanation of the nature of the events or activities and a copy of any itinerary for the events or activities."[7] Unlike other nonimmigrant categories that have a specified time limit, a temporal period is not specified for O nonimmigrants. The regulations state that the validity period must be that which is "necessary to accomplish the event or activity, not to exceed 3 years."[8]

If the activities on the itinerary are related in such a way that they could be considered an event, the petition should be approved for the requested validity period. For example, a series of events that involve the same performers and the same or similar performance, such as a tour by a performing artist in venues around the United States, would constitute an event. In another example, if there is a break in between events in the United States and the petitioner indicates the beneficiary will be returning abroad to engage in activities that are incidental or related to the work performed in the United States, it does not necessarily interrupt the original event.

The burden is on the petitioner to demonstrate that the activities listed on the itinerary relate to the event despite gaps in which the beneficiary may travel abroad and return to the United States. Those gaps may include time in which the beneficiary attends seminars, vacations, or travels between engagements.[9] Those gaps would not be considered to interrupt the original event, and the full period of time requested may be granted as the gaps are incidental to the original event. If a review of the itinerary does not establish an event or activity or a series of connected events and activities that would allow the validity period requested, or if the petitioner is requesting a validity period beyond the last established event or activity, the officer may, in his or her discretion, issue a Request for Evidence (RFE). The RFE provides the petitioner an opportunity to provide additional documentation to establish the requested validity period.

Officers evaluate the totality of the evidence submitted under the pertinent statute and regulations to determine if the events and activities on the itinerary are connected in such a way that they would be considered an event for purposes of the validity period. If the evidence establishes that the activities or events are related in such a way that they could be considered an event, the officer approves the petition for the length of the established validity period.

Even though USCIS may consider a group of related activities to be an event, speculative employment or freelancing are not allowed.[10] A petitioner must establish that there are events or activities in the beneficiary's field of extraordinary ability for the validity period requested. Evidence of such events or activities could include an itinerary for a tour, contract or summary of the terms of the oral agreement under which the beneficiary will be employed, or contracts between the beneficiary and employers if an agent is being used.

Maintaining Status

USCIS does not consider a beneficiary in O-1 status to have failed to maintain nonimmigrant status solely because of the cessation of the employment on which the visa classification was based for a period of up to 60 days or until the end of the authorized validity period, whichever is shorter. USCIS may shorten or eliminate this 60-day grace period as a matter of discretion. Unless otherwise authorized under 8 CFR 274a.12, the O-1 beneficiary may not work during such a period.[11]

Although the O-2 accompanying beneficiary must obtain his or her own classification, this classification does not entitle him or her to work separate and apart from the O-1 beneficiary to whom he or she provides support.[12]

B. Extension of Stay

A petitioner may request an extension of stay for an O-1 or O-2 nonimmigrant beneficiary by filing a new Petition for a Nonimmigrant Worker (Form I-129).[13] O-3 dependents may request an extension of stay or change of status by filing an Application to Extend/Change Nonimmigrant Status (Form I-539), and, when applicable, Supplemental Information for Application to Extend/Change Nonimmigrant Status (Form I-539A).

USCIS may authorize an extension of stay in increments of up to 1 year for an O-1 or O-2 beneficiary to continue or complete the same event or activity for which the beneficiary was admitted, plus an additional 10 days to allow the beneficiary to get their personal affairs in order.[14]

Examples of an event or activity include, but are not limited to:

- A scientific project;
- Conference;
- Convention;
- Lecture series;
- Tour;
- Exhibit;
- Business project;
- Academic year; or
- Engagement.[15]

Continuing employment or research in the same capacity and involving the same activities, for example, may form the basis of an extension for up to 1 year.

Where a petitioner requests to extend the stay of an O-1 or O-2 nonimmigrant based on a new event or activity (whether or not the employer has changed), USCIS may authorize an extension of stay for a period determined to be necessary to accomplish the new event or activity, not to exceed 3 years. Such requests may include instances where a beneficiary's continued employment may involve different activities, such as when continuing in a different phase or trial for the same research.

There is no limit to the number of extensions of stay USCIS may approve for the same beneficiary. Furthermore, USCIS should not deny such requests on the basis of the approval of a permanent labor certification or the filing of a preference petition for the O-1 beneficiary.[16]

C. Change of Status

Generally, a beneficiary in a current valid nonimmigrant status who has not violated his or her status is eligible to change status to that of an O nonimmigrant without having to depart the United States.[17]

To change to O nonimmigrant status, the petitioning employer or agent should file a Petition for a Nonimmigrant Worker (Form I-129) before the beneficiary's current status expires and indicate the request is for a change of status.[18] The beneficiary cannot work in the new nonimmigrant classification until USCIS approves the petition and the change of status request. If USCIS determines that the beneficiary is eligible for the O classification, but not a change of status, the beneficiary must depart the United States, apply for a nonimmigrant visa at a U.S. consular post abroad (unless visa exempt), and then be readmitted to the United States in O-1 or O-2 status.[19]

USCIS should not deny an application for change of status on the basis of the approval of a permanent labor certification or the filing of a preference petition for the O-1 beneficiary.[20]

D. Change of Employer

If an O nonimmigrant in the United States seeks to change employers, the new employer or agent must file a Petition for a Nonimmigrant Worker (Form I-129) to authorize the new employment and, if applicable, request to extend the beneficiary's stay. An O-2 beneficiary may change employers only in conjunction with a change of employers by the principal O-1 beneficiary. If an agent filed the petition, the agent must file an amended petition with evidence relating to the new employer.[21]

In the case of a professional O-1 athlete traded from one organization to another, employment authorization for the player automatically continues for a period of 30 days after acquisition by the new organization, within which time the new organization is expected to file a new Petition for a Nonimmigrant Worker (Form I-129). If a new petition is not filed within 30 days, employment authorization ceases. If a new petition is filed within 30 days, the professional athlete is deemed to be in valid O-1 status, and employment continues to be authorized, until the petition is adjudicated. If USCIS denies the new petition, employment authorization ceases.[22]

Footnotes

[^ 1] See 8 CFR 214.2(o)(6)(iii).

[^ 2] See 8 CFR 214.2(o)(10)

[^ 3] See INA 101(a)(15)(O). See INA 214(a)(2)(A).

[^ 4] See 8 CFR 214.2(o)(1)(i).

[^ 5] See 8 CFR 214.2(o)(3)(ii).

[^ 6] See 8 CFR 214.2(o)(1)(ii)(A)(1).

[^ 7] See 8 CFR 214.2(o)(2)(ii)(C).

[^ 8] See 8 CFR 214.2(o)(6)(iii).

[^ 9] Activities engaged in during the beneficiary's trips outside the United States should not by themselves be used to limit a validity period. An officer should primarily focus on the relatedness of the activities inside the United States to determine whether the beneficiary is engaged in an event for purposes of the validity period.

[^ 10] Pursuant to 8 CFR 214.2(o)(2)(iv)(D), in the case of a petition filed for an artist or entertainer, a petitioner may add additional performances or engagements during the validity period of the petition without filing an amended petition, provided the additional performances or engagements require an alien of O-1 caliber.

[^ 11] See 8 CFR 214.1(l)(2).

[^ 12] See 8 CFR 214.2(o)(4).

[^ 13] See 8 CFR 214.1(c)(1). Where a petitioner demonstrates eligibility for a requested extension, it may be granted at the discretion of USCIS. There is no appeal from the denial of a request for extension of stay. See 8 CFR 214.1(c)(5).

[^ 14] See 8 CFR 214.2(o)(12)(ii).

[^ 15] See 8 CFR 214.2(o)(3)(ii).

[^ 16] See 8 CFR 214.2(o)(13).

[^ 17] See INA 248. See 8 CFR 248.1(a). An example of a violation of status is if, generally, the nonimmigrant's current status expires before filing a Petition for a Nonimmigrant Worker (Form I-129) with USCIS or by working without authorization.

[^ 18] See 8 CFR 248.3(a).

[^ 19] There is no appeal from a change of status denial. See 8 CFR 248.3(g).

[^ 20] See 8 CFR 214.2(o)(13).

[^ 21] See 8 CFR 214.2(o)(2)(iv)(C).

[^ 22] See 8 CFR 214.2(o)(2)(iv)(G) and 8 CFR 274a.12(b)(13).

Part N - Athletes and Entertainers (P)

Chapter 1 - Purpose and Background

A. Purpose

The Immigration and Nationality Act (INA) and implementing regulations provide that qualifying nonimmigrant athletes and entertainers may be approved for P nonimmigrant classification.

B. Background

The Immigration Act of 1990 added the O and P nonimmigrant classes to INA 101(a)(15).[1] These new classes provided for the admission of artists, athletes, entertainers, and other persons of extraordinary ability. However, as a result of the passage of the Armed Forces Immigration Adjustment Act of 1991, the use of the O and P classifications was delayed until April 1, 1992.[2] Before the enactment of these laws, artists, athletes, and other performers were admitted under the H-1 (distinguished merit and ability), H-2 (temporary agricultural or non-agricultural), or B-1 (temporary business visitor) categories. The 1990 amendments also revised the H classifications, effectively barring their continued use by most performing artists and athletes.

C. Legal Authorities

- INA 101(a)(15)(P) - Definition of P nonimmigrant classification
- INA 204(i) - Professional athletes
- INA 214(a)(2)(B) - Admission of or period of stay for P nonimmigrants
- INA 214(c)(1) - Importing employer
- INA 214(c)(4) - Petition of importing employer for P nonimmigrants[3]
- INA 214(c)(5)(B) - Return transportation
- INA 214(c)(6) - Consultation requirement
- 8 CFR 214.2(p) - Requirements for P nonimmigrant classification

Footnotes

[^ 1] See the Immigration Act of 1990, Pub. L. 101-649 (PDF) (November 29, 1990).

[^ 2] See Pub. L. 102-110 (PDF) (October 1, 1991).

[^ 3] The Creating Opportunities for Minor League Professionals, Entertainers, and Teams through Legal Entry (COMPETE) Act of 2006 amended INA 214(c)(4)(A). See the COMPETE Act of 2006, Pub. L. 109-463 (PDF) (December 22, 2006).

Chapter 2 - Eligibility Requirements

A. P-1 Nonimmigrant Classification

1. Internationally Recognized Athlete (P-1A Nonimmigrant)

The P-1A nonimmigrant classification includes individual athletes with an internationally recognized reputation and members of an athletic team that is internationally recognized.[1] The athlete or team must be coming to the United States to participate in an athletic competition which has a distinguished reputation and which requires participation of an athlete or athletic team with an international reputation.[2]

The regulatory requirements that the prospective competitions have a “distinguished reputation” and “require” the participation or services of an internationally recognized athlete or team derive from the statutory language stating that a qualifying athlete is one who performs “at an internationally recognized level of performance.”[3] Accordingly, USCIS interprets this regulatory language consistent with the statutory reference to athletes performing at an “internationally recognized level of performance.” More specifically, the relevant statutory and regulatory provisions do not require that an athlete or team be coming to participate in a competition that is limited to internationally recognized participants. Rather, it is sufficient for the petitioner to show that the competition is at an internationally recognized level of performance such that it requires that caliber of athlete or team to be among its participants or that some level of participation by internationally recognized athletes is required to maintain its current distinguished reputation in the sport.

Relevant considerations for determining whether competitions are at an internationally recognized level of performance such that they require the participation of an internationally recognized athlete or team include, but are not limited to:

- The level of viewership, attendance, revenue, and major media coverage of the events;
- The extent of past participation by internationally recognized athletes or teams;
- The international ranking of athletes competing; or
- Documented merits requirements for participants.

If the record shows the participation of internationally recognized caliber competitors is currently unusual or uncommon, this may indicate that the event may not currently be at an internationally recognized level of performance. In addition, while not necessarily determinative, the fact that a competition is open to competitors at all skill levels may be a relevant negative factor in analyzing whether it is at an internationally recognized level of performance. If the event includes differentiated categories of competition based on skill level, the focus should be on the reputation and level of recognition of the specific category of competition in which the athlete or team seeks to participate.[4]

Individual athletes who are internationally recognized may also be coming to the United States to join a U.S.-based team.[5] When a petition is for a foreign athletic team, each member of an internationally recognized athletic team may be granted P-1A classification based on that relationship, but may not perform services separate and apart from the athletic team.[6]

2. COMPETE Act [Reserved]

[Reserved]

3. Member of Internationally Recognized Entertainment Group (P-1B Nonimmigrant)

The P-1B nonimmigrant classification for entertainers applies to:

- Members of an internationally recognized entertainment group coming to the United States; and
- A person coming to the United States to join, as a member, an internationally recognized group, which can be based in the United States or abroad.[7]

A member of an internationally-recognized entertainment group may be granted P-1B classification based on that relationship, but may not perform services separate and apart from the entertainment group. The P-1B nonimmigrant who is a member of an internationally recognized entertainment group must be coming to the United States to perform with the group as a unit. In addition, the entertainment group must be internationally recognized as outstanding for a sustained and substantial period of time, and 75 percent of the group must have had a sustained and substantial relationship with the group for at least 1 year.[8] The P-1B nonimmigrant classification is not appropriate for a person performing as a solo entertainer.

Provisions for Certain Entertainment Groups

The regulations allow for three special provisions for certain entertainment groups:

- A waiver of the international recognition and 1-year group membership requirement for circus personnel (both those who perform and those who constitute an integral and essential part of the performance), provided that they are coming to join a circus or circus group that has been recognized nationally as outstanding for a sustained and substantial period of time;
- A waiver of the international recognition requirement, in consideration of special circumstances, for some entertainment groups recognized nationally as being outstanding in its discipline for a sustained and substantial period of time; and
- A waiver of the 1-year sustained and substantial relationship requirement for 75 percent of the group due to exigent circumstances.[9]

Group – Defined

The term "group" is defined as two or more persons established as one entity or unit to perform or to provide a service.[10] “Member of a group” means a person who is actually performing the entertainment services.[11] It does not include persons who assist in the presentation who are not on the stage (such as lighting or sound technicians). These support personnel would need to be petitioned for as essential support (P-1S) and a separate petition must be filed for them.[12]

If a solo artist or entertainer traditionally performs on stage with the same group of people, such as back-up singers or musicians, the act may be classified as a group. This group would then need to meet the “75 percent rule.” The “75 percent rule” means that 75 percent of the members of the group must have been performing entertainment services for the group for a minimum of 1 year or more.[13] If the group does not meet the 75 percent rule, the artist or entertainer would need to qualify for another classification, such as an O-1 nonimmigrant (rather than P-1B) and the back-up band as O-2 nonimmigrants.

B. Performers Under Reciprocal Exchange or Culturally Unique Programs

1. Individual Performer or Part of a Group Performing Under a Reciprocal Exchange Program (P-2 Nonimmigrant)

A P-2 nonimmigrant is a person coming to the United States to perform as an artist or entertainer, individually or as part of a group and who seeks to perform under a reciprocal exchange program which is between organization(s) in the United States and organization(s) in one or more foreign states.[14]

2. Artist or Entertainer as Part of Culturally Unique Program (P-3 Nonimmigrant)

A P-3 nonimmigrant is a person coming to the United States solely to perform, teach, or coach under a commercial or noncommercial program that is culturally unique.[15]

C. Essential Support Personnel

Essential support personnel are eligible for a P-1S, P-2S, or P-3S nonimmigrant classification if the petitioner can establish that they are an integral part of the performance of the P-1, P-2, or P-3 athlete, team, entertainer, or entertainment group because he or she performs support services that cannot be readily performed by a U.S. worker and which are essential to the successful performance of services by the P-1, P-2, or P-3 nonimmigrant.[16]

D. Treatment of Family Members

The spouse and unmarried children may qualify for P-4 derivative classification. They are entitled to the same period of admission and limitations as the beneficiary of the P petition. They are not allowed to accept employment unless they have been independently granted employment authorization. If the spouse or unmarried child is in the United States in another nonimmigrant classification, he or she must separately file an Application to Extend/Change Nonimmigrant Status (Form I-539) and, if applicable, Supplemental Information for Application to Extend/Change Nonimmigrant Status (Form I-539A) to request a change of status to P-4. The spouse or unmarried child must also separately file Form I-539 if seeking an extension of stay based on the principal nonimmigrant's stay being extended.

Footnotes

[^ 1] See 8 CFR 214.2(p)(1)(ii)(A)(1). See INA 214(c)(4)(A)(i)(I). For information regarding additional categories of persons eligible for P-1A classification under the Creating Opportunities for Minor League Professionals, Entertainers, and Teams through Legal Entry (COMPETE) Act of 2006, see Pub. L. 109-463 (PDF), 120 Stat. 3477 (December 22, 2006). See INA 214(c)(4)(A).

[^ 2] See 8 CFR 214.2(p)(4)(i) and 8 CFR 214.2(p)(4)(ii)(A).

[^ 3] See 8 CFR 214.2(p)(4)(i) and 8 CFR 214.2(p)(4)(ii)(A). See INA 214(c)(4)(A)(i)(I) and INA 214(c)(4)(A)(ii)(I).

[^ 4] For instance, some of the top marathons allow members of the public to participate in the general event, but also include a category of elite runners who compete against each other for prize money. In such a case, if an athlete is seeking to enter the United States to participate in the elite category, it is appropriate for an officer to consider whether the elite competition is at an internationally recognized level of performance such that it requires the participation of an internationally recognized athlete.

[^ 5] See 8 CFR 214.2(p)(4)(ii)(B).

[^ 6] See 8 CFR 214.2(p)(4)(i)(B).

[^ 7] See 8 CFR 214.2(p)(1)(ii)(A)(2). The P-1B classification should not be limited to individual entertainers coming to the United States to join only foreign-based entertainment groups. Rather, as the regulation at 8 CFR 214.2(p)(3) focuses on whether the group is "internationally recognized," which is defined as "having a high level of achievement in a field evidenced by a degree of skill and recognition substantially above that ordinarily encountered, to the extent that such achievement is renowned, leading, or well-known in more than one country," the P-1B classification should include individual entertainers coming to the United States to join U.S.-based internationally recognized entertainment groups.

[^ 8] See 8 CFR 214.2(p)(4)(i)(B).

[^ 9] See 8 CFR 214.2(p)(4)(iii)(C).

[^ 10] See 8 CFR 214.2(p)(3).

[^ 11] See 8 CFR 214.2(p)(3).

[^ 12] See 8 CFR 214.2(p)(4)(iv).

[^ 13] See 8 CFR 214.2(p)(4)(i)(B).

[^ 14] See INA 101(a)(15)(P)(ii). See 8 CFR 214.2(p)(1)(ii)(B).

[^ 15] See 8 CFR 214.2(p)(1)(ii)(C).

[^ 16] See 8 CFR 214.2(p)(4)(iv). See 8 CFR 214.2(p)(5)(iii). See 8 CFR 214.2(p)(6)(iii).

Chapter 3 - Petitioners

A petitioner seeking to classify a person as a P nonimmigrant must submit a Petition for a Nonimmigrant Worker (Form I-129) on his or her behalf. The petition must be properly filed with the required fee in accordance with the Form I-129 filing instructions.[1] If the beneficiary will work for more than one employer within the same time period, each employer must file a separate petition unless an agent files the petition and certain requirements are met.[2]

A request for an extension of stay for a P nonimmigrant or change of status for a person who is present in the United States in another nonimmigrant classification must be filed on Form I-129.[3] If the person is already in the United States in a P nonimmigrant status and a new employer wishes to petition for him or her, that new employer must use Form I-129 to file for a change of employer or to add an employer, and to request an extension of stay for the person.[4]

If there are any material changes in the terms or conditions of the P nonimmigrant's employment, the petitioner must file an amended petition. However, a petitioner may add additional, similar performances, engagements, or competitions during the validity period without filing an amended petition.[5]

A. Eligible Petitioners

The following petitioners may submit Form I-129 seeking to classify a person as a P nonimmigrant:

- Petitions for P-1 nonimmigrants may be filed by a U.S. employer, a U.S. sponsoring organization, a U.S. agent, or a foreign employer through a U.S. agent;

- Petitions for P-2 nonimmigrants may be filed by the U.S. labor organization which negotiated the reciprocal exchange agreement, the sponsoring organization, or a U.S. employer; and
- Petitions for P-3 nonimmigrants may be filed by the sponsoring organization or a U.S. employer.[6]

Agents as Petitioners

A U.S. agent may file a P-1 petition in the case where the beneficiary is in an occupation where workers are generally self-employed or use agents to arrange short-term employment with multiple employers, or where a foreign employer authorizes a U.S. agent to act on its behalf.[7]

B. Multiple Beneficiaries

In some circumstances, outlined below, a petitioner may file for multiple beneficiaries on the same petition.

P-1 Petition

A petitioner may file for multiple P-1A beneficiaries.[8] In addition, a petitioner may file for multiple beneficiaries that are members of a team or group, or if they will be providing essential support and performing in the same location and in the same occupation. Up to 25 named beneficiaries may be included per petition.[9] However, a separate petition must be submitted for the essential support (non-performing) personnel.[10] More than one P-1 essential support personnel may be included on a petition.

P-2 Petition

P-2 group members can be included on a single petition. A separate petition must be submitted for the essential support personnel.[11]

P-3 Petition

P-3 group members can be included on a single petition. A separate petition must be submitted for the essential support personnel.[12]

Footnotes

[^ 1] Information on filing locations can be found on the Direct Filing Addresses for Form I-129, Petition for a Nonimmigrant Worker webpage.

[^ 2] See 8 CFR 214.2(p)(2)(iv)(B). See Requirements for Agents and Sponsors Filing as Petitioners for the O and P Visa Classifications (PDF), HQ 70/6.2.18, HQ 70/6.2.19, issued November 20, 2009.

[^ 3] See 8 CFR 214.1(c)(1).

[^ 4] See 8 CFR 214.2(p)(2)(iv)(C)(1).

[^ 5] See 8 CFR 214.2(p)(2)(iv)(D).

[^ 6] See 8 CFR 214.2(p)(2)(i).

[^ 7] See 8 CFR 214.2(p)(2)(iv)(E). See Requirements for Agents and Sponsors Filing as Petitioners for the O and P Visa Classifications (PDF), HQ 70/6.2.18, HQ 70/6.2.19, issued November 20, 2009.

[^ 8] See INA 214(c)(4)(G).

[^ 9] See 8 CFR 214.2(p)(2)(iv)(F).

[^ 10] See 8 CFR 214.2(p)(2)(i).

[^ 11] See 8 CFR 214.2(p)(2)(i).

[^ 12] See 8 CFR 214.2(p)(2)(i).

Chapter 4 - Documentation and Evidence

A. Evidence for P-1 Classification

A P-1 petition for classification as an internationally recognized athlete, team, or entertainment group must be supported by evidence that the person, group, or team is internationally recognized as outstanding in the discipline and is entering to perform services which require such a level of performance.[1] If the petition is for a group of entertainers, the petition must contain evidence that at least 75 percent of the group have been performing with the group for at least 1 year.[2] The petitioner must submit a consultation from a labor organization, if one exists.[3]

Internationally Recognized Individual Athlete or Athletic Team

For a team, the petitioner must submit evidence that the team as a unit is internationally recognized. For an individual athlete, the petitioner must submit evidence that the athlete has achieved international recognition in the sport based on his or her reputation.[4]

A petition for an athletic team or individual athlete must include a tendered contract with a “major United States sports league or team” or tendered contract in an individual sport commensurate with international recognition in that sport, if such contracts are normally executed in the sport.[5] USCIS interprets “major United States sports league” as a league that has a distinguished reputation that is commensurate with an internationally recognized level of performance, and “major United States sports team” as a team that participates in such a league, consistent with the statutory standard for internationally recognized athletes.[6]

Therefore, under this interpretation, the league (or the team within the league) may be one where the level of competition in the league is such that the league (or a team within the league) would not be able to remain competitive or maintain its current distinguished reputation in the sport without the services of at least some internationally recognized caliber

athletes.

Factors that may be considered include, but are not limited to: information about the structure of the league or the differentiated categories of competition; documentation showing a pattern of participation by internationally recognized athletes; level of viewership, attendance, revenue, and major media coverage about the league or its teams or competitions; international ranking of athletes competing; or documented merits requirements for league participants.[7]

The petitioner must also submit documentation of at least two forms of the following:[8]

- Evidence of significant participation in a prior season with a major U.S. sports league;[9]
- Evidence of participation in international competition with a national team;
- Evidence of significant participation in a prior season for a U.S. college or university in intercollegiate competition;
- A written statement from an official of the governing body of the sport detailing the person's or team's international recognition;
- A written statement from a recognized expert or member of the sports media detailing the person's or team's international recognition;
- Evidence that the person or team is ranked if the sport has international rankings; or
- Evidence the person or team has received a significant honor or award in the sport.

Entertainment Group

In general, the petitioner must submit evidence of the group's nomination or receipt of significant international awards or prizes for outstanding achievement in its field or three forms of the following types of documentation:[10]

- Critical reviews, advertisements, publicity releases, publications, contracts, or endorsements showing that the group has performed and will perform as a starring or leading entertainment group in productions or events with a distinguished reputation;
- Reviews in major newspapers, trade journals, magazines, or other published material showing the group's international recognition and acclaim for outstanding achievement in its field;
- Articles in newspapers, trade journals, publications, or testimonials showing that the group has performed and will perform services as a leading or starring group for organizations and establishments that have a distinguished reputation;
- Ratings, standing in the field, box office receipts, recording or video sales, and other achievements in the field, as reported in articles in major newspapers, trade journals, or other publications showing major commercial or critically acclaimed success;
- Testimonials showing that the group has achieved significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field; or
- Contracts or other reliable evidence that the group has either commanded or will command a high salary or other substantial remuneration for services comparable to others similarly situated in the field.

Circus Group

The petitioner must submit evidence the beneficiary is coming to join (perform in) a circus that has been recognized nationally as outstanding for a sustained and substantial period or as part of such a circus.[11]

Essential Support Personnel

The petitioner must submit a statement describing the support personnel's prior essentiality and skills and experience with the principal beneficiary, group, or team.[12]

B. Evidence for P-2 Nonimmigrant Classification

A petition filed on behalf of a person seeking P-2 nonimmigrant classification should be submitted with the following supporting evidence: the consultation,[13] a copy of the reciprocal agreement, and evidence that the beneficiaries are subject to the reciprocal exchange.[14] A list of negotiated P-2 reciprocal agreements is maintained on the P-2 Individual Performer or Part of a Group Entering to Perform Under a Reciprocal Exchange Program webpage. If a reciprocal agreement is submitted other than those listed, the officer must review the agreement to determine if the agreement adheres to the regulatory standard.[15]

C. Evidence for P-3 Nonimmigrant Classification

A petition filed on behalf of a person seeking P-3 nonimmigrant classification should be submitted with the following supporting evidence:[16]

- Affidavits, testimonials, or letters from recognized experts attesting to the authenticity of the person's or the group's skills in performing, presenting, coaching, or teaching the unique or traditional art form and giving the credentials of the expert, including the basis of his or her knowledge of the person's or group's skill; or
- Documentation that the performance of the person or group is culturally unique, as evidenced by reviews in newspapers, journals, or other published materials.

In addition, the petition must be submitted with evidence that all of the performances or presentations will be culturally unique events.

D. Consultation Requirement

1. Statutorily Mandated Consultation Process

Along with the supporting documentation, a statutorily mandated consultation process exists for all P petitions.[17] This consultation must be from an appropriate labor organization and address the nature of the work to be done and the person's qualifications or, for certain classifications, the organization may indicate it has no objection to approval of the petition.[18] The petitioner has the burden of furnishing a consultation.

The source and contents of the consultation varies, depending upon the type of petition as shown in the table below.

Consultation Requirement

Petition	Source and Contents of Consultation

Petition	Source and Contents of Consultation
P-1	Consultation with an appropriate labor organization is required if one exists. The consultation must evaluate the person's (group's) qualifications and state whether the services or performances are appropriate for an internationally recognized athlete or entertainment group.[19] The labor organization may also issue a letter of no objection.
P-2	Consultation with an appropriate labor organization to verify that a bona fide reciprocal agreement exists.[20]
P-3	Consultation with an appropriate labor organization to evaluate the cultural uniqueness of the entertainer(s) and whether the performances are in a cultural program appropriate for the P-3 classification.[21] The labor organization may also issue a letter of no objection.
Essential Support Personnel	Consultation with an appropriate labor organization. Consultation must evaluate the essential character of the work, the relationship between the principal and support workers, and the availability of U.S. workers to do the job.[22] The labor organization may also issue a letter of no objection.

The regulations specify mandatory response times for consultations for expedited cases and prescribe action to be taken when a requested opinion is not received.[23] The consultations are advisory in nature only and are not binding on USCIS.[24] A negative consultation does not automatically result in the denial of the petition, as decisions must be based on the totality of the evidence. Accordingly, if the petitioner submits evidence that overcomes a negative advisory opinion and which establishes the merits of the person, USCIS may approve the petition.

2. Petitions Meriting Expedited Processing

If USCIS has determined that a petition merits expeditious handling, USCIS contacts the appropriate labor organization and requests an advisory opinion if one is not submitted by the petitioner. The organization then has 24 hours to respond to the request. If no response to the request is received, then USCIS renders a decision on the petition without an advisory opinion.[25]

Footnotes

[^ 1] See 8 CFR 214.2(p)(4)(i). INA 214(c)(4)(A) provides more information regarding petitions filed under the Creating Opportunities for Minor League Professionals, Entertainers, and Teams through Legal Entry (COMPETE) Act of 2006. See Pub. L. 109-463 (PDF) (December 22, 2006).

[^ 2] See 8 CFR 214.2(p)(4)(iii). Exceptions to some requirements apply to certain entertainment groups under 8 CFR 214.2(p)(4)(iii)(C). For more information, see Chapter 2, Eligibility Requirements, Section A, P-1 Nonimmigrant Classification [2 USCIS-PM N.2(A)].

[^ 3] See Section D, Consultation Requirement [2 USCIS-PM N.4(D)]. See 8 CFR 214.2(p)(2)(ii)(D). See 8 CFR 214.2(p)(7).

[^ 4] 8 CFR 214.2(p)(4)(ii)(B).

[^ 5] 8 CFR 214.2(p)(4)(ii)(B)(*1*).

[^ 6] See INA 214(c)(4)(A)(i)(I) and INA 101(a)(15)(P)(i). USCIS provided this interpretation in its policy guidance on March 26, 2021 in order to provide increased clarity for USCIS officers, to promote consistent adjudications, and to increase transparency for prospective petitioners. While alternative interpretations of the undefined regulatory phrase “major United States sports league or team” are possible, USCIS believes that this interpretation most closely aligns with the statute being interpreted, which requires that internationally recognized athletes perform “at an internationally recognized level of performance.” In addition, the interpretation is consistent with USCIS’ longstanding adjudicative focus on that statutory requirement.

[^ 7] For more information, see the discussion of internationally recognized athletes in Chapter 2, Eligibility Requirements, Section A, P-1 Nonimmigrant Classification [2 USCIS-PM N.2(A)].

[^ 8] See 8 CFR 214.2(p)(4)(ii)(B)(*2*).

[^ 9] See previous discussion regarding the interpretation of “major United States sports league or team.”

[^ 10] See 8 CFR 214.2(p)(4)(iii)(B). Exceptions to some requirements apply to certain entertainment groups under 8 CFR 214.2(p)(4)(iii)(C). For further discussion, see Chapter 2, Eligibility Requirements, Section A, P-1 Nonimmigrant Classification [2 USCIS-PM N.2(A)].

[^ 11] See 8 CFR 214.2(p)(4)(iii)(C).

[^ 12] See 8 CFR 214.2(p)(4)(iv).

[^ 13] See Section D, Consultation Requirement [2 USCIS-PM N.4(D)].

[^ 14] See 8 CFR 214.2(p)(5)(ii).

[^ 15] See 8 CFR 214.2(p)(5)(ii).

[^ 16] See 8 CFR 214.2(p)(6)(ii). See *Matter of Skirball Cultural Center* (PDF), 25 I&N Dec. 799 (AAO 2012).

[^ 17] See INA 214(c)(4)(D). See INA 214(c)(4)(E).

[^ 18] See 8 CFR 214.2(p)(7).

[^ 19] See 8 CFR 214.2(p)(7)(ii). See 8 CFR 214.2(p)(7)(iii).

[^ 20] See 8 CFR 214.2(p)(7)(iv).

[^ 21] See 8 CFR 214.2(p)(7)(v).

[^ 22] See 8 CFR 214.2(p)(7)(vi).

[^ 23] See 8 CFR 214.2(p)(7)(i)(E).

[^ 24] See 8 CFR 214.2(p)(7)(i)(D).

[^ 25] See 8 CFR 214.2(p)(7)(i)(E).

Chapter 5 - Adjudication

A. Approvals

If the necessary required evidence has been submitted and all requirements have been met, the officer approves the petition and issues a Notice of Action (Form I-797) showing the period of validity and the beneficiary's name and classification.

1. Validity Period of Petition for Athletes and Entertainers

The approval period for a P nonimmigrant petition must conform to the limits outlined in the table below.

Approval Period for a P Nonimmigrant Petition

Nonimmigrant Classification	Validity Period
P-1 (individual athlete)	Up to 5 years[1]
P-1 (team or entertainment group)	Period of time determined by USCIS to be necessary to complete the event or activity, but not to exceed 1 year[2]
P-2	Period of time determined by USCIS to be necessary to complete the event or activity, but not to exceed 1 year[3]
P-3	Period of time determined by USCIS to be necessary to complete the event or activity, but not to exceed 1 year[4]

If the petition is approved after the date the petitioner indicated services would begin, the approved petition shows a validity period commencing with the date of approval and up to the date requested by the petitioner, not to exceed the maximum period described above.[5]

If the petitioner filed Form I-129 to extend the validity of the original petition in order to continue or complete the same activities or events specified in the original petition, an extension of stay may be authorized in increments of up to 1 year. P-1 individual athletes may be extended for up to 5 years, not to exceed 10 years in total.[6]

A beneficiary may be admitted to the United States for the validity period of the petition, plus a period of up to 10 days before the validity period begins and 10 days after the validity period ends. The beneficiary may not work except during the validity period of the petition.[7]

2. Validity Period of Petition for Essential Support Personnel

Current DHS regulations provide that an approved P-1 petition for an individual athlete (also known as a P-1A) are valid for a period of up to 5 years.[8] The general rule for the approval period of a P-1 petition for essential support personnel (also known as P-1S) states that the approved petition must only be valid for a period of time determined by USCIS to be necessary to complete the event for which the P-1 is admitted, not to exceed 1 year.[9]

The exception to that general rule is the period for an extension of stay to continue or complete the same event or activity for essential support personnel of a P-1A individual athlete, which may be approved for a period of up to 5 years, for a total period of stay not to exceed 10 years.[10] USCIS interprets this exception at 8 CFR 214.2(p)(14) consistent with its plain language, such that the 5-year extension of stay for a P-1S for an individual athlete is only available when the petitioner requests an extension of stay (and not consulate notification) to continue or complete the same event or activity for a beneficiary who is in the United States in P-1S status at the time the petition extension is properly filed, and the extension of stay request is approved.[11]

Therefore, while the initial validity period of a P-1 petition for essential support personnel is limited to 1 year or less, the validity period of an extension of stay of essential support personnel of a P-1A individual athlete may exceed 1 year thereafter, provided that:

- The purpose is to continue or complete the same event or activity for which they were admitted; and
- The extension of stay validity period does not exceed the period of time necessary to complete the event (not to exceed 5 years, or a total period of stay of 10 years).

B. Denials

If the requirements have not been met, the officer should deny the petition. The petitioner must be notified of the decision, the reasons for denial, and the right to appeal the denial.[12] The denial of a petition to classify a beneficiary as a P nonimmigrant may be appealed to the Administrative Appeals Office. The appeal must be filed on a Notice of Appeal or Motion (Form I-290B) within 30 days of the decision.[13] There is no appeal from a decision to deny an extension of stay to the beneficiary.[14]

If the officer decides to incorporate into the denial decision a negative advisory opinion which USCIS has obtained (separate from one submitted by the petitioner), he or she must disclose the nature of the advisory opinion to the petitioner in a Notice of Intent to Deny (NOID) and give the petitioner an opportunity for rebuttal.

Footnotes

[^ 1] See 8 CFR 214.2(p)(8)(iii)(A).

[^ 2] See 8 CFR 214.2(p)(8)(iii)(A). See 8 CFR 214.2(p)(8)(iii)(B).

[^ 3] See 8 CFR 214.2(p)(8)(iii)(B).

[^ 4] See 8 CFR 214.2(p)(8)(iii)(C).

[^ 5] See 8 CFR 214.2(p)(8)(ii)(A).

[^ 6] See 8 CFR 214.2(p)(14). For guidance on applying the period of authorized stay for individual athletes, see Procedures for Applying the Period of Stay for P-1 Nonimmigrant Individual Athletes (PDF), HQ 70/6.2.19, issued March 6, 2009.

[^ 7] See 8 CFR 214.2(p)(12).

[^ 8] See 8 CFR 214.2(p)(8)(iii)(A).

[^ 9] See 8 CFR 214.2(p)(8)(iii)(E).

[^ 10] See 8 CFR 214.2(p)(14). See Procedures for Applying the Period of Authorized Stay for P-1S Nonimmigrant Individual Athletes Essential Support Personnel (PDF), HQ 70/6.2.19, issued July 14, 2009.

[^ 11] See 8 CFR 214.2(p)(14)(i), which requires a petitioner seeking an extension to file both an extension of the petition and an extension of stay, and also states that the nonimmigrant applies for a visa at a consular office abroad if the nonimmigrant leaves the United States while the extension requests are pending.

[^ 12] See 8 CFR 103.3.

[^ 13] See 8 CFR 103.3(a)(2).

[^ 14] See 8 CFR 214.1(c)(5). While requests to extend petition validity and the person's stay for P nonimmigrants are combined on the petition, USCIS makes a separate determination on each request. See 8 CFR 214.2(p)(14)(i).

Chapter 6 - Post-Adjudication Actions

A. Substitution of Beneficiaries

A petitioner may request a substitution for one or more members of a group on an approved petition by sending a letter requesting substitution and a copy of the petitioner's approval notice to a consular officer where the person will apply for a visa or immigration officer at a port of entry where the person will apply for admission.[1] A petitioner may not request substitutions for support personnel; rather, the petitioner must submit a new petition.[2]

If a group is already in the United States performing with approved P-1 classification and the group now needs to add or substitute members, the additions or substitutes should be petitioned for as P-1s. In such instances, the petitioner must provide evidence of the original approval and the required consultation. In situations involving illness or exigent circumstances, USCIS may waive the 1 year relationship requirements.[3]

B. Revocations

The petitioner should immediately notify USCIS of any changes in the terms and conditions of employment of the beneficiary that may affect eligibility. USCIS may revoke a petition at any time, even after the validity of the petition has expired.

1. Automatic Revocation

The approval of an unexpired petition is automatically revoked if the petitioner, or the employer in a petition filed by an agent, goes out of business, files a written withdrawal of the petition, or notifies USCIS that the beneficiary is no longer employed by the petitioner.[4]

2. Revocation on Notice

When there is no provision that would result in automatic revocation, USCIS may issue a Notice of Intent to Revoke (NOIR) the approval of the petition, such as in cases where:

- The beneficiary is no longer employed by the petitioner in the capacity specified in the petition;
- The statement of facts contained in the petition was not true and correct;
- The petitioner violated the terms or conditions of the approved petition;
- The petitioner violated the statutory or regulatory provisions for P nonimmigrant classification; or
- The approval of the petition violated the regulations or involved gross error.[5]

The NOIR should contain a detailed description of the grounds for the revocation and the time period allowed for the petitioner's rebuttal.[6] USCIS considers all relevant evidence presented in determining whether to revoke the petition. A petition that has been revoked on notice may be appealed to the Administrative Appeals Office.[7] A petition that is automatically revoked may not be appealed.

Footnotes

[^ 1] See 8 CFR 214.2(p)(2)(iv)(H).

[^ 2] See 8 CFR 214.2(p)(2)(iv)(H).

[^ 3] See 8 CFR 214.2(p)(4)(iii)(c)(3).

[^ 4] See 8 CFR 214.2(p)(10)(ii).

[^ 5] See 8 CFR 214.2(p)(10)(iii)(A).

[^ 6] See 8 CFR 214.2(p)(10)(iii)(B). For more information on timeframes for Notices of Intent to Revoke, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 10, Post-Decision Actions, Section D, Revocation, Rescission, or Termination [1 USCIS-PM E.10(D)].

[^ 7] See 8 CFR 103.3.

Part O - Religious Workers (R)

Chapter 1 - Purpose and Background

A. Purpose

The Immigration and Nationality Act (INA) provides separate immigration classifications for religious workers depending on whether they seek to work in the United States on a permanent or a temporary basis.[1] Aliens working in the United States temporarily as a minister or in a religious vocation or occupation are eligible for the nonimmigrant religious worker (R-1) classification.[2]

B. Background

In 1990, Congress created new immigration classifications for religious workers, including the R-1 nonimmigrant classification and a special immigrant religious worker classification.[3]

In 2005, the USCIS Office of Fraud Detection and National Security (FDNS) conducted a Benefit Fraud Assessment of the special immigrant religious worker program by randomly selecting and reviewing pending and approved cases. As a result, USCIS issued a report finding significant fraud in the use of this classification.[4] This led USCIS to reconsider how it administered the special immigrant religious worker program.

In 2008, USCIS promulgated regulations that added requirements to establish eligibility for the special immigrant and nonimmigrant religious worker programs.[5] In part, the regulations introduced a requirement that a beneficiary's prospective employer submit a petition for all R-1 nonimmigrants, including those outside of the United States.[6] The regulations also provided USCIS with discretionary authority to verify the submitted evidence through any means it determines appropriate, up to and including an on-site inspection of the petitioning organization.[7]

C. Legal Authorities

- INA 101(a)(15)(R) - Definition of R nonimmigrant classification
- 8 CFR 214.2(r) - Religious workers

Footnotes

[^ 1] See INA 101(a)(27)(C) and INA 101(a)(15)(R). See 8 CFR 204.5(m). The INA affords permanent religious workers a special immigrant status. Ministers and non-ministers in religious vocations and occupations may immigrate to or adjust status in the United States for the purpose of performing religious work in a full-time, compensated position under the employment-based 4th-preference visa classification. See INA 101(a)(27)(C). For more information about adjusting to lawful permanent residence as a special immigrant religious worker, see Volume 7, Adjustment of Status, Part F, Special Immigrant-Based Adjustment, Chapter 2, Religious Workers [7 USCIS-PM F.2].

[^ 2] See INA 101(a)(15)(R).

[^ 3] See Section 209 of the Immigration Act of 1990 (IMMACT 90), Pub. L. 101-649 (PDF), 104 Stat. 4978, 5027 (November 29, 1990), creating new INA 101(a)(15)(R). See Section 151 of IMMACT 90, Pub. L. 101-649 (PDF), 104 Stat. 4978, 5004 (November 29, 1990), creating new INA 101(a)(27)(C).

[^ 4] See Religious Worker Benefit Fraud Assessment Summary (July 2006).

[^ 5] See 73 FR 72276 (PDF) (Nov. 26, 2008).

[^ 6] Previously, a prospective nonimmigrant outside the United States could apply at a consular office overseas or, if visa-exempt, seek initial admission into the United States. See 72 FR 20442, 20444 (Apr. 25, 2007).

[^ 7] See 8 CFR 214.2(r)(16).

Chapter 2 - General Requirements

A. Overview

The temporary nonimmigrant religious worker (R-1) classification allows religious workers to enter the United States, or change status from another nonimmigrant category, in order to temporarily perform services as a minister of religion or in a religious occupation or vocation.[1]

An alien cannot self-petition for R-1 classification.[2] A U.S. employer must file a Petition for a Nonimmigrant Worker (Form I-129), seeking to classify a beneficiary as an R-1 nonimmigrant. In general, the petitioning R-1 employer must submit evidence demonstrating that:

- The petitioner is either a bona fide non-profit religious organization, or a bona fide organization that is affiliated with the religious denomination;[3]
- The beneficiary has been a member of the same type of religious denomination as that of the petitioner for the 2 years immediately preceding the time of application for admission;[4] and
- The beneficiary is entering the United States for the purpose of undertaking a compensated (either salaried or non-salaried) position or, in certain circumstances, an uncompensated position that is part of an established program for temporary, uncompensated missionary work.[5]

B. Filing Process

USCIS requires a petitioning employer to file the Petition for a Nonimmigrant Worker (Form I-129), with the R-1 Classification Supplement and required fee, for all persons seeking an R-1 nonimmigrant classification.[6] This petition requirement also applies to visa-exempt religious workers, such as Canadian citizens.[7]

To qualify for R-1 nonimmigrant classification, the petitioning U.S. employer must submit the R-1 Employer Attestation that is included in the R-1 Classification Supplement and evidence documenting that the petitioner and beneficiary meet the requirements set forth below.[8]

The petitioner should list all locations where the R-1 nonimmigrant will be working on the Petition for a Nonimmigrant Worker (Form I-129).[9] If it is anticipated that the R-1 nonimmigrant will be moved between different locations within a larger organization, that larger organization should petition for the worker. For example, a minister may move from ministry to ministry within a denomination, including at a different or additional unit of the religious denomination with a different federal tax number if the petitioning organization oversees all of these locations.

An R-1 nonimmigrant may work for more than one bona fide religious organization at the same time.[10] However, except as described in the previous paragraph (involving a larger employer overseeing multiple locations), when the beneficiary works for more than one employer, each employing organization must submit a separate Form I-129 and R-1 Classification Supplement, including the R-1 Employer Attestation, along with the appropriate documentation and fees.[11]

If a petitioner believes that one of the requirements for this classification substantially burdens the organization's exercise of religion, it may seek an exemption under the Religious Freedom Restoration Act of 1993 (RFRA).[12] A written request for the exemption from a provision's requirement should accompany the initial filing, and it must explain how the provision:

- Requires participation in an activity prohibited by a sincerely held religious belief; or
- Prevents participation in conduct motivated by a sincerely held religious belief.

The petitioner must support the request with relevant documentation.[13] The petitioner bears the burden of showing that it qualifies for an RFRA exemption. USCIS decides exemption requests on a case-by-case basis.

Footnotes

[^ 1] In some circumstances, another nonimmigrant classification, such as the business visitor (B-1) classification, may be more appropriate for certain members of religious and charitable activities. Discussion of the B-1 visa is beyond the scope of this Part, but the B-1 classification may include religious ministers who are on an evangelical tour or who are exchanging pulpits with U.S. counterparts, certain missionary workers, or participants in certain voluntary service programs. See 9 FAM 402.16-12, B Visas for Certain Religious Activity. See 9 FAM 402.2-5(C)(1), Ministers of Religion and Missionaries.

[^ 2] While special immigrant religious workers may self-petition, R-1 nonimmigrants may not do so. See 73 FR 72276 (PDF) (Nov. 26, 2008).

[^ 3] See 8 CFR 214.2(r)(3).

[^ 4] See 8 CFR 214.2(r)(3) and 8 CFR 214.2(r)(8)(ii).

[^ 5] See 8 CFR 214.2(r)(1) and 8 CFR 214.2(r)(11).

[^ 6] See 8 CFR 103.2(a)(1).

[^ 7] See 8 CFR 214.2(r)(4)(i).

[^ 8] The R-1 Classification Supplement is part of the Petition for a Nonimmigrant Worker (Form I-129).

[^ 9] See 8 CFR 214.2(r)(8)(x).

[^ 10] See 8 CFR 214.2(r)(2).

[^ 11] See 8 CFR 214.2(r)(1)(v) and 8 CFR 214.2(r)(2). For information on fees, see the Fee Schedule (Form G-1055).

[^ 12] See Pub. L. 103-141 (PDF), 107 Stat. 1488 (November 16, 1993).

[^ 13] See 8 CFR 103.2(b).

Chapter 3 - Petitioner Requirements

A. Qualifying Organization

The petitioner must attest it is either a bona fide non-profit religious organization or a bona fide organization that is affiliated with a religious denomination and is exempt from taxation. The authorizing official must sign the attestation, certifying that the attestation is true and correct.[1]

Bona Fide Non-profit Religious Organization[2]

A religious organization seeking to qualify as a "bona fide non-profit" religious organization in the United States is required to submit evidence that:

- The organization is exempt from federal tax requirements as described in Section 501(c)(3) of the Internal Revenue Code (IRC) of 1986;[3] and
- The organization has a currently valid determination letter from the Internal Revenue Service (IRS) confirming such exemption.[4]

In some cases, the petitioning entity may fall within the umbrella of a parent organization that has received a group tax exemption from the IRS. In these group tax-exempt cases, the petitioner may use the parent organization's IRS determination letter, provided it submits that letter and presents evidence that it is covered under the group exemption granted to the parent organization and it is authorized by the parent organization to use its group tax exemption.

Examples on what may be submitted to show that a petitioner may use a group tax exemption letter from a parent organization include, but are not limited to:

- A letter from the organization holding a group exemption as evidence that the petitioner is covered by such exemption; the letter from the organization named in the exemption must specifically acknowledge that the petitioner falls under the group exemption;
- Copies of pages from a directory for the parent organization showing the petitioner as a member of the group;[5]
- The parent organization's website that lists the petitioner as a member of the group covered by the exemption; and
- An IRS letter confirming the petitioner's coverage under the parent organization exemption.

While the IRS does not require religious organizations to obtain a determination letter, USCIS regulations require petitioners to submit a determination letter with the R-1 petition. USCIS reviews the information contained within the letter to determine if the IRS classified the organization as a religious organization, or as other than a religious organization. Determination letters from the IRS do not expire, but the IRS can revoke them. The IRS offers a web-based Tax Exempt Organization Search tool to verify an organization's tax-exempt status. An organization may use this tool for its own purposes to obtain a printout showing its currently valid tax-exemption. However, such a printout does not satisfy the requirement for submission of an IRS determination letter.

Bona Fide Organization Affiliated with Religious Denomination[6]

A petitioner qualifies as a bona fide organization that is affiliated with a religious denomination if:

- The organization is closely associated with the religious denomination;
- The organization is exempt from federal tax requirements as described in IRC 501(c)(3); and
- The organization has a currently valid determination letter from the IRS confirming such exemption.[7]

B. Petitioner Attestations[8]

The petitioner must provide information and specifically attest to the following (in addition to attesting that it is a qualifying R-1 employer):

- The number of members of the petitioning employer's organization;
- The number of employees who work at the same location where the religious worker will be employed, and a summary of those employees' responsibilities;
- The number of religious workers holding special immigrant religious worker status or R-1 nonimmigrant status currently employed or employed within the past 5 years by the petitioning employer's organization;
- The number of special immigrant religious worker and R-1 nonimmigrant petitions and applications filed by or on behalf of any religious workers for employment by the petitioning employer in the past 5 years;
- The title of the position offered to the beneficiary;
- Detailed description of the beneficiary's proposed daily duties;[9]
- The particulars of the salaried or non-salaried compensation or self-support for the position;[10]
- A statement that beneficiary will be employed at least 20 hours per week;
- The specific location(s) of employment;
- The beneficiary will not be engaged in secular employment;
- The beneficiary is qualified to perform the duties of the offered position; and
- The beneficiary has been a member of the denomination for at least 2 years.

C. Verification and Inspections

USCIS may conduct on-site inspections either before or after USCIS makes a final decision on the petition.[11] The purpose of the inspection is to verify the evidence submitted in support of the R-1 petition, such as the petitioner's attestations and qualifications as a religious organization, the location(s) where the beneficiary will work, the organization's facilities (including places of worship, where applicable), and the nature of the beneficiary's proposed position.

USCIS randomly selects religious worker petitions for compliance review on-site inspections, which normally occur after the approval of the petition.[12] These site visits include inspections of the beneficiary's work locations to verify the beneficiary's work hours, compensation, and duties.[13] USCIS may also conduct "for cause" inspections at any time in cases where there is suspected non-compliance with the terms of the visa classification or fraud.[14] If applicable, USCIS may issue a request for evidence or notice of intent to deny based on the findings of a pre-adjudication inspection, or a notice of intent to revoke based on the findings of a post-adjudication inspection, and the petitioner will have an opportunity to respond.[15]

The petitioner cannot use a foreign address, as the employer must be in the United States in order to petition for religious workers.[16]

D. Documentation and Evidence

General Evidence Required

An R-1 petitioner is required to provide the following documentation and evidence to show the petitioner is a qualifying religious organization:[17]

- A properly completed current version of the Petition for a Nonimmigrant Worker (Form I-129) and R-1 Classification Supplement;
- A currently valid determination letter from the IRS establishing that the organization is a tax-exempt organization;[18] and
- Verifiable evidence of how the petitioner intends to compensate the beneficiary, including whether or not the beneficiary will be self-supporting.

Additional Evidence Required – Group Tax-Exempt Religious Organizations

In addition to the general evidence requirements, a group tax-exempt religious organization is required to provide evidence that it is included under the group exemption granted to a parent organization.[19] USCIS also requires evidence that the parent organization has authorized the petitioning entity to use its tax-exempt status.

Furthermore, an organization whose IRS determination letter does not identify its tax exemption as a religious organization must establish its religious nature and purpose. Such evidence may include the entity's articles of incorporation or bylaws, flyers, articles, brochures, or other literature that describes the religious purpose and nature of the organization.

Additional Evidence Required – Organization Affiliated with Religious Denomination

In addition to the general evidence requirements, a bona fide organization that is affiliated with the religious denomination is also required to submit a Religious Denomination Certification signed by an authorized official of the religious denomination, certifying that the petitioning organization is affiliated with the religious denomination.[20]

If the affiliated organization was granted tax-exempt status under IRC 501(c)(3) under a category other than religious organization, in addition to the general requirements, the petitioner must also provide:

- Documentation that establishes the religious nature and purpose of the organization, such as a copy of the organizing instrument of the organization that specifies the purposes of the organization; and
- Organizational literature, such as books, articles, brochures, calendars, flyers, and other literature describing the religious purpose and nature of the activities of the organization.[21]

Table Summarizing Evidentiary Requirements

The table below serves as a quick reference guide for the evidence required depending on the type of R-1 nonimmigrant petitioner.

Summary of Evidence Requirements Relating to the R-1 Nonimmigrant Petition

Type of Petitioner	Required Evidence
Tax-Exempt 501(c)(3) Religious Organization	• A currently valid determination letter from the IRS establishing that the organization is tax-exempt.
Group Tax-Exempt Religious Organization	• A currently valid determination letter from the IRS establishing that the group is tax-exempt. • Documentation that the organization is covered under the group tax exemption, including, for example, a letter from the parent organization authorizing the petitioner to use its group tax exemption, a directory for that organization listing the petitioner as a member of the group, a membership listing on the parent organization's website that confirms coverage under its exemption, or a letter from the IRS confirming the coverage. • If the submitted IRS determination letter does not identify the organization's tax exemption as a religious organization, then evidence establishing its religious nature and purpose. Such evidence may include, but is not limited to, the entity's articles of incorporation or bylaws, flyers, articles, brochures, or other literature that describes the religious purpose and nature of the organization.
Bona Fide Organization Affiliated with Religious Denomination	• A currently valid determination letter from the IRS establishing that the organization is tax-exempt. • If the organization was granted tax-exempt status under IRC 501(c)(3) as something other than a religious organization, then: ◦ documentation that establishes the religious nature and purpose of the organization, including, but not limited to, a copy of the organizing instrument that specifies the purposes of the organization, organizational literature, such as books, articles, brochures, calendars, flyers, and other literature describing the religious purpose and nature of the activities of the organization. • A Religious Denomination Certification signed by the religious denominational entity (not the petitioner) that the petitioner is affiliated with, which is part of the Petition for a Nonimmigrant Worker (Form I-129), R-1 Classification Supplement, certifying that the petitioning organization is affiliated with the religious denomination.

E. Employer Obligations[22]

The beneficiary's employer must notify DHS within 14 calendar days if:

- The beneficiary is working less than the required number of hours;
- The beneficiary has been released from the employment; or
- The beneficiary has otherwise terminated employment before the expiration of a period of authorized R-1 nonimmigrant stay.

F. Compensation Requirement[23]

An R-1 nonimmigrant must receive either salaried or non-salaried compensation, or provide his or her own support as a missionary under an established missionary program. The petitioner is required to state either how it intends to compensate the R-1 nonimmigrant or how the R-1 nonimmigrant will be self-supporting as part of an established missionary program, and to submit the corresponding, verifiable evidence described below.[24] To the extent that the R-1 nonimmigrant will receive funds or other benefits (such as housing) from a third party, this arrangement does not constitute compensation from the petitioner.[25]

1. Salaried or Non-salaried Compensation

Compensation may be salaried or non-salaried. Salaried means receiving traditional pay such as a paycheck. Non-salaried means any of the following (separately or in combination): receiving support such as room, board, medical care, and transportation instead of or in addition to a paycheck.

The petitioner must submit IRS documentation of compensation, such as IRS Forms W-2 or tax returns, if available. If IRS documentation is unavailable, then the petitioning employer must explain why it is unavailable and submit comparable verifiable documentation.[26]

When the beneficiary will receive salaried or non-salaried compensation, the petitioning employer may also submit verifiable evidence such as:[27]

- Documentation of past compensation for similar positions;
- Budgets showing monies set aside for salaries, leases, etc.;
- Documentary evidence demonstrating that room and board will be provided; or
- Other evidence acceptable to USCIS.[28]

While the regulation does not require audited financial reports, unaudited budgets or financial statements should be accompanied by supporting evidence that is verifiable. For example, budgets should be generally consistent with past revenue and supported by bank statements showing listed cash balances. When relying on bank statements, they should show an

availability of sufficient funds to cover the beneficiary's salaried compensation over a sufficient period of time.

Further, USCIS does not consider salaried or non-salaried support deriving from a third party as a portion of the beneficiary's required compensation. The regulation requires that compensation derive from the petitioner.[29] Room and board at a church member's home, or provided by any other church, is a form of third-party compensation. Unless the church reimburses the other party for this room and board, such arrangements are not a qualifying form of non-salaried compensation. A petitioner may also submit evidence such as proof that it owns the property or a lease showing it pays for the residential space to establish that it is the entity providing non-salaried compensation.

In situations where the petitioning entity is not the entity that will directly compensate the religious worker, USCIS reviews the relationship between the two entities in the totality of the circumstances to confirm that the petitioner who is attesting in the petition is the employer of the beneficiary,[30] and that the petitioner has the ability and intent to compensate the beneficiary.

In making this determination, USCIS considers whether there is a documented relationship between the petitioner and the entity providing salaried or non-salaried compensation to show that the petitioner, through this other entity, is still compensating the beneficiary. Factors that may demonstrate this relationship include, but are not limited to, the following:

- The petitioning entity has the authority to dictate financial policy, remove clergy for cause, and veto acquisition of debt at the compensating entity;
- The petitioning entity owns the compensating entity's assets or includes the compensating entity on its audited financial statements;
- According to established rules or practice in the relevant organization or denomination, the petitioning entity makes personnel decisions for the compensating entity;
- Any other documentation showing the petitioning entity has direct oversight or involvement in the financial and personnel matters of the compensating entity.

As an example, a diocese that has the authority to move clergy from one church to another and jointly owns assets with its subordinate churches that are part of the same group's tax-exempt status may properly file a petition for clergy at a subordinate church even if the subordinate church directly pays the salary. In this example, documentation showing how the subordinate church will compensate the religious worker may be used to satisfy the petitioner's obligation.[31]

Consistent with the required attestations, the prospective employer must state whether the beneficiary will receive salaried or non-salaried compensation and the details of such compensation.[32]

2. Self-Support

Self-support means that the position the beneficiary will hold is part of an established program for temporary, uncompensated missionary work, and part of a broader international program of missionary work the denomination sponsors.[33]

An established program for temporary, uncompensated missionary work, is defined to be a missionary program in which:

- Foreign workers, whether compensated or uncompensated, have previously participated in R-1 status;
- Missionary workers are traditionally uncompensated;
- The organization provides formal training for missionaries; and
- Participation in such missionary work is an established element of religious development in that denomination.[34]

If the beneficiary will be self-supporting, the petitioner must provide:

- Evidence demonstrating that the petitioner has an established program for temporary, uncompensated missionary work;
- Evidence demonstrating that the denomination maintains missionary programs both in the United States and abroad;
- Evidence of the beneficiary's acceptance into the missionary program;
- Evidence demonstrating the religious duties and responsibilities associated with the traditionally uncompensated missionary work; and
- Copies of the beneficiary's bank records, budgets documenting the sources of self-support (including personal or family savings, room and board with host families in the United States, donations from the denomination's churches) or other verifiable evidence acceptable to USCIS.[35]

3. Multiple Beneficiaries

A petitioner is required to attest to the number of special immigrant religious worker and R-1 nonimmigrants it currently employs, the number it has employed within the last 5 years, as well as the number of petitions and applications filed by or on behalf of any special immigrant religious worker and R-1 nonimmigrant for employment by the prospective employer within the last 5 years.[36]

Where the petitioner has filed for multiple beneficiaries, the petitioner may be required to demonstrate that it has the ability to compensate all of its religious workers, including special immigrant religious workers and R-1 nonimmigrants other than the beneficiary of the petition currently being submitted.[37]

Footnotes

[^ 1] See 8 CFR 214.2(r)(8)(i) and the R-1 Classification Supplement in Petition for a Nonimmigrant Worker (Form I-129).

[^ 2] See 8 CFR 214.2(r)(3).

[^ 3] See IRC's Exemption Requirements - 501(c)(3) Organizations.

[^ 4] See 8 CFR 214.2(r)(9). For a religious organization that is recognized as tax-exempt under a group tax exemption, a petition should include a currently valid determination letter from the IRS establishing that the group is tax exempt. See 8 CFR 214.2(r)(9)(iii).

[^ 5] For instance, if a Roman Catholic Church petitions for a priest, the church may submit the group tax-exempt letter issued to the U.S. Conference of Catholic Bishops along with a copy of the Catholic Directory to satisfy the tax exemption requirement.

[^ 6] See 8 CFR 214.2(r)(3).

[^ 7] See Section D, Documentation and Evidence [2 USCIS-PM O.3(D)] for evidentiary requirements.

[^ 8] See 8 CFR 214.2(r)(8).

[^ 9] This attestation is derived from 8 CFR 214.2(r)(8)(vii) and relates to all R-1 petitions, including beneficiaries coming to perform a religious vocation. See 8 CFR 214.2(r)(8)(vii). Post-adjudication site visits focusing on R-1 beneficiaries cannot verify the beneficiary's work hours, compensation, and duties consistent with supporting the integrity of the R-1 classification if the petition provides only a vague description of the beneficiary's proposed duties.

[^ 10] See Chapter 4, Beneficiary Requirements [2 USCIS-PM O.4].

[^ 11] See 8 CFR 214.2(r)(7). See 8 CFR 214.2(r)(16).

[^ 12] As a matter of policy, USCIS no longer conducts mandatory pre-approval on-site inspections of all petitioners for religious workers. However, USCIS may still conduct site visits at any point, including pre-approval, if USCIS determines it appropriate to verify information. USCIS provided this clarification in its policy guidance on March 2, 2023.

[^ 13] See 8 CFR 214.2(r)(16).

[^ 14] See 8 CFR 214.2(r)(16).

[^ 15] See 8 CFR 103.2(b)(8), 8 CFR 103.2(b)(16)(i),and 8 CFR 214.2(r)(18)(iii).

[^ 16] See 8 CFR 214.2(r)(16).

[^ 17] See 8 CFR 103.2(a) and 8 CFR 103.2(b)(1).

[^ 18] Although an IRS-issued tax-exempt determination letter does not expire, a letter that the IRS has revoked cannot be used to meet the regulatory requirement.

[^ 19] See 8 CFR 214.2(r)(9)(ii).

[^ 20] See 8 CFR 214.2(r)(9)(iii)(D).

[^ 21] See 8 CFR 214.2(r)(9)(iii).

[^ 22] See 8 CFR 214.2(r)(14).

[^ 23] See 8 CFR 214.2(r)(11).

[^ 24] See 8 CFR 214.2(r)(11).

[^ 25] See 8 CFR 214.2(r)(11).

[^ 26] See 8 CFR 214.2(r)(11)(i).

[^ 27] This is not a conclusive list and petitioners may submit other verifiable evidence acceptable to USCIS. See 8 CFR 214.2(r)(11)(i).

[^ 28] For instance, petitioners may submit evidence demonstrating that stipends, medical care, or other non-salaried forms of support will be provided. See 73 FR 72276 (PDF), 72281-82 (Nov. 26, 2008).

[^ 29] See 8 CFR 214.2(r)(11).

[^ 30] See 8 CFR 214.2(r)(7) and 8 CFR 214.2(r)(8).

[^ 31] See 8 CFR 214.2(r)(11).

[^ 32] See 8 CFR 214.2(r)(8)(viii).

[^ 33] See 8 CFR 214.2(r)(11)(ii)(A).

[^ 34] See 8 CFR 214.2(r)(11)(ii)(B)*(1)-(4)*.

[^ 35] See 8 CFR 214.2(r)(11)(ii)(C)*(1)-(5)*.

[^ 36] See 8 CFR 214.2(r)(8)(v), 8 CFR 214.2(r)(8)(vi), 8 CFR 204.5(m)(7)(iv), and 8 CFR 204.5(m)(7)(v).

[^ 37] The regulations require that a petitioning organization demonstrate through verifiable evidence its intent to compensate both immigrant and nonimmigrant religious workers, or how a nonimmigrant religious worker will be self-supporting). See 8 CFR 214.2(r)(8)(viii), 8 CFR 214.2(r)(11), 8 CFR 204.5(m)(7)(xi), 8 CFR 204.5(m)(7)(xii), and 8 CFR 204.5(m)(10).

Chapter 4 - Beneficiary Requirements

To qualify for a temporary nonimmigrant religious worker (R-1) classification, the beneficiary must:

- Be a member of a religious denomination having a bona fide non-profit religious organization in the United States for at least the 2 years immediately preceding the filing of the petition;
- Be coming to the United States to work at least in a part-time position (at least 20 hours per week);
- Be coming solely as a minister or to perform a religious vocation or occupation;
- Be coming to or remaining in the United States at the request of the petitioner to work for the petitioner; and
- Not work in the United States in any capacity not approved in a DHS-approved petition.[1]

The beneficiary must also intend to depart the United States upon the expiration or termination of his or her nonimmigrant status. However, a nonimmigrant petition, application for initial admission, change of status, or extension of stay in R classification may not be denied solely on the basis of a filed or an approved request for permanent labor certification or a filed or approved immigrant visa preference petition.[2]

A. Qualifying Employment

The beneficiary must be coming to engage in a religious vocation or in a religious occupation, or as a minister of religion.

Religious Worker[3]

For the purpose of the R-1 nonimmigrant classification, a religious worker is someone who:

- Is a member of the religious denomination that has a bona fide non-profit religious organization in the United States, and was a member in the same type of religious denomination for at least 2 years immediately preceding the time of application for admission;
- Is coming to the United States to work at least part-time (at least 20 hours per week);
- Is coming to the United States solely to perform a religious vocation or occupation in either a professional or nonprofessional capacity, or as a minister;
- Is coming to or remaining in the United States at the request of the petitioner to work for the petitioner;
- Will not work in the United States in any capacity other than that of a religious worker; and
- Is engaged in and, according to the denomination's standards, qualified for a religious occupation or vocation, whether or not in a professional capacity, or as a minister.

Religious Vocation

A religious vocation is a formal lifetime commitment through vows, investitures, ceremonies, or similar indications to a religious way of life. People within a religious vocation dedicate their lives to religious practices and functions, as distinguished from secular members of a denomination.[4] The regulations state that the religious denomination must have a class of persons whose lives are dedicated to religious practices and functions, as distinguished from the secular members of the religion.

Religious Occupation[5]

In order for USCIS to consider the employment a religious occupation, the title of the position is not determinative; rather, USCIS looks at whether the occupation meets all of the following requirements:

- The duties must primarily relate to a traditional religious function and be recognized as a religious occupation within the denomination;
- The duties must be primarily related to, and must clearly involve, inculcating (teaching and instilling in others) or carrying out the religious creed and beliefs of the denomination;
- The duties do not include positions which are primarily administrative or supportive in nature, although limited administrative duties that are only incidental to religious functions are permissible;[6] and
- Religious study or training for religious work does not constitute a religious occupation, but a religious worker may pursue study or training, incident to status, while in the United States as an R-1 nonimmigrant.

Minister[7]

For the purpose of R-1 nonimmigrant classification, a minister is someone who:

- Is fully authorized by and trained in the religious denomination to conduct religious worship, and perform other duties usually performed by authorized members of the clergy of the denomination;
- Performs activities rationally related to being a minister;
- Works solely as a minister in the United States which may include administrative duties incidental to the duties of a minister; and
- Is not a lay preacher or a person not authorized to perform clergy's duties.

B. Religious Denomination

A religious denomination is a religious group or community of believers that have a common type of ecclesiastical government that governs or administers and includes one or more of the following:

- A recognized common creed or statement of faith shared among the denomination's members;
- A common form of worship;
- A common formal code of doctrine and discipline;
- Common religious services and ceremonies;
- Common established places of religious worship or religious congregations; or
- Comparable indications of a bona fide religious denomination.[8]

The R-1 nonimmigrant beneficiary must have at least 2 years, immediately preceding the filing of the petition, of membership in a religious denomination.[9] Such membership must be in the same type of religious denomination in which the beneficiary will work in the United States.[10]

C. Nonimmigrant Intent

To be eligible for R-1 nonimmigrant classification, the beneficiary must maintain an intention to depart the United States upon the expiration or termination of such R-1 nonimmigrant status, if granted.[11] However, a nonimmigrant petition, application for initial admission, change of status, or extension of stay in R-1 nonimmigrant classification may not be denied solely based on the beneficiary's pursuit of permanent residence in the United States (for example, evidence of a filed or approved request for permanent labor certification or immigrant petition on the beneficiary's behalf).[12]

D. Documentation and Evidence

The petitioner must submit evidence to establish that the beneficiary meets the requirements for R-1 nonimmigrant classification.[13]

Ministers

For a beneficiary who is a minister, the petitioner must submit the following:

- A copy of the beneficiary's certificate of ordination or similar documents;
- Documents reflecting acceptance of the beneficiary's qualifications as a minister in the religious denomination; and

- Evidence that the beneficiary has completed any course of prescribed theological education at an accredited theological institution normally required or recognized by that religious denomination, including transcripts, curriculum, and documentation that establishes that the theological education is accredited by the denomination.[14]

For denominations that do not require a theological education, rather than document such education, the petitioner must instead submit evidence of:

- The denomination's requirements for ordination to minister;
- Duties allowed to be performed by virtue of ordination;
- The denomination's levels of ordination, if any; and
- The beneficiary's completion of the denomination's requirements for ordination.[15]

Religious Vocations and Occupations

For a beneficiary who will work in a religious vocation or occupation, the petitioner must submit evidence of the following:

- The beneficiary is entering the United States to perform a religious vocation or occupation, defined above (in either a professional or nonprofessional capacity);[16]
- The beneficiary is qualified for the religious occupation or vocation according to the denomination's standards.[17]

E. Family Members

1. Initial Petition

The spouse and unmarried children under 21 years old of a principal R-1 nonimmigrant may qualify for dependent R-2 status if their primary purpose in coming to the United States is to join or accompany the principal R-1 nonimmigrant.[18]

In general, the spouse and children are granted R-2 nonimmigrant status for the same period of time and subject to the same conditions as the principal R-1 nonimmigrant, regardless of the amount of time the spouse and children may already have spent in the United States in R-2 status.[19]

2. Request to Extend or Change Nonimmigrant Status

R-2 dependents may request an extension of stay or change of status by filing an Application to Extend/Change Nonimmigrant Status (Form I-539).

3. Employment Authorization Prohibited

An R-2 dependent may not accept employment in the United States.[20]

Footnotes

[^ 1] See 8 CFR 214.2(r)(1).

[^ 2] See 8 CFR 214.2(r)(15).

[^ 3] See 8 CFR 214.2(r)(1).

[^ 4] Examples of persons practicing religious vocations include nuns, monks, and religious brothers and sisters. See definition of religious vocation in 8 CFR 214.2(r)(3).

[^ 5] See 8 CFR 214.2(r)(3).

[^ 6] Examples of support positions are janitors, maintenance workers, clerical employees, fund raisers, persons solely involved in the solicitation of donations, or similar positions. See (C) in the definition of religious occupation in 8 CFR 214.2(r)(3).

[^ 7] See 8 CFR 214.2(r)(3).

[^ 8] See 8 CFR 214.2(r)(3).

[^ 9] See 8 CFR 214.2(r)(1)(i).

[^ 10] See definition of denominational membership in 8 CFR 214.2(r)(3).

[^ 11] See 8 CFR 214.2(r)(15).

[^ 12] See 8 CFR 214.2(r)(15).

[^ 13] See 8 CFR 103.2(b)(1). See list of the general eligibility requirements for R-1 status at the beginning of this chapter.

[^ 14] See 8 CFR 214.2(r)(10)(i)-(ii).

[^ 15] See 8 CFR 214.2(r)(10)(iii)(A)-(D).

[^ 16] See 8 CFR 214(r)(1)(iii).

[^ 17] See definition of religious worker in 8 CFR 214.2(r)(3).

[^ 18] See INA 101(a)(15)(R). See 8 CFR 214.2(r)(4)(ii)(C).

[^ 19] See 8 CFR 214.2(r)(4)(ii)(A).

[^ 20] See 8 CFR 214.2(r)(4)(ii)(B).

Chapter 5 - Adjudication

Officers must carefully review each petition for a nonimmigrant religious worker (R-1) to ensure compliance with the intent of the R-1 nonimmigrant category to allow religious workers to temporarily work in the United States. Officers should apply a “preponderance of the evidence” standard when evaluating eligibility for the benefit sought.[1] The burden of proving eligibility for the benefit sought rests entirely with the petitioner.[2]

A. Decision

1. Approvals

If the petitioner properly filed the Petition for a Nonimmigrant Worker (Form I-129) and the officer is satisfied that the petitioner has met the required eligibility standards, the officer should approve the petition. The approval period should not exceed the maximum period of stay allowed.[3]

The table below provides a list of the classifications for R nonimmigrants.

Classes of Beneficiaries and Corresponding Codes of Admission

Beneficiary	Code of Admission
Religious Worker (Principal)	R-1
Spouse of a Principal Religious Worker	R-2
Child of a Principal Religious Worker	R-2

Once USCIS approves the petition, the officer must notify the petitioner of the action taken using a Notice of Action (Form I-797).[4]

2. Denials

If the petitioner does not meet the eligibility requirements, the officer must deny the petition.[5] If the officer denies the petition, he or she must prepare a final notice of action, which includes information explaining why the petition is denied.[6] Additionally, officers should include information about appeal rights and the opportunity to file a motion to reopen or reconsider in the denial notice. The office that issued the decision has jurisdiction over any motion and the Administrative Appeals Office (AAO) has jurisdiction over any appeal.[7]

B. Revocations[8]

USCIS may revoke the approval of a petition at any time. USCIS automatically revokes the approval of the petition if the petitioner ceases to exist or files a written withdrawal of the petition.[9] A notice of intent to revoke (NOIR) is necessary where there is no regulatory provision that would allow for an automatic revocation, such as where:

- The beneficiary is no longer employed by the petitioner in the capacity specified in the petition;
- The statement of facts contained in the petition was not true and correct;
- The petitioner violated the terms and conditions of the approved petition;
- The petitioner violated the statutory or regulatory requirements; or
- The approval of the petition violated the regulations or involved gross error.[10]

The NOIR should contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner’s rebuttal.[11]

USCIS must consider all relevant evidence presented in deciding whether to revoke the approval of the petition.[12]

The petitioner may appeal the decision to revoke the approval of a petition to the AAO if the petition’s approval was revoked on notice. Automatic revocations may not be appealed.[13]

Footnotes

[^ 1] See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (defining “more likely than not” as a greater than 50 percent probability of something occurring). See *Matter of Chawathe (PDF)*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-* (PDF), 20 I&N Dec. 77, 79-80 (Comm. 1989)).

[^ 2] See *Matter of Brantigan* (PDF), 11 I&N Dec. 493 (BIA 1966).

[^ 3] See Chapter 7, Period of Stay [2 USCIS-PM O.7].

[^ 4] See 8 CFR 103.2(b)(19).

[^ 5] See 8 CFR 103.2(b)(8).

[^ 6] See 8 CFR 103.2(b)(19). See 8 CFR 103.3. See 8 CFR 214.2(r)(17).

[^ 7] See 8 CFR 103.3(a)(2).

[^ 8] See 8 CFR 214.2(r)(18)-(19).

[^ 9] See 8 CFR 214.2(r)(18)(ii). See Chapter 7, Period of Stay [2 USCIS-PM O.7].

[^ 10] See 8 CFR 214.2(r)(18)(iii).

[^ 11] For more information on timeframes for Notices of Intent to Revoke, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 10, Post-Decision Actions, Section D, Revocation, Rescission, or Termination [1 USCIS-PM E.10(D)].

[^ 12] See 8 CFR 214.2(r)(18)(iii)(B).

[^ 13] See 8 CFR 214.2(r)(19).

Chapter 6 - Admissions, Extensions of Stay, and Changes of Status

A. Admission

If approved for nonimmigrant religious worker (R-1) classification and found otherwise admissible, a beneficiary may be admitted as an R-1 nonimmigrant for an initial period of up to 30 months from the date of initial admission.[1]

Maintaining Status

A religious worker may only work per the terms of the approved petition. While holding R-1 status, nonimmigrants may not work in the United States in any other capacity but as a religious worker, and cannot change capacities between a minister or other types of religious worker unless specifically approved.[2] An R-1 nonimmigrant may be considered to have violated his or her nonimmigrant status, and therefore not be in lawful immigration status, if he or she works for an employer who has not obtained prior approval of such employment through the filing of a petition and appropriate supplement, supporting documents, and appropriate fees.[3]

B. Extension of Stay

An employer may request an extension of stay for an R-1 nonimmigrant on the Petition for a Nonimmigrant Worker (Form I-129).[4] The extension may be for the validity period of the extension request, up to 30 months, for a maximum period of stay for up to 5 years.[5]

The petitioner must include the following with the Form I-129:

- R-1 Classification Supplement, including the R-1 Employer Attestation;
- Supporting documents to establish eligibility under the R-1 nonimmigrant classification, including documentation of salaried or non-salaried compensation; and
- Initial evidence of the previous R-1 employment, such as financial or other records to establish that the person worked as an R-1 nonimmigrant.[6]

1. Compensation Documentation[7]

Salaried Compensation

Any request for an extension of stay as an R-1 nonimmigrant must include initial evidence of the previous employment as a religious worker. If the beneficiary received salaried compensation, then the petitioner must submit Internal Revenue Service (IRS) documentation of salaried compensation, such as an IRS Form W-2 or certified copies of filed income tax returns, reflecting such work and compensation for the preceding 2 years.[8]

If the beneficiary was admitted for less than 2 years in the R-1 nonimmigrant status, the petitioner may provide evidence of work and compensation in that status for the duration of the beneficiary's authorized admission.[9]

Non-Salaried Compensation

If the beneficiary is requesting an extension of stay as an R-1 nonimmigrant and previously received non-salaried compensation, the petitioner must submit IRS documentation of the non-salaried compensation if available.[10] If no IRS documentation is available, the petitioner must explain the lack of IRS documentation and submit verifiable evidence of all financial support, including information on:[11]

- Stipends;
- Room and board;
- Other support for the beneficiary along with a description of the location where the beneficiary lived (for example, a lease for the beneficiary); or
- Other evidence acceptable to USCIS.

Self-Support[12]

If the beneficiary is applying for an extension of stay as an R-1 nonimmigrant and was previously supporting him or herself financially and not receiving any compensation from the religious organization, the petitioner must provide verifiable documents to show how the beneficiary is self-supporting. Documentation may include:

- Audited financial statements;
- Financial institution records;
- Brokerage account statements;
- Trust documents signed by an attorney; or
- Other evidence acceptable to USCIS.

The table below summarizes the evidence required depending on the type of compensation.

Extension of Stay Requests: Evidence of Beneficiary's Compensation

Beneficiary's Previous Compensation	Required Evidence
Salary	• The petitioner must submit IRS documentation showing that the beneficiary received a salary, such as an IRS Form W-2 or certified copies of filed income tax returns reflecting such work and compensation for the preceding 2 years or the period of stay if less than 2 years.
Non-Salary	• If IRS documentation is available, the petitioner must submit IRS documentation of the non-salaried compensation. • If IRS documentation is not available, the petitioner must explain the lack of IRS documentation and submit verifiable evidence of all financial support, such as stipends, room and board, or other support for the beneficiary along with a description of the location where the beneficiary lived, or a lease for the beneficiary. The petitioner may also submit other evidence acceptable to USCIS.
No Salary, But Provided Own Support	• Provide verifiable documents to show how support was maintained, such as audited financial statements, financial institution records, brokerage account statements, trust documents signed by an attorney, or other evidence acceptable to USCIS.

2. Requests for Evidence

With regard to a beneficiary's eligibility for an extension of stay, an officer may issue a request for evidence (RFE) to the petitioner if it appears that the beneficiary has not maintained his or her status due to the following reasons:

- Termination – USCIS has been notified that the beneficiary was terminated from the employment before the expiration of a period of authorized R-1 stay;
- Released from Employment – USCIS has been notified that the beneficiary has been released from employment before the expiration of a period of authorized R-1 stay; or
- Worked Less Than Required Hours – USCIS has been notified that the beneficiary is working less than the required number of hours for the employment.[13]

C. Change of Status

Generally, a beneficiary in a current valid nonimmigrant status who has not violated his or her status is eligible to change status to an R-1 nonimmigrant in the United States without having to return to his or her home country for a visa interview.[14] Such a beneficiary may be granted R-1 status for an initial period of up to 30 months.[15]

To change nonimmigrant statuses, the petitioning employer should file a Petition for a Nonimmigrant Worker (Form I-129) before the beneficiary's current status expires and indicate the request is for a change of status. The beneficiary cannot work in the new R-1 nonimmigrant classification until USCIS approves the petition and the change of status request. If USCIS determines that the beneficiary is eligible for R-1 nonimmigrant, but not a change of status, the beneficiary must apply for an R-1 nonimmigrant visa at a U.S. consular post abroad and then be readmitted to the United States as an R-1 nonimmigrant.[16]

D. Change of Employer

USCIS considers any unauthorized change to a new employer a failure to maintain status. If the R-1 nonimmigrant is to be employed by a different or additional unit of the religious denomination (if it has a different federal tax number), the employer must file a new Form I-129. Such a circumstance would be considered new employment.

However, an example of a permissible employment location change that would not require a new petition would be a petition filed on behalf of a minister who moves from ministry to ministry within a denomination so long as the organization that oversees all of these locations is the petitioner for that minister.[17]

Footnotes

[^ 1] See 8 CFR 214.2(r)(4).

[^ 2] See 8 CFR 214.2(r)(1)(v) and 8 CFR 214.2(r)(2). See 8 CFR 214.2(r)(18)(iii)(A)(1).

[^ 3] See 8 CFR 214.2(r)(13).

[^ 4] See 8 CFR 214.1(c)(1). Where a petitioner demonstrates eligibility for a requested extension, it may be granted at USCIS' discretion. Petitioners may not appeal denials of an application for extension of stay. See 8 CFR 214.1(c)(5).

[^ 5] For more information on maximum allowable time in R-1 nonimmigrant status, see Chapter 7, Period of Stay [2 USCIS-PM O.7].

[^ 6] See 8 CFR 214.2(r)(5). See 8 CFR 214.2(r)(12).

[^ 7] See 8 CFR 214.2(r)(11) and 8 CFR 214.2(r)(12)(i).

[^ 8] See 8 CFR 214.2(r)(12)(i).

[^ 9] See 8 CFR 214.2(r)(12).

[^ 10] See 8 CFR 214.2(r)(12)(ii).

[^ 11] See 8 CFR 214.2(r)(12)(ii).

[^ 12] See 8 CFR 214.2(r)(12)(iii).

[^ 13] See 8 CFR 214.2(r)(14).

[^ 14] An example of a violation of status is if, generally, the nonimmigrant's current status expires before seeking extension of status by filing a Petition for a Nonimmigrant Worker (Form I-129) with USCIS or by working without valid employment authorization.

[^ 15] See 8 CFR 214.2(r)(4).

[^ 16] There is no appeal from a change of status denial. See 8 CFR 248.3(g).

[^ 17] See 8 CFR 214.2(r)(7). See 8 CFR 214.2(r)(13).

Chapter 7 - Period of Stay

A. Maximum Period of Stay

An eligible alien may be admitted as a nonimmigrant religious worker (R-1) or may change status to R-1 nonimmigrant classification for a period of up to 30 months from the date of initial admission.[1] USCIS may grant one extension for up to 30 months, but with the total period of stay not to exceed the statutory maximum of 5 years (60 months) if the R-1 nonimmigrant is otherwise eligible.[2]

An R-1 nonimmigrant may be subject to removal if he or she violates the terms of his or her status, such as remaining in the United States longer than the period of his or her authorized stay.

B. Exceptions to Limitation on Total Stay[3]

A beneficiary who has spent 5 years in the United States in R-1 nonimmigrant status may not be readmitted to or receive an extension of stay in the United States under the R-1 nonimmigrant classification, unless such a beneficiary subsequently has resided abroad and been physically present outside the United States for the immediate prior year. However, this 5-year limitation does not apply to beneficiaries who:

- Did not reside continually in the United States and whose employment in the United States was seasonal or intermittent or was for an aggregate of 6 months or less per year; or
- Reside abroad and regularly commute to the United States to engage in part-time employment.

Petitioners and beneficiaries must meet all qualifications for the exception to the limitation on total stay, and must provide clear and convincing evidence that they qualify for the exception. Such proof may include arrival and departure records, transcripts of processed income tax returns, and records of employment abroad.

C. Recapture Time

USCIS only counts time physically spent in the United States in the R-1 nonimmigrant status towards the maximum 5 years of authorized stay. Officers should count only time spent physically in the United States in valid R-1 status toward the 5-year maximum period of stay.

When requesting an extension, the petitioner, on behalf of the R-1 nonimmigrant, may request that full calendar days spent outside the United States during the period of petition validity be recaptured and added back to his or her remainder of the total maximum period of stay, regardless of whether the R-1 nonimmigrant is currently in the United States or abroad and regardless of whether he or she currently holds R-1 nonimmigrant status.

It is the burden of the petitioner, on behalf of the beneficiary, to demonstrate continuing eligibility for the classification and that the beneficiary is entitled to recapture time with appropriate evidence. The reason for the absence is not relevant to whether the time may be recaptured. Any trip of at least one 24-hour calendar day outside the United States for any purpose, personal or professional, can be recaptured.

1. Evidence

The burden of proof remains with the R-1 petitioner, on behalf of the beneficiary, to submit evidence documenting periods of physical presence outside the United States when seeking an extension of petition validity and extension of stay as an R-1 nonimmigrant. The R-1 nonimmigrant is in the best position to organize and submit evidence of his or her departures from and readmissions to the United States. While a summary, charts of travel, or both are often submitted to facilitate review of the accompanying documentation, independent documentary evidence, such as photocopies of passport stamps, Arrival/Departure Records (Form I-94), and plane tickets establishing that the R-1 beneficiary was outside the United States during all of the days, weeks, or months that he or she seeks to recapture is always required.

The fact that the burden may not be met for some claimed periods generally has no bearing on other claimed periods for which the burden has been met. Any periods for which the burden has been met may be added to the eligible period of admission upon approval of the application for extension of status. An R-1 beneficiary may not be granted an extension of stay for periods that are not supported by independent documentary evidence. It is not necessary to issue a request for evidence (RFE) for any claimed periods unsupported by independent documentary evidence.

2. Applicability to R-2 Dependents

The status of an R-2 dependent of a principal R-1 nonimmigrant is subject to the same period of admission and limitations as the principal beneficiary, regardless of the time such spouse and children may have spent in the United States in R-2 status.[4] For example, if an R-1 nonimmigrant is able to recapture a 2-week missionary trip abroad, then his or her R-2 dependents, if seeking an extension of stay, should be given an extension of stay up to the new expiration of the R-1 nonimmigrant's period of stay.

3. Seasonal or Intermittent Employment Exception

An R-1 nonimmigrant is eligible for the exception to the limitation of stay requirements by demonstrating that he or she:

- Did not reside continually in the United States and that his or her employment in the United States was seasonal or intermittent or was for an aggregate of 6 months or less per year; or
- Resides abroad and regularly commutes to the United States to engage in part-time employment.

To qualify for this exception, the petitioner and the beneficiary must provide clear and convincing proof that the beneficiary qualifies for such an exception. Such proof generally consists of evidence such as: Arrival/Departure Records (Form I-94), transcripts of processed income tax returns, and records of employment abroad.

Footnotes

[^ 1] See 8 CFR 214.2(r)(4).

[^ 2] See 8 CFR 214.2(r)(5).

[^ 3] See 8 CFR 214.2(r)(6).

[^ 4] See 8 CFR 214.2(r)(4)(ii)(A).

Part P - USMCA Professionals (TN)

Chapter 1 - Purpose and Background

A. Purpose

The North American Free Trade Agreement (NAFTA) created certain economic and trade relationships between Canada, Mexico, and the United States. NAFTA permits a Canadian or Mexican citizen to seek admission into the United States for a temporary period to engage in business activities at a professional level, including a professional in the TN nonimmigrant visa classification.[1]

To qualify for this nonimmigrant status, the alien must be a citizen of Canada or Mexico seeking admission for a temporary period of time to engage in business activities at a professional level.[2]

On July 1, 2020, the United States-Mexico-Canada Agreement (USMCA) (PDF) entered into force and replaced NAFTA.[3] However, the USMCA retained all substantive immigration-related elements of the former NAFTA and the United States continues to use the TN designation for these professionals. The USMCA list of professionals that govern TN admissions is identical to the NAFTA list.[4]

For the purposes of discussing TN classification, this part uses the terms “NAFTA” and “USMCA” interchangeably.

B. Background

On December 17, 1992, the United States, Mexico, and Canada signed the NAFTA. Congress implemented this agreement in the North American Free Trade Implementation Act.[5] The agreement entered into force on January 1, 1994. As previously mentioned, NAFTA allows Canadian or Mexican citizens who qualify to enter the United States temporarily for certain types of employment.[6] The associated “TN professional” category from the agreement is a business person[7] seeking entry to engage in a business activity at a professional level[8] in a profession listed in NAFTA Appendix 1603.D.1.[9]

The “TN professional” was modeled on the professional category in the United States-Canada Free-Trade Agreement (CFTA), which was in effect from January 1, 1989, until NAFTA’s entry into force on January 1, 1994.[10] An alien admitted as a TN professional is not necessarily otherwise eligible for other temporary worker classifications, such as H-1B, or as an employment-based immigrant.[11]

On July 1, 2020, the United States-Mexico-Canada Agreement (USMCA) (PDF) replaced NAFTA, but did not make any substantive changes to the provisions in NAFTA that affect immigration matters.[12] As provided above, even though the USMCA replaced NAFTA, the USMCA retained all substantive elements of the former NAFTA and the United States continues to use the TN designation for these professionals.[13]

C. Roles in U.S. Government

1. U.S. Customs and Border Protection

NAFTA/USMCA provides that qualifying TN professionals may be granted entry into participating countries upon application for admission at the border. In effect, this agreement grants U.S. Customs and Border Protection (CBP) primary authority to adjudicate TN applications for admission to the United States.[14]

NAFTA/USMCA Chapter 16, Annex 1603, Section (D)(2)(a) specifies that no party to the agreement may require prior approval procedures, petitions, labor certification tests, or other similar procedures as a condition of such entry. This means that Canadian TN professionals may apply for admission directly at:

- A U.S. Class A port-of-entry;
- An airport handling international flights; or
- A pre-clearance or pre-flight station in Canada.

Canadian TN professionals may apply for admission to the United States without first filing a Petition for a Nonimmigrant Worker (Form I-129) with USCIS or obtaining a nonimmigrant visa from the U.S. Department of State (DOS). Unlike Canadian TN professionals, Mexican TN professionals may not apply for admission directly with CBP. Mexican TN professionals must first obtain a TN nonimmigrant visa from the U.S. Department of State (DOS).

When applying to CBP for admission, the TN professional must:

- Meet all eligibility requirements as a TN professional;
- Satisfy the inspecting CBP officer that the proposed stay is temporary;[15] and
- Comply with existing immigration measures applicable to admission into the United States as a nonimmigrant, including proof of citizenship in a NAFTA/USMCA signatory country.[16]

2. USCIS

A qualified Canadian or Mexican professional present in the United States may apply for an extension of his or her TN status if he or she is currently in a valid TN status. In addition, such professionals who are under a different valid nonimmigrant status may apply for a change of status to TN. In all cases, such professionals must file a Petition for a Nonimmigrant Worker (Form I-129) with USCIS to do so.[17]

USCIS also accepts and adjudicates Form I-129 petitions filed by Canadian TN professionals residing outside the United States. If approved, the Canadian professional may present the approval notice to a CBP officer at the port of entry (as opposed to having to file an application for admission with CBP to enter under the TN classification as described above).

D. Legal Authorities

- NAFTA/USMCA Chapter 16 – Temporary entry for business persons
- The United States-Mexico-Canada Agreement (USMCA) (PDF) – Protocol replacing the North American Free Trade Agreement with the Agreement between Canada, the United States of America, and the United Mexican States
- Pub. L. 103-182 (PDF) (December 8, 1993) – North American Free Trade Implementation Act
- Pub. L. 116-113 (PDF) (January 29, 2020) – United States-Mexico-Canada Agreement Implementation Act
- INA 214(e) – Nonimmigrant professionals and annual numerical limit
- 8 CFR 214.6 – Citizens of Canada or Mexico seeking temporary entry under NAFTA/USMCA to engage in business activities at a professional level

Footnotes

[^ 1] See NAFTA Annex 1603, Section D (limited to the entry of a citizen of a party country seeking to render professional-level services for an entity in another party country). The TN classification is not found in the general temporary immigration provisions at section 101(a)(15) of the Immigration and Nationality Act (INA), but is included at INA 214(e).

[^ 2] For specific professions that may be eligible for the TN nonimmigrant classification, see NAFTA Chapter 16, Appendix 1603.D.1 to Annex 1603, Professionals (NAFTA Appendix 1603.D.1).

[^ 3] See United States-Mexico-Canada Agreement Implementation Act, Pub. L. 116-113 (PDF) (January 29 2020).

[^ 4] See NAFTA Chapter 16, Annex 1603, Section D, Professionals. See USMCA, Chapter 16, Appendix 2 (PDF) (found at page 1322 of the USMCA).

[^ 5] See Pub. L. 103-182 (PDF) (December 8, 1993).

[^ 6] See NAFTA Annex 1603, Section D (limited to the entry of a citizen of a party country seeking to render professional-level services for an entity in another party country).

[^ 7] See 8 CFR 214.6(b) (defining business person as a citizen of Canada or Mexico who is engaged in the trade of goods, the provision of services, or the conduct of investment activities).

[^ 8] See 8 CFR 214.6 (NAFTA TN classification) and 8 CFR 214.6(b) (definition of business activities at a professional level).

[^ 9] See 8 CFR 214.6(c) for the requirements for each eligible profession within the TN classification.

[^ 10] Congress implemented CFTA in 1988. See United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. 100-449 (PDF) (September 28, 1988).

[^ 11] See INA 101(a)(15)(H)(i)(b). See INA 203(b)(3).

[^ 12] See United States-Mexico-Canada Agreement Implementation Act, Pub. L. 116-113 (PDF) (January 29 2020).

[^ 13] The USMCA list of professionals that govern TN admissions is identical to the NAFTA list. See NAFTA Chapter 16, Annex 1603, Section D, Professionals. See USMCA, Chapter 16, Appendix 2 (PDF) (found at page 1322 of the USMCA).

[^ 14] See NAFTA Chapter 16, Annex 1603, Section D, Professionals.

[^ 15] See 8 CFR 214.6(b).

[^ 16] See 8 CFR 235 (inspection of persons applying for admission). See 8 CFR 214.6(d).

[^ 17] See Chapter 4, Extension of Stay and Change of Status [2 USCIS-PM P.4]. See Part A, Nonimmigrant Policies and Procedures, Chapter 4, Extension of Stay, Change of Status, and Extension of Petition Validity [2 USCIS-PM A.4].

Chapter 2 - Eligibility Requirements

An alien may be eligible to work in the United States as a North American Free Trade Agreement (NAFTA/USMCA) professional in the TN nonimmigrant classification,[1] if he or she meets the following conditions:[2]

- The alien is a citizen of Canada or Mexico;
- The alien's profession is included in NAFTA/USMCA;[3]
- The position in which the alien will be working in the United States requires a NAFTA/USMCA professional;
- The alien has the qualifications of the profession (that is, he or she meets the specific requirements, education, and experience, as applicable); and
- The alien will work in a prearranged full-time or part-time job for a U.S. employer or entity.[4] Self-employment does not qualify under NAFTA/USMCA.

A. Definitions

The table below provides terms and definitions that relate to eligibility as a TN professional.[5]

Definition of Terms Common to TN Nonimmigrant Classification

Term	Definition
Business activities at a professional level	• Those undertakings which require, for successful completion, that the person have at least a baccalaureate degree or appropriate credentials demonstrating status as a professional in a profession set forth in NAFTA/USMCA Appendix 1603.D.1.

Term	Definition
Businessperson	• As defined in the NAFTA/USMCA, a citizen of Canada or Mexico who is engaged in the trade of goods, the provision of services, or the conduct of investment activities.
Engage in business activities at a professional level	• The performance of prearranged business activities for a U.S. entity, including an individual person. • It does not authorize the establishment of a business or practice in the United States in which the professional will be, in substance, self-employed. A professional is deemed to be self-employed if he or she will be rendering services to a corporation or entity of which the professional is the sole or controlling shareholder or owner.
Temporary entry	• As defined in the NAFTA/USMCA, entry without the intent to establish permanent residence. • The alien must satisfy the inspecting immigration officer that the proposed stay is temporary. • A temporary period has a reasonable, finite end that does not equate to permanent residence. To establish that the alien's entry will be temporary, the alien must demonstrate to the satisfaction of the inspecting immigration officer that the work assignment in the United States ends at a predictable time and that he or she will depart upon completion of the assignment.
Citizen, with respect to Mexico	• As defined in NAFTA/USMCA Annex 1608, a national or a citizen according to the existing provisions of Articles 30 and 34, respectively, of the Mexican Constitution.

B. Self-Employment

1. General Considerations

Canadian or Mexican citizens seeking to engage in self-employment in trade or investment activities in the United States are not eligible for the TN nonimmigrant classification and instead must seek classification as a Treaty Trader or Treaty Investor (E nonimmigrant).[6]

NAFTA Chapter 16, Annex 1603, Section B, Traders and Investors, establishes the appropriate category of temporary entry for a Canadian or Mexican citizen seeking to develop and direct investment operations in another party country. Self-employment conflicts with the intent of the NAFTA Implementation Act and its accompanying Statement of Administrative Action (SAA), which states: “Section D of Annex 1603 does not authorize a professional to establish a business or practice in the U.S. in which the professional will be self-employed.”[7]

Although the regulations governing the previous United States-Canada Free-Trade Agreement (CFTA) Implementation Act did not address self-employment, the bar on establishing a business or practice in which the professional will be self-employed is consistent with the intent of the United States and Canada in entering into the CFTA. Since entry into NAFTA was not intended to substantively change the treatment of professionals, this explicit bar only clarifies existing law.[8]

A Canadian or Mexican citizen who is self-employed outside the United States may seek admission to the United States in accordance with a prearranged agreement with an enterprise owned by another person or entity located in the United States. A TN applicant may not do so to render prearranged services for a U.S. corporation or entity for which the alien is the sole or controlling shareholder or owner or over which he or she holds de facto control.[9]

Relevant factors for determining whether the alien is self-employed include, but are not limited to:

- Whether the U.S. enterprise is a separate legal entity from the alien;
- Whether the alien has substantial control over the enterprise for which he or she will work in the United States; and
- Whether evidence indicates the U.S. enterprise was established to facilitate the alien’s self-employment in the United States.

2. Separate Legal Entity (Substantively Separate)

An alien is ineligible for classification as a TN professional if the enterprise in the United States offering a contract or employment is a sole proprietorship he or she will operate. Even if the receiving enterprise is legally distinct from the alien, such as a corporation having a separate legal existence, entry as a TN professional must be refused if the receiving enterprise is substantially controlled by that alien.[10]

3. Substantial Control of Enterprise

Whether an alien substantially controls the U.S. enterprise depends on the specific facts of each case. The relevant factors in determining what constitutes substantial control include, but are not limited to:

- Whether the alien has established the receiving enterprise;
- Whether the alien has sole or primary control of the U.S. enterprise (regardless of the alien’s actual percentage of share ownership);
- Whether the alien is the sole or primary owner of the enterprise; and
- Whether the alien is the sole or primary recipient of the enterprise’s income.

4. Established to Facilitate Self-Employment

An alien is ineligible for classification as a TN professional if evidence indicates that the enterprise he or she will work for in the United States was established to facilitate self-employment. The following activities may indicate such an intent:

- Incorporation of an enterprise in which the alien will be self-employed; or
- Initiation of communications (for example, by direct mail or by advertising) for the purpose of obtaining employment or entering into contracts for an enterprise in which the alien will be self-employed the United States.

On the other hand, the following activities do not constitute the establishment of a business in which the alien will be self-employed in the United States:

- Responding to unsolicited inquiries about service(s) that he or she may be able to perform; or
- Establishing business premises from which to deliver prearranged services to clients.

C. Prearranged Professional Services

To obtain TN classification, an alien must be seeking admission to provide prearranged professional services to an individual person or an enterprise.[11] If the business activities are provided to an enterprise, the enterprise must be substantively separate from the alien seeking entry.

To constitute prearranged professional services, a formal arrangement must be in place to provide professional services to an individual person or an enterprise in the United States. The formal arrangement may be through an employee-employer relationship or through a signed contract between the alien or the alien's employer and a person or enterprise in the United States.

D. Professional Activities in the United States

The enterprise in the United States for which the business activities are to be performed may take any legal form.[12] The enterprise can be "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or government-owned, including any corporation, trust partnership, sole proprietorship, joint venture or other association."[13]

Footnotes

[^ 1] Even though the United States-Mexico-Canada-Agreement (USMCA) replaces NAFTA, the USMCA retains all substantive elements of the former NAFTA, and the United States continues to use the TN designation for NAFTA/USMCA professionals.

[^ 2] See 8 CFR 214.6(a)-(c).

[^ 3] See NAFTA Chapter 16, Annex 1603, Section D, Professionals. See USMCA, Chapter 16, Appendix 2 (PDF) (found at page 1322 of the USMCA).

[^ 4] See the U.S. Department of State's Visas for Canadian and Mexican USMCA Professional Workers webpage.

[^ 5] See 8 CFR 214.6(b).

[^ 6] See INA 101(a)(15)(E). For information on seeking E nonimmigrant classification, see the Temporary (Nonimmigrant) Workers webpage.

[^ 7] See the SAA (PDF) at 179.

[^ 8] See 8 CFR 214.6(b).

[^ 9] See 8 CFR 214.6(b) (definition of engage in activities at a professional level).

[^ 10] See 8 CFR 214.6(b) (definition of engage in activities at a professional level).

[^ 11] See 8 CFR 214.6(b) (definition of engage in business activities at a professional level).

[^ 12] See NAFTA Chapter 2, Article 201, Definitions of General Application.

[^ 13] See NAFTA Chapter 2, Article 201, Definitions of General Application.

Chapter 3 - Documentation and Evidence

A. Filing Requirements

1. Canadian Citizens

Canadian citizens residing outside the United States may choose to file a Petition for a Nonimmigrant Worker (Form I-129) with USCIS requesting initial TN status. Canadian citizens may also file Form I-129 if requesting an extension of status while currently in valid TN status, or if requesting a change of status to TN from another valid nonimmigrant status. Canadian citizens usually do not need a visa as a TN professional,[1] although the U.S. Department of State (DOS) can issue a visa at a U.S. embassy or consulate to qualified Canadian TN visa applicants upon request. A Canadian citizen without a TN visa may also apply for TN nonimmigrant status at a U.S. port of entry.[2]

2. Mexican Citizens

Mexican citizens must file a Petition for a Nonimmigrant Worker (Form I-129) with USCIS if requesting an extension of status while currently in valid TN status, or if requesting a change of status to TN from another valid nonimmigrant status. Mexican citizens residing outside the United States must apply for a TN visa at a U.S. embassy or consulate.[3]

B. Evidence

1. Business Activity Requirements

The applicant for TN nonimmigrant classification must demonstrate that he or she will engage in business activities in the United States at a professional level in a profession listed in NAFTA/USMCA. The alien must provide documentation describing the professional activities that he or she will perform for the U.S. employer or entity, including a summary of the daily job duties, if appropriate.[4]

2. Degree Requirements

If a profession requires a baccalaureate or licenciatura degree, experience cannot be substituted for that degree. In some professions, an alternative to a bachelor's degree is listed. For some professions, experience is required in addition to the degree.[5]

Degrees, diplomas, or certificates received by the alien from an educational institution outside of the United States, Canada, or Mexico must be accompanied by an evaluation by a reliable credentials evaluation service that specializes in evaluating foreign educational credentials.[6]

Experiential evidence should be in the form of letters from former employers. If the alien was formerly self-employed, business records attesting to that self-employment must be submitted.

3. Professional License Requirements

The alien must meet applicable license requirements to practice a licensed profession in the U.S. state in which the alien intends to practice.[7]

In certain circumstances, although a profession may generally require licensing, there may be duties within the occupation that do not require licensing. A state may require a profession to be licensed for certain activities but not for all activities engaged in by the profession.

For example, a dentist must possess a license in the United States to practice dentistry, but if a Canadian or Mexican citizen is coming to the United States as a TN nonimmigrant to give a seminar on dentistry, a U.S. license is not necessary. A Canadian TN applicant may establish qualifications as a dentist by showing a Canadian provincial license such as a Doctor of Dental Surgery D.D.S. or a Doctor of Medicine in Dentistry D.M.D.[8]

Similarly, a Mexican dentist coming to give a seminar on dentistry might show a professional license in dentistry from the Federal Secretary of Education's General Directorship of Professions such as a Doctor en Odontologia Degree or a Doctor en Cirugia Dental Degree.[9]

As another example, a Canadian lawyer might be seeking admission as a TN nonimmigrant to offer professional-level legal advice about Canadian law but is not going to practice law in the United States. Such a Canadian citizen would need only to establish qualification as a lawyer in Canada, such as a Juris Doctor (J.D.) degree or provincial bar membership. The same would apply to a Mexican lawyer seeking admission as a TN nonimmigrant offering professional legal advice about Mexican law but is not going to practice law in the United States.

USMCA allows for temporary entry to perform training functions relating to any of the cited occupations or professions, including conducting seminars.[10] However, these training functions must be conducted as a prearranged activity performed for a U.S. entity. The subject matter of the training must also be at a professional level. The training function does not allow an alien seeking admission as a TN nonimmigrant to conduct seminars that are not prearranged.

Footnotes

[^ 1] Even though the United States-Mexico-Canada-Agreement (USMCA) replaced NAFTA, the USMCA retains all substantive elements of the former NAFTA, and the United States continues to use the TN designation for NAFTA and USMCA professionals.

[^ 2] For information on applying for TN nonimmigrant status at a port of entry, see U.S. Customs and Border Protection's For Canadian and Mexican Citizens webpage and USCIS' TN USMCA Professionals webpage.

[^ 3] See 22 CFR 41.59(c). See 9 FAM 402.17-7, Temporary Entry.

[^ 4] See 8 CFR 214.6(b) (definition of business activities at a professional level). See 8 CFR 214.6(d)(3)(ii)(B).

[^ 5] For a complete list of professions with minimum education requirements and alternative credentials, see NAFTA Appendix 1603.D.1 and Chapter 16, Annex 1603, Section D. See 8 CFR 214.6(c).

[^ 6] See 8 CFR 214.6(d)(3)(ii).

[^ 7] See 8 CFR 214.6(d)(3)(ii) (the applicant must meet "the criteria to perform at" the proposed professional level).

[^ 8] See NAFTA Appendix 1603.D.1 (Dentist).

[^ 9] See NAFTA Appendix 1603.D.1 (Dentist).

[^ 10] See NAFTA Appendix 1603.D.1, n 1.

Chapter 4 - Extension of Stay and Change of Status

A. Filing

Both Canadian and Mexican citizens can be admitted, granted extensions of stay, or granted change of status as a TN or TD nonimmigrant in increments of up to 3 years. There is no limit to the number of times a Mexican or Canadian citizen can be granted TN or TD status, provided he or she intends to remain temporarily in the United States as a nonimmigrant.[1]

If requesting an extension of stay in the United States, a Mexican or Canadian must apply for an extension of TN[2] status or a change of status from another nonimmigrant classification to TN status by filing a Petition for a Nonimmigrant Worker (Form I-129).

Applicants seeking to extend or change their status must file the appropriate form according to the instructions at the time of filing.[3]

B. Evidence

1. Change of Status

Unless otherwise limited by statute, a citizen of Canada or Mexico currently in the United States in another valid nonimmigrant classification may request a change of status to TN.[4]

If requesting a change of status to TN, the alien must submit evidence demonstrating that he or she will be engaged in business activities at a professional level and that he or she possesses the required professional qualifications.[5] Acceptable evidence may include, but is not limited to, the following:

- A letter from the employer in the United States indicating an offer of employment, the activity to be engaged in, the anticipated length of stay, and the arrangements for remuneration;

- A copy of the alien's last two pay stubs and Wage and Tax Statement (IRS Form W-2), if employed in the United States; and
- Evidence the alien meets the educational or licensing requirements (or both) that apply to the relevant profession or occupation.

2. Extension of Stay

If requesting an extension of stay in TN classification, the alien must submit evidence, such as a letter, describing the continuing employment and evidence of his or her continued valid licensing (if required by the profession or the state or both).

Footnotes

[^ 1] See INA 214(b).

[^ 2] Even though the United States-Mexico-Canada-Agreement (USMCA) replaces the North American Free Trade Agreement (NAFTA), the USMCA retains all substantive elements of the former NAFTA, and the United States continues to use the TN designation for NAFTA and USMC professionals.

[^ 3] See 8 CFR 103.2(a)(1).

[^ 4] See INA 248. If the alien is in the United States as a nonimmigrant specialty occupation worker (H-1B) or intracompany transferee (L-1), he or she may change to TN classification if otherwise eligible, without regard to the maximum time limits for those classifications. A Canadian who is a nonimmigrant exchange visitor (J) subject to the 2-year foreign residence requirement may not change to TN classification but may leave the United States and seek readmission as a TN nonimmigrant.

[^ 5] See NAFTA Annex 1603, Section D, Professionals and Appendix 1603.D.1.

Chapter 5 - Other Factors to Consider

A. Request to Change or Add U.S. Employers

A Canadian or Mexican citizen present in the United States as a TN professional[1] may apply to change or add employers[2] while in the United States by filing a Petition for a Nonimmigrant Worker (Form I-129). The applicant (not petitioners) must show that he or she meets all applicable documentary requirements.[3] Employment with a different or additional employer is not authorized until USCIS approves the application.[4]

Alternatively, a Canadian citizen seeking to change or add a U.S. employer may depart the United States and apply for readmission to obtain additional employment authorization with a new or additional employer.[5]

A Mexican citizen seeking to change or add a U.S. employer may depart the United States and seek a new visa from a U.S. embassy or consulate before readmission.[6] He or she must still meet applicable documentary requirements[7] and pay any required fees.

A Canadian or Mexican citizen who is transferred to another location (for example, another branch or office) by the same U.S. employer to perform the same services may do so without seeking readmission or filing a petition with USCIS.[8] If the transfer is to a separately incorporated subsidiary or affiliate, the TN nonimmigrant (and any dependents) must file a new Form I-129.

B. No Limitations on Length of Stay

A TN applicant is not admitted or granted TN status indefinitely. TNs are admitted for a certain period of time (up to 3 years) in TN status. There is no cumulative total limiting the period of time a citizen of Canada or Mexico may remain in the United States in TN classification, provided that the TN nonimmigrant continues to be engaged in a TN occupation.[9] Citizens of Canada or Mexico seeking a change of status to or extension of stay in TN status, or readmission, must be examined to ensure qualification for such nonimmigrant classification.[10]

C. Spouse and Unmarried Minor Children

The spouse and unmarried minor children, who are accompanying or following to join a TN nonimmigrant, if otherwise eligible, are accorded TD classification.[11] These aliens are required to present a valid, unexpired nonimmigrant visa unless otherwise visa-exempt.[12] There is no requirement that the dependent also be a citizen of Canada or Mexico.

In general, no fee is required for admission of Canadian dependents in TD nonimmigrant status, and dependents are issued documentation allowing for multiple entries into the United States.[13]

A dependent spouse or child cannot accept employment while in the United States in TD nonimmigrant status.[14] Dependents in TD nonimmigrant status may attend school in the United States on a full-time basis, however, as such attendance is deemed incidental to status.

Spouses and children of TN nonimmigrants are admitted under the TD classification and may apply for extension of stay or a change of status from another nonimmigrant classification to TD status by filing an Application to Extend/Change Nonimmigrant Status (Form I-539). A TD nonimmigrant must provide evidence of the principal's continued TN status or continuing employment and licensing, if required.

D. Labor Disputes

DHS may not classify citizens of Mexico or Canada as a TN nonimmigrant if:

- The Secretary of Labor certifies or otherwise informs USCIS that a strike or other labor dispute such as a lockout involving a work stoppage of workers is in progress in the occupational classification at the place of intended employment; and
- The temporary entry of a citizen of Mexico or Canada in TN nonimmigrant status may adversely affect the settlement of any labor dispute or the employment of any person who is involved in such dispute.[15]

Footnotes

[^ 1] Even though the United States-Mexico-Canada-Agreement (USMCA) replaces North American Free Trade Agreement (NAFTA), the USMCA retains all substantive elements of the former NAFTA, and the United States continues to use the TN designation for NAFTA and USMC professionals.

[^ 2] See 8 CFR 214.6(i).

[^ 3] See Chapter 3, Documentation and Evidence, Section B, Evidence [2 USCIS-PM P.3(B)].

[^ 4] See 8 CFR 214.6(i)(1).

[^ 5] See 8 CFR 214.6(i)(2).

[^ 6] See 8 CFR 214.6(i)(2).

[^ 7] See Chapter 3, Documentation and Evidence, Section B, Evidence [2 USCIS-PM P.3(B)].

[^ 8] See 8 CFR 214.6(i)(3).

[^ 9] See 8 CFR 214.6(h)(1)(iv).

[^ 10] See INA 214(b).

[^ 11] See 8 CFR 214.6(j).

[^ 12] See 8 CFR 212.1 for documentary requirements for nonimmigrants, including visa exemptions.

[^ 13] See 8 CFR 214.6(j)(3).

[^ 14] See 8 CFR 214.6(j)(4).

[^ 15] See 8 CFR 214.6(k).

Chapter 6 - Requirements for Specific Occupations

The following sections provide further guidance on TN admissions sought in specific occupations.[1] A TN applicant must demonstrate that he or she will perform the duties described below. A job title or the employer's categorization of the job does not establish eligibility.[2]

A. Scientific Technician/Technologist

Eligibility for admission as a Scientific Technician/Technologist (ST/T) under the provisions of the United States-Mexico-Canada-Agreement (USMCA) requires, among other things, that the alien is a businessperson possessing:

- A theoretical knowledge of any of the following disciplines: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology, or physics; and
- The ability to solve practical problems in any of those disciplines, or the ability to apply the principles of any of those disciplines to basic or applied research.[3]

1. Direct Support of Supervisory Professional

Aliens in the ST/T category must be coming to work in direct support of a supervisory professional.[4] The supervisory professional must individually qualify as a professional in agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology, or physics.[5] Regardless of the ST/T's individual qualifications, the supervisory professional's duties being supported by the ST/T must be within the duties of a qualified professional in one of these listed fields.

The footnotes to the appendix found in 8 CFR 214.6(c) are specific as to the fields, and by extension the professions that an ST/T may support. Note 6 does not include any work involving the support of a professional who is providing patient care, because neither the field of medicine nor that of patient care are fields identified in note 6.

A radiologic technologist who supports a physician that is providing patient care would therefore not qualify under note 6. The fact that a physician (for instance, a radiologist) may have studied or have expertise in biology, chemistry or physics is not relevant; what is relevant for purposes of the ST/T TN classification is whether the radiologist is providing patient care and the TN applicant is seeking to provide direct support to the radiologist in providing patient care.[6]

On the other hand, an alien might qualify as an ST/T if, for example, he or she is engaged in research that supports a professional who may be a physician (among other qualifications) but is working as a biologist or chemist, and not as a physician whose role is providing patient care.[7]

Moreover, a general offer of employment is not sufficient, by itself, to qualify as an ST/T. The offer must demonstrate that the work of the ST/T will be directly relevant to supporting the duties required of the supervisory professional, meaning the work must be managed, coordinated, and reviewed by the professional supervisor and must also be in direct support of the supervisory professional's own work.

2. Nature of the Work Intended to Support the Supervisory Professional

The ST/T's position in the United States must primarily involve activities that are consistent with an ST/T. Whether a particular job is that of an ST/T is determined by the primary activity the alien will perform, not by the title of the position offered. In determining said primary activity, occasional or merely incidental hands-on work by the supervisory professional is not disqualifying.[8]

The alien should not be coming to do work that is normally performed by the construction trades (such as welders, boilermakers, carpenters, electricians), even where these trades are specialized to a particular industry (for example, aircraft, power distribution). Such aliens are not admissible as ST/Ts.[9]

In determining whether the activities to be performed are qualifying, officers must consider all the facts presented and not rely solely on one source or piece of evidence in making this determination.

In this regard, officers may consult the U.S. Department of Labor's (DOL) Occupational Outlook Handbook (OOH) and other reliable sources, such as DOL's Standard Occupational Classification (SOC) system,[10] in determining whether proposed job functions are consistent with those of a scientific technician or technologist. Officers must consider all of the alien's documented training and experience. In all cases, officers must evaluate eligibility for TN classification based on the primary activity and not simply by the job title.

Neither the OOH nor the SOC, however, are specific to the requirements of the TN classification and are not determinative. Instead, these references must be weighed considering all the facts presented.

3. Training or Education Required

The ST/T's theoretical knowledge in the specific discipline generally should have been acquired through the successful completion of at least 2 years of training in a relevant educational program. Such training may be documented by presentation of a diploma or certificate. An ST/T is not required to have a baccalaureate degree and may instead provide documentation of extensive work experience directly related to the profession. USCIS weighs the lack of degree in consideration of the entire record.

B. Other Specialty Occupations

1. Medical Laboratory Technologist (Canada) and Medical Technologist (Mexico and United States)

An alien in this category must be seeking temporary entry to perform in a laboratory chemical, biological, hematological, immunologic, microscopic, or bacteriological tests and analyses for diagnosis, treatment, or prevention of diseases.[11] The alien must present the health care worker certification described in this chapter.

2. Physician (Teaching or Research Only)

Foreign medical school graduates seeking temporary entry in this category may not engage in direct patient care. Patient care incidental to teaching or research, however, is permissible.[12] To determine if the patient care will be incidental, examples of relevant factors include, but are not limited to:

- The amount of time spent in patient care relative to teaching or research;
- Whether the physician receives compensation for patient care services;
- Whether the salary offer is so substantial in teaching or research that direct patient care is unlikely; and
- Whether the physician will have a recurring or scheduled patient load.

3. Registered Nurses

Registered nurses must demonstrate eligibility for TN status based on this specific occupation by providing a provincial or state license or licenciatura degree.[13] However, in order to be admitted as a TN nonimmigrant, the registered nurse must present a permanent state license, a temporary state license, or other temporary authorization to work as a registered nurse, issued by the state nursing board in the state of intended employment.[14] Admission of nurses should not be limited to the expiration date of these documents.

In addition, registered nurses must present a certificate from the Commission on Graduates of Foreign Nursing Schools or an equivalent credentialing organization.[15]

4. Sylviculturists and Foresters

Sylviculturists[16] and foresters plan and supervise the growing, protection, and harvesting of trees. Range managers improve, protect, and manage rangelands to maximize their use without damaging the environment. A baccalaureate or licenciatura degree in forestry or a related field or a state or provincial license is the minimum entry requirement for these occupations.[17]

5. Disaster Relief Insurance Claims Adjusters

Disaster relief insurance claims adjusters must submit documentation that there is a declared disaster event. In general, an event can only be considered a disaster event upon declaration by at least one of the following:

- The President of the United States;
- A state statute or a local ordinance; or
- The Property Claims Service of the American Insurance Services Group through the assignment of a catastrophe serial number to the disaster event site.

An association of insurance companies representing at least 15 percent of the property casualty market in the United States may also declare a disaster if associated property damage exceeds $5 million and represents a significant number of claims.

6. Management Consultants

Management consultants provide services that improve the managerial, operating, and economic performance of public and private entities by analyzing and resolving strategic and operating problems to improve the entity's goals, objectives, policies, strategies, administration, organization, and operation.

To demonstrate eligibility for TN status based on this specific occupation, an alien must show:

- Proof of a baccalaureate or licenciatura degree;
- Equivalent professional experience as established by a statement or professional credential attesting to 5 years' experience as a management consultant; or
- Professional experience in a field of specialty related to the consulting agreement as evidenced by 5 years' experience.[18]

Management consultants are usually independent contractors or employees of consulting firms under contracts to U.S. entities. A management consultant may be a salaried employee of the U.S. entities to which he or she is providing services but may only fill irregular or non-routine temporary positions. If the employer is a U.S. management-consulting firm, the alien may be admitted temporarily to fill an otherwise permanent position.

7. Computer Systems Analyst

A computer systems analyst requires a baccalaureate or licenciatura degree. In the alternative, the analyst may have a post-secondary diploma or certificate and 3 years' experience.[19] An acceptable post-secondary diploma is a credential issued, on completion of 2 or more years of post-secondary education, by an accredited academic institution in Canada or the

United States.[20]

An acceptable post-secondary certificate is a certificate issued upon completion of 2 or more years of post-secondary education at an academic institution, by the federal government of Mexico or a state government in Mexico, an academic institution recognized by the federal government or a state government, or an academic institution created by federal or state law.[21]

While systems analysts may perform some programming, this category does not include programmers. A systems analyst is an information specialist who analyzes how data processing can be applied to the specific needs of users and who designs and implements computer-based processing systems. Systems analysts study the organization itself to identify its information needs and design computer systems that meet those needs.

8. Hotel Managers

Hotel managers must possess a baccalaureate or licenciatura degree in hotel or restaurant management. A post-secondary diploma in hotel or restaurant management plus 3 years of experience in the field is also sufficient to show a TN applicant qualifies under this specific occupation.[22]

9. Animal and Plant Breeders

Animal and plant breeders breed animals and plants to improve their economic and aesthetic characteristics. Both occupations require a baccalaureate or licenciatura degree.[23]

10. Economists

An economist must have a baccalaureate or a licenciatura degree.[24] Whether a particular job is that of an economist is determined by the primary activity, not by the title of the job. For purposes of the TN classification, the profession of economist does not include positions where the duties are primarily the activity of other occupations, such as those performed by financial analysts, market research analysts, and marketing specialists.

Economists generally specialize in either microeconomics (analyzing the behavior of individual people and firms with the aim of understanding the relationships between supply and demand) or macroeconomics (analyzing aggregated indicators to determine how different sectors of the economy relate to each other).[25] In addition to these two broad focus areas, economists may apply economic analysis to issues in a variety of fields, such as labor, international trade, development, econometrics, education, health, and industrial organization, among other fields.

The DOL's Standard Occupational Classification (SOC) system[26] defines economists as conducting research, preparing reports, or formulating plans to address economic problems related to the production and distribution of goods and services or monetary and fiscal policy.[27] Economists may collect and process economic and statistical data using sampling techniques and econometric methods.[28]

The SOC's definition of the economist occupation specifically excludes the occupations of market research analyst and marketing specialist (SOC #13-1161).[29] To be consistent with the SOC, USCIS does not consider the economist occupation to include persons engaged primarily in activities associated with market research analysts and marketing specialists, as described in the SOC and the Occupational Outlook Handbook (OOH).

11. Engineers

A baccalaureate or licenciatura degree or a state or provincial license is required to qualify for TN nonimmigrant status under the occupational category for engineer.[30] The degree must be in the related engineering field. Officers may refer to DOL publications, such as the OOH, to determine the types of degrees suitable for engineers.

An engineer may not fill computer-related jobs unless he or she has credentials as a computer or software engineer in a bona fide engineering specialty offering full engineering credentials, such as professional engineering licenses.

Footnotes

[^ 1] See USMCA Appendix 1603.D.1. See the footnotes to the appendix found in 8 CFR 214.6(c).

[^ 2] In certain cases, the officer may determine that a foreign health care worker certification is required. See 8 CFR 212.15(k).

[^ 3] See USMCA Appendix 1603.D.1. See the footnotes to the appendix found in 8 CFR 214.6(c).

[^ 4] See USMCA Appendix 1603.D.1, footnote 5. See 8 CFR 214.6(c), n. 6.

[^ 5] See 8 CFR 214.6(c), n. 6. The ST/T applicant is not required to have been trained in or normally be employed in the same discipline as the supervisory professional he or she is supporting. However, if the ST/T applicant is normally engaged in a different discipline, there must be an articulable relevant nexus between the ST/T applicant's experience and training and the performance of the duties required to provide direct support to the supervisory professional. For example, if the applicant for TN classification as an ST/T has training and experience only in the field of astronomy and cannot demonstrate relevant training and/or professional experience performing duties that are required to support a meteorologist, he or she would not qualify for TN classification as an ST/T supporting a meteorologist under 8 CFR 214.6(c), n. 6. The alien may, however, qualify were he or she seeking to provide direct support to an astronomer.

[^ 6] For the same reason, this analysis would apply to Polysomnographic Technologists, Cardiovascular Technicians, Sonographers, Medical Dosimetrists, Nuclear Medicine Technologists, and other occupations working in support of physicians providing patient care.

[^ 7] While USCIS has in the past approved certain ST/Ts supporting physicians providing patient care, there has not been a formal USCIS policy regarding adjudication of ST/Ts who provide patient care, nor has there been a consistent past practice within USCIS or as between USCIS adjudications and U.S. Customs and Border Protection (CBP) admissibility determinations. Therefore, this guidance does not constitute a change in practice or policy but rather constitutes an effort by USCIS to provide policy guidance to adjudicators to ensure consistent adjudications with respect to ST/Ts seeking TN classification under and consistent with DHS regulations at 8 CFR 214.6(c) and note 6.

[^ 8] The officer determines what is 'occasional' or 'incidental' on a case-by-case basis.

[^ 9] See 8 CFR 214.6(c) which excludes construction trades as eligible, stating that, “A business person in this category must be seeking temporary entry for work in direct support of professionals in agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology or physics.”

[^ 10] Federal statistical agencies use the SOC system to classify workers into occupational categories. The system classifies all workers into one of 840 detailed occupations according to their occupational definition. To facilitate classification, detailed occupations are combined to form 461 broad occupations, 97 minor groups, and 23 major groups. Detailed occupations in the SOC with similar job duties, and in some cases skills, education, or training are grouped together.

[^ 11] See 8 CFR 214.6(c), n 7.

[^ 12] Patient care is incidental when it happens in conjunction with the physician’s teaching or research.

[^ 13] See 8 CFR 214.6(c).

[^ 14] See INA 212(m)(1)(C).

[^ 15] See 8 CFR 212.15.

[^ 16] Sylviculture is the growing and cultivation of trees.

[^ 17] See 8 CFR 214.6(c).

[^ 18] See 8 CFR 214.6(c).

[^ 19] See 8 CFR 214.6(c).

[^ 20] See 8 CFR 214.6(c), n. 3.

[^ 21] See 8 CFR 214.6(c), n. 4.

[^ 22] See 8 CFR 214.6(c).

[^ 23] See 8 CFR 214.6(c).

[^ 24] See 8 CFR 214.6(c).

[^ 25] DOL’s Bureau of Labor Statistics (BLS) provides a formal description of the economist occupation on its Occupational Outlook Handbook (OOH) webpage.

[^ 26] Federal statistical agencies use the SOC system to classify workers into occupational categories. The system classifies all workers into one of 840 detailed occupations according to their occupational definition. To facilitate classification, detailed occupations are combined to form 461 broad occupations, 97 minor groups, and 23 major groups. Detailed occupations in the SOC with similar job duties, and in some cases skills, education, or training are grouped together.

[^ 27] SOC system definition of Economist (#19-3011).

[^ 28] SOC system definition of Economist (#19-3011).

[^ 29] TN nonimmigrant economists are defined by qualifying business activity.

[^ 30] See 8 CFR 214.6(c).

Part Q - Nonimmigrants Intending to Adjust Status (K, V)

In May 2020, USCIS retired its Adjudicator’s Field Manual (AFM), a collection of our immigration policies and procedures.

See more

In May 2020, USCIS retired its Adjudicator’s Field Manual (AFM), a collection of our immigration policies and procedures. We are working quickly to update and incorporate all of the AFM content into the USCIS Policy Manual, the agency’s centralized online repository for immigration policies. Until then, we have moved any remaining AFM content to its corresponding Policy Manual Part. To the extent that a provision in the Policy Manual conflicts with remaining AFM content or Policy Memoranda, the updated information in the Policy Manual prevails. If you have questions or concerns about any discrepancies among these resources, contact PolicyFeedback@uscis.dhs.gov.

AFM Chapter 37 - Nonimmigrants Intending to Adjust Status (K and V Classifications) (External)

Volume 3 - Humanitarian Protection and Parole

Part A - Protection and Parole Policies and Procedures

Part B - Victims of Trafficking

Chapter 1 - Purpose and Background

A. Purpose

Human trafficking (also known as trafficking in persons) involves the exploitation of persons in order to compel labor, services, or commercial sex acts.[1] The Trafficking Victims Protection Act (TVPA), part of the Victims of Trafficking and Violence Protection Act of 2000, was enacted to strengthen the ability of law enforcement agencies to investigate and prosecute trafficking in persons, while offering protections to victims of such trafficking, including temporary protections from removal, access to certain federal and state public benefits and services, and the ability to apply for T nonimmigrant status (commonly referred to as the T visa).

T nonimmigrant status allows eligible victims of a severe form of trafficking in persons[2] to remain in the United States on a temporary basis, receive employment authorization, and qualify for benefits and services to the same extent as a refugee.[3] It also allows victims to apply for T nonimmigrant status for certain family members.

B. Background

USCIS has sole jurisdiction over the adjudication of the Application for T Nonimmigrant Status (Form I-914).[4] T nonimmigrant status provides:

- Nonimmigrant status and employment authorization for an initial period of up to 4 years;
- Access to public benefits and services;
- Nonimmigrant status for certain eligible family members; and
- The opportunity to apply for lawful permanent resident status if eligible.[5]

Applications are adjudicated by officers who receive trauma-informed and victim-centered training. There are protections in place to safeguard the confidentiality of any information relating to the applicant.[6] In addition, in recognition of the unique challenges trafficking victims may face in providing evidentiary proof of their victimization, USCIS must consider "any credible evidence" in determining whether the applicant has established eligibility for T nonimmigrant status.[7]

C. Legislative History

Since the initial creation of the T nonimmigrant classification in 2000, Congress has amended the program requirements several times. In addition to creating a nonimmigrant classification for victims of human trafficking, the TVPA and subsequent reauthorizing legislation provide various means to combat trafficking in persons, including tools to effectively prosecute and punish perpetrators of trafficking in persons and prevent incidents of human trafficking.

T Nonimmigrant Status: Acts and Amendments

Acts and Amendments	Key Changes
Trafficking and Violence Protection Act (TVPA) of 2000[8]	• Established T nonimmigrant classification as a temporary immigration benefit available to eligible victims of a severe form of trafficking in persons. • Created a pathway to lawful permanent residence (a green card) for eligible T nonimmigrants.
Trafficking Victims Protection Reauthorization Act (TVPRA) of 2003[9]	• Extended derivative T nonimmigrant status to certain family members of the principal trafficking victim.
Violence Against Women and Department of Justice Reauthorization Act (VAWA) of 2005[10]	• Authorized the duration of T nonimmigrant status for up to 4 years, with the option to extend status in yearly increments when the T nonimmigrant's presence is necessary to assist in the criminal investigation or prosecution of human trafficking. • Defined law enforcement requests where the trafficking victims were unable to cooperate due to physical or psychological trauma suffered as unreasonable. • Eliminated the requirement that relatives of the principal trafficking victim demonstrate extreme hardship to obtain derivative T nonimmigrant status. • Created an additional avenue for trafficking victims to adjust status before accruing 3 years of continuous physical presence in cases where the Attorney General certifies that the investigation or prosecution is complete. • Permitted some trafficking victims earlier access to permanent residence by allowing period(s) of continuous physical presence during the investigation or prosecution into acts of trafficking to count towards the physical presence requirement for adjustment of status under INA 245(l). • Extended 8 U.S.C. 1367 confidentiality protections to applicants for T nonimmigrant status. • Created a waiver for the unlawful presence ground of inadmissibility where the trafficking was at least one central reason for the applicant's unlawful presence in the United States. • Permitted aliens who entered the United States in certain nonimmigrant statuses to later change status to T nonimmigrant status, if eligible.
William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA 2008)[11]	• Provided that an applicant can establish the physical presence requirement if the applicant was allowed entry into the United States to participate in investigative or judicial processes associated with an act or a perpetrator of trafficking. • Provided an exception to the requirement to comply with reasonable requests for assistance from law enforcement due to physical or psychological trauma. • Extended eligibility for derivative status to parents or unmarried siblings under the age of 18 who face a present danger of retaliation as a result of the principal's escape from trafficking or cooperation with law enforcement. • Expanded ability to extend T nonimmigrant status by allowing DHS to consider exceptional circumstances. • Extended the validity period of T nonimmigrant status to include the period the application for adjustment of status is pending. • Authorized DHS to waive good moral character disqualifications at the adjustment of status stage if the disqualification was caused by or incident to the trafficking.
Violence Against Women Reauthorization Act of 2013 (VAWA 2013)[12]	• Created a new classification of derivative relatives for the adult or minor child of the principal's derivative relative, if the adult or minor child faces a present danger of retaliation as a result of the principal's escape from trafficking or cooperation with law enforcement. • Clarified that presence in the Commonwealth of the Northern Mariana Islands constitutes presence in the United States. • Exempted from the public charge ground of inadmissibility T nonimmigrants and applicants setting forth a prima facie ("at first look") case for eligibility for T nonimmigrant status.[13]

Acts and Amendments	Key Changes
Justice for Victims of Trafficking Act of 2015 (JVTA)[14]	• Added “patronizing” and “soliciting” to the definition of sex trafficking at 22 U.S.C. 7102(12). • Added “patronized or solicited” to the crime of sex trafficking at 18 U.S.C. 1591. • Mandated human trafficking awareness training for relevant DHS personnel with law enforcement and public facing roles.

D. Legal Authorities

- INA 101(a)(15)(T) – Definition of T nonimmigrant classification
- 8 CFR 214.200 – 8 CFR 214.216 – Alien victims of severe forms of trafficking in persons
- INA 101(i) – Referral to nongovernmental organizations and employment authorization
- INA 212(d)(3)(A)(ii) and INA 212(d)(13); 8 CFR 212.16 – Waivers of inadmissibility
- INA 214(o) – Nonimmigrants guilty of trafficking in persons, numerical limitations, and length and extension of status
- 8 CFR 274a.12(a)(16), 8 CFR 274a.12(c)(25), and 8 CFR 274a.12(c)(40) – Employment authorization
- INA 237(d) – Administrative stay of removal
- 8 U.S.C. 1367 – Penalties for disclosure of information
- 28 CFR 1100.35 – Authority to permit continued presence in the United States for victims of severe forms of trafficking in persons
- 22 U.S.C. 7105(b)(1) – Assistance for victims of trafficking in the United States
- 22 CFR 41.84 – Victims of trafficking in persons

Footnotes

[^ 1] See Trafficking and Violence Protection Act (TVPA) of 2000, Pub. L. 106-386 (PDF), 114 Stat. 1464, 1470 (October 28, 2000), codified at 22 U.S.C. 7101.

[^ 2] The term “severe form of trafficking in persons” is a legal term defined in the TVPA. The term is often referred to as “trafficking,” “human trafficking,” or “acts of trafficking.”

[^ 3] See TVPA, Pub. L. 106–386 (PDF), 114 Stat. 1464, 1475 (October 28, 2000) (stating that such persons “shall be eligible for benefits and services…to the same extent as an alien who is admitted to the United States as a refugee under section 207 of the [INA]”). See INA 101(i)(2) (mandating employment authorization for principal T nonimmigrants).

[^ 4] USCIS also has sole jurisdiction over the adjudication of the Application for Derivative T Nonimmigrant Status (Form I-914, Supplement A).

[^ 5] Congress provided a specific basis for T nonimmigrants to adjust under INA 245(l), with eligibility criteria distinct from the criteria that apply to family-based, employment-based, and diversity visa adjustment under INA 245(a). For more information, see Volume 7, Adjustment of Status, Part J, Trafficking Victim-Based Adjustment [7 USCIS-PM J].

[^ 6] See 8 U.S.C. 1367. See 8 CFR 214.216. See Volume 1, General Policies and Procedures, Part A, Public Services, Chapter 7, Privacy and Confidentiality, Section E, VAWA, T and U Cases [1 USCIS-PM A.7(E)].

[^ 7] See 8 CFR 214.204(l). USCIS also determines the evidentiary value of submitted evidence in its sole discretion.

[^ 8] See Pub. L. 106–386 (PDF) (October 28, 2000). See 22 U.S.C. 7101–7110. See 22 U.S.C. 2151n. See 22 U.S.C. 2152d.

[^ 9] See Pub. L. 108-193 (PDF) (December 19, 2003).

[^ 10] See Pub. L. 109-162 (PDF) (January 5, 2006). See Violence Against Women and Department of Justice Reauthorization Act of 2005 Technical Amendments, Pub. L. 109-271 (PDF) (August 12, 2006).

[^ 11] See Pub. L. 110-457 (PDF) (December 23, 2008).

[^ 12] See Pub. L. 113-4 (PDF) (March 7, 2013).

[^ 13] See 8 U.S.C. 1641(c)(4). See INA 212(a)(4)(E)(iii).

[^ 14] See Pub. L. 114-22 (PDF) (May 29, 2015).

Chapter 2 - Eligibility Requirements

A. Overview of Eligibility Requirements

To establish eligibility for T nonimmigrant status,[1] principal applicants must demonstrate that they:

- Have been a victim of a severe form of trafficking in persons;
- Are physically present in the United States,[2] American Samoa, or at a port of entry to the United States or American Samoa[3] on account of such trafficking;
- Have complied with any reasonable request for assistance in a federal, state, tribal, or local detection, investigation, or prosecution into acts of trafficking or the investigation of a crime where acts of trafficking are at least one central reason for the commission of that crime,[4] unless the applicant was under 18 years of age at the time at least one of the acts of trafficking occurred, or is unable to cooperate with a reasonable request due to physical or psychological trauma;[5]
- Would suffer extreme hardship involving unusual and severe harm upon removal from the United States;[6] and
- Are admissible to the United States or qualify for a waiver of any applicable grounds of inadmissibility.[7]

B. Victim of Severe Form of Trafficking in Persons

1. General Definition

The term “severe form of trafficking in persons” is defined by the Trafficking and Victims Protection Act (TVPA)[8] and USCIS regulations.[9] The definition includes both sex trafficking and labor trafficking. Applicants must demonstrate that the trafficker engaged in a prohibited action by means of force, fraud, or coercion for a particular purpose.[10] The table below breaks down the definition of a severe form of trafficking in persons into its three elements: action, purpose and means.

Severe Form of Trafficking in Persons Definition

Type of Trafficking	Action	Purpose	Means
Sex Trafficking	• Recruiting • Harboring • Transporting • Provision • Soliciting • Patronizing • Obtaining (Of a person)	For the purpose of a commercial sex act	Where the commercial sex act is induced by force, fraud, or coercion (Not required when the victim is under 18 years of age)
Labor Trafficking	• Recruiting • Harboring • Transporting • Provision • Obtaining (Of a person)	For the purpose of subjecting the victim to: • Involuntary servitude • Peonage • Debt bondage • Slavery	Through use of force, fraud, or coercion

2. Definition of Harboring

While the term harboring is most commonly understood to mean actively hiding or concealing a fugitive, harboring within the trafficking context refers to the series of actions a trafficker takes to exert and maintain control over a victim by substantially limiting or restricting a victim’s movement or agency.

The term agency refers to the ability to act according to one's own free will, control over one's emotional and physical states of being, and ability to exert (or attempt to exert) influence over oneself.[11] A victim’s ability to eventually escape the trafficking does not necessarily invalidate the lack of agency the victim experienced throughout the victimization. Some factors officers may evaluate to determine whether harboring occurred include, but are not limited to:

- Isolation of the victim;
- Limitations on the victim’s ability to interact with others;
- Restrictions on the victim’s movement; and
- Consequences of acting outside of the trafficker’s orders or without the trafficker’s explicit permission.

Harboring does not require a preexisting relationship between the victim and the trafficker. However, harboring may occur within a variety of consensual relationships, including employer-employee, parent-child, smuggler-smugglee, landlord-tenant, and marriages and other intimate partner relationships.

Harboring may occur for any period of time, even a brief period, but generally must endure long enough to substantially limit or restrict the victim’s movement or agency.

3. Definition of Coercion

The regulations define coercion as:

- Threats of serious harm to or physical restraint against any person;
- Any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
- Abuse or threatened abuse of the legal process.[12]

Threats of Serious Harm

Serious harm includes any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious when considering the surrounding circumstances to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services[13] in order to avoid experiencing that harm.[14] Serious harm may include various types of harm, including, but not limited to:

- Harm to third parties close to the victim, such as family members or children in the care of the victim;
- Banishment or expulsion from the home of the victim or family members;
- Starvation or restriction of food;
- Bankruptcy of the victim or family members;
- Refusing to send money to the victim’s family;
- Withholding pay or other compensation resulting in an inability to pay off debt or obtain necessary medical care or nutrition;
- Subjecting victims to isolation, denial of sleep, or other punishments;
- Threats of deportation or removal from the United States;
- Threats to report the victim to law enforcement or immigration authorities; and
- Reputational harm, such as threats to falsely accuse the victim of being a thief or threats to disclose engagement in commercial sex, if the victim attempts to leave.

One type of harm alone may constitute serious harm; however, whether the harm asserted constitutes “serious harm” depends on the facts of the case. In cases involving multiple types of harm, each type of harm may separately meet the definition of serious harm, or when considered together may constitute serious harm.

In determining whether the trafficker made a threat of serious harm that could reasonably be believed by the victim, USCIS considers any vulnerabilities of the victim, including but not limited to the victim's particular socioeconomic situation, physical and mental condition, age, education, cultural background, training, experience, or intelligence.[15]

Officers should determine whether a reasonable person in the same circumstances as the victim would believe that the victim would suffer serious harm if the victim did not provide labor or services. Appendix: Case Law References for T Visa Adjudications [3 USCIS-PM B, Appendices Tab] lists decisions that may provide additional clarification on the concepts of threats of harm and serious harm.

Use or Threats of Use of Physical Restraint

The use or threat of use of physical restraint or physical injury, including the use of violence or threats of violence, can constitute coercion.[16] Examples of physical coercion include:

- An actual or threatened physical act that could result in harm;
- The use or threatened use of any object or weapon to intimidate or injure; and
- The use of threats through words or actions to instill in the victim a fear that others would kill, injure, or use force against the victim or any other person.

There is no requirement that the victim be physically restrained and prevented from escaping in order for USCIS to find that physical coercion occurred. In addition, sexual abuse could constitute physical coercion.

Analyzing Whether Actions Constitute Threats

In the coercion analysis, officers may need to determine whether a trafficker's actions constitute a threat.

A threat is a serious expression of an intention to inflict harm, immediately or in the future, as distinguished from idle or careless talk, exaggeration, or something said in a joking manner. For an expression to be a threat, the expression must have been made under such circumstances that a reasonable person (in the victim's circumstances) who heard, read, saw, or otherwise experienced the action would perceive it to be a serious expression of an intent to cause harm. In addition, the trafficker must have made the expression intending it to be a threat, or with the knowledge that the statement would be viewed as a threat.[17]

USCIS views threats from the viewpoint of the victim, considering the victim's individual circumstances and the totality of the circumstances surrounding the trafficker's threats.

Scheme, Pattern, or Plan

Instead of direct threats or use of overt violence, traffickers may employ a scheme, plan, or pattern, "intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint."[18]

In determining whether there is such a scheme, pattern, or plan, officers should consider the totality of the trafficker's actions and any evidence of the trafficker's intent in carrying them out. Officers may consider actions taken before the victim's arrival in the United States or before the start of the performance of labor or services that are relevant to establishing a scheme, pattern, or plan.

Indicators of a scheme, pattern, or plan could include a range of actions by traffickers, some of which may overlap with the types of serious harm discussed above. The following non-exhaustive list includes factors that may contribute to a finding of coercion by way of a scheme, pattern, or plan:

- Limiting access to public benefits and services;
- Confiscation of identification, travel, or other personal documents;
- Creating a climate of social or linguistic isolation;
- Subjecting the victim to verbal abuse, physical abuse, or harsh living or working conditions;
- Creating a belief that the perpetrator could be physically violent through demonstrations of physical violence against workers or others;
- Inducing workers to take on high debt;
- Fraudulent promises about work or housing conditions;
- Subjecting the victim to economic detriment through tactics including, but not limited to:
  - Underpaying or not paying what was promised to the employee;
  - Not supplying promised work hours; or
  - Deducting expenses from pay that are unreasonable or not as contracted;
- Creating a belief that the employer has the power to deport, arrest, or blacklist[19] a victim through actions such as, but not limited to:
  - Discussing the employer's relationship with law enforcement;
  - Threatening to call law enforcement or other authorities (for example, the sheriff, police, immigration authorities or Federal Bureau of Investigation) if the employee complains about conditions or leaves the job;
  - Threatening to ensure the employee is never able to work in the United States again;
  - Filing a criminal complaint if the employee complains about working conditions or requests unpaid wages;
  - Threatening to report the employee as an absconder; or
  - Creating a belief that the employer has powerful connections to those who can impose harm on the victim or victim's family members, such as connections to political leaders, local law enforcement, or organized crime, in the United States or the victim's home country.

Abuse or Threatened Abuse of the Legal Process

Coercion could also include abuse or threatened abuse of the legal process, which means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.[20]

Appendix: Case Law References for T Visa Adjudications [3 USCIS-PM B, Appendices Tab] lists decisions that may provide additional clarification on the concept of threatened or actual abuse of the legal system. The following is a non-exhaustive list of the types of threats that could establish abuse or threatened abuse of the legal process:

- Threats of imprisonment, prosecution, or imposition of criminal sanctions for failure to perform labor or services;
- Threats to institutionalize someone in a mental health facility;

- Threats to have immigration authorities arrest or deport workers, particularly for failing to comply with the trafficker's directives or to perpetuate workers' ongoing labor by exploiting their fears; or
- Threats to call immigration authorities, to report a worker for absconding, or to let a person's visa expire.

Legal coercion may occur even when the threatened outcome is not an actual legal possibility. In determining the purpose behind the threats, USCIS examines any threat of legal consequences in light of all of the surrounding circumstances and considers whether the threat is being used for an end different from that envisioned by the law or for a coercive purpose designed to intimidate.

4. Labor Trafficking Concepts

Involuntary Servitude

Involuntary servitude is defined as a condition of servitude induced by:

- Means of any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or
- Abuse or threatened abuse of legal process.[21]

Involuntary servitude may occur where a victim initially voluntarily agrees to perform a service but is later forced or coerced into performing the same service. Involuntary servitude also occurs when the victim is forced to work for the perpetrator by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through the law or the legal process. This definition includes those cases in which the perpetrator holds the victim in servitude by placing the victim in fear of such physical restraint or injury or legal coercion.[22] Coercion may also be established if the perpetrator uses psychological abuse.

Involuntary servitude may occur in circumstances where the victim has a preexisting relationship or arrangement with the trafficker. For example, involuntary servitude may occur in the context of a domestic relationship (including parent-child, intimate partner, or roommate relationships). Involuntary servitude can include, but is not limited to, domestic servitude and sexual exploitation. Whether the conditions occurred in a domestic context or outside of the home is not in and of itself determinative of whether involuntary servitude has occurred.

Conditions of servitude are defined by compulsory service or labor against a victim's will in a manner that deprives the victim of liberty. Such conditions do not include scenarios in which:

- The victim is free to quit or leave without incurring retribution or harm (or without fear of retribution or harm);[23]
- The victim can exercise significant control over their working conditions;[24] or
- The victim continued working to avoid the ordinary financial, personal, or professional consequences of quitting or leaving.[25]

Conditions of Servitude Induced by Domestic Violence

Trafficking can occur alongside intimate partner abuse, and involuntary servitude and domestic violence may coexist in some situations. In determining whether abuse or threats of abuse (including physical violence, mental abuse, emotional abuse, sexual violence, intimidation, and controlling behavior in the home) create a condition of involuntary servitude that constitutes a severe form of trafficking in persons, officers should evaluate whether the situation involves:

- Compelled or coerced labor or services; or
- Forced sexual activity.

Although domestic violence and trafficking often intersect, not all work that occurs as the result of domestic violence constitutes a condition of servitude. For example, in certain contexts, the unequal assignment of household tasks among household members may signal an abusive relationship, but it does not automatically constitute the creation of a condition of servitude.

Forced labor[26] compelled by domestic violence occurs where the aim of the domestic violence is to force the victim to engage in labor that creates a condition of servitude. To distinguish between domestic violence and labor trafficking resulting from domestic violence, applicants must demonstrate that the perpetrator's motivation or purpose is or was to subject the applicant to a condition of servitude.

Officers may evaluate the actions the trafficker has taken to maintain the applicant in a condition of servitude, including recruitment, harboring, transportation, provision, obtaining, patronization, or solicitation, to further understand the goal of the perpetrator. Where trafficking is accompanied and enforced by abuse, victims may act upon the trafficker's demands for labor and services due to fear or coercion and may feel that they do not have their own liberty or self-determination.

The following non-exhaustive list outlines circumstances where the trafficker may control the victim's liberty to create a condition of servitude:

- An expectation that the victim's life fulfills the orders of the trafficker (such as a demand from the trafficker to perform domestic labor at an unreasonable level, including unreasonable working hours or constant availability to perform labor regardless of health or energy);
- Lack of control over the victim's own wages despite laboring under the trafficker's demands; or
- The imposition of unequal living arrangements as part of the campaign of force, fraud, and coercion (for example, unequal sleeping arrangements, living arrangements, or access to nourishment).

Conditions of Servitude Induced During a Voluntary Smuggling Arrangement

Aliens may experience violence over the course of their smuggling. While not all crimes or exploitation that occur during a smuggling arrangement rise to the level of trafficking, smuggling may develop into trafficking. The existence of a voluntary smuggling arrangement does not invalidate the possibility of involuntary servitude arising within the smuggling.

Peonage

Peonage is a status or condition of involuntary servitude based upon real or alleged indebtedness.[27] In other words, the perpetrator compels the victim into involuntary servitude in order to satisfy a real or artificially-created debt.

When a debtor voluntarily enters into a contract to pay off a debt, that debtor, like any other contractor, can choose at any time to break the contract. It does not matter that a debtor entered into a contract agreeing to perform services or labor for the creditor. There is a clear distinction between peonage and voluntarily agreeing to perform labor or provide services in payment of a debt.

In determining whether an applicant has been a victim of peonage, officers should follow the guidance above related to involuntary servitude, with the added element that the victim was held in involuntary servitude in order to satisfy a real or artificially-created debt. If the facts support a finding that the applicant was a victim of peonage, USCIS officers should also consider the applicant a victim of involuntary servitude.

Debt Bondage

"Debt bondage" is the status or condition of a debtor arising from a pledge by the debtor of the personal services of the debtor or those of a person under the debtor's control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not limited and defined.[28] Appendix: Case Law References for T Visa Adjudications [3 USCIS-PM B, Appendices Tab] lists decisions that may provide additional clarification on the concept of debt bondage.

Slavery

The term slavery is not defined in the TVPA or regulations, but is generally understood to mean the state of being held under the complete and total ownership or control of another person or entity and being deprived of liberty, autonomy, and independence for the purpose of subjecting the victim to forced labor or services.

5. Definition of Sex Trafficking

Sex trafficking is the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act.[29] A commercial sex act is any sex act on account of which anything of value is given to or received by any person.[30] For sex trafficking to constitute a severe form of trafficking in persons, the commercial sex act must generally have been induced by force, fraud, or coercion.[31] However, a minor under the age of 18 who engages in a commercial sex act meets the definition of a victim of a severe form of trafficking in persons without having to show force, fraud, or coercion. This is because minors under the age of 18 cannot consent to sexual acts.

6. Key Principles of Trafficking in Persons

Actual Labor or Services Need Not Have Been Performed

In determining whether an applicant has been a victim of a severe form of trafficking, it is not necessary for the victim to actually perform the labor or commercial sex act(s) to be eligible for T nonimmigrant status. For example, a victim may be recruited through force, fraud, or coercion for the purpose of performing labor or services but be rescued or have escaped before performing any labor or services.

Appendix: Case Law References for T Visa Adjudications [3 USCIS-PM B, Appendices Tab] lists decisions that may provide additional clarification on the concepts of labor and services. The statutory definitions of trafficking include acts committed "for the purpose of" subjecting someone to a form of trafficking. Therefore, the statute does not require the victim to actually perform the labor or services.

Compensation is Not Determinative

A worker who is paid some or all the promised wages may still be a victim of trafficking. The fact that an applicant was paid a salary or wage for work is not determinative of whether the applicant was subjected to one of the federal trafficking crimes.

Appendix: Case Law References for T Visa Adjudications [3 USCIS-PM B, Appendices Tab] lists decisions that may provide additional clarification on the concept of compensation.

Labor or Services Might Include Non-Traditional Types of Work

When analyzing whether a person has been subjected to involuntary servitude or peonage, USCIS considers that the labor or services might include non-traditional types of work. Appendix: Case Law References for T Visa Adjudications [3 USCIS-PM B, Appendices Tab] lists decisions that may provide additional clarification on the concepts of non-traditional work. Compelled labor or services provided in the context of a familial or intimate partner relationship may satisfy the definition.

For example, in certain contexts, domestic labor may constitute forced labor and satisfy the involuntary servitude assessment, when the actions are induced by force, fraud, or coercion and where the perpetrator had a goal of securing the forced labor or services for the purpose of subjecting the victim to a condition of servitude.

In addition, other non-traditional types of work, including situations where a victim is forced or coerced to engage in criminal behavior (such as drug trafficking or theft), may also constitute forced labor or services when the actions are induced by force, fraud, or coercion, and where the perpetrator had a goal of securing the forced labor or services for the purpose of subjecting the victim to a condition of servitude.[32] USCIS evaluates such situations on a case-by-case basis, considering all relevant circumstances. USCIS retains the authority to request relevant criminal records, including arrest or police reports, trial transcripts, criminal complaints and indictments, and conviction records.

No Defined Length of Time Required

To establish that they are or have been a victim of trafficking and have been compelled to perform the labor or services, applicants do not need to show that they were victimized for a defined length of time. For example, in the context of involuntary servitude, the duration of time can be of varying length and may be short in duration.[33]

However, the totality of the circumstances must establish that the nature of the work was intended to create a condition of servitude. Appendix: Case Law References for T Visa Adjudications [3 USCIS-PM B, Appendices Tab] lists decisions that may provide additional clarification on the concept of timeframes.

The labor or services at issue also do not have to be coerced in every instance. There could be time periods in which the labor or services were voluntary and time periods in which they were involuntary. However, the labor or services must have been involuntary for at least some portion of the time that the applicant was performing the work to constitute labor trafficking.

There is no requirement regarding the length of time the labor or services are performed or the means used to induce the acts. Nevertheless, the applicant must establish that the trafficker acted for the purpose of subjecting the victim to involuntary servitude, peonage, debt bondage, slavery, or a commercial sex act. The duration of the labor or services may be relevant in assessing the trafficker's purpose or motivation.

Trafficker Engaged in Prohibited Action for a Particular Purpose

An applicant must provide facts and evidence establishing the perpetrator's intent or purpose to demonstrate that trafficking has occurred. To establish that they are a victim of a severe form of trafficking in persons, an applicant must demonstrate that the perpetrator engaged in a specific prohibited action through the use of force, fraud, or coercion for the purpose of inducing a commercial sex act or subjecting the applicant to involuntary servitude, peonage, debt bondage, or slavery.

7. Difference Between Trafficking and Smuggling

Federal law distinguishes between the crimes of human smuggling and human trafficking.[34] Trafficking is a crime committed against a person regardless of the person's immigration status or the crossing of a transnational border, while smuggling is a crime committed against a country's immigration laws and involves the willful movement of a person across a country's border.

A person may voluntarily consent to be smuggled. In contrast, an act of trafficking must involve both a particular means, such as the use of force, fraud, or coercion, and a particular purpose, such as subjection to involuntary servitude or a commercial sex act. Federal law prohibits forced labor regardless of the victim's initial consent to work.[35]

While human trafficking and smuggling are distinct, they are not mutually exclusive. Trafficking may occur in the context of some smuggling arrangements. For example, a person who initially agreed to be smuggled in exchange for money, services, or labor could become a victim of trafficking if, over the course of the smuggling, the smuggler subjects or intends to subject the person to acts beyond or distinct from those agreed upon that meet the definition of a severe form of trafficking.

A consensual smuggling agreement does not excuse any acts of trafficking that may arise during the course of smuggling. However, as with all cases, the applicant must establish the perpetrator's purpose. In cases involving smuggling, this may include establishing that the smuggler's motivation or purpose shifted over time to that of a trafficker and that the initial consent has been invalidated by the actions of the smuggler-turned-trafficker.

The perpetrator's purpose or motivations can be multifaceted. For example, a smuggler who intends to extort a person for financial payments during a smuggling arrangement may also have a dual or shifting purpose to compel forced labor or services that place the person into a condition of servitude, even where the forced labor or services end upon completion of the smuggling arrangement.

Short periods of victimization may qualify as a condition of servitude depending on the victim's credible statements. Conversely, a person may be forced to perform certain labor within a smuggling arrangement outside of a condition of servitude that does not rise to trafficking, such as facilitating the smuggling operation or avoiding detection at the border. USCIS makes an individualized determination of whether trafficking has been established based on the evidence in each particular case.

Even if an applicant establishes that trafficking arose over the course of their smuggling arrangement, the applicant must nevertheless establish that they are physically present in the United States or a U.S. port of entry on account of their trafficking.

C. Physical Presence on Account of Trafficking

Principal applicants for T nonimmigrant status must demonstrate at the time of application that they are physically present in the United States, American Samoa, the Commonwealth of the Northern Mariana Islands,[36] or at a U.S. port of entry, on account of trafficking.[37]

Some traffickers arrange for entry of their victims into these jurisdictions as part of the trafficking scheme, while other traffickers prey upon aliens who are already in the United States. Aliens already in the United States may have entered lawfully or they may have entered without being admitted or paroled and are unlawfully present. USCIS takes into account any relevant circumstances relating to the applicant's arrival and current presence in these jurisdictions.[38]

1. Establishing Physical Presence Requirement

Applicants are able to establish physical presence on account of trafficking if they:

- Are present because they are currently being subjected to a severe form of trafficking in persons;
- Were liberated from a severe form of trafficking in persons by a law enforcement agency (LEA);
- Escaped a severe form of trafficking in persons before an LEA was involved;
- Were subjected to a severe form of trafficking in persons at some point in the past and their continuing presence in the United States is directly related to the original trafficking in persons; or
- Are present on account of having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or perpetrator of trafficking.[39]

Applicants must demonstrate physical presence at the time of the application, but the phrase "at the time of application" does not impose a limitation on the specific amount of time between the original trafficking and the filing of the application. The victim may file the application at any time.

There is no requirement that the victim be in an ongoing trafficking situation, be in continuous contact with the trafficker, interact with the trafficker, or be under the control of the trafficker to qualify under this standard, although these factors may be relevant in determining whether an applicant has established physical presence on account of trafficking.

Trafficking survivors experience significant consequences of their victimization that may delay filing, including trauma, lack of access to legal representation, lack of support, and even lack of knowledge that they are a victim of trafficking. The passage of time alone does not prevent an applicant from establishing physical presence on account of their trafficking; however, an applicant still bears the burden of establishing that their current presence in the United States is on account of trafficking.

Establishing Liberation by Law Enforcement[40]

To establish physical presence under this provision, applicants must demonstrate that law enforcement assisted in liberating them from the trafficking situation. The applicant can satisfy physical presence under this provision regardless of the timeline between the liberation from original trafficking and the filing of the T visa application.[41] To establish that an applicant was liberated by law enforcement, the applicant must show that an LEA was involved in freeing the applicant from the trafficking situation and was aware of the applicant's victimization.

Establishing Law Enforcement Agency Involvement[42]

To establish physical presence under this provision, the applicant must demonstrate that the LEA became actively involved in detecting, investigating, or prosecuting the acts of trafficking.[43] LEA involvement requires law enforcement action beyond receiving the applicant's tip, and can be satisfied by demonstrating that the LEA interviewed the applicant or otherwise became involved in detecting, investigating, or prosecuting the trafficking after the applicant escaped.

The applicant can satisfy physical presence under this provision regardless of the time that has passed between the LEA's involvement and the filing of the T visa application.[44]

Establishing the Direct Relationship between the Applicant's Ongoing Presence and the Original Trafficking in Persons[45]

To establish eligibility under this provision, applicants must establish that their current presence in the United States is directly related to the original trafficking in persons, regardless of the length of time that has passed between the trafficking and filing of their application.[46] USCIS may find that an applicant's current presence is not directly related to the original trafficking if the applicant:

- Has repeatedly traveled outside the United States since the trafficking, and the departures from the United States are not the result of continued victimization;
- Lacks sufficient evidence that their continued ties to the United States are directly related to their trafficking; or
- Has established an intent to abandon their life in the United States.

Developments in an applicant's life following the trafficking, including professional and personal milestones (such as finding new employment, having children, getting married, managing mental health diagnoses) do not necessarily prevent an applicant from establishing ongoing presence on account of trafficking. Despite reaching certain milestones, an applicant can still demonstrate that their continuing presence in the United States is directly related to the initial victimization. The applicant may accomplish this by explaining the impact of the trauma the applicant continues to experience as a result of the trafficking.

When evaluating whether an applicant's continuing presence in the United States is directly related to the original trafficking in persons, USCIS considers all evidence using a victim-centered approach.[47] Officers should look for a sufficiently detailed description of the specific impacts of trafficking on the applicant's life at the time of application. The applicant may not establish eligibility if the evidence of the ongoing impact of trauma on the applicant's life does not sufficiently establish the connection between the trafficking and the applicant's presence in the United States at the time of filing.

Factors officers may consider include, but are not limited to:

- Ongoing psychological or physical trauma (or both) the applicant suffers as a result of victimization;
- Health diagnoses stemming from the victimization;
- Ability to access legal, mental health, social, or other services as a tool for rehabilitation in the United States or in the home country, and whether the applicant is currently or has recently accessed trafficking-related services and benefits;
- Current efforts the applicant is undertaking to rehabilitate and stabilize, including self-identification as a victim or survivor;
- The level of control or fear the trafficker still exerts over the victim (including continued fear of law enforcement and immigration authorities and fear of retaliation from the trafficker in the victim's home country);
- Past threats from, actions by, or interactions with the trafficker and any ongoing impact on the applicant's daily life;
- Current cooperation with law enforcement;
- Financial impacts of the applicant's victimization; and
- Any other activities the applicant has undertaken to deal with the consequences of having been trafficked.

Establishing Presence for Participation in an Investigative or Judicial Process[48]

The applicant meets the physical presence requirement[49] when the trafficking occurred in the United States or abroad and meets the federal definition of "a severe form of trafficking in persons" and the victim is allowed entry into the United States to participate in the detection, investigation, prosecution, or judicial process associated with an act or a perpetrator of trafficking.

Trafficking that Began Abroad and Continues to the Port of Entry or Into the United States

An applicant may be able to establish physical presence as someone who is present because they are "currently being subjected to a severe form of trafficking in persons" if the acts of trafficking:

- Began abroad and caused the victim's entry into the United States or presence at the U.S. port of entry;
- Were discovered at the port of entry or continued after the applicant entered; and
- Are ongoing.[50]

Establishing Physical Presence When the Trafficking Ended Outside the United States

Applicants may be able to establish that they are physically present in the United States on account of trafficking[51] even when the trafficking occurred and ended abroad. Applicants must demonstrate that they are now in the United States or at a port of entry on account of their trafficking.

2. Departures From the United States

An applicant who has voluntarily departed (or has been removed) from the United States at any time after the act of a severe form of trafficking in persons is not considered to be physically present in the United States on account of such trafficking, except under the following circumstances:

- The applicant's reentry was the result of the continued victimization;
- The applicant is a victim of a new incident of a severe form of trafficking in persons;
- The applicant has been allowed reentry to the United States for participation in the detection, investigation, prosecution, or judicial processes associated with an act or a perpetrator of trafficking, regardless of where such trafficking occurred;
- The applicant's presence in the United States is on account of their past or current participation in investigative or judicial processes associated with an act or perpetrator of trafficking, regardless of where such trafficking occurred; or
- The applicant returned to the United States and received treatment or services related to their victimization that cannot be provided in their home country or last place of residence outside the United States.[52]

The key factors USCIS considers are the reason(s) for the applicant's departure and the circumstances surrounding the applicant's return to the United States.

USCIS cannot approve the application for T nonimmigrant status until the applicant returns to the United States.[53]

Reentry Due to Continued Victimization

To overcome the presumption that the applicant is no longer physically present on account of trafficking following a departure and sufficiently establish that the applicant's reentry is due to continued victimization,[54] the applicant must demonstrate that the reentry stemmed from a continuation of a prior trafficking scheme or show a clear connection between the

applicant's continued victimization by the trafficker and the reentry.[55]

Continued victimization does not require that an applicant is currently a victim of trafficking; rather, it can include ongoing victimization that directly results from past trafficking. If an applicant experienced harm such as abduction, abuse, threats, or other trauma during their trafficking that resulted in continuing physical or psychological harm, that applicant's reentry could be a result of their continued victimization, even though they were not trafficked upon reentry.

For example, if an applicant left the United States and their trafficker threatened to harm them and their family, such that they had to flee to the United States, they may be able to satisfy the physical presence requirement if they establish that their reentry into the United States was the result of continued victimization tied to ongoing or past trafficking.

Factors that officers may consider when evaluating whether the applicant's reentry resulted from continuing victimization include, but are not limited to:

- The extent of the applicant's continued fear of and connection to the trafficker;
- The threats and risk of harm the trafficker poses to the applicant and the applicant's family; and
- The nature and severity of the victimization arising out of the impacts of trafficking on the applicant's life at the time of reentry.

Allowed Reentry for Participation in Investigative or Judicial Processes

Applicants who departed the United States after their trafficking and subsequently reentered may satisfy the physical presence requirement if they demonstrate that they were allowed reentry[56] for participation in investigative or judicial processes[57] associated with an act or perpetrator of trafficking.[58]

Where the applicant was allowed reentry into the United States for participation in investigative or judicial processes[59] associated with an act or perpetrator of trafficking, the applicant must have entered by lawful means, and it does not matter where the trafficking occurred.[60] In this scenario, the applicant is considered to be physically present on account of trafficking, regardless of where such trafficking occurred.[61] To satisfy this ground, the applicant's entry must be lawful and directly connected to the applicant's participation in an investigation or judicial process related to the trafficking.[62]

Establishing Presence on Account of Past or Current Participation in Investigative or Judicial Processes

Applicants who departed the United States after their trafficking and subsequently reentered may still satisfy the physical presence requirement, even if they were not specifically allowed reentry for that purpose.[63] This may include situations where an applicant returned to the United States to pursue civil, administrative, or criminal remedies related to their trafficking.[64]

Where the applicant reentered the United States (by any means) and their physical presence is on account of their past or current participation in investigative or judicial processes, they are considered physically present on account of trafficking, regardless of where such trafficking occurred. To satisfy this ground, the applicant's presence must be directly connected to the applicant's participation in an investigation or judicial process related to the trafficking.

Establishing Presence Based on Receipt of Treatment or Services Related to Victimization

Where the applicant reentered the United States (by any means) and their physical presence is related to their receipt of treatment or services related to their victimization that cannot be provided in their home country or last place of residence outside the United States, they are considered physically present on account of their trafficking.[65] To satisfy this ground, the applicant must provide evidence of the treatment or services they received in the United States, as well as evidence that such treatment or services is not available in their home country or last place of residence outside the United States.

D. Requests for Law Enforcement Assistance

1. General Rule

An applicant for T nonimmigrant status is required to comply with any reasonable request for assistance in a federal, state, or local investigation or prosecution of acts of trafficking in persons or the investigation of a crime where an act of trafficking in persons is at least one central reason for the commission of that crime.[66] If an officer determines that a request was reasonable and no exceptions or exemptions apply, the officer then examines whether an applicant complied with the request.

An LEA includes any federal, state, tribal, or local LEA, prosecutor, judge, labor agency, children's protective services agency, adult protective services agency, or other authority that has the responsibility and authority for the detection, investigation, or prosecution of severe forms of trafficking in persons.[67] Federal LEAs include, but are not limited to the following:

- U.S. Department of Justice agencies, including U.S. Marshals Service, Offices of the United States Attorneys, and Civil Rights and Criminal Divisions;
- U.S. Department of Homeland Security agencies, including U.S. Immigration and Customs Enforcement and Customs and Border Protection;
- U.S. Department of State agencies, including Diplomatic Security Service;
- U.S. Department of Labor agencies;
- Other independent labor agencies, such as the Equal Employment Opportunity Commission and National Labor Relations Board;
- Offices of inspectors general;
- Offices for civil rights and civil liberties; and
- Bureau of Indian Affairs Police.

2. Totality of the Circumstances Test

The reasonableness of an LEA request for assistance depends on the totality of the circumstances. USCIS considers the following non-exhaustive set of factors:

- General law enforcement and prosecutorial practices;
- The nature of the victimization;
- The specific circumstances of the victim;
- The victim's capacity, competency, or lack thereof;
- Trauma suffered (both mental and physical) and whether the request would cause further trauma;
- Access to support services;
- The safety of the victim or the victim's family;
- Compliance with previous requests and the extent of such compliance;
- Whether the request would yield essential information;

- Whether the information could be obtained without the victim's compliance;
- Whether a qualified interpreter or attorney was present to ensure the victim understood the request;
- Cultural, religious, or moral objections to the request;
- The time the victim had to comply with the request;
- The age, health, and maturity of the victim; and
- Any other relevant circumstances surrounding the request.[68]

3. Comparably-Situated Crime Victim Standard

In examining the totality of the circumstances, USCIS uses a comparably-situated crime victim standard,[69] which focuses on the protection of victims and provides more flexibility than other standards in order to strike the proper balance between the law enforcement need to investigate and prosecute and the need to ensure that victims are not overburdened, retraumatized, or put at unnecessary risk due to reporting their trafficking.

The focus is whether the request the LEA made of the trafficking victim was generally reasonable compared to similarly-situated crime victims, not whether a victim's refusal was unreasonable.[70]

4. Contact with Law Enforcement

Applicants must, at a minimum, have had contact with an LEA with jurisdiction[71] over the crime regarding their victimization, unless they qualify for an age-based exemption or a trauma-based exception.[72] It is sufficient for applicants to provide credible evidence to document that they have reported the victimization, including any crime where the acts of trafficking constitute at least one central reason for the commission of that crime, to law enforcement having jurisdiction over the conduct at issue.

Applicants may establish that they have cooperated with reasonable requests for assistance by submitting a Declaration for Trafficking Victim (Form I-914, Supplement B).

Applicants may also be able to satisfy the requirement to comply with reasonable requests for assistance by reporting their victimization to law enforcement by email, letter, or other reporting mechanisms and complying with reasonable requests for assistance (including, if requested, rerouting the report through the proper channels or to the proper authority with jurisdiction).

If the law enforcement agency that received the report reasonably requests that the applicant instead contact a different law enforcement agency for investigation or development of the information, non-compliance with that reasonable law enforcement request for assistance may render the applicant ineligible for T nonimmigrant status.

Alternatively, applicants may demonstrate that they qualify for an exemption due to age or exception due to trauma.

Form I-914, Supplement B provides valuable evidence of the victim's cooperation with reasonable requests for assistance but is not a required form of evidence to establish eligibility for T nonimmigrant status. Completing Form I-914, Supplement B is a discretionary LEA decision. Although USCIS does not require applicants to submit the Form I-914, Supplement B, officers may request one depending on the circumstances.

For example, if an applicant mentions significant cooperation with an LEA in their personal affidavit but does not provide sufficient detail regarding this cooperation for USCIS to determine eligibility, USCIS may request additional evidence detailing the cooperation, including, but not limited to, Form I-914, Supplement B.

Reporting to an LEA without any authority to detect, investigate, or prosecute the underlying trafficking generally does not satisfy the reporting requirement.

However, if an applicant submits credible evidence of reporting to an LEA outside of the physical jurisdiction where the trafficking occurred, this would satisfy the reporting requirement as long as the record establishes that the LEA had jurisdiction to detect, investigate, or prosecute the trafficking crime, or the LEA connected the applicant with the agency with jurisdiction and contact between the applicant and the agency with jurisdiction has occurred.[73]

An applicant who has never had contact with an LEA regarding the victimization associated with the acts of a severe form of trafficking in persons is not eligible for T nonimmigrant status unless the applicant qualifies for the age-based exemption or trauma-based exception.[74]

5. Age-Based Exemption and Trauma-Based Exception

An applicant is exempt from the requirement to comply with reasonable law enforcement requests if the applicant was under 18 years of age at the time at least one of the acts of trafficking occurred.[75]

An applicant may qualify for an exception if the applicant can establish that the applicant's lack of contact with an LEA or compliance with a reasonable request for assistance is due to physical or psychological trauma.[76]

6. The Relationship Between Assistance with Law Enforcement and Victimization

To establish eligibility for T nonimmigrant status, applicants must demonstrate that the acts of trafficking that they reported to law enforcement are also the acts of trafficking that they experienced directly. Witnessing trafficking alone is not sufficient to satisfy this requirement.

There are many complex factors that inform law enforcement's decision to pursue a case, including the high evidentiary standards for pursuing criminal matters, the difficulty locating the perpetrator, and the expiration of the statute of limitations. The decision to pursue an investigation or prosecution falls solely within the discretion of law enforcement. There is no requirement that law enforcement initiate or complete an investigation or prosecution to satisfy the law enforcement cooperation requirement.

Applicants can satisfy the reasonable request for assistance requirement if they participate in an investigation or prosecution against their trafficker even if the applicant is not directly named in the case. The applicant does not need to demonstrate that the acts of trafficking they suffered are directly referenced in any investigation or prosecution that law enforcement pursues. Therefore, where a case evolves into a formal judicial proceeding as a result of the applicant's cooperation, the applicant does not need to demonstrate any direct reference to their victimization.

E. Extreme Hardship

1. General Rule

An applicant must demonstrate that removal from the United States would subject the applicant to extreme hardship involving unusual and severe harm.[77] Generally, a finding of extreme hardship involving unusual and severe harm may not be based solely upon current or future economic detriment, or the lack of, or disruption to, social or economic opportunities.[78] Officers must consider the totality of the circumstances and all relevant factors in analyzing extreme hardship.

2. Factors

Factors that officers consider in evaluating whether removal would result in extreme hardship involving unusual and severe harm include both traditional extreme hardship factors and factors associated with having been a victim of a severe form of trafficking in persons.[79]

Traditional extreme hardship factors include, but are not limited to, the following:

- The age of the applicant, both at the time of entry and at the time of the application;
- Family ties in the United States and in the country to which the applicant would be returned, if any;
- Length of residence in the United States;
- The health of the applicant and the availability and quality of any required medical treatment in the country of relocation, including length and cost of treatment;
- The political and economic conditions in the country to which the applicant would be returned;
- The possibility of other means of adjusting status in the United States;
- The applicant's community ties in the United States; and
- The applicant’s immigration history.[80]

Extreme hardship factors associated with having been a victim of a severe form of trafficking in persons include, but are not limited to:[81]

- The age, maturity, and personal circumstances of the applicant;[82]
- Any physical or psychological issues the applicant has that require medical or psychological care not reasonably available in the foreign country to which the applicant would be returned;[83]
- The nature and extent of the physical and psychological consequences of having been a victim of a severe form of trafficking in persons;[84]
- The impact of the loss of access to the U.S. courts and criminal justice system for purposes relating to the incident of a severe form of trafficking in persons or other crimes perpetrated against the applicant, including criminal and civil redress for acts of trafficking in persons, criminal prosecution, restitution, and protection;[85]
- The reasonable expectation that the existence of laws, social practices, or customs in the foreign country to which the applicant would be returned would penalize the applicant severely for having been the victim of a severe form of trafficking in persons;[86]
- The likelihood of re-victimization and the need, ability, and willingness of foreign authorities to protect the applicant;[87]
- The likelihood that the trafficker in persons or others acting on behalf of the trafficker in the foreign country would harm the applicant;[88]
- The likelihood that the existence of civil unrest or armed conflict would threaten the applicant’s individual safety;[89] and
- The current or likelihood of future economic harm.[90]

In most instances, USCIS does not consider hardship to persons other than the applicant in determining whether an applicant would suffer extreme hardship involving unusual and severe harm.[91] However, USCIS considers the totality of the circumstances, and extreme hardship to an applicant’s family member or someone close to the applicant may be a relevant factor, but only to the extent that the evidence specifically demonstrates that the applicant will suffer extreme hardship as a result of hardship to a person other than themselves. The outcome of the analysis depends on the facts and circumstances of each case.

F. Admissibility

Applicants for T nonimmigrant status and their derivative family members must establish that they are admissible[92] to the United States or must qualify for a waiver of any applicable grounds of inadmissibility.[93] To apply for a discretionary waiver of any grounds of inadmissibility, an applicant files an Application for Advance Permission to Enter as a Nonimmigrant (Form I-192).

G. Bar to T Nonimmigrant Status Eligibility

An applicant is barred from receiving T nonimmigrant status if there is substantial reason to believe that the applicant has committed an act of a severe form of trafficking in persons.[94]

H. Effect of Immigration Status on Application

Lawful permanent residents, conditional permanent residents, and U.S. citizens are not eligible for classification as a T nonimmigrant.[95] A person in another valid nonimmigrant status may apply for T nonimmigrant status. However, an alien may not hold more than one nonimmigrant status at a time.[96]

Footnotes

[^ 1] To apply for the T nonimmigrant status classification, the applicant must file an Application for T Nonimmigrant Status (Form I-914).

[^ 2] The United States includes the 50 states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands. See INA 101(a)(38). See 8 CFR 214.201.

[^ 3] Throughout this part, “U.S. port of entry” refers to any port of entry to the United States or American Samoa.

[^ 4] See 8 CFR 214.202(c).

[^ 5] See 8 CFR 214.202(c)(1) and 8 CFR 214.202(c)(2).

[^ 6] See 8 CFR 214.202(d).

[^ 7] See Volume 9, Waivers and Other Forms of Relief, Part O, Victims of Trafficking [9 USCIS-PM O].

[^ 8] See Pub. L. 106-386 (PDF), 114 Stat. 1464, 1470 (October 28, 2000), codified at 22 U.S.C. 7102(11).

[^ 9] See 8 CFR 214.201.

[^ 10] A victim of sex trafficking who was under 18 years of age at the time at least one of the acts of trafficking occurred does not need to demonstrate that the commercial sex act was induced by force, fraud, or coercion. See 8 CFR 214.201.

[^ 11] See American Psychological Association Dictionary of Psychology's definition of "agency." See Merriam-Webster Dictionary's definition of "agency."

[^ 12] See 8 CFR 214.201.

[^ 13] The term "labor or services" encompasses both labor trafficking and sex trafficking.

[^ 14] See 18 U.S.C. 1589. See H.R. Rep. 106-939 (PDF), p. 101 (Oct. 5, 2000). See 8 CFR 214.201.

[^ 15] See John S. Siffert, *Modern Federal Jury Instructions-Criminal* (Newark: Mathew Bender Elite Products, 2003), P 47A.02 at 5.

[^ 16] See 8 CFR 214.201.

[^ 17] See John S. Siffert, *Modern Federal Jury Instructions-Criminal* (Newark: Mathew Bender Elite Products, 2003), P 47A.02.

[^ 18] See 18 U.S.C. 1589.

[^ 19] See Merriam-Webster Dictionary's definition of "blacklist."

[^ 20] See 18 U.S.C. 1589(c)(1). See 8 CFR 214.201.

[^ 21] See 8 CFR 214.201.

[^ 22] See 8 CFR 214.201.

[^ 23] Retribution or harm in this context does not include the ordinary consequences of quitting or leaving a job.

[^ 24] Whether a victim can exercise significant control over their working conditions is assessed based on the totality of the circumstances. However, involuntary servitude is not established based solely on the fact that an employer, rather than an employee, sets the terms and conditions of employment (such as wages, hours, location, and duties or responsibilities).

[^ 25] The ordinary consequences of quitting or leaving may vary by individual. Examples of such consequences generally include, but are not limited to, having to look for a new job, loss of income if another job is not immediately available, being laid off, not receiving a promotion, impact on any existing immigration status, or receiving a negative reference.

[^ 26] The term forced labor is commonly used to refer to labor trafficking.

[^ 27] See 8 CFR 214.201.

[^ 28] See 8 CFR 214.201.

[^ 29] See 8 CFR 214.201.

[^ 30] See 8 CFR 214.201.

[^ 31] See 8 CFR 214.201 (defining "severe form of trafficking in persons").

[^ 32] In analyzing this non-traditional work, USCIS considers that trafficking victims may have criminal records and grounds of inadmissibility (such as drug possession charges due to being forced to use drugs, or prostitution charges) that are directly related to their victimization and their trafficker's efforts to subject them to labor or sex trafficking, or both.

[^ 33] 18 U.S.C. 1584 requires that involuntary servitude be for "any term," which suggests that the duration of time can be short.

[^ 34] See 8 U.S.C. 1324. See 22 U.S.C. 7102.

[^ 35] See 67 FR 4784, 4787 (PDF) (Jan. 31, 2002).

[^ 36] Before the federalization of Commonwealth of the Northern Mariana Islands (CNMI) immigration law on November 28, 2009, persons in the CNMI had to travel to Guam or elsewhere in the United States to be admitted as a T nonimmigrant. The 2009 legislation effectively replaced the CNMI's immigration laws with U.S. immigration laws. Applicants in CNMI can now apply for T nonimmigrant status without traveling to the United States or Guam. See Consolidated Natural Resources Act of 2008, Pub. L. 110–229 (PDF) (May 8, 2008).

[^ 37] See INA 101(a)(15)(T)(i)(II). See 8 CFR 214.207(a).

[^ 38] See 67 FR 4784, 4787 (PDF) (Jan. 31, 2002).

[^ 39] See INA 101(a)(15)(T)(i)(II). See 8 CFR 214.207(a). See 8 CFR 214.207(b)(4).

[^ 40] See 8 CFR 214.207(a)(2).

[^ 41] See 8 CFR 214.207(a)(2).

[^ 42] See 8 CFR 214.207(a)(3).

[^ 43] This means of establishing physical presence is distinct from the eligibility requirement to cooperate with any reasonable requests for assistance from law enforcement under INA 101(a)(15)(T)(i)(III) and 8 CFR 214.208. Applicants can generally satisfy the compliance with reasonable requests for assistance requirement by reporting their victimization to law

enforcement by email, letter, or other reporting mechanisms and complying with reasonable requests for assistance or demonstrating that they qualify for an exemption due to age or exception due to trauma.

[^ 44] See 8 CFR 214.207(a)(3).

[^ 45] See 8 CFR 214.207(a)(4).

[^ 46] See 8 CFR 214.207(a)(4).

[^ 47] For additional explanation of the concept of a “victim-centered approach,” see Chapter 7, Adjudication, Section A, Victim-Centered Approach [3 USCIS-PM B.7(A)].

[^ 48] See 8 CFR 214.207(a)(5).

[^ 49] See 8 CFR 214.207(a).

[^ 50] See 8 CFR 214.207(a)(1).

[^ 51] See 8 CFR 214.207(a)(5)(i).

[^ 52] See 8 CFR 214.207(b).

[^ 53] See 8 CFR 214.207(b).

[^ 54] See 8 CFR 214.207(b)(1).

[^ 55] See, for example, *In re 22022429* (PDF, 642.18 KB), Non-Precedent Decision (AAO Apr. 13, 2023) (finding that an applicant who departed and reentered the United States after being trafficked submitted sufficient evidence to establish that her reentry was due to her continued victimization); *In re 24626163* (PDF, 588.62 KB), Non-Precedent Decision (AAO Mar. 6, 2023) (finding that an applicant who departed and reentered the United States after being trafficked did not establish physical presence because he did not provide evidence that he suffered harm as a result of continued victimization); *In re 19062659* (PDF, 639.99 KB), Non-Precedent Decision (AAO Dec. 16, 2022) (finding that an applicant who departed and reentered the United States after being trafficked established physical presence because her reentries were the result of her continued victimization because she was still employed by her traffickers and subjected to constant and repeated threats by them); and *In re 14280188* (PDF, 666.92 KB), Non-Precedent Decision (AAO Sep. 9, 2021) (finding that an applicant who departed and reentered the United States after being trafficked established physical presence because her trafficker forced her reentry, controlled her, and she remained fearful of him).

[^ 56] Applicants may enter the United States through law enforcement agency “sponsorship,” such as through a grant of parole to assist law enforcement. See 8 CFR 212.5. If DHS paroles an applicant to pursue civil remedies associated with an act or perpetrator of trafficking, the applicant meets the physical presence requirement because DHS facilitated the victim’s entry into the United States for participation in an investigation or prosecution.

[^ 57] The term “judicial processes” refers to criminal investigations, prosecutions, and civil proceedings.

[^ 58] See 8 CFR 214.207(b)(3).

[^ 59] The term “judicial processes” refers to criminal investigations, prosecutions, and civil proceedings. Applicants may enter the United States through a grant of parole to assist law enforcement. If DHS paroles an applicant to pursue civil remedies associated with an act or perpetrator of trafficking, the applicant meets the physical presence requirement because DHS facilitated the victim’s entry into the United States for participation in an investigation or prosecution.

[^ 60] See 8 CFR 214.207(b)(3).

[^ 61] See 8 CFR 214.207(b)(3).

[^ 62] See 8 CFR 214.207(b)(3). See 81 FR 92266, 92272-73 (PDF) (Dec. 19, 2016).

[^ 63] See 8 CFR 214.207(b)(4).

[^ 64] See 8 CFR 214.207(b)(4).

[^ 65] See 8 CFR 214.207(b)(5).

[^ 66] See INA 101(a)(15)(T)(i)(III)(aa).

[^ 67] See 8 CFR 214.201.

[^ 68] See 8 CFR 214.208(c).

[^ 69] See 81 FR 92266, 92275 (PDF) (Dec. 19, 2016).

[^ 70] See 81 FR 92266, 92275 (PDF) (Dec. 19, 2016). See 8 CFR 214.208(c).

[^ 71] The provisions of the T Final Rule, 89 FR 34864 (Apr. 30, 2024) apply generally to applications pending or filed on or after its effective date, August 28, 2024. However, regarding pending applications, no provision of the rule applies to an applicant who filed before August 28, 2024, if it would make an applicant who was eligible under the previous regulations, ineligible, such as the requirement at 8 CFR 214.208(b) to report to law enforcement with jurisdiction over the trafficking.

[^ 72] See 8 CFR 214.208(b).

[^ 73] See 8 CFR 214.208(b). The provisions of the T Final Rule, 89 FR 34864 (Apr. 30, 2024) apply generally to applications pending or filed on or after its effective date, August 28, 2024. However, regarding pending applications, no provision of the rule applies to an applicant who filed before August 28, 2024, if it would make an applicant who was eligible under the previous regulations, ineligible, such as the requirement at 8 CFR 214.208(b) to report to law enforcement with jurisdiction over the trafficking.

[^ 74] See 8 CFR 214.208(e).

[^ 75] See 8 CFR 214.208(e)(2).

[^ 76] See INA 101(a)(15)(T)(i)(III)(bb) and INA 101(a)(15)(T)(i)(III)(cc). See 8 CFR 214.208(e)(1).

[^ 77] See INA 101(a)(15)(T)(i)(IV).

[^ 78] See 8 CFR 214.209.

[^ 79] See 8 CFR 214.209(a).

[^ 80] See Volume 9, Waivers and Other Forms of Relief, Part B, Extreme Hardship, Chapter 5, Extreme Hardship Considerations and Factors, Section D, Examples of Factors that May Support a Finding of Extreme Hardship [9 USCIS-PM B.5(D)] and Section E, Particularly Significant Factors [9 USCIS-PM B.5(E)]. See *Matter of Anderson* (PDF), 16 I&N Dec. 596, 597 (BIA 1978). See *Matter of Kao and Lin* (PDF), 23 I&N Dec. 45 (BIA 2001). See *Matter of Pilch* (PDF), 21 I&N Dec. 627 (BIA 1996). See *Matter of Cervantes* (PDF), 22 I&N Dec. 560 (BIA 1999).

[^ 81] See 8 CFR 214.209(b).

[^ 82] See 8 CFR 214.209(b)(1).

[^ 83] See 8 CFR 214.209(b)(2).

[^ 84] See 8 CFR 214.209(b)(3).

[^ 85] See 8 CFR 214.209(b)(4).

[^ 86] See 8 CFR 214.209(b)(5).

[^ 87] See 8 CFR 214.209(b)(6).

[^ 88] See 8 CFR 214.209(b)(7).

[^ 89] See 8 CFR 214.209(b)(8).

[^ 90] See 8 CFR 214.209(b)(9).

[^ 91] See 8 CFR 214.209(c)(2).

[^ 92] See INA 212(a). Applicants for T nonimmigrant status are subject to all of the inadmissibility grounds at INA 212(a) except for the public charge ground of inadmissibility. See INA 212(d)(13)(A).

[^ 93] See INA 212(d)(13) and INA 212(d)(3). See Volume 9, Waivers and Other Forms of Relief, Part O, Victims of Trafficking [9 USCIS-PM O].

[^ 94] See INA 214(o)(1). See 8 CFR 214.202(e).

[^ 95] See INA 101(a)(3). See INA 101(a)(15). See INA 101(a)(20). See *Matter of C-G-*, 1 I&N Dec. 70 (BIA 1941) (noting that an alien may not be an immigrant and a nonimmigrant at the same time).

[^ 96] See 67 FR 4784, 4792 (PDF) (Jan. 31, 2002).

Chapter 3 - Documentation and Evidence for Principal Applicants

To apply for T nonimmigrant status, the principal applicant must file an Application for T Nonimmigrant Status (Form I-914).[1]

A. Burden of Proof

The applicant bears the burden of establishing eligibility for T nonimmigrant status.[2] The applicant must meet all the eligibility requirements from the time of filing the application through adjudication.[3]

B. Standard of Proof

The standard of proof is the amount of evidence needed to establish eligibility for the benefit sought. USCIS evaluates applications for T nonimmigrant status under the preponderance of the evidence standard. The applicant has the burden of demonstrating eligibility by a preponderance of the evidence.[4]

C. Evidence

USCIS reviews all evidence and may investigate any aspect of the application. Officers may use evidence previously submitted by the applicant for any immigration benefit or relief in evaluating the eligibility of an applicant for T nonimmigrant status. USCIS is not bound by previous factual determinations made in connection with a prior application or petition for any immigration benefit or relief. USCIS determines, in its sole discretion, the evidentiary value of previously or concurrently submitted evidence.[5]

In reviewing the application, officers consider the statements, arguments, and assertions of attorneys and accredited representatives, but they do not constitute evidence and are not entitled to evidentiary weight.[6]

1. Any Credible Evidence Provision

An officer must consider any credible evidence an applicant submits to establish eligibility. The “any credible evidence” provision applies to the type or form of evidence officers must consider or may require. However, the standard of proof for each eligibility requirement remains a preponderance of the evidence. For each eligibility requirement, applicants must submit sufficient relevant, probative, and credible evidence to establish that the claim is “more likely than not” or “probably” true.[7]

Inability to Obtain Documentation and Evidence

In establishing eligibility for T nonimmigrant status, an applicant may submit "any credible evidence" for consideration.[8] USCIS recognizes the difficulties trafficking victims may experience in obtaining primary or secondary evidence relevant to establishing their eligibility, and therefore allows applicants to submit any credible evidence.

Due to the nature of their victimization (including possible loss of control of personal possessions as a tactic to further force, fraud, or coercion), trafficking victims may be unable to obtain certain personal information that would otherwise be available to support a determination of eligibility. The trafficker may control access to, confiscate, or destroy relevant documentation, including identification, travel, employment, or immigration documentation.

Applicants are not required to demonstrate the unavailability of primary and secondary evidence; however, when an applicant fails to submit evidence sufficient to establish eligibility, officers may request that the applicant demonstrate or explain the unavailability of a specific document or specific types of documents if they are necessary to establish eligibility. Although USCIS allows submission of any credible evidence and assesses the credibility of all evidence submitted, an explanation from the applicant regarding the unavailability of specific documents assists officers in determining eligibility.

Factual Inconsistencies

In evaluating the credibility and sufficiency of an applicant's personal statement and other evidence submitted, officers must consider the impact of trauma and victimization. Officers should also be mindful of the complex ways in which trauma may present for survivors of trafficking, including cognitive, emotional, sensory, and physical impacts.

Because trauma impacts every person differently, what is traumatizing to one person may not be traumatizing to another. In some cases, trauma may result in the applicant being unable to recollect or express all details of the victimization in a linear fashion. Officers must review inconsistencies in the applicant's story over the course of the applicant's immigration journey in light of this fact, particularly if the applicant has established that the applicant is a victim of a severe form of trafficking in persons.

A person's recollection of traumatic experiences may shift over time. As such, inconsistencies in the applicant's account of victimization may not necessarily be indicators of fraud or lack of credibility but may instead be the result of a fragmented recollection due to trauma.

In addition, trafficking survivors may experience fear or mistrust of authorities, including law enforcement or immigration authorities, that may lead them to provide inconsistent information.

USCIS considers the totality of the circumstances in evaluating any inconsistencies in the record, including but not limited to:

- Any potential physical or mental effects of trauma;
- Where it appears the applicant has a fear or mistrust of authorities;
- The applicant's background and individual circumstances; and
- Any other relevant factors.

If, after considering the totality of the circumstances, USCIS believes the inconsistencies in the evidence raise eligibility concerns, USCIS provides written notice of the issues in a Request for Evidence (RFE) or Notice of Intent to Deny (NOID), giving the applicant the opportunity to respond and resolve the inconsistencies.

2. Weighing and Determining the Credibility of Evidence

Officers should not require the applicant to submit particular types of evidence and may not deny applications for T nonimmigrant status due to the applicant's failure to do so. However, officers may deny an application for T nonimmigrant status where evidence lacks credibility, and the credibility concerns are not overcome by other evidence, such that the applicant has not met their burden of proof to establish eligibility by a preponderance of the evidence. Officers must examine each piece of evidence individually and within the context of the totality of the evidence for relevance, probative value, and credibility.[9]

The determination of what evidence is credible and the weight given to each type of evidence is within the sole discretion of USCIS and determined on a case-by-case basis.[10] Evidence that is relevant includes specific facts that address the eligibility criteria for T nonimmigrant status. Probative value speaks not to the quantity of evidence but instead to its quality. Evidence that is credible is plausible, sufficiently detailed, and internally and externally consistent regarding each eligibility requirement.[11]

When an officer determines the applicant has failed to meet their burden of establishing an eligibility requirement by a preponderance of the evidence, the officer may issue an RFE or NOID requesting additional evidence to establish eligibility.

Any RFE or NOID must be tailored to address credibility or evidentiary issues as they relate to the applicant's eligibility and refrain from retraumatizing a potential victim. For example, officers should not issue an RFE or NOID that expresses skepticism or disbelief about the applicant's claim, but instead should focus on the need for additional detail, explain the lack of probative value of the evidence submitted, or highlight inconsistencies in the record.

After requesting an explanation or additional information from an applicant whose case presents credibility or evidentiary concerns, an officer determines whether their explanation is reasonable or they have submitted sufficient evidence to establish eligibility by a preponderance of the evidence.

USCIS makes determinations of credibility based on the particular facts and circumstances of the case, taking into account the limitations on the particular applicant's ability to obtain evidence and the general considerations that pertain to victim-based cases, including the impact of trauma and victimization discussed above.

3. Initial Filing and Accompanying Evidence

When filing the Application for T Nonimmigrant Status (Form I-914), the applicant should submit:

- Any credible evidence demonstrating that the applicant meets the eligibility requirements;[12]
- The applicant's signed personal statement describing the facts of the victimization, the applicant's physical presence in the United States as it relates to the trafficking, the hardship the applicant fears if they are removed from the United States, compliance with reasonable requests for assistance from law enforcement (or a basis for why the applicant has not complied), and any other eligibility requirements;[13]and
- If the applicant is seeking a waiver of inadmissibility, an Application for Advance Permission to Enter as a Nonimmigrant (Form I-192),[14] must be submitted with supporting evidence.[15]

The applicant must also submit biometrics at a local Application Support Center after receipt of an appointment notice.[16]

4. Evidence from Law Enforcement Agency

An applicant may wish to submit evidence from a law enforcement agency (LEA) to help establish eligibility requirements, including victimization and compliance with reasonable requests for assistance.[17] Evidence from an LEA is optional, and USCIS does not give it any special evidentiary weight.[18]

Law Enforcement Agency Declaration

An applicant may provide evidence from an LEA by submitting a Declaration for Trafficking Victim (Form I-914, Supplement B). The Supplement B must be signed by a supervising official responsible for the investigation or prosecution of severe forms of trafficking in persons.

The LEA completing the Supplement B should attach the results of any name or database inquiries performed and describe the victimization (including dates where known) and the cooperation of the victim. USCIS, not the LEA, determines if the applicant was or is a victim of a severe form of trafficking in persons and otherwise meets the eligibility requirements for T nonimmigrant status. Under federal law, the decision of whether to complete a Supplement B is within the discretion of the LEA.[19] A formal investigation or prosecution is not required to complete a Supplement B.[20]

An LEA may disavow or withdraw the contents of a previously submitted Supplement B in writing.[21] After disavowal or withdrawal, USCIS generally no longer considers the Supplement B as evidence of the applicant's compliance with requests for assistance in the LEA's detection, investigation, or prosecution. However, USCIS may consider a disavowed or withdrawn Supplement B for other eligibility requirements along with any other credible evidence relevant to the application.[22]

USCIS determines whether to consider the disavowed or withdrawn Supplement B as evidence of compliance by assessing the stated reasons for the disavowal or withdrawal. If there is an explanation from the LEA for the withdrawal or disavowal, officers should consider that explanation in determining whether to still consider the declaration as evidence of compliance with requests for assistance.

Continued Presence Documentation

An applicant granted Continued Presence (CP) by the DHS Center for Countering Human Trafficking should submit documentation of the grant of CP.[23] DHS may revoke CP if the recipient commits a crime, absconds, departs without obtaining advance parole, receives an immigration benefit, or is determined not to be a trafficking victim. Once CP is revoked, USCIS generally no longer considers CP as evidence of the applicant's compliance with requests for assistance in the LEA's investigation or prosecution, but it may be considered for other purposes.[24]

If USCIS determines that the revocation of the CP was unrelated to an applicant's compliance (for example, revocation due to the applicant departing without advance parole or for subsequent criminal conduct), USCIS may continue to consider the grant of CP as evidence of the applicant's compliance with the LEA investigation or prosecution.

5. Evidence of Immigration History

An applicant may also submit any evidence regarding entry, admission into, or permission to remain in the United States, or note that such evidence is contained within an applicant's immigration file.[25]

6. Evidence of Severe Form of Trafficking in Persons

The applicant must submit evidence that demonstrates that the applicant is or has been a victim of a severe form of trafficking in persons. The applicant's evidence should establish that the trafficker:

- Used a particular action (recruitment, transportation, harboring, provision, obtaining, or in the case of sex trafficking, also patronizing or soliciting);
- Employed a particular means (force, fraud, or coercion), except in instances of sex trafficking involving victims under 18 years of age; and
- Acted with the purpose of achieving an actual or intended end (commercial sex act, involuntary servitude, peonage, debt bondage, or slavery).[26]

If an applicant has not performed labor or services or a commercial sex act, the applicant must establish that they were recruited, transported, harbored, provided, or obtained (or in the case of sex trafficking, patronized or solicited) for the purpose of a commercial sex act or subjection to involuntary servitude, peonage, debt bondage, or slavery.[27]

The applicant may satisfy this requirement by submitting the following types of evidence:[28]

- The applicant's personal statement, which should describe the circumstances of the victimization suffered;
- Form I-914, Supplement B;
- For applicants who are children under 18 years old, a letter from the U.S. Department of Health and Human Services certifying that the child is a victim of trafficking;
- Documentation of a grant of CP;[29] or
- Any other credible evidence, including but not limited to:
  - Trial transcripts;
  - Court documents;
  - Police reports or other documentation from an LEA;
  - News articles;
  - Copies of reimbursement forms for travel to and from court;
  - Affidavits from case managers, therapists, medical professionals, witnesses, or other victims in the same trafficking scheme;
  - Correspondence or other documentation from the trafficker;
  - Documents used in furtherance of the trafficking scheme, such as recruitment materials, advertisements, pay stubs, logbooks, or contracts; and
  - Photographs or images.[30]

Applicants should describe the steps they have taken to report the crime to an LEA and indicate whether any criminal records relating to the trafficking crime are available.[31] If there has been civil litigation related to the trafficking, applicants may include this evidence as well.

7. Evidence of Physical Presence on Account of Trafficking

Evidence of Physical Presence in the United States

The applicant must submit evidence demonstrating that the applicant is physically present in the United States or at a port-of-entry on account of trafficking in persons. Because the regulatory language about the physical presence requirement is phrased in the present tense, USCIS considers the victim's current situation, and whether the victim can establish current presence in the United States on account of trafficking.

USCIS considers any credible evidence presented to determine physical presence, including the applicant's responses on the application for T nonimmigrant status regarding when they escaped from the trafficker, what activities they have undertaken since that time, including any steps taken to deal with the consequences of having been trafficked, and the applicants' ability to leave the United States.[32]

Applicants may establish physical presence by submitting the following types of evidence:

- Form I-914, Supplement B;
- Documentation of a grant of CP;[33]
- Documentation of entry into the United States or permission to remain in the United States, such as parole,[34] or a notation that such evidence is within the applicant's immigration records; or
- Any other credible evidence, including a personal statement from the applicant, stating the date and place (if known) and the manner and purpose (if known) for which the applicant entered the United States and demonstrating that the applicant is now present on account of the trafficking.[35]

Evidence to Establish the Direct Relationship between the Applicant's Ongoing Presence and the Original Trafficking in Persons

An applicant may support the claim that the applicant's continuing presence in the United States is directly related to the original trafficking in persons by providing any credible evidence. Officers should consider all evidence describing the ongoing impacts of trafficking on the applicant's life at the time of application using a victim-centered approach.

The applicant cannot satisfy the physical presence requirement[36] unless the evidence sufficiently establishes the connection between the specific impact of trauma on the applicant's life at the time of filing and the applicant's ongoing presence in the United States.

Evidence that USCIS may consider includes, but is not limited to:

- A narrative within the personal statement explaining the physical effects or psychological trauma the applicant has suffered as a result of the trafficking and a description of how this trauma impacts the applicant's life at the time of filing;
- Affidavits, evaluations, diagnoses, or other records from the applicant's service providers (including therapists, psychologists, psychiatrists, and social workers) documenting the therapeutic, psychological or medical services the applicant has sought or is currently accessing as a result of victimization and that describe how the applicant's life is being impacted by the trauma at the time of filing;
- Documentation of any additional stabilizing services and benefits, including financial, language, housing, or legal resources, the applicant is accessing or has accessed as a result of being trafficked. For those services and benefits not currently being accessed, the record should demonstrate how those past services and benefits related to trauma the applicant is experiencing at the time of filing;
- Evidence demonstrating the applicant's ability to access services in the United States or in the applicant's home country;
- Form I-914, Supplement B or other statements from LEAs documenting the cooperation between the applicant and the law enforcement agency; and
- Copies of news reports, law enforcement records, or court records.

Evidence of Reentry for or Physical Presence on Account of Participation in Investigative or Judicial Processes

There is a general presumption that victims who have traveled outside of the United States at any time after the act of trafficking and then returned are not present on account of trafficking. To overcome this presumption, applicants must show that their reentry into the United States was the result of continued victimization or that they are a victim of a new incident of a severe form of trafficking in persons.[37] This presumption also may be overcome when the applicant is allowed reentry in order to participate in investigative or judicial processes associated with an act or a perpetrator of trafficking.[38]

This presumption may also be overcome when the applicant's current presence is directly related to their past or current participation in investigative or judicial processes associated with an act or perpetrator of trafficking, regardless of where such trafficking occurred.[39]

To establish that they were allowed entry or reentry into the United States to participate in an investigative or judicial process associated with an act or a perpetrator of trafficking, applicants must show documentation of entry through a legal means such as parole and must submit evidence that the entry is for participation in investigative or judicial processes associated with an act or perpetrator of trafficking.[40]

To establish that they are physically present on account of their participation in investigative or judicial processes associated with an act or perpetrator of trafficking, applicants need not show documentation of their entry through a legal means, but must submit evidence of their participation in the investigative or judicial processes. This is distinct from establishing physical presence after departure based on having been allowed entry for participation in investigative or judicial processes associated with the trafficking.

Such evidence may include:

- Form I-914, Supplement B;
- Other evidence from an LEA to describe the victim's participation;
- A personal statement from the victim; or
- Any other credible supporting documentation showing that the applicant's entry was for participation in the investigative or judicial processes relating to the applicant's trafficking.

Evidence of Presence Based on Receipt of Treatment or Services Related to Victimization

An applicant may also overcome the general presumption that they are not present on account of trafficking due to a departure and be considered physically present on account of their trafficking in cases where:

- The applicant reentered the United States (by any means); and
- The applicant's physical presence is related to their receipt of treatment or services related to their victimization that cannot be provided in their home country or last place of residence outside the United States.[41]

To satisfy this ground, the applicant must provide evidence of the treatment or services they received in the United States, as well as evidence that such treatment or services are not available in their home country or last place of residence outside the United States.

Such evidence may include:

- Medical or psychological records of the applicant's treatment;
- Country conditions information regarding the availability of treatment or services in an applicant's home country or last place of residence outside the United States;
- A personal statement from the victim; or
- Any other credible supporting documentation showing that the applicant's entry was to receive treatment or services related to their victimization and such treatment or services cannot be provided in the applicant's home country or last place of residence outside the United States.

If the applicant meets the physical presence requirement, the applicant must still satisfy all the other requirements for T nonimmigrant status, including compliance with reasonable requests for assistance from the LEA.

8. Evidence of Compliance with Law Enforcement Requests

Evidence to Establish Compliance

In determining whether an applicant complied with reasonable LEA requests for assistance, USCIS examines the totality of the circumstances, including several specific factors,[42] and considers any credible evidence submitted.

To establish compliance with LEA requests for assistance, the applicant may submit a variety of evidence, including but not limited to:

- Form I-914, Supplement B;
- Documentation of a grant of CP;[43]
- Email and letter correspondence showing reporting or communication between the applicant or the applicant's attorney and an LEA;
- Copies of phone and fax logs or email and letter correspondence showing contact with an LEA to report the victimization or offer assistance, and evidence of any response received from the LEA;
- A personal statement explaining the applicant's efforts to report to an LEA and the response or lack of response from the LEA; and
- Any credible evidence demonstrating the victim's willingness to assist in the detection, investigation or prosecution of a severe form of trafficking in persons, such as:
  - Trial transcripts;
  - Court documents;
  - Police reports;
  - News articles;
  - Copies of reimbursement forms for travel to and from court;
  - Affidavits from the victim and other witnesses; and
  - Any other credible evidence.

The applicant should describe in their personal statement[44] what they have done to report the crime to an LEA and indicate whether criminal records relating to the trafficking crime are available.[45] The applicant's statement should also show that an LEA with the responsibility and authority for the detection, investigation, or prosecution of severe forms of trafficking in persons has information about such trafficking in persons, and that the applicant has complied with any reasonable request for assistance in the investigation or prosecution of such acts of trafficking.

If the applicant did not report the crime, the applicant must provide an explanation to demonstrate that they qualify for an exemption due to age or an exception for trauma.[46]

The absence of a Supplement B generally does not adversely affect an applicant who can meet the evidentiary burden with the submission of other evidence of sufficient reliability and relevance. Though an LEA declaration is not required, USCIS considers it to be a useful and convenient form of evidence, among other types of credible evidence.[47] Even in the absence of an LEA declaration, USCIS may, at its discretion, contact the LEA that is involved in the case.[48]

Evidence to Establish Physical or Psychological Trauma Exception

To establish the trauma-based exception to the requirement to comply with reasonable LEA requests, an applicant may provide the following evidence:

- A personal statement describing the trauma and explaining the circumstances surrounding the trauma experienced;[49]
- A signed statement from a qualified professional (such as a medical professional, mental health professional, social worker, or victim advocate) attesting to the victim's mental state or medical condition;[50]
- Medical or psychological records documenting the trauma or its impact;[51]
- Witness statements;[52]
- Photographs;[53]
- Police reports;[54]
- Court records and court orders;[55]
- Disability determinations;[56]
- Government agency findings;[57] or
- Any other credible evidence.[58]

To establish that the person providing the signed attestation is qualified to make such a determination, the applicant should provide a description or evidence of the person's qualifications, credentials, or education, or provide a detailed description of the person's contact and experience with the applicant.[59]

Although a victim's affidavit alone may satisfy this evidentiary burden, USCIS strongly encourages applicants to submit additional relevant evidence.[60]

Evidence of Age-Based Exemption

If an applicant was under the age of 18 at the time of victimization and is therefore exempt from the requirement to comply with reasonable law enforcement requests, the applicant must submit credible evidence of their age, including an official copy of their birth certificate, a passport, or a certified medical opinion, if available.[61] The applicant may also submit other evidence of their age.

9. Evidence of Extreme Hardship

Applicants must submit evidence that demonstrates they would suffer extreme hardship involving unusual and severe harm if removed from the United States. When evaluating whether removal would result in extreme hardship involving unusual and severe harm, USCIS considers several factors.[62]

The applicant may document extreme hardship through a personal statement or other evidence, including evidence from relevant country condition reports and any other public or private sources of information. The applicant may include evidence of hardship arising from circumstances surrounding the victimization and any other circumstances.[63] USCIS does not consider evidence of hardship to persons other than the applicant unless the evidence specifically demonstrates hardship to the applicant as a result of hardship to another person.

Applicants under the age of 18 are not exempt from the extreme hardship requirement. However, USCIS considers an applicant's age, maturity, and personal circumstances (among other factors) when evaluating the extreme hardship requirement.[64]

Footnotes

[^ 1] See the Form I-914 webpage for more information on filing.

[^ 2] See INA 291.

[^ 3] See INA 291. See 8 CFR 103.2(b)(1) and 8 CFR 214.204(l). See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 4, Burden and Standards of Proof [1 USCIS-PM E.4].

[^ 4] See *Matter of Chawathe* (PDF), 25 I&N Dec. 369, 376 (AAO 2010). See *Matter of Martinez* (PDF), 21 I&N Dec. 1035, 1036 (BIA 1997). See Volume 1, General Policies and Procedures, E, Adjudications, Chapter 4, Burden and Standards of Proof, Section B, Standards of Proof [1 USCIS-PM E.4(B)].

[^ 5] See 8 CFR 214.204(l)(3).

[^ 6] See *Matter of Obaigbena* (PDF), 19 I&N Dec. 533, 534 n.2 (BIA 1988).

[^ 7] See *Matter of Chawathe* (PDF), 25 I&N Dec. 369 (AAO 2010).

[^ 8] See 8 CFR 214.204(l).

[^ 9] See *Matter of Chawathe* (PDF), 25 I&N Dec. 369, 376 (AAO 2010).

[^ 10] See 8 CFR 214.204(l)(3).

[^ 11] Internal consistency refers to consistency within the same document as the evidence in question. External consistency refers to consistency between the evidence in question and other pieces of evidence in the record.

[^ 12] See 8 CFR 214.204(c)(2).

[^ 13] See 8 CFR 214.204(c)(1).

[^ 14] See Fee Schedule (Form G-1055).

[^ 15] See 8 CFR 214.204(d).

[^ 16] See 8 CFR 103.16.

[^ 17] See 8 CFR 214.204(e).

[^ 18] See 8 CFR 214.204(e)(1) and 8 CFR 214.204(e)(2).

[^ 19] See 8 CFR 214.204(e)(5).

[^ 20] See 8 CFR 214.204(e)(6).

[^ 21] If a certifying official discovers information regarding a victim, crime, or Supplement B that the agency believes USCIS should be aware of, or if the official wishes to withdraw the certification, the official should contact USCIS using the directions outlined in the Instructions for Form I-914, Supplement B.

[^ 22] See 8 CFR 214.204(h).

[^ 23] See 8 CFR 214.204(i) and 28 CFR 1100.35 (U.S. Immigration and Customs Enforcement's authority to grant Continued Presence).

[^ 24] See 8 CFR 214.204(i).

[^ 25] See 8 CFR 214.204(j).

[^ 26] See 8 CFR 214.206(a)(1).

[^ 27] See 8 CFR 214.206(a)(2).

[^ 28] See 8 CFR 214.206(a)(3).

[^ 29] See 8 CFR 214.204(i).

[^ 30] See 8 CFR 214.206(a)(3)(ii).

[^ 31] See 8 CFR 214.206(a).

[^ 32] See 8 CFR 214.207.

[^ 33] See 28 CFR 1100.35.

[^ 34] See INA 212(d)(5).

[^ 35] See 8 CFR 214.207(c).

[^ 36] See 8 CFR 214.207(a)(4).

[^ 37] See 8 CFR 214.207(b).

[^ 38] See 8 CFR 214.207(b)(3).

[^ 39] See 8 CFR 214.207(b)(4).

[^ 40] See 8 CFR 214.207(b)(3).

[^ 41] See 8 CFR 214.207(b)(5).

[^ 42] See Chapter 2, Eligibility Requirements, Section D, Requests for Law Enforcement Assistance, Subsection 2, Totality of the Circumstances Test [3 USCIS-PM B.2(D)(2)].

[^ 43] See 28 CFR 1100.35.

[^ 44] See Section C, Evidence, Subsection 3, Initial Filing and Accompanying Evidence [3 USCIS-PM B.3(C)(3)].

[^ 45] See 8 CFR 214.206(a)(2)(i). See 8 CFR 214.208(a) (requiring that the applicant has had contact with an LEA regarding the acts of a severe form of trafficking in persons).

[^ 46] See 8 CFR 214.208(e)(1) and 8 CFR 214.208(e)(2).

[^ 47] See 81 FR 92266, 92276 (PDF) (Dec. 19, 2016).

[^ 48] See 81 FR 92266, 92276 (PDF) (Dec. 19, 2016).

[^ 49] See 8 CFR 214.208(e)(1)(i).

[^ 50] See 8 CFR 214.208(e)(1)(ii).

[^ 51] See 8 CFR 214.208(e)(1)(iii).

[^ 52] See 8 CFR 214.208(e)(1)(iv).

[^ 53] See 8 CFR 214.208(e)(1)(v).

[^ 54] See 8 CFR 214.208(e)(1)(vi).

[^ 55] See 8 CFR 214.208(e)(1)(vii).

[^ 56] See 8 CFR 214.208(e)(1)(viii).

[^ 57] See 8 CFR 214.208(e)(1)(ix).

[^ 58] See 8 CFR 214.208(e)(1)(x).

[^ 59] See 81 FR 92266, 92277 (PDF) (Dec. 19, 2016).

[^ 60] See 81 FR 92266, 92277 (PDF) (Dec. 19, 2016).

[^ 61] See 8 CFR 214.208(e)(2). A certified medical opinion may include medical evaluations, dental assessments, and x-ray records.

[^ 62] See Chapter 2, Eligibility Requirements, Section E, Extreme Hardship, Subsection 2, Factors [3 USCIS-PM B.2(E)(2)].

[^ 63] See 8 CFR 214.209(a). See Volume 9, Waivers and Other Forms of Relief, Part O, Victims of Trafficking, Chapter 3, INA 212(d)(13) Waivers, Section A, Waiver Eligibility [9 USCIS-PM O.3(A)].

[^ 64] See 81 FR 92266, 92277 (PDF) (Dec. 19, 2016).

Chapter 4 - Family Members

A. Overview

A victim who has applied for or been granted T nonimmigrant status (the “principal applicant”) may request derivative status for certain eligible family members. The principal applicant may file Supplement A, Application for Derivative T Nonimmigrant Status (Form I-914, Supplement A) concurrently with the principal applicant’s Application for T Nonimmigrant Status (Form I-914), at any time while the principal’s application is pending, or while the principal holds T-1 nonimmigrant status.

Eligible family members must be admissible to the United States or apply for a discretionary waiver of inadmissibility.[1]

There are two general categories of family members eligible for derivative T nonimmigrant status if accompanying, or following to join, the principal:

- Those whose eligibility is based on the age of, and their relationship to, the principal; and
- Those whose eligibility is based on a showing of a present danger of retaliation.[2]

B. Derivative Status Based on Relationship to Principal

Where the principal T nonimmigrant (T-1) is under 21 years of age, the following table outlines which family members may be eligible for derivative T nonimmigrant status.[3]

Derivative Status Based on Principal T Nonimmigrant Who is Under 21

Family Member	Code of Admission
Spouse	T-2
Child (unmarried and under 21 years of age)[4]	T-3
Parent	T-4
Unmarried sibling under 18 years of age	T-5

Where the principal is 21 years of age or older, the following table outlines which family members may be eligible for derivative T nonimmigrant status.[5]

Derivative Status Based on Principal T Nonimmigrant Who is 21 or Older

Family Member	Code of Admission
Spouse	T-2
Child (unmarried and under 21 years of age)[6]	T-3

C. Derivative Status Based on Fear of Retaliation

1. General Categories of Eligible Family Members

Regardless of the age of the principal, a principal T nonimmigrant's family members may be eligible for derivative T nonimmigrant status if they are in present danger of retaliation as a result of the principal applicant's escape from trafficking or cooperation with law enforcement.[7] The following table outlines which family members may be eligible on this basis.

Derivative Status Based on Fear of Retaliation

Family Member	Code of Admission
Parent	T-4
Unmarried sibling under 18 years of age[8]	T-5
Adult or minor child of a derivative family member[9]	T-6

2. Adult or Minor Child of Derivative Family Member (T-6)

The T-6 category is unique in that it expands eligibility beyond relatives who are typically eligible for derivative status. To qualify for T-6 status, the applicant must establish:

- The familial relationship between the T-6 family member and the parent of the T-6;
- That USCIS granted the T-6 family member's parent T-2, T-3, T-4, or T-5 status as the principal's derivative beneficiary; and
- That the T-6 family member faces a present danger of retaliation as a result of the principal's escape from trafficking or cooperation with law enforcement.

T-6 derivatives could include the principal's grandchild, the principal's spouse's child (if not otherwise already eligible as the principal's child), the principal's sibling (if not otherwise already eligible, such as those over the age of 18 or married), and the principal's niece or nephew. The adult or minor child can be of any age or marital status.

If the status of the T-1 principal or the T-2, T-3, T-4, or T-5 derivative was erroneously granted and subsequently revoked, or the T-2, T-3, T-4, or T-5 later becomes ineligible for derivative T nonimmigrant status (for example, a T-3 or T-5 derivative abroad married before admission to the United States), the T-6 applicant would not be eligible for T-6 nonimmigrant status or admission to the United States as a T-6 nonimmigrant.

The table below illustrates which family members of a principal T-1 nonimmigrant could derive T-6 status if they demonstrate they meet the present danger of retaliation requirement.

Family Members Eligible to Derive T-6 Status Based on Present Danger of Retaliation

Age of the T-1 Principal	Derivative Family Member of the T-1 Principal[10]	Eligible T-6 Derivative
Under the age of 21	Spouse (T-2)	The T-2 spouse's child[11] (the principal's stepchild)
	Unmarried child under age 21 (T-3)	The T-3 child's child (the principal's grandchild)
	Parent (T-4)	The T-4's child (the principal's sibling)
	Sibling (under the age of 18 and unmarried) (T-5)	The T-5 sibling's child (the principal's niece or nephew)
21 years of age or older	Spouse (T-2)	The T-2 spouse's child (the principal's stepchild)
	Unmarried child under age 21 (T-3)	The T-3 child's child (the principal's grandchild)
Any age	Parent (T-4) based on present danger of retaliation	The T-4 parent's child (the principal's stepchild)
	Sibling (under the age of 18 and unmarried) (T-5) based on present danger of retaliation	The T-5 sibling's child (the principal's niece or nephew)

Age of the T-1 Principal	Derivative Family Member of the T-1 Principal[10]	Eligible T-6 Derivative
Note: Where ages are listed in this table, they refer to age at the time of the principal applicant's filing for T-1 nonimmigrant status. T-6 family members are eligible regardless of their marital status or age. There is no T derivative status for children (or other family members) of the adult or minor child who is granted T-6 status.		

USCIS recognizes that this derivative family category is based on "a present danger of retaliation" and different family members may face a danger of retaliation at different times. The T-6's family member does not have to hold derivative status at the time of the T-6 application.

For example, if the principal's spouse held T-2 status but then died before the principal files for T-6 status for the spouse's adult child, the adult child may still be eligible for T-6 status. Additionally, if a parent who had obtained T-4 status allowed that status to lapse without extending it, the T-4 parent's adult or minor child could still be eligible for T-6 status if the child faced a present danger of retaliation.

D. Family Relationship at Time of Filing

1. General Rule

Generally, subject to age-out protections and except as specified in subsections 2 through 4, the family relationship must exist at each of the following times:

- When the applicant files the application for T-1 nonimmigrant status;[12]
- When USCIS adjudicates the application for T-1 nonimmigrant status;
- When the applicant files the application for derivative T nonimmigrant status;
- When USCIS adjudicates the application for derivative T nonimmigrant status; and
- When the eligible family member is admitted to the United States, if residing abroad.

2. Spousal Relationship Must Exist When Principal's Application is Adjudicated

USCIS evaluates whether the marriage creating the qualifying spousal relationship or stepchild and stepparent relationship exists at the time of adjudication of the principal's application and thereafter.

Principal applicants who marry while their application is pending may file Form I-914, Supplement A on behalf of their spouse, even if the relationship did not exist at the time they filed their principal application.[13] Similarly, the principal applicant may file for a stepparent or stepchild if the qualifying relationship was created after they filed their principal application but before it was approved.[14]

3. Requirement to Be Unmarried

An eligible child seeking T-3 nonimmigrant status or eligible sibling seeking T-5 nonimmigrant status must be unmarried:

- When the principal files the application for T-1 nonimmigrant status;
- When USCIS adjudicates the application for T-1 nonimmigrant status;
- When the principal files an application on behalf of an eligible family member for derivative T-3 or T-5 nonimmigrant status;
- When USCIS adjudicates the application for derivative T-3 or T-5 nonimmigrant status; and
- When the family member is admitted to the United States, if residing abroad.

4. Exceptions to General Rule: Relationship and Age-Out Protections

There are certain protections available to family members whose age or relationship changes after the principal files an application for T nonimmigrant status.

Protection for New Child of a Principal Applicant

If the T-1 principal applicant had a child after filing the application for T-1 nonimmigrant status, the child is eligible to accompany or follow to join the T-1 principal applicant.[15] This includes becoming the parent of a child by means of a biological, step,[16] or adoptive relationship.

Age-Out Protection for Eligible Family Members of a Principal Applicant Under 21 Years of Age

For principal applicants who were under 21 years of age when they filed for T-1 nonimmigrant status, USCIS continues to consider a T-4 parent or T-5 unmarried sibling as eligible for derivative status even if the principal applicant turns 21 before USCIS adjudicates the T-1 application.

Unmarried siblings under 18 years of age at the time the principal filed the T-1 application remain eligible for T-5 status even if they turn 18 years of age before USCIS adjudicates the T-1 application, so long as the sibling is unmarried.[17] The derivative sibling does not "age out" even upon reaching age 18.

Age-Out Protection for Child of a Principal Applicant

USCIS continues to consider a T-3 child as an eligible family member so long as the child was under 21 years of age at the time the principal filed for T-1 nonimmigrant status. As long as the child is unmarried, the child remains eligible even if the child is over 21 years of age at the time of adjudication of the T-1 application.[18] The derivative T-3 does not "age out" even upon reaching age 21.

E. Death of Qualifying Relative

USCIS may not approve derivative status for a surviving relative whose qualifying relative (the principal applicant) died before USCIS approved the derivative T application.[19] However, the unique structure of the T-6 classification may provide for continuing eligibility for the T-6 derivative even if the T-2, T-3, T-4, or T-5 derivative beneficiary dies before the principal files for T-6 status for the surviving relative.

For example, adult children who are married or over 21 years of age could potentially qualify for T-6 nonimmigrant status if they are the children of the T-1's deceased spouse and meet the present danger of retaliation requirement.

However, in order for the spouse's children (adult or minor) to be eligible for the T-6 category under this scenario, the principal's spouse must have held T-2 nonimmigrant status through the principal T-1 nonimmigrant before the T-2 spouse died. If the principal's spouse held T-2 status but then died before the principal filed for T-6 status for the spouse's adult or minor child, the adult or minor child may still be eligible for T-6 status. However, if the T-1 principal's spouse is deceased and never held T-2 status, then the spouse's child would not be eligible for T-6 status.

Footnotes

[^ 1] See 8 CFR 214.211(a).

[^ 2] See INA 101(a)(15)(T)(ii). See 8 CFR 214.211(a)(3).

[^ 3] See INA 101(a)(15)(T)(ii)(I).

[^ 4] See INA 101(b)(1), which specifically defines the term "child." The definition includes stepchildren and adopted children under certain circumstances.

[^ 5] See INA 101(a)(15)(T)(ii)(II).

[^ 6] See INA 101(b)(1), which specifically defines the term "child." The definition includes stepchildren and adopted children under certain circumstances.

[^ 7] See INA 101(a)(15)(T)(ii)(III).

[^ 8] See INA 101(a)(15)(T)(ii)(III).

[^ 9] The adult or minor child can be of any age or marital status. In enacting this new category of derivative beneficiaries in the Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4 (PDF) (March 7, 2013), Congress used the term "adult or minor children," which is not a term of art in the Immigration and Nationality Act (INA). Under the INA, the term "son or daughter" means a child who is married or over the age of 21, while "child" means a child who is unmarried and under the age of 21. USCIS construes the meaning of the language "adult or minor children" to encompass both the INA definitions of "son or daughter" and "child." Therefore, persons of any age and any marital status are "adult or minor children" and may be eligible for T-6 derivative status.

[^ 10] The derivative family members of the T-1 principal listed in this column can either currently hold T-2, T-3, T-4, or T-5 nonimmigrant status, have a pending application for such status that USCIS will approve before or with the application for the T-6 nonimmigrant, or have held such status in the past (with some exceptions).

[^ 11] This assumes the principal's T-2 spouse's child was not already eligible as a child T-3 derivative beneficiary. Stepchildren are included in the INA definition of a child so long as the parents married when the stepchild (spouse's biological child) was under the age of 18. However, a biological child of the T-2 spouse whose marriage to the T-1 principal nonimmigrant occurred after the child turned 18 years of age is not eligible as a T-3 nonimmigrant, but the same child may be eligible for T-6 status.

[^ 12] See 8 CFR 214.211(d)(1) as limited by *Medina Tovar v. Zuchowski,* 982 F.3d 631 (9th Cir. 2020) (holding invalid the regulatory requirement that a spousal relationship exist at the time a Petition for U Nonimmigrant Status (Form I-918) is filed in order for the spouse to be eligible for classification as a U-2 nonimmigrant). As a matter of policy, USCIS applies the *Medina Tovar* decision nationwide to spousal and stepparent-stepchild relationships arising in T visa and U visa adjudications. Therefore, where the family relationship is created by marriage, it does not have to exist at the time the applicant submits the application for T-1 nonimmigrant status. In that circumstance, the family relationship must exist at the four subsequent points set forth at 8 CFR 214.211(d).

[^ 13] See 8 CFR 214.211(e)(4)(ii) as limited by *Medina Tovar v. Zuchowski,* 982 F.3d 631 (9th Cir. 2020).

[^ 14] See 8 CFR 214.211(e)(4)(ii) and 8 CFR 214.211(d)(4)(iii), as limited by *Medina Tovar v. Zuchowski*, 982 F.3d 631 (9th Cir. 2020).

[^ 15] See 8 CFR 214.211(e)(1).

[^ 16] An applicant can establish a T-3 stepparent and stepchild relationship if the applicant shows that the qualifying relationship was created before the stepchild turned 18, regardless of the adjudication outcome for an application for derivative T-2 nonimmigrant status (for example, the spousal relationship that created the stepparent and stepchild relationship), so long as the application for derivative T-2 nonimmigrant status was not denied due to failure to establish the claimed spousal relationship.

[^ 17] See 8 CFR 214.211(e)(2).

[^ 18] See 8 CFR 214.211(e)(3).

[^ 19] See INA 204(l).

Chapter 5 - Documentation and Evidence for Family Members

A principal T nonimmigrant (T-1) may submit an application to USCIS to obtain derivative T nonimmigrant status for eligible family members who are inside or outside the United States.[1] The T-1 principal must complete a separate Application for Derivative T Nonimmigrant Status (Form I-914, Supplement A) for each eligible family member.

A. Evidence

The applicant must submit the following with the Form I-914, Supplement A:

- Evidence demonstrating the family relationship that makes the derivative eligible for T nonimmigrant status;[2]
- Evidence demonstrating the danger of retaliation if relevant to the basis for seeking derivative status;[3] and
- If the family member is seeking a waiver of inadmissibility, an Application for Advance Permission to Enter as a Nonimmigrant (Form I-192), with supporting evidence.[4]

The family member must also submit biometrics.[5] If the family member is inside the United States, USCIS schedules a biometrics appointment at a local Application Support Center. Family members outside the United States must submit fingerprints through a completed fingerprint card (FD-258) for scanning or by electronic means as instructed by the U.S. embassy or consulate. USCIS mails fingerprint cards to the applicant, along with instructions, after the applicant files the application for the eligible family member.[6]

1. Establishing Family Relationship

USCIS must consider any credible evidence submitted to establish proof of the claimed family relationship. The instructions for the Application for T Nonimmigrant Status (Form I-914) include a list of documents the applicant may submit to establish the claimed relationship.

2. Establishing Danger of Retaliation

A family member seeking derivative T nonimmigrant status based on a present danger of retaliation must demonstrate the basis of this danger.

An applicant may satisfy this requirement by submitting the following types of evidence:

- Documentation of a previous grant of parole to an eligible family member;[7]
- A signed statement from a law enforcement official describing the danger of retaliation;[8]
- A personal statement from the principal or derivative applicant describing the danger the family member faces and how the danger is linked to the principal applicant's escape or cooperation with law enforcement (although a personal statement may be insufficient on its own to prove present danger);[9] or
- Any other credible evidence, including trial transcripts, court documents, police reports, news articles, copies of reimbursement forms for travel to and from court, and affidavits from other witnesses.[10]

USCIS may contact a law enforcement agency involved in the detection, investigation, or prosecution of the trafficking, if appropriate.[11]

B. Timeframe for Filing the Application for Derivative Status

The T-1 principal may file the Application for Derivative T Nonimmigrant Status (Form I-914, Supplement A) at the following times:

- Concurrently with the principal's Application for T Nonimmigrant Status (Form I-914);
- While the principal's application is pending; or
- At any time after the principal's application is approved, so long as the principal continues to hold T-1 nonimmigrant status.[12]

If the principal no longer holds T-1 nonimmigrant status because the validity period has expired and has not been extended, USCIS denies the application for the eligible family member.

Footnotes

[^ 1] See INA 214(o).

[^ 2] See 8 CFR 214.211(c)(2).

[^ 3] See 8 CFR 214.211(c)(3).

[^ 4] See 8 CFR 214.211(c)(4). For information regarding filing fees, see Fee Schedule (Form G-1055).

[^ 5] See 8 CFR 103.16.

[^ 6] See 8 CFR 103.16.

[^ 7] See 8 CFR 214.211(f)(1).

[^ 8] See 8 CFR 214.211(f)(2).

[^ 9] See 8 CFR 214.211(f)(3).

[^ 10] See 8 CFR 214.211(f)(4).

[^ 11] See 8 CFR 214.211(f).

[^ 12] See 8 CFR 214.211(b)(1).

Chapter 6 - Bona Fide Determinations

A. Bona Fide Determination Process

Federal statutes provide certain benefits to individuals with a bona fide application for T nonimmigrant status.[1] Consequently, USCIS implemented the Bona Fide Determination (BFD) process.[2] Through the BFD process, USCIS may exercise discretion to grant deferred action[3] and a BFD Employment Authorization Document (BFD EAD) to aliens with pending, bona fide applications for T nonimmigrant status. This process promotes victim stability and continued cooperation with law enforcement.

The BFD process contains two steps. In the first step, USCIS determines whether an application is bona fide. This involves determining whether the pending application is complete, and whether the results of initial background checks are complete, have been reviewed, and do not present national security concerns. In the second step, USCIS considers whether to grant deferred action and employment authorization as part of the discretionary determination, considering all relevant factors.[4]

If USCIS grants the applicant deferred action as a result of the BFD process, USCIS then also exercises its discretion to grant that applicant a BFD EAD for the duration of the deferred action period. If the annual cap[5] on available visas has been met, USCIS places all applications that have been issued a BFD on the waiting list. Once an application is on the waiting list, the next step is final adjudication when a visa becomes available.

Only applicants living in the United States may receive deferred action, since those outside the United States have no potential removal to be deferred. Likewise, USCIS may only issue BFD EADs to applicants in the United States since those outside the United States cannot as a practical matter work in the United States.[6]

B. Bona Fide Determination

Bona fide generally means “made in good faith; without fraud or deceit.”[7] Accordingly, when interpreting the statutory term within the context of T nonimmigrant status, USCIS determines whether an application is bona fide based on the applicant’s compliance with initial evidence requirements and successful completion of background checks.

1. Principal Applicants

USCIS determines a principal application is bona fide if:

- The principal applicant properly filed a complete Application for T Nonimmigrant Status (Form I-914); and
- USCIS received and reviewed the results of the principal applicant’s initial background checks and determined that the applicant does not present national security concerns.[8]

2. Eligible Family Members

An eligible family member is not guaranteed a BFD solely because the principal applicant receives a BFD.[9] The record must independently demonstrate the Application for Derivative T Nonimmigrant Status (Form I-914, Supplement A) is bona fide.

USCIS determines an eligible family member’s application is bona fide when:

- USCIS determined the principal applicant’s Form I-914 is bona fide;
- The derivative applicant properly filed a complete Application for Derivative T Nonimmigrant Status (Form I-914, Supplement A);
- The application is supported by credible evidence that the derivative applicant qualifies as an eligible family member; and
- USCIS received and reviewed the results of the derivative applicant’s initial background checks and determined that the applicant does not present national security concerns.[10]

C. Exercise of Discretion

Once USCIS determines an application is bona fide, USCIS then considers whether the applicant poses a risk to public safety or national security. USCIS makes this determination based on background and security checks results from biometrics, any additional background check information, and review of any other relevant discretionary factors. For individuals who are required to provide biometrics, USCIS does not make this discretionary determination until it has received the results of the biometrics-based background and security checks.

USCIS uses the results of the background checks and other information in the record to make the discretionary determination of whether deferred action is warranted. During secondary review,[11] USCIS also uses such information to determine whether an applicant is admissible for the purposes of receiving a grant of T nonimmigrant status or merits a favorable exercise of discretion to waive any grounds of inadmissibility.

USCIS may choose not to exercise its discretion to grant deferred action and a BFD EAD where an applicant appears to pose a risk to national security or public safety or presents other negative discretionary factors.

1. National Security and Public Safety Concerns

Where a principal applicant or eligible family member has been convicted of or arrested for certain acts, USCIS may not issue deferred action and a BFD EAD and instead may proceed to secondary review, which involves a full adjudication of T nonimmigrant eligibility for the principal applicant and any family members.

The following concerns generally overlap with inadmissibility grounds[12] and may include:

- National security concerns;[13] and
- Public safety concerns, which include but are not limited to:
  - Murder, rape, or sexual abuse;
  - Offenses involving firearms, explosive materials, or destructive devices;[14]
  - Offenses relating to peonage, slavery, involuntary servitude, and trafficking in persons;[15]
  - Aggravated assault;
  - An offense relating to child pornography; and
  - Manufacturing, distributing, or selling of drugs or narcotics.[16]

USCIS may determine that other adverse factors beyond those listed above weigh against a favorable exercise of discretion.

However, USCIS may also exercise discretion favorably notwithstanding the above concerns if warranted based on the totality of the circumstances.

2. Comprehensive Review of Adverse Factors During Secondary Review

Recognizing that many factors may influence whether criminal activity is prosecuted and results in a conviction, an arrest for a serious crime may be relevant to whether USCIS should exercise its discretion favorably. Therefore, a determination about whether to favorably exercise discretion when there are any adverse concerns requires a comprehensive review of the available evidence. For example, officers may need to request additional evidence or information in certain cases where security checks indicate that an applicant has an arrest record.

USCIS does not conduct this in-depth, discretionary review during the BFD process. Instead, if USCIS determines that an applicant’s case presents relevant adverse factors that would require further review, USCIS proceeds to secondary review, which is a full T nonimmigrant status eligibility adjudication. During the full adjudication of the Form I-914, applicants have the opportunity to provide USCIS with potentially mitigating information or other evidence pertaining to arrests or convictions.

D. Adjudicative Process

1. Bona Fide Determination

When USCIS determines a principal applicant and any eligible family members have a bona fide application and warrant a favorable exercise of discretion, USCIS may grant deferred action and issues a BFD EAD.

2. Prima Facie Case for Approval

Where USCIS determines that an application is bona fide, the applicant is also considered to have established a prima facie case for approval for purposes of an administrative stay of removal.[17] The term “prima facie” refers to an application appearing sufficient on its face.

The steps taken to determine whether an application is bona fide and whether an applicant may receive deferred action through the BFD process rely on the initial evidence submitted with an application for T nonimmigrant status, as well as the results of background checks. The determination of whether an applicant is eligible for T nonimmigrant status is a more complex evaluation.

Impact of Past Grants on Future Determinations

An initial grant or renewal of deferred action and issuance of a BFD EAD does not guarantee that USCIS will approve the principal applicant or their eligible family members for T nonimmigrant status.

When the application is under final adjudication, an officer assesses eligibility requirements for T nonimmigrant status. This adjudication does not include consideration of prior grants of deferred action or BFD EAD.

3. Secondary Review

A determination that an applicant will not receive deferred action and a BFD EAD is not a denial of Form I-914 or the Application for Employment Authorization (Form I-765). USCIS does not accept or process motions to reopen or reconsider, appeals,[18] or requests to re-apply for deferred action and a BFD EAD.

When USCIS determines an application does not initially appear to be bona fide or does not merit a favorable exercise of discretion, USCIS proceeds to secondary review of the application, which consists of a full adjudication of T nonimmigrant status eligibility.[19]

4. BFD EAD Issuance

Previously Filed Applications for Employment Authorization

USCIS uses the pending Form I-765 filed by a principal or derivative applicant under the T visa employment authorization category[20] to issue a BFD EAD. Using the pending application limits the burden on applicants to file additional paperwork.

Once USCIS has determined that an applicant present in the United States has a bona fide application for T nonimmigrant status and merits a favorable exercise of discretion, and therefore may receive deferred action and a BFD EAD, USCIS issues a notice to inform the applicant of the decision.[21]

Applicants who have already filed a Form I-765 receive a grant of deferred action and an EAD valid for 4 years from the date of approval of the Form I-765.

Application for Employment Authorization Needed

Where an applicant has filed a bona fide application for T nonimmigrant status but has not filed an accompanying Form I-765 under the relevant category, USCIS issues a notice indicating that the applicant has received a BFD and may receive a BFD EAD. To obtain an EAD, the applicant must file a Form I-765 after receiving this notice.

Applicants who file a new Form I-765 after receiving the BFD notice from USCIS may receive deferred action and employment authorization valid for 4 years from the date of approval of the Form I-765.

Applicants who do not file a Form I-765 in conjunction with their application for T nonimmigrant status will likely experience delays in receiving any deferred action and BFD EAD. As such, USCIS strongly encourages all applicants to file their Form I-765 at the same time as their application for T nonimmigrant status to ensure efficient processing.

5. Eligible Family Members Residing Outside of the United States

USCIS only issues deferred action and BFD EADs to eligible family members living in the United States. As deferred action is an exercise of prosecutorial discretion to make an alien a lower priority for removal from the United States, it is only applicable to aliens in the United States. Additionally, USCIS only has authority over alien employment authorization in the United States.[22]

Because the BFD EAD is only for applicants living in the United States, eligible family members who live outside of the United States proceed to full adjudication when the principal’s application has been fully adjudicated.

E. Post Adjudicative Actions

1. Requests to Renew Deferred Action and BFD EAD

An applicant who requires a renewal of the grant of the BFD EAD and deferred action while their application for T nonimmigrant status remains pending may submit a request to renew the EAD under existing procedures. USCIS reviews the application for the BFD EAD and considers whether deferred action and employment authorization are still warranted as a matter of discretion.

An initial BFD EAD grant does not guarantee future renewals. Principal applicants and eligible family members are evaluated independently for each deferred action and EAD renewal to ensure that the grant of deferred action and BFD EAD are still warranted as a matter of discretion.

2. Background and Security Checks

USCIS updates and reviews background and security checks at regular intervals during the validity period of a principal applicant or eligible family member’s deferred action. Additionally, USCIS retains discretion to update background and security checks at any time when case-specific circumstances warrant.

During those reviews, USCIS evaluates whether the applicant and eligible family members who have been granted deferred action and BFD EADs continue to merit a favorable exercise of discretion while their applications for T nonimmigrant status are pending with USCIS.

If USCIS determines that adverse information may impact a principal applicant’s or eligible family member’s ability to maintain deferred action and a BFD EAD, USCIS places the application in line for a full adjudication.

3. Termination and Revocation

USCIS may terminate the grant of deferred action and revoke the BFD EAD[23] at any time if it determines the favorable exercise of discretion or BFD EAD are no longer warranted, or the prior deferred action and BFD EAD were granted in error. For example, USCIS may terminate deferred action and revoke the BFD EAD if USCIS identifies any adverse information, such as new information pertaining to the risks the applicant poses to national security or public safety, or any other relevant adverse discretionary factor.

Footnotes

[^ 1] See 22 U.S.C. 7105(b)(1)(E)(i)(II)(aa). See INA 237(d)(1) (authorizing the Secretary of Homeland Security to grant an administrative stay of removal to an individual whose application for T nonimmigrant status sets forth a “prima facie case for approval,” until the application is approved or there is a final administrative denial after exhaustion of administrative appeals; “prima facie” is encompassed by the bona fide determination described at 8 CFR 214.205).

[^ 2] See 8 CFR 214.205. USCIS implemented the bona fide determination (BFD) process on August 28, 2024, the effective date of the Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status Final Rule. See 89 FR 34864 (Apr. 30, 2024). USCIS applies the BFD process to all applications for T nonimmigrant status filed on or after August 28, 2024. However, if an application was pending as of that date, and additional evidence is required to establish eligibility for principal T nonimmigrant status, USCIS conducts a bona fide review. In such cases, USCIS issues a Request for Evidence informing the applicant that they may be eligible for deferred action and an EAD and may file an Application for Employment Authorization (Form I-765).

[^ 3] INA 103(a) grants the Secretary of Homeland Security the authority to administer and enforce the immigration laws and 6 U.S.C. 202(5) provides authority to set national immigration enforcement policies and priorities. Decisions made to either initiate or terminate enforcement proceedings are under the purview of the executive branch, and therefore fall within DHS’s authority. See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The executive branch has exercised its discretion to grant deferred action, and the federal courts have consistently recognized the existence of this authority, since the mid-1970s. See, for example, *Soon Bok Yoon v. INS*, 538 F.2d 1211, 1213 (5th Cir. 1976); *Vergel v. INS*, 536 F.2d 755, 757-58 (8th Cir. 1976); and *Nicholas v. INS*, 590 F.2d 802, 806-08 (9th Cir. 1979), superseded by rule on other grounds, as stated in *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1024 (9th Cir. 1985).

[^ 4] In exercising its discretion, USCIS may consider the results of background checks resulting from biometrics submission, which is required for principal applicants under 8 CFR 214.204(k) as well as eligible family members under 8 CFR 214.211(c)(1).

[^ 5] See Chapter 8, Annual Cap and Waiting List [3 USCIS-PM B.8].

[^ 6] See INA 274A. See 8 CFR 274a.12(a)-(c) (referring to employment in the United States).

[^ 7] See Black’s Law Dictionary (12th ed. 2024).

[^ 8] See 8 CFR 214.205.

[^ 9] Generally, USCIS will not consider an eligible family member for deferred action and employment authorization until the principal applicant has received deferred action and employment authorization, unless there is an operational reason to process a derivative after the principal receives a BFD but before they receive deferred action and employment authorization, such as resource management.

[^ 10] See INA 212(a)(3).

[^ 11] Secondary review occurs when an application does not initially appear bona fide, and consists of a full adjudication.

[^ 12] See INA 212(a).

[^ 13] As listed in INA 212(a)(3).

[^ 14] Such as those defined in INA 101(a)(43)(C) and INA 101(a)(43)(E).

[^ 15] As defined in INA 101(a)(43)(K)(iii).

[^ 16] This includes acts defined in INA 101(a)(43)(B).

[^ 17] INA 237(d)(1).

[^ 18] Because deferred action is by its nature an exercise of prosecutorial discretion and not an immigration benefit as defined in 8 CFR 1.2, the agency does not have a process to file an administrative appeal or a motion to reopen or to reconsider. The decision not to exercise favorable prosecutorial discretion is appropriately an action within USCIS’ sole and unreviewable discretion. In addition, appeals are not available to applicants who have been denied employment authorization under 8 CFR 274a.13(c). The lack of an appeals process for BFD EADs aligns with regulatory practice pertaining to employment authorization generally.

[^ 19] See Chapter 7, Adjudication [3 USCIS-PM B.7].

[^ 20] See 8 CFR 274a.12(a)(16) and 8 CFR 274a.12(c)(25).

[^ 21] For applicants for T nonimmigrant status whose applications have been deemed bona fide, BFD EADs are issued under 8 CFR 274a.12(c)(40).

[^ 22] See INA 274A.

[^ 23] See 8 CFR 274a.14(b).

Chapter 7 - Adjudication

A. Victim-Centered Approach

USCIS strives to apply a victim-centered approach to all victim-based filings. A victim-centered approach places equal value on stabilizing victims by providing immigration relief and investigating and prosecuting traffickers. In the context of adjudicating applications for T nonimmigrant status, a victim-centered approach means applying a trauma-informed, survivor-informed, and culturally competent approach to all policies regarding victims.

When corresponding with the applicant, officers should be mindful of the potential for retraumatization in both in-person and written interactions.

B. Interview

USCIS has discretion to interview applicants for T nonimmigrant status for purposes of adjudicating the application.[1] USCIS conducts a full review of the application and supporting evidence to determine whether an interview may be warranted.

USCIS recognizes the vulnerable position of applicants for T nonimmigrant status. USCIS generally does not require an interview if the record contains sufficient information and evidence to approve the application without an in-person assessment. However, USCIS reserves the right to interview the T applicant as needed.

C. Requests to Expedite

USCIS has discretion to expedite the adjudication of immigration benefit requests, including the Application for T Nonimmigrant Status (Form I-914) and Application for Derivative T Nonimmigrant Status (Form I-914, Supplement A).[2]

D. Requests for Evidence and Notices of Intent to Deny

If the applicant has not presented sufficient or credible evidence to establish each eligibility requirement for T-1 nonimmigrant status by a preponderance of the evidence, USCIS may issue a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) to request evidence of eligibility.[3]

When there is derogatory information of which the applicant is unaware and upon which an adverse decision will be based, USCIS provides a detailed summary of the derogatory information that gives the applicant meaningful notice of the derogatory information, in accordance with 8 CFR 103.2(b)(16)(i), and an opportunity to rebut to the applicant through an RFE, NOID, or other formal notice.[4]

E. Approvals

Principal Applicants

If USCIS determines the applicant is eligible for T-1 nonimmigrant status, USCIS approves the application and grants T-1 nonimmigrant status, subject to the annual limitation.[5] USCIS provides the applicant with a written notice stating the applicant is approved and has received T-1 nonimmigrant status.[6]

USCIS may also notify other parties and entities of the approval as it determines appropriate, including any law enforcement agency (LEA) providing an endorsement and the U.S. Department of Health and Human Services' Office of Refugee Resettlement, consistent with the exceptions to the prohibitions on disclosure.[7]

Derivative Applicants

USCIS cannot approve applications for derivative T nonimmigrant status until the principal's application has been approved.

So long as the principal T nonimmigrant's application has been approved, if USCIS determines a family member of the principal nonimmigrant is eligible for derivative T nonimmigrant status, USCIS approves the family member's application.

Derivative Applicants Inside the United States

For derivative family members inside the United States, USCIS notifies the T-1 principal of the approval and provides evidence of derivative T nonimmigrant status to the derivative.[8]

Derivative Applicants Outside the United States

For derivative family members outside the United States, USCIS notifies the T-1 principal of the approval and provides the necessary documentation to the U.S. Department of State for consideration of visa issuance.[9]

To enter the United States, the derivative beneficiary must present a valid, unexpired passport as well as a valid, unexpired visa.[10] In the event of an unforeseen emergency that prevents a derivative beneficiary from presenting such documents, the derivative may apply to have USCIS waive these documentary requirements.[11] USCIS decides such applications on a discretionary, case-by-case basis. USCIS can revoke any waiver it grants to waive a documentary requirement at any time.

F. Denials

If USCIS determines that the applicant has not established eligibility for T nonimmigrant status, USCIS notifies the applicant of its decision to deny the application.[12] Consistent with disclosure rules,[13] in certain limited circumstances USCIS may also provide notice of the denial to any LEA providing an LEA declaration and the U.S. Department of Health and Human Services' Office of Refugee Resettlement.[14]

A principal applicant may request USCIS to reconsider the denial by filing a Notice of Appeal or Motion (Form I-290B). Additionally, both principal applicants and derivatives may appeal a denial of an application for T nonimmigrant status to the Administrative Appeals Office (AAO) using the Form I-290B.[15] If the applicant files a timely Form I-290B, the denial does not become final until the AAO issues a decision dismissing the appeal.[16]

Footnotes

[^ 1] See 8 CFR 103.2(b)(9).

[^ 2] See Volume 1, General Policies and Procedures, Part A, Public Services, Chapter 5, Expedite Requests [1 USCIS-PM A.5].

[^ 3] See 8 CFR 103.2(b)(8) and 8 CFR 214.205(a)(1). See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 4] See 8 CFR 103.2(b)(8)(iii), 8 CFR 103.2(b)(16)(i), and 8 CFR 214.205(a)(1), except as otherwise provided in 8 CFR 103.2(b)(16).

[^ 5] See Chapter 8, Annual Cap and Waiting List [3 USCIS-PM B.8].

[^ 6] See 8 CFR 103.2(b)(19).

[^ 7] See Chapter 14, Confidentiality Protections and Prohibitions Against Disclosure [3 USCIS-PM B.14].

[^ 8] See 8 CFR 103.2(b)(19) and 8 CFR 214.211(h)(i)(1).

[^ 9] See 8 CFR 214.211(h)(i)(2).

[^ 10] See 8 CFR 212.1.

[^ 11] See 8 CFR 212.1(g). See 8 CFR 212.1(o).

[^ 12] See 8 CFR 103.3.

[^ 13] See Chapter 14, Confidentiality Protections and Prohibitions Against Disclosure [3 USCIS-PM B.14].

[^ 14] See 8 CFR 214.204(q).

[^ 15] See 8 CFR 103.3.

[^ 16] See 8 CFR 214.204(q).

Chapter 8 - Annual Cap and Waiting List

By Congressional mandate, USCIS may only grant T-1 nonimmigrant status to 5,000 persons in any fiscal year.[1] Derivatives are not subject to this annual cap. However, USCIS does not approve applications for derivative T nonimmigrant status until USCIS has approved T-1 nonimmigrant status for the related principal applicant.

A. Waiting List Procedures

If the annual cap is met in a given fiscal year, USCIS places applicants who receive a bona fide determination but who are not granted T-1 nonimmigrant status due solely to the cap on a waiting list.[2] USCIS determines priority on the waiting list by the date the application was properly filed, with the oldest applications receiving the highest priority.[3] USCIS generally adjudicates applications in the order in which they are received.

In the subsequent fiscal year, USCIS issues a number to each applicant on the waiting list in the order of the highest priority.[4] After USCIS issues T-1 nonimmigrant status to qualifying applicants on the waiting list, USCIS issues any remaining T-1 nonimmigrant numbers for that fiscal year to new qualifying applicants in the order that the applications were properly filed.[5]

B. Unlawful Presence

An applicant for T nonimmigrant status on the waiting list to whom USCIS granted deferred action does not accrue unlawful presence[6] while maintaining deferred action.[7]

C. Removal from the Waiting List

Applicants on the waiting list must remain admissible to the United States and otherwise eligible for T nonimmigrant status. If at any time before final adjudication, USCIS receives information that an applicant is no longer eligible for T nonimmigrant status, USCIS may remove an applicant from the waiting list and terminate any grant of deferred action or parole at its discretion. USCIS provides notice to the applicant of that decision.[8]

Footnotes

[^ 1] See INA 214(o)(2).

[^ 2] See 8 CFR 214.210(b).

[^ 3] See 8 CFR 214.210(b)(1).

[^ 4] See 8 CFR 214.210(b)(2).

[^ 5] See 8 CFR 214.210(b)(3).

[^ 6] See INA 212(a)(9)(B). See Volume 8, Admissibility, Part O, Aliens Unlawfully Present [8 USCIS-PM O].

[^ 7] See 8 CFR 214.210(c).

[^ 8] See 8 CFR 214.210(d).

Chapter 9 - Applicants in Removal Proceedings

An applicant in removal proceedings who wishes to apply for T nonimmigrant status must file the Application for T Nonimmigrant Status (Form I-914) or Application for Derivative T Nonimmigrant Status (Form I-914, Supplement A) directly with USCIS.

A. Administrative Closure

In its discretion, DHS may agree to the request of a person who is in proceedings, whether a principal or derivative applicant, to file with the immigration judge or the Board of Immigration Appeals (BIA) a joint motion to administratively close or terminate proceedings without prejudice, whichever is appropriate, while USCIS adjudicates an application for T nonimmigrant status.[1]

B. Final Orders of Removal

A person subject to a final order of removal, deportation, or exclusion may file an application for T-1 nonimmigrant status directly with USCIS.[2] If a family member eligible for derivative status is the subject of a final order of removal, deportation, or exclusion, the principal may file an application for derivative T nonimmigrant status directly with USCIS.

The filing of an application for T nonimmigrant status, whether for a principal or derivative applicant, does not automatically stay a final order of removal and has no effect on DHS's authority or discretion to execute a final order of removal, although the person who is in proceedings may request an administrative stay of removal.[3]

If the person, whether the principal or derivative applicant, is in detention pending execution of the final order, the period of detention reasonably necessary to bring about the applicant's removal[4] is extended during the period that any stay is in effect.

Neither an immigration judge nor the BIA has jurisdiction to adjudicate an application for a stay of removal, deportation, or exclusion based on the filing of an application for T nonimmigrant status.[5] This jurisdiction rests with U.S. Immigration and Customs Enforcement (ICE).[6]

By operation of law, a USCIS approval of an application for T nonimmigrant status cancels any order of removal, deportation, or exclusion issued by DHS as of the date of the approval.[7] Upon approval of an application for T nonimmigrant status, an applicant who is the subject of an order of removal, deportation, or exclusion issued by an immigration judge or the BIA may seek cancellation of such order by filing a motion to reopen and terminate removal proceedings with the immigration judge or the BIA, whichever is appropriate.[8] Upon a final denial of the application for T nonimmigrant status, any stay of removal, deportation, or exclusion issued due to the pending application for T nonimmigrant status is lifted.[9]

Footnotes

[^ 1] See 8 CFR 214.204(b)(1)(ii).

[^ 2] See 8 CFR 214.204(b)(2).

[^ 3] See 8 CFR 241.6(a) (procedures to request administrative stay).

[^ 4] See 8 CFR 241.4 (discussing duration of detention).

[^ 5] See 8 CFR 214.205(g)(3).

[^ 6] See INA 237(d).

[^ 7] See 8 CFR 214.204(o)(1).

[^ 8] See 8 CFR 214.204(o)(2).

[^ 9] See 8 CFR 214.204(q)(3).

Chapter 10 - Duration and Extensions of Status

A. Overview

T nonimmigrant status is limited to 4 years for a principal T nonimmigrant, unless the principal qualifies for an extension.[1] USCIS may grant eligible family members derivative T nonimmigrant status for a period that does not exceed the expiration date of the period approved for the T-1 principal.[2]

T nonimmigrant status is extended by operation of law during the time that a principal or eligible family member's Application to Register Permanent Residence or Adjust Status (Form I-485) under INA 245(l) is pending.[3] Additionally, as a matter of discretion, USCIS may grant an extension of T nonimmigrant status for up to 4 additional years in the following two circumstances:

- A law enforcement agency (LEA), prosecutor, judge, or other authority investigating or prosecuting activity relating to human trafficking certifies that the presence of the nonimmigrant in the United States is necessary to assist in the investigation or prosecution of such activity;[4] or
- USCIS determines that an extension is warranted due to exceptional circumstances.[5]

B. Applications for Extensions of Status

1. Extensions Based on Adjustment of Status Application

To receive an extension of T nonimmigrant status based on filing an Application to Register Permanent Residence or Adjust Status (Form I-485) under INA 245(l), the T nonimmigrant must file the application in accordance with the form instructions.[6] If the T nonimmigrant files the adjustment application while still in valid T nonimmigrant status, the applicant does not need to file an Application to Extend/Change Nonimmigrant Status (Form I-539).

However, if USCIS receives the adjustment application after the period of T nonimmigrant status has expired, the filing does not operate to extend T nonimmigrant status. The Notice of Action (Form I-797) receipt notice for the adjustment application indicates that for applicants who properly and timely file their adjustment application, USCIS extends their T nonimmigrant status for as long as the adjustment application is pending.

Because both timely and untimely applicants receive the receipt notice, the receipt notice by itself does not demonstrate an automatic extension of T nonimmigrant status. Applicants may provide both the receipt notice and the Arrival/Departure Record (Form I-94) showing their most up-to-date period of T nonimmigrant status to demonstrate that their adjustment applicant was timely filed and their T nonimmigrant status has been automatically extended.

The extension of T nonimmigrant status is valid until USCIS makes a decision on the adjustment application and, during that time, the applicant continues to be in valid T nonimmigrant status with all the associated rights, privileges, and responsibilities. T nonimmigrants seeking to adjust status are authorized to work in the United States while their adjustment application is pending.

Proof of Employment Authorization

Principal T-1 nonimmigrants seeking to adjust status may present a Form I-94 reflecting their most recent validity period of T-1 nonimmigrant status with the receipt notice as evidence of employment authorization for 24 months from the expiration date on the Form I-94, unless the adjustment application is denied or withdrawn, whichever is earlier.

Principal T-1 nonimmigrants seeking to adjust status may file an Application for Employment Authorization (Form I-765) concurrently with the adjustment application to obtain an Employment Authorization Document (EAD). While the adjustment application is pending, USCIS issues any EAD, as well as renewals of such EAD, using the (c)(9) eligibility code.[7]

USCIS also issues derivative T nonimmigrants who properly file an adjustment application a receipt notice. USCIS does not extend the status of a derivative T nonimmigrant based solely on the principal T nonimmigrant's pending adjustment application. Derivatives must independently file an adjustment application. To obtain employment authorization during the extended period of T nonimmigrant status, derivative T nonimmigrants must file an Application for Employment Authorization (Form I-765).

2. Extensions Based on Law Enforcement Need or Exceptional Circumstances

To request an extension of T nonimmigrant status based on law enforcement need or exceptional circumstances, the T nonimmigrant must file an Application to Extend/Change Nonimmigrant Status (Form I-539), along with supporting evidence, in accordance with the form instructions. The T nonimmigrant bears the burden of establishing eligibility for this discretionary extension of status.

Derivative family members who have not previously entered or resided in the United States as a T nonimmigrant cannot receive an extension of status. Instead, USCIS may issue an amended approval notice with updated validity dates.

If USCIS approves the Form I-539, USCIS issues a notice of extension of the T nonimmigrant status on a Notice of Action (Form I-797).

The extension of T nonimmigrant status based on law enforcement need or exceptional circumstances is valid for 1 year from the date the initial T nonimmigrant status ends. In the case of a Form I-539 untimely filed after T nonimmigrant status has expired, the extension is valid from the date the previous status expired and for 1 year from approval of the extension.[8] During that period, the applicant continues to be in valid T nonimmigrant status with all the associated rights, privileges, and responsibilities.

USCIS issues any EAD (including renewals) using the (a)(16) eligibility code for principals and (c)(25) eligibility code for derivatives.[9] Applicants must file an application for employment authorization in order to receive an EAD, which they may file concurrently with Form I-539.

C. Timing of Application

The applicant should file the Application to Extend/Change Nonimmigrant Status (Form I-539) before the applicant's T nonimmigrant status expires. USCIS, however, has discretion to grant an extension after the expiration of the status.[10] When filing a Form I-539 untimely, the applicant should explain the reason(s) for the late filing.[11]

USCIS exercises its discretion to grant or deny an untimely filed extension request based upon the justification for the untimely filing in the specific circumstances of the case. If USCIS grants an extension of T nonimmigrant status, USCIS issues a new Form I-797 extension notice valid from the date that the previous status expired and ending 1 year after the approval of the application to extend status. Once an applicant receives this new Form I-797, the applicant may then file an application to adjust status before the expiration of the extension.

There is no appeal of a denial of a Form I-539. However, an applicant may file a motion to reopen or reconsider within 30 days of the denial.[12]

D. Evidence

1. Law Enforcement Need

In cases in which the T nonimmigrant is filing for an extension of status based on law enforcement need, supporting evidence may include:

- A newly executed Declaration for Trafficking Victim (Form I-914, Supplement B); or
- Other evidence from a law enforcement official, prosecutor, judge, or other authority who can detect, investigate, or prosecute human trafficking activity and was involved in the applicable case. The applicant must include evidence that comes directly from an LEA.

USCIS does not require Form I-914, Supplement B to demonstrate law enforcement need, although it is helpful. The applicant may submit a letter on the agency's letterhead, emails, or faxes from an LEA or any other credible evidence.

2. Exceptional Circumstances

Where T nonimmigrants are filing for an extension of status based on exceptional circumstances, applicants may submit their own statement and any other credible evidence to establish exceptional circumstances. Such evidence could include, but is not limited to:

- Medical records;
- Police or court records;
- News articles;
- Correspondence with a U.S. embassy or consulate;
- Evidence of consular processing backlogs or other delays; and
- Affidavits from persons with direct knowledge or familiarity with the applicant's circumstances.[13]

To establish eligibility for an extension of status due to exceptional circumstances, applicants should provide evidence showing how the exceptional circumstances necessitate the continuance of T nonimmigrant status.

While an applicant can file more than one extension of status, if the extension of status is based on the same evidence as a prior request, the mere fact that USCIS previously found the circumstance to be exceptional does not mean that USCIS will come to the same conclusion a second time. USCIS considers every request on a case-by-case basis and based on the evidence presented with the request.

The need to accrue continuous physical presence to be eligible to adjust status is not generally considered an exceptional circumstance warranting an extension of status. However, USCIS acknowledges that some T-1 nonimmigrants may have been unable to return to the United States due to circumstances outside their control (such as the COVID-19 pandemic or consular processing delays). USCIS may consider delays in consular processing for derivatives to be an exceptional circumstance that justifies extending the principal's T nonimmigrant status, even if it appears the principal will not be able to adjust status under INA 245(l).

E. Considerations for Family Members

To be eligible to apply for adjustment of status, a family member who is a derivative T nonimmigrant must continue to hold T nonimmigrant status at the time of filing the application for adjustment of status.[14] To facilitate efficient processing, USCIS encourages derivative T nonimmigrants to file for adjustment of status concurrently with the principal T nonimmigrant. A derivative T nonimmigrant's status is automatically extended when the derivative properly files for adjustment of status.

Once a principal T nonimmigrant is no longer a T nonimmigrant, whether due to adjustment of status to lawful permanent residence, change to another nonimmigrant status, or expiration of T nonimmigrant status, derivative T nonimmigrants are no longer eligible for initial admission into the United States on a T visa.[15]

Where the approved derivative is awaiting initial issuance of a T visa by a consulate and the principal's nonimmigrant status is soon to expire, USCIS strongly encourages the principal to seek an extension of status based on exceptional circumstances, following the instructions to the Form I-539, and then wait for the derivatives to be admitted to the United States as T derivatives before filing an adjustment application.

This prevents the derivative from being ineligible for initial admission to the United States on a derivative T visa due to the expiration of the principal's T nonimmigrant status or adjustment of status to lawful permanent residence. Once the principal T-1 nonimmigrant adjusts status, the derivative nonimmigrant can no longer be initially admitted as a T nonimmigrant.

Footnotes

[^ 1] See INA 214(o)(7)(A). See 8 CFR 214.203(a) and 8 CFR 214.212(a).

[^ 2] See 8 CFR 214.203(b).

[^ 3] See INA 214(o)(7)(C). See 8 CFR 214.212(h). See Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 9, Death of Petitioner or Principal Beneficiary [7 USCIS-PM A.9].

[^ 4] See INA 214(o)(7)(B)(i).

[^ 5] See INA 214(o)(7)(B)(iii). See 8 CFR 214.212(f) (stating that USCIS may approve an extension of status for a principal applicant based on exceptional circumstances when an approved eligible family member is awaiting issuance of their T visa by a consulate and the principal's T-1 status will expire soon).

[^ 6] USCIS adjudicates adjustment of status applications according to the T adjustment regulations at 8 CFR 245.23.

[^ 7] See 8 CFR 274a.12(c)(9).

[^ 8] The applicant should present the Form I-797 demonstrating proof of extension of T nonimmigrant status when filing an Application to Register Permanent Residence or Adjust Status (Form I-485) to adjust status to lawful permanent resident before the extension expires. See Volume 7, Adjustment of Status, Part J, Trafficking Victim-Based Adjustment [7 USCIS-PM J].

[^ 9] See 8 CFR 274a.12(a)(16). See 8 CFR 274a.12(c)(25).

[^ 10] See 8 CFR 214.212(c).

[^ 11] See 8 CFR 214.212(c).

[^ 12] See 8 CFR 103.5(a). See Notice of Appeal or Motion (Form I-290B).

[^ 13] See 8 CFR 214.212(g).

[^ 14] See 8 CFR 245.23(b)(2).

[^ 15] See 8 CFR 214.203(b) (stating that derivative family members' period of admission may not exceed the initial period of admission for the T-1 principal applicant).

Chapter 11 - Federal Benefits and Work Authorization

A. Federal Benefits

Children under the age of 18 are eligible for certain federal benefits and services as soon as they are identified as possible victims of trafficking.[1] Adults are eligible for these benefits and services upon approval of T nonimmigrant status.[2]

When USCIS receives an application from a principal applicant under the age of 18, USCIS notifies the Department of Health and Human Services (HHS) to facilitate the provision of interim assistance.[3] In the case of adults, USCIS notifies HHS upon approval of an application for T nonimmigrant status.[4]

B. Employment Authorization

To ensure efficient processing of deferred action and a Bona Fide Determination Employment Authorization Document (BFD EAD), USCIS strongly encourages all applicants to file their Application for Employment Authorization (Form I-765) at the same time as their Application for T Nonimmigrant Status (Form I-914).

Once the Form I-914 is approved, however, a principal T nonimmigrant is authorized to work incident to status and does not need to file a separate Form I-765. Upon approval of T-1 nonimmigrant status, USCIS issues an EAD, which is valid for the duration of the T-1 nonimmigrant status. If the EAD is lost, stolen, or destroyed, the T-1 nonimmigrant must file an application for a replacement document.[5]

A derivative T nonimmigrant is eligible to receive employment authorization but must apply by filing an application for employment authorization with USCIS in accordance with the form instructions.[6] Derivatives in the United States may file the application concurrently with the Application for Derivative T Nonimmigrant Status (Form I-914, Supplement A) or any time thereafter.

Derivatives outside the United States are not eligible for employment authorization until after lawful admission to the United States in T nonimmigrant status. Therefore, derivative family members who are outside the United States should not file the application for employment authorization until after they are lawfully admitted as a T nonimmigrant. If USCIS approves the application, USCIS grants the derivative employment authorization[7] for the period remaining in derivative T nonimmigrant status.[8]

Footnotes

[^ 1] See 22 U.S.C. 7105(b)(1)(G).

[^ 2] See 22 U.S.C. 7105(b)(1)(E).

[^ 3] See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457 (PDF), 122 Stat. 5044, 5077 (December 23, 2008). See 8 CFR 214.204(b)(4).

[^ 4] See 8 CFR 214.204(o).

[^ 5] See 8 CFR 214.204(o)(3). See Application for Employment Authorization (Form I-765).

[^ 6] For information regarding filing fees, see Fee Schedule (Form G-1055).

[^ 7] USCIS grants such authorization under 8 CFR 274a.12(c)(25).

[^ 8] See 8 CFR 214.211(i)(3).

Chapter 12 - Travel Outside the United States

A. Travel While Application for T Nonimmigrant Status is Pending

The filing of an application for T nonimmigrant status does not grant the applicant permission to travel outside the United States. Departures from the United States while an application for T nonimmigrant status is pending could affect the applicant's ability to establish eligibility for T nonimmigrant status. For example, a departure may impact their ability to establish physical presence in the United States or at a U.S. port of entry on account of trafficking and extreme hardship.[1] Additionally, an applicant's departure from the United States while the application for T nonimmigrant status is pending could impact the applicant's ability to return to the United States unless the applicant has another status that allows for travel. Moreover, if an applicant for T nonimmigrant status has accrued more than 180 days of unlawful presence in a single stay before departing, the applicant would be inadmissible if they again seek admission to the United States within 3 or 10 years of departure.[2]

B. Travel for T Nonimmigrants

A T nonimmigrant may travel outside the United States before applying for lawful permanent resident status. The T nonimmigrant must file an Application for Travel Documents, Parole Documents, and Arrival/Departure Records (Form I-131) seeking an advance parole document, and must be issued an advance parole document that is valid for the entire period of travel before leaving the United States in order to return to the United States in T nonimmigrant status.

Leaving the United States after first obtaining an advance parole document does not constitute a departure within the meaning of INA 212(a)(9)(B)(i).[3] Therefore, a T nonimmigrant who accrued more than 180 days of unlawful presence in a single stay would not be inadmissible under INA 212(a)(9)(B)(i) upon leaving the United States after first obtaining an advance parole document and thereafter again seeking admission.[4] However, leaving the United States after first obtaining an advance parole document does count towards time constituting a break in continuous physical presence for the purposes of adjustment under INA 245(l).[5]

A T nonimmigrant who departs the United States and returns through means other than an advance parole document issued before departure or admission at a designated port of entry with a T nonimmigrant visa does not resume T nonimmigrant status and may have to reapply for such status if certain requirements are not met. In order for a T-2, T-3, T-4, T-5, or T-6 nonimmigrant to depart the United States and return to the United States in T nonimmigrant status, the T nonimmigrant must either:

- File an Application for Travel Documents, Parole Documents, and Arrival/Departure Records (Form I-131), and obtain advance parole before departure; or
- Apply for and receive a T nonimmigrant visa from the U.S. Department of State and seek admission as a T nonimmigrant at a designated port of entry.

C. Travel Considerations

Even if a person is granted an advance parole travel document before departing the United States, the document does not entitle the person to be paroled into the United States. U.S. Customs and Border Protection makes a separate, discretionary decision on a request for parole when the person arrives at a U.S. port of entry.

DHS may revoke or terminate an advance parole document at any time, including while the person is outside the United States.[6] In that event, the person may be unable to return to the United States unless the person has a valid visa or other document that permits the person to travel to the United States and seek admission.

If the person is in the United States and DHS has granted deferred action in the case, the deferred action terminates automatically if the person leaves the United States without advance parole. Generally, if the person is in the United States and has applied for adjustment of status to that of a lawful permanent resident, USCIS deems the adjustment application abandoned if the person leaves the United States without advance parole.

Footnotes

[^ 1] See Chapter 2, Eligibility Requirements, Section C, Physical Presence on Account of Trafficking [3 USCIS-PM B.2(C)].

[^ 2] See INA 212(a)(9)(B)(i). See Volume 8, Admissibility, Part O, Aliens Unlawfully Present, Chapter 6, Effect of Seeking Admission Following Accrual of Unlawful Presence, Section A, Inadmissibility Based on Seeking Admission within the Statutory 3 Years or 10 Years After Departure or Removal [8 USCIS-PM O.6(A)].

[^ 3] See *Matter of Arrabally and Yerrabelly* (PDF), 25 I&N Dec. 771 (BIA 2012).

[^ 4] See Volume 8, Admissibility, Part O, Aliens Unlawfully Present, Chapter 6, Effect of Seeking Admission Following Accrual of Unlawful Presence, Section A, Inadmissibility Based on Seeking Admission within the Statutory 3 Years or 10 Years After Departure or Removal [8 USCIS-PM O.6(A)].

[^ 5] See Volume 7, Adjustment of Status, Part J, Trafficking Victim-Based Adjustment, Chapter 2, Eligibility Requirements, Section A, Principal Applicants [7 USCIS-PM J.2(A)].

[^ 6] See 8 CFR 212.5(e).

Chapter 13 - Revocation of Status

A. Grounds for Revocation

USCIS can revoke its approval of T nonimmigrant status at any time based on the specific grounds discussed below.[1] For most grounds, USCIS first issues a notice of intent to revoke. However, USCIS automatically revokes an approved application for derivative T nonimmigrant status if the beneficiary of the approved derivative application notifies USCIS that the beneficiary will not apply for admission to the United States.[2]

USCIS may revoke an approved application for T nonimmigrant status for the following reasons:

- The approval of the application violated the statutory and regulatory requirements for T nonimmigrant visas or involved USCIS error in the preparation, procedure, or adjudication that affects the outcome;[3]
- In the case of a T-2 spouse, a final divorce from the T-1 principal;[4]
- In the case of a T-1 principal, a law enforcement agency (LEA) with jurisdiction[5] to detect, investigate, or prosecute the acts of severe forms of trafficking in persons notifies USCIS that the T-1 nonimmigrant has refused to comply with reasonable requests to assist with the investigation or prosecution of the trafficking in persons and provides USCIS with a detailed explanation in writing;[6] or
- The LEA that signed the LEA endorsement withdraws it or disavows its contents and notifies USCIS and provides a detailed explanation of its reasoning in writing.[7]

B. Procedure for Revocation

If USCIS revokes approval of the previously approved T nonimmigrant status application, USCIS may notify the LEA that signed the LEA endorsement, any consular officer having jurisdiction over the applicant, or the Office of Refugee Resettlement of the Department of Health and Human Services of the revocation.[8]

The applicant may appeal the decision to revoke the approval within 30 days after the date of the revocation notice to the Administrative Appeals Office using the Notice of Appeal or Motion (Form I-290B).[9]

C. Effect of Revocation

1. Revocation of a Principal's Application

Revocation of an approved application for T-1 nonimmigrant status results in termination of T status for the principal and any derivatives. If a derivative application is pending at the time of such revocation, USCIS denies it. Revocation of an approved application for T-1 nonimmigrant status or an application for derivative T nonimmigrant status also revokes any waiver of inadmissibility granted in conjunction with such application. The revocation of a person's T-1 status has no effect on the annual cap.[10]

2. Revocation of T-2, T-3, T-4 or T-5 Derivative Status

If USCIS revokes T-2, T-3, T-4, or T-5 derivative status under 8 CFR 214.213, eligibility for T-6 derivative status may be affected. In cases in which the revocation ground relates to the derivative beneficiary's eligibility for derivative T nonimmigrant status, the adult or minor child of the derivative beneficiary may not be eligible for T-6 status. Without a derivative beneficiary parent who has obtained valid derivative T nonimmigrant status, a potential T-6 family member is not able to derive T-6 status.

However, when the revocation ground is not related to the derivative beneficiary's eligibility for derivative status, the adult or minor child may still be eligible for T-6 status. For example, one of the revocation grounds is for divorce. If the T-1's spouse held T-2 status but then the couple divorced and USCIS revoked the T-2 status under 8 CFR 214.213(b)(2), the adult or minor child of the T-2 may still be eligible for T-6 status. The divorce of the T-2 does not impact eligibility when the T-6 derivative's application is approved and is therefore different from other revocation grounds.

Footnotes

[^ 1] See 8 CFR 214.213.

[^ 2] See 8 CFR 214.213(a).

[^ 3] See INA 101(a)(15)(T). See 8 CFR 214.213(b)(1).

[^ 4] See 8 CFR 214.213(b)(2).

[^ 5] The provisions of the T Final Rule, 89 FR 34864 (Apr. 30, 2024) apply generally to applications pending or filed on or after its effective date, August 28, 2024. However, regarding pending applications, no provision of the rule applies to an applicant who filed before August 28, 2024, if it would make an applicant who was eligible under the previous regulations ineligible, such as the requirement at 8 CFR 214.208(b) to report to law enforcement with jurisdiction over the trafficking.

[^ 6] See 8 CFR 214.213(b)(3).

[^ 7] See 8 CFR 214.213(b)(4).

[^ 8] See 8 CFR 214.213(c) for procedures for revocation and appeal specific to applications for T nonimmigrant status. See 8 CFR 103.3 for additional information on appeal procedures.

[^ 9] See 8 CFR 103.3(a)(2).

[^ 10] See 8 CFR 214.213(d).

Chapter 14 - Confidentiality Protections and Prohibitions Against Disclosure

A. Confidentiality Protections

DHS may not generally disclose any information relating to applicants for T nonimmigrant status, as that information could be used against them by traffickers or others who would seek to harm them.[1] They are also protected against traffickers attempting to provide adverse evidence against them in relation to their applications with USCIS. These protections include the following:

- DHS is prohibited from making an adverse determination of admissibility or deportability against an applicant for T nonimmigrant status based on information furnished solely by the perpetrator of the acts of trafficking in persons;[2] and
- DHS is prohibited from disclosing any information relating to the beneficiary of a pending or approved application for T nonimmigrant status except in certain limited circumstances.[3]

B. Disclosure of Information

Officers must comply with the confidentiality provisions when an applicant for T nonimmigrant status requests information about the applicant's case.[4]

Footnotes

[^ 1] See 8 U.S.C 1367.

[^ 2] See 8 U.S.C. 1367(a)(1)(F).

[^ 3] See 8 U.S.C. 1367(a)(2). See Volume 1, General Policies and Procedures, Part A, Public Services, Chapter 7, Privacy and Confidentiality, Section E, VAWA, T, and U Cases [1 USCIS-PM A.7(E)]. See Implementation of Section 1367 Information Provisions (PDF), DHS Instruction 002-02-001, Revision 00.1, issued November 7, 2013.

[^ 4] See Volume 1, General Policies and Procedures, Part A, Public Services, Chapter 7, Privacy and Confidentiality [1 USCIS-PM A.7].

Part C - Victims of Crimes

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures.

See more

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures. We are working quickly to update and incorporate all of the AFM content into the USCIS Policy Manual, the agency's centralized online repository for immigration policies. Until then, we have moved any remaining AFM content to its corresponding Policy Manual Part. To the extent that a provision in the Policy Manual conflicts with remaining AFM content or Policy Memoranda, the updated information in the Policy Manual prevails. If you have questions or concerns about any discrepancies among these resources, contact PolicyFeedback@uscis.dhs.gov.

AFM Chapter 39 - Victims of Trafficking in Persons and other Crimes (External)

Chapter 1 - Purpose and Background

A. Purpose

In 2000, Congress created the U nonimmigrant classification (also known as the "U visa") through the passage of the Victims of Trafficking and Violence Protection Act (including the Battered Immigrant Women's Protection Act (BIWPA)).[1] The U visa serves two purposes:

- Strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking, and other crimes; and
- Protect victims of crime who have suffered substantial mental or physical abuse due to the qualifying crime and are willing to help law enforcement authorities in the investigation or prosecution of the qualifying criminal activity or the qualifying crime (QCA).[2]

B. Background

U nonimmigrant status is available to any alien who is a victim of a QCA and is otherwise eligible for the status, regardless of sex.[3] Such victims may self-petition for U nonimmigrant status by filing a Petition for U Nonimmigrant Status (Form I-918).

Aliens petitioning for U nonimmigrant status must provide a certification from a federal, state, tribal, or local law enforcement official, prosecutor, judge, or other authority investigating or prosecuting the QCA. The certification must state that the petitioner "has been helpful, is being helpful, or is likely to be helpful" in the "investigation or prosecution"[4] of the QCA.[5]

Aliens can file petitions for or pursue U nonimmigrant status while living inside or outside of the United States.

Principal petitioners can submit U nonimmigrant petitions on behalf of certain qualifying family members. Qualifying family members may include the petitioner's spouse, unmarried children under the age of 21, and unmarried siblings under the age of 18. Qualifying family member eligibility depends on the age of the principal petitioner at the time the principal petitioner files the petition for U nonimmigrant status.[6] USCIS must grant the principal petitioner U-1 nonimmigrant status before granting U nonimmigrant status to qualifying family members.

USCIS may grant U nonimmigrant status for an initial period of up to 4 years.[7] Principal petitioners in the United States receive employment authorization incident to status.[8] Qualifying family members in the United States are also authorized to work incident to status.[9]

After at least 3 years of continuous physical presence in the United States in U nonimmigrant status, principal U nonimmigrants and their qualifying family members may apply for adjustment of status to that of a lawful permanent resident.[10]

1. Acts and Amendments

Congress first established the U nonimmigrant status in 2000. Since then, Congress has enacted several amendments. The table below provides an overview of major legislation related to U nonimmigrant status.

U Nonimmigrant Status: Acts and Amendments

Acts and Amendments	Key Changes

Violence Against Women Act of 2000[11]	• Established U nonimmigrant status for alien victims of certain serious crimes when:
	  ◦ The victim has suffered substantial physical or mental abuse as a result of the crime;
	  ◦ The victim has information about the crime; and
	  ◦ A law enforcement official or a judge certifies that the victim "has been helpful, is being helpful, or is likely to be helpful" in the "investigation or prosecution" of that crime.
	  ◦ Established a list of QCA categories.

Violence Against Women and Department of Justice Reauthorization Act of 2005[12]	• Clarified that the duration of status for an initial grant of U nonimmigrant status is 4 years. • Clarified that aliens in the United States on K visas (fiancé(e) or spouse) and S visas (informant), or persons admitted under the visa waiver program, are not prohibited from qualifying for U nonimmigrant status. • Clarified that aliens who came to the United States on J visas to receive graduate medical training, and aliens who are subject to the 2-year foreign residence requirement, may also qualify for U nonimmigrant status. • Established discretion for DHS to grant stays of removal to petitioners for U nonimmigrant status who have received prima facie determinations. • Established a prohibition on adverse determinations of admissibility or deportability based on information provided to DHS by abusers or perpetrators of QCA.
William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008[13]	• Clarified that the duration of status for an initial grant of U nonimmigrant status is up to 4 years. • Provided for extensions of status based on law enforcement need or exceptional circumstances, or while an application for adjustment of status is pending. • Provided discretion to grant employment authorization to an alien who has a pending, bona fide petition for U nonimmigrant status.
Violence Against Women Reauthorization Act of 2013[14]	• Provided age-out protection by preserving the age of certain family members at the time the principal petitioner files his or her petition for U nonimmigrant status. • Provided that the exception for disclosure to law enforcement officials for a legitimate law enforcement purpose must be in a manner that protects confidentiality of the information. • Provided an additional exception for disclosure of protected information to national security officials for national security purposes.

2. Program History

Congress created the U visa program in 2000 through the passage of the Victims of Trafficking and Violence Protection Act (including the Battered Immigrant Women's Protection Act (BIWPA)). On September 17, 2007, DHS published an interim rule implementing the U nonimmigrant status provisions of BIWPA at 8 CFR 214.14 and 8 CFR 212.17.[15]

Between the time BIWPA was enacted and when the implementing regulations were published, legacy Immigration and Naturalization Service (INS) and DHS gave alien crime victims who may have been eligible based on the statutory criteria the opportunity to seek interim relief until regulations were promulgated. The 2007 interim rule formally created Form I-918, as well as the current administrative and adjudications processes for U nonimmigrant status.[16]

The 2007 interim rule addresses eligibility criteria, the petition process, filing requirements, evidentiary standards, and benefits associated with the U nonimmigrant classification.[17] The rule also provided that DHS would automatically issue an Employment Authorization Document (EAD) to principal petitioners upon the approval of the petition for U nonimmigrant status.[18]

The statute provides for 10,000 U visas available every fiscal year.[19] This statutory cap only applies to principal petitioners, not their qualifying family members. The statutory cap has been met each fiscal year, beginning in Fiscal Year (FY) 2010. Starting in FY 2011, DHS began to receive more petitions than visas available under the statutory cap.[20]

DHS created the waiting list process through the 2007 interim rule as a mechanism to address the remaining eligible petitioners after the statutory cap had been reached in a given fiscal year. U nonimmigrant petitioners placed on the waiting list, whose petitions have been deemed approvable but for the statutory cap, are eligible for employment authorization and receive a grant of deferred action[21] or, in limited circumstances, parole.

The William Wilberforce Trafficking Victims Reauthorization Act of 2008 (TVPRA 2008), signed into law on December 23, 2008, amended the Immigration and Nationality Act (INA) to provide DHS with discretion to grant employment authorization to an alien who has a pending, bona fide petition for U nonimmigrant status.[22]

In June 2021, USCIS implemented the Bona Fide Determination (BFD) process for principal petitioners and qualifying family members with pending, bona fide petitions who USCIS determines merit a favorable exercise of discretion. Under this process, USCIS exercises its discretion on a case-by-case basis to grant BFD Employment Authorization Documents (BFD EADs) and deferred action. The BFD process is distinct from the waiting list process. Before June 2021, a principal petitioner and his or her qualifying family members received employment authorization and deferred action only when USCIS placed the principal petitioner on the waiting list.

C. Legal Authorities

- INA 101(a)(15)(U) - Definition of U nonimmigrant classification
- INA 103(a) - Powers and duties of the Secretary of Homeland Security

- INA 214(p) - Requirements applicable to U nonimmigrant status visas
- 8 CFR 214.14 - Alien victims of certain qualifying criminal activity
- INA 212(a) - Classes of “aliens” ineligible for visas or admission
- INA 212(d)(3) - Temporary admission of nonimmigrants
- INA 212(d)(14) - Discretion to waive ground of inadmissibility for U nonimmigrant status
- INA 212(a)(4)(E)(ii) – Exemption from public charge ground of inadmissibility
- INA 237(d) – Administrative stay of final order of removal
- INA 248(b) – Change of nonimmigrant classification
- 8 U.S.C. 1367 – Penalties for disclosure of information
- 8 CFR 212.17 – Applications for the exercise of discretion relating to U nonimmigrant status
- 8 CFR 274a.12 – Classes of “aliens” authorized to accept employment

Footnotes

[^ 1] See Section 1513 of the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA 2000), Pub. L. 106-386 (PDF), 114 Stat. 1464, 1533 (October 28, 2000), as amended by Section 801 of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), Pub. L. 109-162 (PDF), 119 Stat. 2960, 3053 (January 5, 2006); Violence Against Women and Department of Justice Reauthorization Act of 2005—Technical Corrections, Pub. L. 109-271 (PDF), 120 Stat. 750 (August 12, 2006); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), Pub. L. 110-457 (PDF), 122 Stat. 5044 (December 23, 2008); and Title VIII of the Violence Against Women Reauthorization Act of 2013 (VAWA 2013), Pub. L. 113-4 (PDF), 127 Stat. 54, 110 (March 7, 2013).

[^ 2] See Section 1502 and 1513(a)(2) of the Violence Against Women Act of 2000, Pub. L. 106-386 (PDF), 114 Stat. 1518, 1533-1534 (October 28, 2000) (“[P]roviding battered immigrant women and children who were experiencing domestic violence at home with protection against deportation allows them to obtain protection orders against their abusers and frees them to cooperate with law enforcement and prosecutors in criminal cases brought against their abusers and the abusers of their children . . .”).

[^ 3] For specific requirements, see Chapter 2, Eligibility Requirements for U Nonimmigrant Status [3 USCIS-PM C.2].

[^ 4] In this context, the terms “investigation or prosecution” encompass detection, investigation, prosecution, conviction, and sentencing. See 8 CFR 214.14(a)(5).

[^ 5] See INA 214(p)(1).

[^ 6] See 8 CFR 214.14(f)(1).

[^ 7] See INA 214(p)(6) (subject to extension based on law enforcement need, while an application for adjustment of status under INA 245(m) is pending, or if warranted due to exceptional circumstances). See 8 CFR 214.14(g)(2).

[^ 8] See 8 CFR 274a.12(a)(19).

[^ 9] See INA 101(a)(15)(U)(ii). See INA 214(p)(3)(B). See 8 CFR 274a.12(a)(20). Under 8 CFR 214.14(f)(7), qualifying family members must file a separate Application for Employment Authorization (Form I-765) to obtain an employment authorization document.

[^ 10] See INA 245(m).

[^ 11] See Section 1513 of VTVPA 2000, Pub. L. 106-386 (PDF), 114 Stat. 1464, 1533 (October 28, 2000).

[^ 12] See Title VIII of VAWA 2005, Pub. L. 109-162 (PDF), 119 Stat. 2960, 3053 (January 5, 2006).

[^ 13] See TVPRA 2008, Pub. L. 110-457 (PDF) (December 23, 2008).

[^ 14] See VAWA 2013, Pub. L. 113-4 (PDF) (March 7, 2013).

[^ 15] See 72 FR 53014 (PDF) (Sept. 17, 2007) (interim rule).

[^ 16] See 72 FR 53014 (PDF) (Sept. 17, 2007) (interim rule).

[^ 17] See 72 FR 53014 (PDF) (Sept. 17, 2007) (interim rule).

[^ 18] See 8 CFR 214.14(c)(7).

[^ 19] See INA 214(p)(2).

[^ 20] See Number of Form I-918, Petition for U Nonimmigrant Status by Fiscal Year, Quarter, and Case Status (Fiscal Years 2009-2020).

[^ 21] Deferred action is an exercise of prosecutorial discretion that makes the alien a lower priority for removal. See 72 FR 53014 (PDF), 53015 (Sept. 17, 2007), footnote 3. See 8 CFR 274a.12(c)(14).

[^ 22] See Section 201(c) of Pub. L. 110-457 (PDF), 122 Stat. 5044, 5053 (December 23, 2008). See INA 214(p)(6).

Chapter 2 - Eligibility Requirements for U Nonimmigrant Status

A. Principal Petitioners

To be eligible for U nonimmigrant status, principal petitioners must establish that they meet the following eligibility requirements by a preponderance of the evidence:

- They are or were the victim of a qualifying criminal activity or qualifying crime (QCA) that violated U.S. law or occurred in the United States (including Indian country and military installations) or the territories and possessions of the United States;
- They possess information concerning the QCA;

- They have been, are being, or are likely to be helpful to a federal, state, tribal, or local law enforcement official, prosecutor, judge, or other authority investigating or prosecuting the QCA;
- They have suffered substantial physical or mental abuse as a result of being a victim of a QCA;[1] and
- They are admissible or merit a discretionary waiver of any applicable grounds of inadmissibility.[2]

B. Qualifying Family Members

Certain family members of the principal petitioner may be eligible for derivative U nonimmigrant status, depending on the age of the principal petitioner at the time of filing the principal petition for U nonimmigrant status.[3] The principal petitioner must be granted U-1 nonimmigrant status in order for any qualifying family member to be granted derivative U nonimmigrant status.

Overview of Qualifying Family Members

Petitioner	Qualifying Family Member
A principal petitioner 21 years of age or older at the time of filing the petition may file for:	• Spouse (U-2) • Unmarried children under the age of 21 (U-3)
A principal petitioner under the age of 21 years old at the time of filing the petition may file for:	• Spouse (U-2) • Unmarried children under the age of 21 (U-3) • Parents (U-4) • Unmarried siblings under the age of 18 (U-5)

Principal petitioners may choose to file for qualifying family members:

- At the time of submitting the principal petition;
- After the principal petition has been filed and remains pending; or
- After the principal petition has been approved for U nonimmigrant status.

When determining whether a family member is eligible for U-2, U-3, U-4, or U-5 nonimmigrant status, officers must confirm that:

- The alien for whom the Petition for Qualifying Family Member of U-1 Recipient (Form I-918, Supplement A) was filed has a qualifying family relationship with the principal petitioner; and
- The qualifying family member is admissible to the United States.

For the alien to establish eligibility as a qualifying family member, the relationship between the principal petitioner and the family member must exist:

- When the principal petitioner's Petition for U Nonimmigrant Status (Form I-918) is favorably adjudicated;
- When the Form I-918 Supplement A is filed;
- When the Form I-918 Supplement A is adjudicated; and
- At the time of the family member's admission as a U nonimmigrant.[4]

The eligibility requirements that apply to principal petitioners do not apply to qualifying family members. Qualifying family members do not need to demonstrate helpfulness in the investigation or prosecution of the qualifying crime, or that they have suffered substantial physical or mental abuse as a result of a qualifying crime.

Footnotes

[^ 1] See INA 101(a)(15)(U).

[^ 2] See INA 212(d)(14).

[^ 3] See 8 CFR 214.14(f)(1).

[^ 4] See 8 CFR 214.14(f)(4) as limited by *Medina Tovar v. Zuchowski,* 982 F.3d 631 (9th Cir. 2020) (en banc) (holding invalid the regulatory requirement that a spousal relationship exist at the time the Form I-918 is filed in order for the spouse to be eligible for classification as a U-2 nonimmigrant). As a matter of policy, USCIS applies the *Medina Tovar* decision nationwide.

Chapter 3 - Documentation and Evidence [Reserved]

Chapter 4 - Adjudication

The U nonimmigrant status program now involves three distinct adjudicative processes:

- Bona Fide Determination (BFD) process for principal petitioners and qualifying family members with pending, bona fide U nonimmigrant petitions, who USCIS determines merit a favorable exercise of discretion;[1]
- Waiting list adjudication for petitions USCIS determines are eligible for U nonimmigrant status but cannot be approved due to the annual statutory cap; and
- Final adjudication of eligible petitions for U nonimmigrant status, where the approval of a principal petition results in the issuance of a visa drawn from the statutory cap of 10,000 visas allotted per fiscal year.

Overview of U Nonimmigrant Adjudication Processes

Adjudication	USCIS Process	Benefits

Adjudication	USCIS Process	Benefits
BFD (Interim Benefit)	• Does not make a final determination of eligibility. • Determines whether a pending petition is bona fide by meeting initial filing requirements and whether background checks are completed. • Determines whether background checks indicate a risk to national security or public safety, and otherwise merits a favorable exercise of discretion. • Initiates waiting list adjudication for principal petitioners who do not receive a Bona Fide Determination Employment Authorization Document (BFD EAD). • Places BFD EAD recipients in line with U waiting list petitioners for U nonimmigrant status adjudication in receipt date order	• Principal petitioners and qualifying family members living in the United States receive a BFD EAD and deferred action valid for 4 years.
Waiting List (Interim Benefit)	• Determines eligibility for U nonimmigrant status at the time of adjudication. • Places eligible petitioners not granted U nonimmigrant status "due solely to the (statutory) cap" on the waiting list.[2] • Denies ineligible petitioners. • Places U waiting list petitioners in line with BFD EAD recipients for U nonimmigrant status adjudication in receipt date order.	• Principal petitioners and qualifying family members living in the United States are eligible for employment authorization and deferred action for 4 years. • USCIS may grant principal petitioners and qualifying family members living outside of the United States parole in limited circumstances.
Final Adjudication (Full Benefit)	• Makes a final determination of eligibility for U nonimmigrant status. • Grants U nonimmigrant status to eligible petitioners. • Denies ineligible petitioners.	• Principal petitioners and qualifying family members in the United States receive U nonimmigrant status and employment authorization for up to 4 years.

Footnotes

[^ 1] See Appendix: Bona Fide Determination Process Flowchart [3 USCIS-PM C.4, Appendices Tab].

[^ 2] See 8 CFR 214.14(d)(2).

Chapter 5 - Bona Fide Determination Process

By statute, USCIS has discretion to provide employment authorization to aliens with pending, bona fide U nonimmigrant status petitions.[1] Consequently, USCIS implemented the Bona Fide Determination (BFD) process.

During the BFD process, USCIS first determines whether a pending petition is bona fide. Second, USCIS, in its discretion, determines whether the petitioner poses a risk to national security or public safety, and otherwise merits a favorable exercise of discretion. If USCIS grants the alien a Bona Fide Determination Employment Authorization Document (BFD EAD) as a result of the BFD process, USCIS then also exercises its discretion to grant that alien deferred action for the period of the BFD EAD. USCIS generally does not conduct waiting list adjudications for aliens who USCIS grants BFD EADs and deferred action to; these petitioners' next adjudicative step is final adjudication when space is available under the statutory cap.[2]

As a matter of policy, USCIS interprets "bona fide" as part of its administrative authority to implement the statute as outlined below. Bona fide generally means "made in good faith; without fraud or deceit."[3] Accordingly, when interpreting the statutory term within the context of U nonimmigrant status, USCIS determines whether a petition is bona fide based on the petitioner's compliance with initial evidence requirements and successful completion of background checks. If USCIS determines a petition is bona fide, USCIS then considers any national security and public safety risks, as well as any other relevant considerations, as part of the discretionary adjudication.[4]

As a primary goal, USCIS seeks to adequately evaluate and adjudicate petitions as efficiently as possible. The BFD process provides an opportunity for certain petitioners to receive BFD EADs and deferred action while their petitions are pending, consistent with the William Wilberforce Trafficking Victims Reauthorization Act of 2008 (TVPRA 2008).[5]

Only petitioners living in the United States may receive BFD EADs, since those outside the United States cannot as a practical matter work in the United States.[6] Likewise, deferred action can only be accorded to petitioners in the United States since those outside the United States have no potential removal to be deferred.

A. Bona Fide Determination

1. Principal Petitioners

USCIS determines a principal petition is bona fide if:

- The principal petitioner has properly filed a complete Petition for U Nonimmigrant Status (Form I-918), including all required initial evidence,[7] except for the Application for Advance Permission to Enter as a Nonimmigrant (Form I-192).[8] Required initial evidence includes:
  - A complete and properly filed U Nonimmigrant Status Certification (Form I-918, Supplement B) submitted within 6 months of the certifier's signature; and
  - A personal statement from the petitioner describing the facts of the victimization; and
- USCIS has received the result of the principal petitioner's background and security checks based upon biometrics.[9]

2. Qualifying Family Members

A qualifying family member is not guaranteed a BFD EAD solely because the principal petitioner receives a BFD.[10] The record must independently demonstrate the Form I-918, Supplement A is bona fide. USCIS determines a qualifying family member's petition is bona fide when:

- The principal petitioner receives a BFD;
- The petitioner has properly filed a complete Petition for Qualifying Family Member of U-1 Recipient (Form I-918, Supplement A);
- The petition includes credible evidence of the qualifying family relationship;[11] and
- USCIS has received the results of the qualifying family member's background and security checks based upon biometrics.[12]

B. Exercise of Discretion, Including Risk to National Security or Public Safety and Other Factors

Once USCIS has determined a petition is bona fide, USCIS determines whether the petitioner poses a risk to national security[13] or public safety by reviewing the results of background checks, and considers other relevant discretionary factors.[14] USCIS then determines whether to exercise its discretion to issue a BFD EAD and grant deferred action to a petitioner.

Section 214(p)(6) of the Immigration and Nationality Act (INA) gives the Secretary of Homeland Security, and USCIS as his or her designee, discretionary authority over the issuance of employment authorization to aliens with pending, bona fide U nonimmigrant status petitions.[15] A principal petitioner or qualifying family member who poses a risk to national security or public safety, or has other adverse discretionary factors, may not merit the favorable exercise of discretion necessary to grant deferred action.

Moreover, at the final adjudication, such individuals may require a waiver for any grounds of inadmissibility, and may be ineligible for U nonimmigrant status if they do not merit a favorable exercise of discretion. Therefore, in exercising the discretion granted by the INA, USCIS grants BFD EADs to principal petitioners and qualifying family members with pending bona fide petitions who it determines merit a favorable exercise of discretion, considering any risk to national security or public safety, as well as other relevant discretionary factors.

USCIS may choose not to exercise its discretion to grant a BFD EAD and deferred action where a petitioner appears to pose a risk to national security or public safety. For example, where a principal petitioner or qualifying family member has been convicted of or arrested for any of the following acts, USCIS generally does not issue a BFD EAD and deferred action and instead proceeds to a full adjudication to assess eligibility for waiting list placement. The following categories generally overlap with inadmissibility grounds[16] and may include:

- National security concerns;[17] and
- Public safety concerns, which include but are not limited to:
  - Murder, rape, or sexual abuse;
  - Offenses involving firearms, explosive materials, or destructive devices;[18]
  - Offenses relating to peonage, slavery, involuntary servitude, and trafficking in persons;[19]
  - Aggravated assault;
  - An offense relating to child pornography; and
  - Manufacturing, distributing, or selling of drugs or narcotics.[20]

Violent and dangerous crimes, such as those listed above, embody the very activities law enforcement seeks to deter and prevent through cooperation facilitated by the U nonimmigrant status program.

Additionally, USCIS may determine on a case-by-case basis that other adverse factors weigh against a favorable exercise of discretion. USCIS may also exercise discretion favorably notwithstanding the above concerns if case-specific circumstances warrant it.

Recognizing that many factors may influence whether criminal activity is prosecuted and results in a conviction, an arrest for a serious crime is relevant to whether USCIS should exercise its discretion favorably. A determination about whether to favorably exercise discretion when there are indicators of national security or public safety concerns requires a comprehensive review of the available evidence.

For example, officers may need to request additional evidence or information in certain cases where security checks indicate that a petitioner has an arrest record.[21] Therefore, USCIS does not conduct this in-depth, discretionary review during the BFD process. Instead, if USCIS determines that a petitioner may pose a risk to national security or public safety, or has other relevant adverse factors that would require further review, and therefore will not receive a BFD EAD, USCIS initiates a waiting list adjudication and conducts a comprehensive discretionary review as part of the evaluation of Form I-192 if one is submitted.

USCIS evaluates all evidence provided by petitioners regarding their arrest records before making determinations for waiting list placement.[22]

C. Adjudicative Process

USCIS evaluates all petitions for U nonimmigrant status filed by aliens living in the United States as described above.[23] If USCIS determines a principal petitioner and any other qualifying family members have a bona fide petition and warrant a favorable exercise of discretion, USCIS issues them BFD EADs and grants deferred action.

USCIS initiates waiting list adjudication for petitioners who do not receive BFD EADs. When USCIS determines a principal petitioner will not receive a BFD EAD, USCIS proceeds to a full adjudication for waiting list placement for the principal petitioner and his or her qualifying family members.

A determination that a petitioner will not receive a BFD EAD and deferred action is not a denial of Form I-918 or the Application for Employment Authorization (Form I-765). A petitioner who does not receive a BFD EAD and deferred action is evaluated for waiting list eligibility and still has the opportunity to obtain employment authorization and a grant of deferred action if deemed eligible for waiting list placement. Consequently, non-issuance of a BFD EAD is not a final agency action. Correspondingly, USCIS does not accept or process motions to reopen or reconsider, appeals,[24] or requests to re-apply for a BFD EAD.

For any qualifying family member who will not receive a BFD EAD, USCIS completes a full adjudication for that qualifying family member. The full adjudication includes the issuance of Requests for Evidence (RFEs) to address any deficiencies or concerns identified in the qualifying family member's record but it is not an adjudication for waiting list placement. Because qualifying family members are "accompanying or following to join" the principal petitioner, they will not be placed on the waiting list unless the principal petitioner was placed on the waiting list.[25]

If the qualifying family member resolves the deficiencies or concerns in the record, USCIS issues a BFD EAD and grants deferred action to the qualifying family member. If additional evidence provided by the qualifying family member does not resolve the deficiencies or concerns identified, then USCIS does not issue a BFD EAD and generally places the qualifying family member's petition with the principal petition back in line to await a final statutory cap adjudication.

When USCIS issues a final decision to the principal petitioner, USCIS also issues a final decision for any qualifying family member who did not receive a BFD EAD. USCIS retains the authority to deny any petition when, after full adjudication, USCIS determines the qualifying family member is ineligible for the underlying benefit.

For example, USCIS may deny the petition where the record establishes that the claimed family member does not have a qualifying family relationship with the petitioner, or where USCIS determines a favorable exercise of discretion is not warranted to waive the qualifying family member's grounds of inadmissibility.

1. Criminal History Check for Bona Fide Determination Employment Authorization Documents

To efficiently determine whether to issue BFD EADs and grant deferred action, USCIS conducts background and security checks to identify petitioners who may pose risks to national security and public safety, or other adverse discretionary factors. USCIS relies on a variety of databases that collect information from law enforcement agencies and other federal, state, local, and tribal agencies, including information regarding arrests and convictions.

USCIS uses this information to determine whether a petitioner is admissible for the purposes of receiving a grant of U nonimmigrant status or merits a favorable exercise of discretion to waive any grounds of inadmissibility. USCIS' consideration of national security and public safety risks at the BFD EAD stage aligns with inadmissibility grounds evaluated during the adjudication of a petition for U nonimmigrant status and is therefore a consistent exercise of discretion within the authority afforded by INA 214(p)(6) to grant BFD EADs.

A petitioner who is not issued a BFD EAD due to the risk the petitioner appears to pose to national security or public safety receives a full adjudication for waiting list placement. During the adjudication for waiting list placement, petitioners have the opportunity to provide USCIS with potentially mitigating information or other evidence pertaining to arrests or convictions.

USCIS issues petitioners a BFD EAD and grants deferred action in order to promote victim stability and continued cooperation with law enforcement. However, USCIS updates and reviews background and security checks at regular intervals during the validity period of a principal petitioner or a qualifying family member's BFD EAD.

Additionally, USCIS retains discretion to update background and security checks at any time when case-specific circumstances warrant. During those reviews, USCIS evaluates whether the petitioner and qualifying family members who have been granted BFD EADs and deferred action continue to warrant the BFD EAD and merit a favorable exercise of discretion while their petitions for U nonimmigrant status are pending with USCIS.

USCIS reserves the right to revoke the BFD EAD[26] and terminate the grant of deferred action at any time if it determines the BFD EAD or favorable exercise of discretion are no longer warranted, or the prior BFD EAD and deferred action were granted in error.

For example, USCIS may revoke the BFD EAD and terminate deferred action if USCIS identifies any adverse information, such as new information pertaining to the risks the petitioner poses to national security or public safety, or the withdrawal of a petitioner's Form I-918, Supplement B. At that time, USCIS initiates a waiting list adjudication to gather additional information and evidence to determine if the petitioner is eligible for a waiver of inadmissibility for any relevant inadmissibility grounds and placement on the waiting list.

2. Previously Filed Form I-765 for Bona Fide Determination Process

USCIS uses all Applications for Employment Authorization (Form I-765) already filed by principal petitioners under 8 CFR 274a.12(a)(19) and (c)(14) to issue a BFD EAD. USCIS also uses Form I-765 applications previously filed under 8 CFR 274a.12(a)(20) and (c)(14) for a qualifying family member to issue a BFD EAD to qualifying family members. Using previously filed applications limits the burden on petitioners to file additional paperwork.

Where a petitioner has filed a Form I-918 but has not filed an accompanying application for employment authorization under 8 CFR 274a.12(a)(19), (a)(20) or (c)(14), USCIS issues a notice indicating that the petitioner has received a BFD and may receive a BFD EAD. To obtain an EAD, the petitioner must file a Form I-765 after receiving this notice.

3. Bona Fide Determination Employment Authorization Document Issuance

Once USCIS has determined that a petitioner present in the United States has a bona fide petition and merits a favorable exercise of discretion, and therefore may receive a BFD EAD, USCIS issues a notice to inform the petitioner of the decision.

Such petitioners who have already filed a Form I-765 under either of the EAD classifications noted above then receive an EAD and a grant of deferred action valid for 4 years. Petitioners who must file a new Form I-765 after receiving the BFD notice from USCIS receive employment authorization and deferred action valid for 4 years once USCIS finishes adjudicating the Form I-765.

4. Prima Facie Case for Approval

Where USCIS issues a BFD EAD to a petitioner, the petitioner is also considered to have established a prima facie case for approval within the meaning of INA 237(d)(1). The term "prima facie" refers to a petition appearing sufficient on its face.

The evaluation performed by USCIS to determine whether a petition is bona fide and whether a petitioner receives a BFD EAD is a more complex evaluation than looking at the petition on its face alone. The BFD process satisfies the prima facie standard that U.S. Immigration and Customs Enforcement (ICE) previously requested in specific circumstances[27] since the steps taken to determine whether a petition is bona fide and a petitioner receives a BFD EAD rely on the initial evidence submitted with a petition for U nonimmigrant status, as well as the results of background checks.

5. Waiting List Adjudication for Petitioners Not Issued a Bona Fide Determination Employment Authorization Document

Once an officer has determined that a petitioner will not receive a BFD EAD, the officer reviews the complete filing and identifies any deficiencies or concerns that need to be addressed for waiting list adjudication. The officer then issues an RFE or Notice of Intent to Deny (NOID), which includes:[28]

- A notice explaining that USCIS will not be issuing a BFD EAD; and
- An RFE to address any deficiencies or concerns associated with waiting list adjudication.

If USCIS determines that a petitioner will not receive a BFD EAD, but can be placed on the waiting list, that decision generally does not affect the timeline in which the petition for U nonimmigrant status is adjudicated for final determination of U nonimmigrant status. If USCIS determines that a petitioner will not receive a BFD EAD and cannot be placed on the waiting list, USCIS will deny the petition.

6. Request to Renew Bona Fide Determination Employment Authorization Document and Deferred Action

Generally, USCIS does not charge a fee for the filing of certain victim-based and humanitarian benefit requests, including Form I-918 and Form I-918, Supplement A.[29] Consequently, petitioners who receive BFD EADs do not need to submit a filing fee for the initial Form I-765 associated with the BFD EAD. Petitioners who choose to renew their BFD EADs may do so under existing procedures without a fee.[30] Once a BFD EAD is renewed, the accompanying grant of deferred action is also renewed.

TVPRA 2008 requires USCIS to permit petitioners for U nonimmigrant status to apply for fee waivers for “any fees associated with filing an application for relief through final adjudication of the adjustment of status.”[31] USCIS has interpreted this to mean that, in addition to the main benefit request, applicants and petitioners must have the opportunity to request a fee waiver for any form associated with the main benefit, including applications for waivers of inadmissibility or employment authorization. Principal petitioners and qualifying family members who are seeking to renew a BFD EAD must either submit a filing fee or submit a Request for Fee Waiver (Form I-912).

An initial BFD EAD grant does not guarantee future renewals. Principal petitioners and qualifying family members are evaluated independently for each EAD and deferred action renewal to ensure that the BFD EAD and grant of deferred action are still warranted as a matter of discretion.

>Additionally, USCIS may identify principal petitioners and qualifying family members who pose a risk to national security and public safety during the validity period of the BFD EAD and deferred action, until final adjudication of U nonimmigrant status.

At any point during the validity period, USCIS has the right to revoke employment authorization or terminate deferred action if USCIS determines a national security or public safety concern is present, if USCIS determines the BFD EAD and deferred action is no longer warranted, the Form I-918 Supplement B law enforcement certification is withdrawn, or USCIS determines the prior BFD EAD was issued in error.[32]

If USCIS determines that adverse information may impact a principal petitioner’s ability to maintain a BFD EAD and deferred action, USCIS will initiate a waiting list review for the principal petition. Similarly, if USCIS determines that adverse information may impact a qualifying family member’s ability to maintain a BFD EAD and deferred action, USCIS will conduct a full adjudication of the qualifying family member’s petition as described above to determine whether the qualifying family member can maintain a BFD EAD and deferred action.

An initial grant or renewal of a BFD EAD and deferred action does not guarantee that USCIS will approve the principal petitioner or his or her qualifying family members for U nonimmigrant status. Generally, USCIS adjudicates petitions for U nonimmigrant status in the order in which they are received, subject to limited exceptions. When the principal petitioner’s filing is next in line for final adjudication, an officer assesses eligibility requirements for U nonimmigrant status. This adjudication does not include consideration of prior grants or renewals of BFD EAD or deferred action.

7. Petitioners Residing Outside of the United States

USCIS only issues BFD EADs and deferred action to petitioners living in the United States as it cannot provide deferred action or employment authorization to petitioners outside the United States. Deferred action, as an exercise of prosecutorial discretion to make an alien a lower priority for removal from the United States, is only applicable to aliens in the United States. Additionally, INA 274A gives the Secretary of Homeland Security, and USCIS as his or her designee, authority over alien employment authorization in the United States.

Because the BFD EAD is only for petitioners living in the United States, principal petitioners (and their qualifying family members) who live outside of the United States proceed directly to waiting list adjudication.

Generally, USCIS adjudicates cases in the order in which they were received to determine waiting list placement. If USCIS determines a principal petitioner residing outside the United States is eligible for waiting list placement, the principal petitioner and his or her qualifying family members should submit a Form I-765 upon admission to the United States to receive an EAD.

Footnotes

[^ 1] See INA 214(p)(6) (“The Secretary may grant work authorization to any alien who has a pending, bona fide application for nonimmigrant status under section 101(a)(15)(U).”).

[^ 2] See Appendix: Bona Fide Determination Process Flowchart [3 USCIS-PM C.5, Appendices Tab].

[^ 3] See Black’s Law Dictionary (11th ed. 2019).

[^ 4] Submission of biometrics is a requirement for principal petitioners as well as derivatives. See 8 CFR 214.14(c)(3) and 8 CFR 214.14(f)(5).

[^ 5] See Pub. L. 110-457 (PDF) (December 23, 2008). See INA 214(p)(6) (“The Secretary may grant work authorization to any alien who has a pending, bona fide application for nonimmigrant status under section 101(a)(15)(U).”).

[^ 6] See INA 274A. See 8 CFR 274a.12(a), (b), (c) (referring to employment in the United States).

[^ 7] See 8 CFR 214.14(c)(2).

[^ 8] One of the main purposes for issuing employment authorization to those with pending, bona fide petitions is to provide EADs to good faith petitioners who are vulnerable due to lengthy wait times. Requiring and adjudicating Form I-192 for purposes of the EAD would delay the EAD adjudication and undermine efficiency. Instead of adjudicating the Form I-192 at this stage, USCIS relies on criminal history checks.

[^ 9] See instructions for the Petition for U Nonimmigrant Status (Form I-918).

[^ 10] The principal petitioner enables access to the benefits associated with U nonimmigrant status for the qualifying family member. Therefore, USCIS does not consider a qualifying family member for a BFD unless the principal petitioner receives a BFD.

[^ 11] Under INA 214(p)(4), USCIS considers any credible evidence relevant to the petition.

[^ 12] See instructions for Petition for Qualifying Family Member of U-1 Recipient (Form I-918, Supplement A).

[^ 13] See INA 212(a)(3).

[^ 14] See Section C, Adjudicative Process, Subsection 1, Criminal History Check for BFD EADs [3 USCIS-PM C.5(C)(1)].

[^ 15] See INA 214(p)(6) (“The Secretary *may* grant work authorization to any alien who has a pending, bona fide application for nonimmigrant status under section 101(a)(15)(U).”) (emphasis added).

[^ 16] See INA 212(a).

[^ 17] As listed in INA 212(a)(3).

[^ 18] Such as those defined in INA 101(a)(43)(C) and (E).

[^ 19] As defined in INA 101(a)(43)(K)(iii).

[^ 20] This includes acts defined in INA 101(a)(43)(B).

[^ 21] See *Matter of Arreguin*, 21 I&N Dec. 38, 42 (BIA 1995) (considering but hesitating to give "substantial weight" to an uncorroborated arrest report). See *Garces v. U.S. Att'y Gen.*, 611 F.3d 1337, 1350 (11th Cir. 2010) ("Absent corroboration, the arrest reports by themselves do not offer reasonable, substantial, and probative evidence that there is reason to believe Garces engaged in drug trafficking.").

[^ 22] See *Henry v. I.N.S.*, 74 F.3d 1, 6 (1st Cir. 1996) (noting "while an arrest, without more, is simply an unproven charge, the fact of the arrest, and its attendant circumstances, often have probative value in immigration proceedings.").

[^ 23] See Section A, Principal Petitioners [3 USCIS-PM C.5(A)] and Section B, Qualifying Family Members [3 USCIS-PM C.5(B)].

[^ 24] Appeals are not available to applicants who have been denied employment authorization under 8 CFR 274a.13(c). Therefore, even if the BFD EAD issuance was considered a final agency action, the lack of an appeals process for BFD EADs aligns with regulatory practice pertaining to employment authorization generally.

[^ 25] See INA 101(a)(15)(U)(ii).

[^ 26] See 8 CFR 274a.14(b).

[^ 27] See ICE's Revision of Stay of Removal Request Reviews for U Visa Petitioners webpage.

[^ 28] See Chapter 6, Waiting List [3 USCIS-PM C.6].

[^ 29] See Fee Schedule (Form G-1055).

[^ 30] See 8 CFR 274a.13(d). See Instructions for Form I-765. See Fee Schedule (Form G-1055).

[^ 31] See INA 245(l)(7).

[^ 32] See 8 CFR 274a.14(b).

Chapter 6 - Waiting List

When the 10,000 visas under the statutory cap have been allocated in a given fiscal year, USCIS places remaining petitioners eligible for U nonimmigrant status on the waiting list. Principal petitioners placed on the waiting list are eligible for employment authorization and receive a grant of deferred action or, in limited circumstances, parole.[1] Additionally, USCIS grants these same benefits to the qualifying family members of principal petitioners placed on the waiting list.

Officers initiate a waiting list adjudication for petitioners who do not receive employment authorization and deferred action based on the Bona Fide Determination (BFD) process.[2] While the BFD process does not include a full analysis of eligibility requirements, USCIS conducts a full adjudication necessary to determine eligibility for U nonimmigrant status as part of the waiting list process. Unlike the BFD process, officers may issue a Request for Evidence (RFE) or a Notice of Intent to Deny (NOID) to gather additional information necessary to adjudicate for waiting list placement.

Consistent with longstanding practice, U.S. Immigration and Customs Enforcement (ICE) may request expedited waiting list adjudications for specific petitioners, in relation to enforcement priorities.[3]

Except in cases where ICE requests expedited waiting list adjudication, or where USCIS revokes the Bona Fide Determination Employment Authorization Document (BFD EAD) and terminates deferred action, USCIS generally does not conduct waiting list adjudications for aliens to whom USCIS grants BFD EADs and deferred action.

A. Eligibility

To be placed on the waiting list, a petitioner must establish all statutory and regulatory requirements by a preponderance of the evidence.[4] At the time of placement on the waiting list, a petitioner is considered eligible for U nonimmigrant status, but not granted U nonimmigrant status "due solely to the cap."[5] Though petitioners placed on the waiting list are generally approved for U nonimmigrant status, approval is not guaranteed.[6]

B. Adjudication of Waiting List Eligibility

USCIS determines waiting list placement on a case-by-case basis. Officers:

- Perform a full evaluation of eligibility requirements, which includes but is not limited to:
  - Determining whether the petitioner was the victim of qualifying criminal activity or qualifying crime (QCA);
  - Analyzing evidence submitted to establish substantial mental and physical abuse;
  - Assessing the U Nonimmigrant Status Certification (Form I-918, Supplement B) for all details regarding the QCA;
- Complete a full review of background checks; and
  - Determine whether any applicable inadmissibility grounds are waivable in the exercise of discretion in the final adjudication, which includes a detailed, individualized assessment for principal petitioners and qualifying family members who have one or more applicable grounds of inadmissibility.[7]

Petitioners or qualifying family members who are inadmissible under INA 212(a) are generally ineligible to receive visas or be admitted to the United States. USCIS may exercise its discretion to deny waiver requests in the following circumstances:

- Aliens with criminal histories or serious immigration violations;
- Aliens who pose a national security or public safety risk;
- Aliens determined to have committed fraud or misrepresentation; or
- For any other reasons that USCIS deems necessary and appropriate.

For example, officers may need to request additional evidence or information in certain cases where security checks indicate that a petitioner has an arrest record.[8] The courts and administrative appellate bodies have deemed an arrest record, as well as police reports and other corroborating information, as appropriate for consideration for purposes of applications for discretionary relief, provided that the evidentiary weight of the arrest and police reports is properly assessed and considered.[9]

Although officers fully evaluate a petition for placement on the waiting list, officers must review the filing again and determine that the petitioner remains eligible for U nonimmigrant status before approving the petition when space becomes available under the statutory cap in a subsequent fiscal year.

Decision

Upon determining eligibility for waiting list placement, USCIS issues a notice to petitioners with information regarding eligibility for work authorization and deferred action. Employment authorization based on deferred action is permitted under 8 CFR 274a.12(c)(14) to petitioners living in the United States who have filed an Application for Employment Authorization (Form I-765).

Waitlisted petitioners remain on the waiting list until their petitions are adjudicated for U nonimmigrant status in the order they were received. Grants of deferred action or parole to principal petitioners placed on the waiting list, and their qualifying family members, are preserved until a final agency decision is made on the petition, unless the individual grant of deferred action or parole is terminated at USCIS' discretion.[10]

Waitlisted petitioners do not accrue unlawful presence while on the waiting list.[11] Petitioners on the waiting list and their qualifying family members, who are outside the United States, may generally seek parole on a case-by-case basis through the processes available to other aliens.

Principal petitioners placed on the waiting list, and their qualifying family members, receive employment authorization valid for a period of 4 years, similar to petitioners who receive a BFD EAD. Principal petitioners who file an application for employment authorization under 8 CFR 274a.12(c)(14) must submit a fee or a Request for Fee Waiver (Form I-912). Principal petitioners placed on the waiting list and their qualifying family members may request renewals of employment authorization and deferred action if they remain on the waiting list longer than 4 years.

Principal petitioners are granted employment authorization incident to a grant of U nonimmigrant status. Consequently, USCIS converts applications for employment authorization under 8 CFR 274a.12(a)(19) to 8 CFR 274a.12(c)(14) for principal petitioners placed on the waiting list.

For applications for employment authorization under 8 CFR 274a.12(a)(20) or (c)(14), qualifying family members must submit a fee or a Form I-912.[12]

USCIS issues an RFE or NOID to principal petitioners who are determined ineligible for waiting list placement based on the file review. Petitioners have the opportunity to submit additional information to address deficiencies or concerns identified in the RFE or the NOID. If, after reviewing the additional evidence, the officer determines that the petitioner has not established eligibility for U nonimmigrant status by a preponderance of the evidence, USCIS issues a notice of denial of the petition for U nonimmigrant status to the petitioner.

Footnotes

[^ 1] See 8 CFR 214.14(d)(2).

[^ 2] See Chapter 5, Bona Fide Determination Process [3 USCIS-PM C.5].

[^ 3] See ICE Directive 11005.2: Stay of Removal Requests and Removal Proceedings Involving U Nonimmigrant Status (U Visa) Petitioners, issued August 2, 2019.

[^ 4] See Chapter 2, Eligibility Requirements for U Nonimmigrant Status, Section A, Principal Petitioners [3 USCIS-PM C.2].

[^ 5] See 8 CFR 214.14(d)(2).

[^ 6] See Chapter 7, Adjudication for Statutory Cap, Section C, Adjudicative Order [3 USCIS-PM C.7].

[^ 7] Congress granted DHS the discretionary authority to waive most inadmissibility grounds for a person seeking U nonimmigrant status if it is in the public or national interest to do so. See INA 212(d)(3)(A)(ii). See INA 212(d)(14) (authorizing the waiver of any inadmissibility ground except for participation in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing). See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis [1 USCIS-PM E.8].

[^ 8] See *Matter of Arreguin*, 21 I&N Dec. 38, 42 (BIA 1995) (considering but hesitating to give "substantial weight" to an uncorroborated arrest report). See *Garces v. U.S. Att'y Gen.*, 611 F.3d 1337, 1350 (11th Cir. 2010) ("Absent corroboration, the arrest reports by themselves do not offer reasonable, substantial, and probative evidence that there is reason to believe Garces engaged in drug trafficking.").

[^ 9] See *Paredes-Urrestarazu v. U.S. I.N.S.*, 36 F.3d 801, 810 (9th Cir. 1994) *Paredes-Urrestarazu v. I.N.S.*, 36 F.3d 801, 810 (9th Cir. 1994) (holding that an arrest can be relevant to a discretionary determination). See *Matter of Grijalva (PDF)*, 19 I&N Dec. 713, 721-22 (BIA 1988) (hearsay evidence is admissible in deportation proceedings unless its use is fundamentally unfair; the admission into evidence of police reports concerning the circumstances of an arrest and conviction is appropriate in cases involving discretionary relief). See *Matter of Teixeir*a (PDF), 21 I&N Dec. 316, 321 (BIA 1996) (police reports that are not part of the "record of conviction" may be appropriately considered for purposes of an application for discretionary relief, where the focus is on conduct rather than conviction). See *Avila-Ramirez v. Holder*, 764 F.3d 717, 725 (7th Cir. 2014) (consideration of arrest reports in the weighing of discretionary factors is not prohibited but must be given appropriate evidentiary weight). See *Arias-Minaya v. Holder*, 779 F.3d 49, 54 (1st Cir. 2015) (noting "it is settled beyond hope of contradiction that in reviewing requests for discretionary relief, immigration courts may consider police reports" and that this holds true even where there is no conviction.).

[^ 10] See 8 CFR 214.14(d)(3).

[^ 11] See INA 212(a)(9)(B). See 8 CFR 214.14(d)(3).

[^ 12] See 8 CFR 274a.12(c)(14).

Chapter 7 - Final Adjudication

A. Determination of U Nonimmigrant Status for A Petitioner Granted A Bona Fide Determination Employment Authorization Document and Deferred Action

A Bona Fide Determination Employment Authorization Document (BFD EAD) and grant of deferred action does not guarantee eligibility for U nonimmigrant status at the time a visa becomes available in a given fiscal year under the statutory cap.

Officers perform a full file review to determine eligibility for U nonimmigrant status for petitioners granted employment authorization and deferred action, as a matter of discretion, through the BFD process.

USCIS determines eligibility for U nonimmigrant status on a case-by-case basis. Officers:

- Perform a full evaluation of eligibility requirements, which includes but is not limited to:
  - Determining whether the petitioner was the victim of qualifying criminal activity or qualifying crime (QCA);
  - Analyzing evidence submitted to establish substantial mental and physical abuse;
  - Assessing the U Nonimmigrant Status Certification (Form I-918, Supplement B) law enforcement certification for all details regarding the QCA;
- Complete a full review of background checks; and
- Determine whether any applicable inadmissibility grounds are waivable in the exercise of discretion, which includes a detailed, individualized assessment for principal petitioners and qualifying family members who have one or more applicable grounds of inadmissibility.[1]

Petitioners and qualifying family members seeking U nonimmigrant status who USCIS determines are inadmissible,[2] and do not warrant the favorable exercise of discretion to waive such inadmissibility, are generally ineligible to receive visas or be admitted to the United States. USCIS may exercise its discretion to deny waiver requests in the following circumstances:[3]

- Aliens with criminal histories and serious immigration violations;
- Aliens who pose a national security or public safety risk;
- Aliens determined to have committed fraud or misrepresentation; or
- For any other reasons that USCIS deems necessary and appropriate.

B. Determination of U Nonimmigrant Status for Petitioners Placed on the Waiting List

Although officers fully evaluate a petition for placement on the waiting list, officers conduct an additional review of the petition and update background checks to establish continuing eligibility before approving the petition when a visa becomes available in a subsequent fiscal year.

If the principal petitioner or qualifying family member has failed to establish one of the eligibility requirements, USCIS issues a Request for Evidence (RFE) to the petitioner. Petitioners have the opportunity to submit additional information to address deficiencies or concerns identified in the RFE.

Placement on the waiting list does not guarantee a grant of U nonimmigrant status. USCIS may deny a petition for U nonimmigrant status if USCIS determines the petitioner is ineligible. For example, officers may deny a petition for U nonimmigrant status where acts of criminality or immigration violations occurring after a petitioner was placed on the waiting list trigger inadmissibility grounds and USCIS does not favorably exercise its discretion to waive those grounds. Officers may also deny a petition where a certifier has withdrawn the Form I-918, Supplement B after USCIS placed the petitioner on the waiting list.

C. Order of Adjudication

Neither Congress nor USCIS anticipated filings to significantly exceed the statutory cap every year. The waiting list was first created as an intermediate mechanism for a small number of petitioners who could not be granted U nonimmigrant status in a fiscal year due to the limited number of visa numbers allotted under the statutory cap.[4] The BFD process was created as an additional mechanism to provide petitioners with bona fide petitions with employment authorization and deferred action, which are benefits equal to those accorded to petitioners placed on the waiting list.

Although current regulatory language notes the prioritization of petitioners placed on the waiting list for grants of U nonimmigrant status under the statutory cap as visas become available,[5] the regulation also clearly envisions “the oldest petitions receiving the highest priority” for such visa numbers.

To best reconcile these regulatory provisions with the BFD policy, and to maintain fairness between petitioners placed on the waiting list and petitioners issued BFD EADs, USCIS prioritizes all petitions for adjudication of U nonimmigrant status under the statutory cap in the order they were received, ensuring older petitions maintain their priority over newer petitions.

Consequently, when U nonimmigrant visas become available each fiscal year, USCIS draws from both BFD recipients and waitlisted petitioners, in order of filing date with the oldest filings receiving highest priority, to meet the statutory cap.

D. Decision

1. Approval

Petitioners Living Inside the United States

Upon approval, principal petitioners and their qualifying family members living in the United States receive a grant of U nonimmigrant status, valid for a period of no more than 4 years.

Principal Petitioners

After USCIS approves U nonimmigrant status for a principal petitioner living in the United States, USCIS notifies the petitioner of such approval by issuing a Notice of Action (Form I-797). USCIS also includes an Arrival-Departure Record (Form I-94), indicating U-1 nonimmigrant status.

Principal petitioners living in the United States receive employment authorization incident to a grant of U nonimmigrant status.[6] However, petitioners living outside the United States do not receive an initial employment authorization document until they have obtained a U nonimmigrant visa at a U.S. consulate or embassy and have been admitted to the United States as a U nonimmigrant.

Qualifying Family Members

USCIS may not approve U nonimmigrant status for a qualifying family member unless USCIS has granted the principal petitioner U nonimmigrant status.

When USCIS approves a Petition for Qualifying Family Member of a U-1 Recipient (Form I-918, Supplement A) for a qualifying family member living in the United States, it concurrently grants that petitioner U-2, U-3, U-4, or U-5 nonimmigrant status.

USCIS issues the Form I-797 regarding the approval of U-2, U-3, U-4, or U-5 nonimmigrant status to the principal petitioner. USCIS also issues a Form I-94 indicating U-2, U-3, U-4, or U-5 nonimmigrant status.

Classes of Applicants and Corresponding Codes of Admission

Applicant	Code of Admission
Principal Petitioner	U-1
Spouse of Principal Petitioner	U-2
Unmarried Child under the age of 21 of Principal Petitioner	U-3
Parent of Principal Petitioner (who is under the age of 21)	U-4
Unmarried Sibling under the age of 18 of Principal Petitioner (who is under the age of 21)	U-5

Qualifying family members must submit a fee or a Request for Fee Waiver (Form I-912) for an Application for Employment Authorization (Form I-765) associated with a grant of U nonimmigrant status.[7]

Petitioners Living Outside the United States

After USCIS approves U nonimmigrant status for a principal petitioner or qualifying family member living outside the United States, USCIS notifies the principal petitioner of such approval on Form I-797. USCIS also forwards the notice to the U.S. Department of State (DOS).

DOS communicates the approval to the U.S. embassy or consulate with jurisdiction over the area in which the principal petitioner or qualifying family member is located. DOS communicates the approval to the appropriate port of entry for principal petitioners or qualifying family members who are from countries that are exempt from visa requirements.[8] The approved petitioners and qualifying family members may then seek admission to the United States as U nonimmigrants at a designated port of entry.

2. Denial

USCIS provides written notification to the principal petitioner, listing the reasons for the denial of a Petition for U nonimmigrant status (Form I-918), and a Form I-918 Supplement A, where applicable.[9] A principal petitioner may request USCIS to reconsider the denial by filing a Notice of Appeal or Motion (Form I-290B).

Alternatively, the principal petitioner may appeal the denial to the Administrative Appeals Office (AAO).[10] If a principal petitioner pursues an appeal, the denial of U nonimmigrant status is not deemed administratively final until the AAO issues a decision affirming the denial.

The denial of a petition for U nonimmigrant status automatically lifts any stay of removal based on the U nonimmigrant status petition as of the date the denial becomes administratively final for a principal petitioner or qualifying family member subject to an order of removal, deportation, or exclusion.

Footnotes

[^ 1] Congress granted DHS the discretionary authority to waive most inadmissibility grounds for an alien seeking U nonimmigrant status if it is in the public or national interest to do so. See INA 212(d)(3)(A)(ii). See INA 212(d)(14) (authorizing the waiver of any inadmissibility ground except for participation in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing). See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis [1 USCIS-PM E.8].

[^ 2] See INA 212(a).

[^ 3] See 8 CFR 212.17.

[^ 4] See 72 FR 53013 (PDF), 53033 (Sept. 17, 2007) (estimating USCIS would receive 12,000 principal petitions per year). See Number of Form I-918, Petition for U Nonimmigrant Status By Fiscal Year, Quarter, and Case Status (Fiscal Years 2009-2020).

[^ 5] See 8 CFR 214.14(d)(2) ("After U-1 nonimmigrant status has been issued to qualifying petitioners on the waiting list, any remaining U–1 nonimmigrant numbers for that fiscal year will be issued to new qualifying petitioners in the order that the petitions were properly filed.").

[^ 6] See 8 CFR 274a.12(c).

[^ 7] See 8 CFR 274a.12(a)(20).

[^ 8] See DOS's Visa Waiver Program webpage.

[^ 9] See 8 CFR 103.3(a)(1).

[^ 10] See 8 CFR 103.3.

Chapter 8 - Post-Adjudicative Matters [Reserved]

Part D - Violence Against Women Act

Chapter 1 - Purpose and Background

A. Purpose

The Violence Against Women Act of 1994 (VAWA) amended the nation's immigration laws and included a broad range of criminal, civil, and health-related provisions.[1] VAWA addressed the unique issues faced by victims of domestic violence and abuse and provided certain alien family members of abusive U.S. citizens and lawful permanent residents (LPRs) the ability

to self-petition for immigrant classification without the abuser's knowledge, consent, or participation in the immigration process. This allowed victims to seek both safety and independence from their abuser.

Spouses, children, and parents of U.S. citizens and spouses and children of LPRs may file a self-petition for immigrant classification with USCIS. An alien filing the self-petition is generally known as a VAWA self-petitioner.[2] If USCIS approves the self-petition, VAWA self-petitioners may then seek an immigrant visa from outside the United States or apply for adjustment of status inside the United States.[3]

B. Background

Under the family-based immigration process, U.S. citizens and LPRs may petition for certain categories of relatives to immigrate to the United States. This process generally requires U.S. citizens and LPRs to first file a family-based petition with USCIS on behalf of their alien family member. If USCIS approves the petition, the family member is then eligible to apply for LPR status.

Because the family-based immigration process requires U.S. citizens and LPRs to petition for their alien family member, they have control over the petitioning process. Some U.S. citizens and LPRs use their control over this process as a tool to further abuse the alien, threatening to withhold or withdraw the petition in order to control, coerce, and intimidate their family members. This allows abusive U.S. citizens and LPRs to perpetuate their abuse, and their family members may be afraid to report them to law enforcement or leave the abusive situation, as they may be dependent on the U.S. citizen or LPR to obtain or maintain their immigration status.

With the passage of VAWA, Congress created a path for victims of domestic violence and abuse to independently petition for themselves, or self-petition, for immigrant classification. The purpose of the immigration amendments in VAWA was to give aliens who have been abused by their U.S. citizen or LPR relative the opportunity to independently seek immigrant classification without the abuser's participation or knowledge. Allowing victims to self-petition means that they are no longer dependent on their abusive family member to obtain immigration status, thereby removing at least one barrier to ending the abuse.

Legislative History

VAWA was enacted into law as Section IV of the Violent Crime Control and Law Enforcement Act of 1994.[4] Since its passage in 1994, there have been three reauthorizations of the statute (in 2000, 2005, and 2013), all of which expanded and added new protections for VAWA self-petitioners.[5]

The table below provides a summary of key provisions related to self-petitions in VAWA and its subsequent reauthorizations.

Key Provisions of VAWA and Subsequent Reauthorizations

Laws	Key Provisions for VAWA Self-Petitions
Violent Crime Control and Law Enforcement Act of 1994[6] (The VAWA provisions of this law are known as the "Violence Against Women Act of 1994" or VAWA 1994)	• Created self-petitioning provisions for abused spouses and children of U.S. citizens and LPRs • Established the "any credible evidence" standard
Victims of Trafficking and Violence Protection Act of 2000 (VAWA 2000)[7]	• Removed the extreme hardship eligibility requirement • Removed the requirement that self-petitioners be married to the abuser at the time of filing • Allowed continued eligibility in certain circumstances despite the death of the U.S. citizen, termination of the marriage, or loss of the abuser's U.S. citizenship or LPR status • Created a definition for "intended spouse" and added provisions for self-petitioners whose marriage was not legitimate solely due to the abuser's bigamy • Allowed the filing of self-petitions from outside the United States • Specified the authority to consider deferred action and employment authorization for certain self-petitioners • Allowed certain children to remain eligible for benefits despite turning 21 years old • Allowed self-petitioners to adjust status within the United States • Added provisions allowing exemptions and waivers for certain grounds of inadmissibility
Violence Against Women and Department of Justice Reauthorization Act of 2005[8] Violence Against Women and Department of Justice Reauthorization Act of 2005 Technical Amendments (These two laws are collectively referred to as VAWA 2005)[9]	• Created a uniform definition for "VAWA self-petitioner" • Created self-petitioning provisions for abused parents of U.S. citizen sons and daughters 21 years of age or older • Provided work authorization to aliens with approved self-petitions • Allowed abused children to file a self-petition until age 25 in certain circumstances • Extended protections for children to remain eligible for benefits despite turning 21 years old • Removed the 2-year legal custody and joint residency requirement for abused adopted children • Strengthened confidentiality protections for self-petitioners
Violence Against Women Reauthorization Act of 2013 (VAWA 2013)[10]	• Allowed continued eligibility for derivative children where the self-petitioner died • Exempted self-petitioners from the public charge ground of inadmissibility

C. Legal Authorities

- INA 101(a)(51) – Definition of VAWA self-petitioner
- INA 204 – Procedure for granting immigrant status
- 8 CFR 204.2 – Petitions for relatives, widows and widowers, and abused spouses and children[11]
- 8 U.S.C. 1367 – Penalties for disclosure of information

Footnotes

[^ 1] See Title IV of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322 (PDF), 108 Stat. 1796, 1902 (September 13, 1994).

[^ 2] See INA 101(a)(51). Although INA 101(a)(51) includes several benefits under the term “VAWA self-petitioner,” this part focuses on self-petitions filed under INA 204(a).

[^ 3] See INA 201(b)(2)(A)(i). See INA 203(a)(2)(A). See INA 245(a).

[^ 4] See Title IV of Pub. L. 103-322 (PDF), 108 Stat. 1796, 1902 (September 13, 1994).

[^ 5] See Title V of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386 (PDF), 114 Stat. 1464, 1518 (October 28, 2000). See Title VIII of the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162 (PDF), 119 Stat. 2960, 3053 (January 5, 2006). See Section 6 of the Violence Against Women and Department of Justice Reauthorization Act of 2005 Technical Amendments, Pub. L. 109-271 (PDF), 120 Stat. 750, 762 (August 12, 2006). See Title VIII of the Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4 (PDF), 127 Stat. 54, 110 (March 7, 2013).

[^ 6] See Pub. L. 103-322 (PDF), 108 Stat. 1796, 1902 (September 13, 1994).

[^ 7] See Pub. L. 106-386 (PDF), 114 Stat. 1464, 1518 (October 28, 2000).

[^ 8] See Pub. L. 109-162 (PDF), 119 Stat. 2960, 3053 (January 5, 2006).

[^ 9] See Pub. L. 109-271 (PDF), 120 Stat. 750, 762 (August 12, 2006).

[^ 10] See Pub. L. 113-4 (PDF), 127 Stat. 54, 110 (March 7, 2013).

[^ 11] The VAWA regulations at 8 CFR 204.2 were promulgated in March 1996 and have not been updated to include superseding statutory provisions. Note that some of the regulatory provisions may no longer apply.

Chapter 2 - Eligibility Requirements and Evidence

The Violence Against Women Act of 1994 (VAWA) and its subsequent reauthorizations amended the Immigration and Nationality Act (INA) to allow abused spouses and children of U.S. citizens and lawful permanent residents (LPRs) and abused parents of U.S. citizen sons and daughters 21 years of age or older to file their own self-petition for immigrant classification.[1] Aliens filing self-petitions are referred to as VAWA self-petitioners or self-petitioners in this part.[2]

The VAWA self-petition is filed on the Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360).[3] An approved Form I-360 provides self-petitioners with immigrant classification as either immediate relatives or under a family-based preference category and allows them to apply for LPR status.[4]

A. General Overview of Eligibility Requirements

Self-petitioners must file a Form I-360 and submit evidence to establish, by a preponderance of the evidence, that they meet the general eligibility requirements outlined in the table below.[5]

General Eligibility Requirements for VAWA Self-Petitioners
The self-petitioner must have a qualifying relationship to an abusive U.S. citizen or LPR relative as the: • Spouse, intended spouse, or former spouse of a U.S. citizen or LPR; • Child of a U.S. citizen or LPR; or • Parent of a U.S. citizen son or daughter that is 21 years of age or older.
The self-petitioner must have been married in good faith (for self-petitioning spouses only).
The self-petitioner is eligible for immigrant classification as an immediate relative or under a family-based preference category.[6]
The self-petitioner was subjected to battery or extreme cruelty perpetrated by the U.S. citizen or LPR during the qualifying relationship (self-petitioning spouses may also be eligible based on the battery or extreme cruelty subjected on their child).
The self-petitioner resides or resided with the abusive U.S. citizen or LPR.
The self-petitioner is a person of good moral character.[7]

General Evidentiary Requirements[8]

While self-petitioners are encouraged to submit primary evidence, when possible, USCIS must consider any credible evidence relevant to the petition.[9] The self-petitioner may, but is not required to, demonstrate that primary or secondary evidence is not available.[10] A petition may not be denied for failure to submit particular evidence. The petition may only be denied on evidentiary grounds if the evidence submitted is not credible or otherwise does not establish eligibility.

The determination of what evidence is credible and the weight to be given that evidence is within the sole discretion of USCIS.[11] As with all petitions and applications for an immigration benefit, a self-petitioner must remain eligible to receive a benefit under VAWA at the time of filing through final adjudication.[12]

B. Qualifying Relationship

Self-petitioners must demonstrate a qualifying relationship to an abusive U.S. citizen or LPR to be eligible for VAWA benefits.[13] Self-petitioners who have a qualifying relationship include:

- An abused spouse of a U.S. citizen or LPR or a spouse of a U.S. citizen or LPR whose child was abused by the U.S. citizen or LPR (self-petitioning spouse[14]);

- An abused child of a U.S. citizen or LPR (self-petitioning child); or
- An abused parent of a U.S. citizen son or daughter 21 years of age or older (self-petitioning parent).[15]

To establish a qualifying relationship, the self-petitioner must submit evidence to prove the requisite familial relationship to the abuser as well as evidence of the abuser's U.S. citizenship or LPR status.[16]

1. Abuser's U.S. Citizenship or Lawful Permanent Resident Status

The self-petitioner's abusive qualifying family member must generally be a U.S. citizen or LPR when the self-petition is filed.[17] There are certain exceptions, however, where self-petitioners may preserve their eligibility in cases where abusers have lost or renounced their U.S. citizenship or LPR status for a reason that was related to an incident of abuse.[18] Changes to the abuser's U.S. citizenship or LPR status after the self-petitioner files the self-petition do not adversely impact approving a pending self-petition or the validity of an approved self-petition.[19]

Primary evidence to demonstrate the abuser's U.S. citizenship includes, but is not limited to:

- A birth certificate (or legible photocopy) issued by a civil authority that establishes the abuser's birth in the United States;
- A copy of an unexpired U.S. passport issued initially for a full 10-year period to the abuser over the age of 18 at the time of issuance;
- A copy of an unexpired U.S. passport issued initially for a full 5-year period to the abuser under the age of 18 at the time of issuance;
- A statement executed by a U.S. consular officer certifying the abuser to be a U.S. citizen and the bearer of a currently valid U.S. passport;
- The abuser's Certificate of Naturalization or Certificate of Citizenship or a copy of either document; or
- The abuser's Report of Birth Abroad of a Citizen of the United States (Department of State Form FS-240).[20]

Other examples of evidence to establish the U.S. citizenship of the abuser may include a receipt or approval notice of a Petition for Alien Relative (Form I-130) filed by the abuser for an immediate relative category, the abuser's A-Number with evidence of naturalization, or information on a marriage license or certificate showing the abuser's birth in the United States.

Primary evidence to demonstrate the abuser's LPR status is a copy of the abuser's Permanent Resident Card (Form I-551) or other proof from the DHS reflecting LPR status.[21] Other examples of evidence to establish the abuser's LPR status include but are not limited to:

- A copy of the pages of the abuser's passport with visas and entry stamps showing name and immigration status; or
- The abuser's A-Number with verification of status.

If self-petitioners are unable to provide documentary evidence of the abuser's U.S. citizenship or LPR status, they should provide some identifying information for the abusive U.S. citizen or LPR, such as a name, place of birth, country of birth, date of birth, or Social Security number. USCIS uses this information to conduct a search of DHS records to attempt to verify the abuser's citizenship or immigration status.[22] If USCIS is unable to identify a record as relating to the abuser or the record does not establish the abuser's citizenship or LPR status, the officer should adjudicate the self-petition based on the information submitted by the self-petitioner.[23]

An abused spouse or child of a U.S. national may also be eligible for VAWA benefits, as a U.S. national is accorded the same rights as an LPR.[24] USCIS treats a self-petitioning spouse or child of a U.S. national as a self-petitioning spouse or child of an LPR when adjudicating the self-petition.

2. Self-Petitioning Spouse

Generally, to establish a qualifying relationship, self-petitioning spouses must have a legally valid marriage to their abusive U.S. citizen or LPR spouse at the time the self-petition is filed.[25] In certain circumstances, however, self-petitioning spouses may continue to be eligible for VAWA benefits if the marriage was terminated due to divorce or death prior to filing the self-petition.[26] If self-petitioning spouses divorce their abusive U.S. citizen or LPR spouse after the self-petition is filed, it does not adversely impact approving a pending self-petition or the validity of an approved self-petition.[27]

USCIS generally considers a marriage as legally valid according to the laws of the place where the marriage was celebrated.[28] However, if a marriage is valid in the country where celebrated but considered contrary to U.S. public policy, the marriage is not recognized as valid for immigration purposes.[29] For example, incestuous and plural marriages generally are considered contrary to U.S. public policy. A common law marriage may be considered a legally valid marriage for the purpose of establishing VAWA eligibility.

Examples of evidence of a legal marriage include, but are not limited to:

- A marriage certificate issued by civil authorities;[30]
- Common law marriage announcements or certificates;
- Affidavits and photos of the wedding ceremony;
- Demonstrating a common law marriage if no certificate or announcement is available in states where common law marriages may be contracted; or
- Any other credible evidence to establish a marital relationship.

If self-petitioners were previously married, they must submit evidence to establish that all of their prior marriages were legally terminated, and that they were legally free to enter a valid marriage with the abuser.[31] If the U.S. citizen or LPR spouse was previously married, self-petitioners should submit evidence, if available, to establish that all of their spouse's prior marriages were legally terminated.[32] If the U.S. citizen or LPR spouse's prior marriages were not legally terminated, however, self-petitioners may continue to be eligible as intended spouses.[33]

A civil authority must have issued the marriage termination document (such as a divorce decree or an annulment) for it to be considered valid. Officers should refer to the U.S. Department of State's Foreign Affairs Manual and U.S. Visa: Reciprocity and Civil Documents by Country webpage for country-specific information regarding the legal termination of any marriage that occurred or was terminated outside the United States.

Note that if a divorce decree requires a waiting or revocable period that has not concluded (for example, a "nisi" period in a domestic decree or an "idda" period in a foreign decree), the decree is not considered final and the marriage has not been legally terminated.[34]

Examples of evidence of a legally terminated marriage may include, but are not limited to:

- A final decree of divorce;

- A decree of annulment;
- A death certificate; or
- Any other credible evidence to establish a terminated marriage.

Intended Spouse

VAWA protects “intended spouses” who believed that they entered into a valid marriage, but the marriage was invalid solely due to the abusive U.S. citizen or LPR’s bigamy or polygamy.[35] To be eligible as intended spouses, self-petitioners must have believed that they entered into a legally valid marriage with the U.S. citizen or LPR. Therefore, USCIS focuses its inquiry on the intent of the self-petitioner and not on the intent of the abuser.

To demonstrate a qualifying relationship to the abusive U.S. citizen or LPR as an intended spouse, the self-petitioner must submit evidence to establish the following requirements:

- The self-petitioner believed a legal marriage was created with the U.S. citizen or LPR spouse who was not already married and therefore free to enter into a valid marriage;
- A marriage ceremony was actually performed;
- The requirements for the establishment of a bona fide marriage were otherwise met; and
- The apparent marriage between the self-petitioner and the U.S. citizen or LPR is not legitimate solely because of the U.S. citizen’s or LPR’s other, preexisting marriage.[36]

USCIS considers a marriage certificate issued by civil authorities in the United States or abroad to be evidence of the self-petitioner’s intent. If self-petitioners were previously married, they must submit evidence to demonstrate that all their prior marriages were legally terminated. Evidence of the termination of all the abusive U.S. citizen’s or LPR’s prior marriages, however, is not required to establish eligibility as an intended spouse.

Intended spouses in common law marriages are eligible as VAWA self-petitioners as long as they can demonstrate the requirements listed above, including that a marriage ceremony was actually performed.

Self-Petitioning Spouse Whose Child was Abused

A spouse of an abusive U.S. citizen or LPR is eligible to self-petition based on abuse committed by the U.S. citizen or LPR against the spouse’s child.[37] The abused child does not need to be the abuser’s child. If the self-petition is based on a claim that the self-petitioner’s child was battered or subjected to extreme cruelty committed by the U.S. citizen or LPR, the self-petitioner should submit evidence of a relationship to the abused child, such as the child's birth certificate or other evidence demonstrating the relationship (in addition to demonstrating the required marital relationship to the abuser).[38]

3. Self-Petitioning Child

Self-petitioning children may establish a qualifying relationship to their abusive U.S. citizen or LPR parent if they are the biological child, stepchild, or adopted child of the abuser.[39] The child must be unmarried and less than 21 years old when the self-petition is filed in order to be considered a child for immigration purposes.[40] In certain circumstances, children who turn 21 years old prior to filing the self-petition or while the self-petition is pending may remain eligible for VAWA benefits.[41] The self-petitioner must remain unmarried, however, at the time of filing and when the self-petition is approved.[42] To be considered unmarried, the self-petitioner must either never have been married or have legally terminated all prior marriages.

Termination of the abuser's parental rights or a change in legal custody does not alter the child’s eligibility to self-petition, provided the petitioner meets the definition of the term “child” under immigration law and meets all other eligibility requirements.[43]

Biological Child

Self-petitioning children may demonstrate a qualifying relationship if they are the biological child of the abusive U.S. citizen or LPR parent. If the U.S. citizen or LPR parent utilized Assisted Reproductive Technology, however, and does not have a genetic relationship to the self-petitioning child, the child may still be able to demonstrate a qualifying parent-child relationship in certain circumstances.[44] If the child did not acquire U.S. citizenship at birth and the abusive U.S. citizen or LPR parent is the biological mother of the self-petitioning child, the primary evidence to demonstrate a qualifying relationship is the child’s birth certificate issued by civil authorities listing the mother’s name.[45] If the mother’s name on the birth certificate is different from the name listed on the self-petition, the self-petitioning child may submit evidence of the name change.[46]

Other examples of evidence of a biological relationship may include, but are not limited to:

- A court decree of paternity;
- A custody or child support order;
- A baptismal certificate (or other religious document) with the seal of the religious authority showing the date and place of birth and the baptism (or similar religious ceremony) and the name(s) of the parent(s);
- Early school records showing the date of admission to the school, the child’s date and place of birth, and the name(s) of the parent(s);
- Medical records, such as a hospital birth record that names the parent(s) of the child;
- Census record, such as a state or federal census record showing the name, place of birth, and date of birth or age of each person listed; or
- Any other credible evidence of the relationship.

Self-petitioning children whose abusive U.S. citizen or LPR parent is their biological father must provide evidence demonstrating that they were either:

- Born in wedlock;
- Legitimated, or were born out of wedlock but later placed in the same legal position as a child born in wedlock; or
- Born out of wedlock but have or have had an ongoing bona fide relationship with the abusive father.[47]

For children born in wedlock, self-petitioners must submit evidence of their biological relationship to their father, the marriage of the child’s parents, and evidence of the legal termination of all prior marriages, if applicable.[48]

Examples of evidence may include:

- The child’s birth certificate issued by civil authorities to show a biological relationship;
- A civilly-issued marriage certificate of the parents;

- Common law marriage announcements or certificates conforming to the legal requirements of the location where the marriage took place;
- Proof of the legal termination of the parents' prior marriages, if any, issued by civil authorities; or
- Any other available evidence.[49]

Children who were legitimated must provide evidence of a biological relationship to the father and evidence of the child's legitimation.[50] Generally, legitimation is governed by the law of the place of residence of the parent or child.[51] Self-petitioners may generally establish legitimation by showing that their parents married at any time before they turned 18 years old.[52]

Children who were born out of wedlock and have not been legitimated must provide evidence that a bona fide parent-child relationship with the abusive biological father has been established.[53] Evidence should establish more than merely a biological relationship. A bona fide parent-child relationship should include emotional or financial ties (or both).[54] There should be evidence that the father and child actually lived together, that the father openly held the child out as being his own, that the father provided for some or all of the child's needs, or that the father's behavior in general evidenced a genuine relationship with the child.[55]

Examples of evidence to establish a bona fide parent-child relationship may include, but are not limited to:

- Money order receipts or cancelled checks showing the father's financial support of the child;
- The father's income tax returns, medical records, or insurance policies listing the child as a dependent;
- School, social services, or other state or federal government agency records for the child listing the father as a guardian or family contact;
- Correspondence between the parties;
- Notarized affidavits of friends, neighbors, school officials, or other associates with knowledge of the relationship; or
- Any other credible evidence of a bona fide parent-child relationship.

The following table provides a summary of the types of evidence required to demonstrate a qualifying relationship for self-petitioning children who have a biological relationship to their abusive U.S. citizen or LPR parent.

Self-Petitioning Child: Required Evidence for Biological Children

Child	Abusive Parent	Required Evidence[56]
Child	Biological mother	• Evidence of the biological relationship
Child born in wedlock	Biological father	• Evidence of the biological relationship; • Evidence of the marriage of the child's parents; and • Evidence of the legal termination of all prior marriages, if any
Legitimated child	Biological father	• Evidence of the biological relationship, and • Evidence of the child's legitimation
Child born out of wedlock	Biological father	• Evidence of the biological relationship, and • Evidence that a bona fide parent-child relationship has been established between the child and the abusive parent

Stepchild

Self-petitioning children may demonstrate a qualifying relationship if they have a step relationship with the abusive U.S. citizen or LPR parent. A step relationship is created when a child's biological or legal parent marries a person who is not the child's other biological or legal parent before the child's 18th birthday.[57] If the marriage that created the step relationship is terminated due to divorce prior to filing, the stepchild remains eligible to self-petition.[58] If the marriage is terminated due to the death of the biological or legal parent prior to filing, the stepchild may remain eligible to self-petition if a family relationship has continued to exist as a matter of fact between the stepparent and stepchild at the time of filing.[59]

To demonstrate a qualifying relationship as a stepchild of an abusive U.S. citizen or LPR stepparent, self-petitioning children must submit evidence of:

- The relationship between themselves and their biological or legal parent;
- The marriage between their biological or legal parent and the abusive stepparent before they turned 18 years old; and
- The termination of all prior marriages for both the biological or legal parent and stepparent, if applicable.[60]

Examples of evidence that demonstrate a qualifying step relationship between a self-petitioning child and an abusive stepparent may include, but are not limited to:

- The child's birth certificate issued by civil authorities;
- A civilly-issued marriage certificate of the child's biological or legal parent and stepparent showing marriage before the stepchild turned 18 years old;
- Common law marriage announcements or certificates;
- A final decree of divorce or annulment; or
- Any other credible evidence of a qualifying step relationship.[61]

Intended Spouse Provision and Self-Petitioning Children

The INA does not extend the intended spouse provision for self-petitioning spouses to self-petitioning children.[62] Therefore, if the marriage that created the step relationship is not legally valid due to bigamy or polygamy on the part of the stepparent, the child is not eligible to self-petition. However, children can be included as derivatives on their biological or legal parent's self-petition if the biological or legal parent can establish a qualifying relationship with the abusive stepparent under the intended spouse provisions.

Adopted Child

Generally, for an adoption to be the basis for granting immigration benefits, an adoption must comply with certain statutory requirements. In the family-based petition process, the statute requires that the adoptee beneficiary has been in the legal custody of and jointly resided with the adoptive parent(s) for at least 2 years.[63] Abused adopted children, however, are not required to demonstrate that the U.S. citizen or LPR had 2 years of legal custody and 2 years of joint residence with them in order to be eligible for a VAWA self-petition.[64]

Self-petitioning adopted children may demonstrate a qualifying relationship to a U.S. citizen or LPR parent if they submit evidence of an adoption that is valid for immigration purposes.[65] Generally, for an adoptive relationship to be considered valid for the family-based petition process, the U.S. citizen or LPR must have legally adopted the child while the child was under age 16.[66] In certain circumstances, the adoption may take place prior to the child attaining 18 years old if the sibling exception applies.[67] Evidence of an adoption that may demonstrate a qualifying adoptive relationship may include a copy of the legal adoption decree or order issued by the appropriate civil authority or other relevant evidence that an adoptive relationship is valid.[68]

4. Self-Petitioning Parent

Self-petitioning parents must demonstrate a qualifying relationship to their abusive U.S. citizen son or daughter who is 21 years of age or older.[69] The INA defines a “child” as an unmarried person who is under 21 years of age.[70] Therefore, the abusive son or daughter must have qualified as the child of the abused parent before turning 21 years of age but must be 21 years of age or older at the time of filing.[71] Parents of abusive LPR sons and daughters are not eligible for VAWA benefits.

To establish a qualifying relationship, a self-petitioning parent must be a biological parent, stepparent, or adoptive parent of an abusive U.S. citizen son or daughter.[72] The requirements for self-petitioning parents are similar to the requirements for self-petitioning children to demonstrate the required parent-child relationship.

Biological Parent

Self-petitioning parents may demonstrate a qualifying relationship if they are the biological parent of the abusive U.S. citizen son or daughter. If the self-petitioning parent utilized Assisted Reproductive Technology, however, and does not have a genetic relationship to the U.S. citizen or LPR child, the parent may still be able to demonstrate a qualifying parent-child relationship in certain circumstances.[73] If the self-petitioning parent is the biological mother of the abusive U.S. citizen son or daughter, the primary evidence to demonstrate the qualifying relationship is the child’s birth certificate issued by civil authorities listing the mother’s name.[74] If the mother's name on the birth certificate is different from the name as reflected on the self-petition, the self-petitioner may submit evidence of the name change.[75]

If primary evidence is unavailable, other examples of evidence of a biological relationship may include, but are not limited to:

- A court decree of paternity;
- Custody or child support orders;
- A baptismal certificate (or other religious document) with the seal of the religious authority showing the date and place of birth and baptism (or similar religious ceremony) and the names of the parents;
- Early school records showing the date of admission to the school, the child’s date and place of birth, and the name(s) of the parent(s);
- Medical records, such as the hospital birth record that names the parent(s) of the child;
- Census record, such as a state or federal census record showing the name, place of birth, and date of birth or age of each person listed; or
- Any other credible evidence of the relationship.

If the self-petitioning parent is the biological father of the abusive U.S. citizen son or daughter, then the parent must provide evidence demonstrating that the child was either:

- Born in wedlock;
- Legitimated, or was born out of wedlock but later placed in the same legal position as a child born in wedlock; or
- Born out of wedlock but has or had an ongoing bona fide relationship with the abused parent.[76]

For fathers whose abusive U.S. citizen sons or daughters were born in wedlock, self-petitioners must submit evidence of their biological relationship to their child, the marriage between the parents of the child, and evidence of the legal termination of all prior marriages, if applicable.[77]

Examples of such evidence may include:

- A birth certificate for the child issued by civil authorities to show a biological relationship;
- A civilly-issued marriage certificate of the parents;
- Common law marriage announcements or certificates conforming to the legal requirements of the location of the marriage;
- Proof of the legal termination of the parents’ prior marriages, if any, issued by civil authorities; or
- Any other available evidence.[78]

If the child was legitimated, the father must provide evidence of a biological relationship to the child and evidence of the child’s legitimation.[79] Generally, legitimation is governed by the law of the place of residence of the parent or child.[80] Self-petitioners may generally establish legitimation by showing that they married the child’s other parent at any time before the child turned 18 years old.[81]

Fathers whose children were born out of wedlock and have not been legitimated must provide evidence that a bona fide parent-child relationship has been established with the child.[82] Evidence should establish more than merely a biological relationship. A bona fide parent-child relationship includes emotional or financial ties (or both) or a genuine concern or interest for the child’s support, instruction, and general welfare.[83] There should be evidence that the father and child actually lived together, that the father openly held the child out as being his own, that the father provided for some or all of the child’s needs, or that the father’s behavior in general evidenced a genuine concern for the child.[84]

Examples of evidence to establish a bona fide parent-child relationship may include, but are not limited to:

- Money order receipts or cancelled checks showing the father's financial support of the child;
- The father's income tax returns, medical records, or insurance policies listing the child as a dependent;
- School, social services, or other state or federal government agency records for the child listing the father as a guardian or family contact;
- Correspondence between the parties;
- Notarized affidavits of friends, neighbors, school officials, or other associates with knowledge of the relationship; or

- Any other credible evidence of a bona fide parent-child relationship.

The following table provides a summary of the types of evidence sufficient to demonstrate a qualifying relationship for self-petitioning parents who have a biological relationship to their abusive U.S. citizen son or daughter.

Self-Petitioning Parent: Required Evidence for Biological Parents

Abusive Son or Daughter	Parent	Required Evidence[85]
Son or daughter	Biological mother	• Evidence of the biological relationship
Son or daughter was born in wedlock	Biological father	• Evidence of the biological relationship; • Evidence of the marriage of the child's parents; and • Evidence of the legal termination of all prior marriages, if any
Legitimated son or daughter	Biological father	• Evidence of the biological relationship, and • Evidence of the child's legitimation
Son or daughter was born out of wedlock	Biological father	• Evidence of the biological relationship, and • Evidence that a bona fide parent-child relationship has been established between the child and the parent

Stepparent

Self-petitioning parents may demonstrate a qualifying relationship if they have a stepparent relationship with the abusive U.S. citizen son or daughter. A step relationship is created if the abused parent married the son or daughter's other biological or legal parent before the son or daughter's 18th birthday.[86] If the marriage that created the step relationship is terminated due to divorce prior to filing, the stepparent remains eligible to self-petition.[87] If the marriage is terminated due to the death of the biological or legal parent prior to filing, the stepparent may remain eligible to self-petition if a family relationship has continued to exist as a matter of fact between the stepparent and stepson or stepdaughter at the time of filing.[88]

To demonstrate a qualifying stepparent relationship, self-petitioning parents must submit evidence of:

- The relationship between the biological or legal parent and the abusive son or daughter;
- Their marriage with the stepson or stepdaughter's biological or legal parent; and
- The termination all prior marriages for both themselves and their spouse (biological or legal parent), if applicable.[89]

Examples of evidence that demonstrate a qualifying step relationship between a self-petitioning stepparent and an abusive U.S. son or daughter may include, but are not limited to:

- The son or daughter's birth certificate issued by civil authorities;
- A civilly-issued marriage certificate of the stepparent and the son or daughter's biological or legal parent showing marriage before the stepson or stepdaughter turned 18 years old;
- Common law marriage announcements or certificates;
- A final decree of divorce or annulment; or
- Any other credible evidence of a qualifying step relationship.[90]

Adoptive Parent

Self-petitioning parents may demonstrate a qualifying relationship if they have an adoptive relationship with their U.S. citizen son or daughter.[91] Generally, for an adoptive relationship to be the basis for granting immigration benefits, the adoption must be valid for immigration purposes[92] and comply with certain statutory requirements.[93]

For the adoptive relationship to be considered valid under INA 101(b)(1)(E), a child generally must be adopted while under age 16.[94] Unlike abused adopted children, abused adoptive parents must demonstrate 2 years of legal custody and 2 years of joint residence with their adopted U.S. citizen son or daughter in order to establish a qualifying adoptive relationship.[95] Self-petitioning parents may demonstrate a qualifying adoptive relationship by submitting evidence of:

- An adoption that is valid for immigration purposes;
- 2 years of legal custody of the adopted son or daughter; and
- 2 years of joint residence with the adopted son or daughter.[96]

Self-petitioning parents may also establish an adoptive parent-child relationship under INA 101(b)(1)(F) or INA 101(b)(1)(G).[97]

C. Good Faith Marriage (Self-Petitioning Spouses Only)

A self-petitioning spouse's eligibility for the self-petition requires more than showing a legal marital relationship to a U.S. citizen or LPR. The self-petitioner must also establish that the marriage was entered into in good faith and was not entered into for the purpose of evading immigration laws.[98]

To demonstrate a good faith marriage, self-petitioning spouses must show that at the time of the marriage, they intended to establish a life together with the U.S. citizen or LPR. USCIS does not deny a self-petition, however, solely because the spouses are not living together, or the marriage is no longer viable.[99] Additionally, separation from the U.S. citizen or LPR spouse, even shortly after the marriage took place, does not prove by itself that a marriage was not entered into in good faith.[100]

Examples of evidence to demonstrate good faith entry into the marriage may include, but are not limited to:

- Documentation that one spouse has been listed as the other spouse's beneficiary on insurance policies;
- Joint property leases, income tax forms, or accounts (for example, bank accounts, utility statements or accounts, and credit cards accounts);

- Evidence of courtship, a wedding ceremony, a shared residence, or shared experiences;
- Birth certificates of children born to the self-petitioner and abusive spouse;
- Police, medical, or court documents providing information about the relationship;
- Affidavits of persons with personal knowledge of the relationship; or
- Any other credible evidence that demonstrates the self-petitioner's intentions for entering into the marriage.[101]

D. Eligible for Immigrant Classification

A VAWA self-petitioner must establish eligibility for a family-based immigrant classification as either an immediate relative or under a family-based preference category.[102] VAWA eligibility generally extends to children, spouses, and parents of abusive U.S. citizens, who are considered immediate relatives, and spouses and children of abusive LPRs, who are included in family-based preference categories.

Because VAWA self-petitions provide for family-based immigrant classification, they must comply with provisions applicable to family-based petitions, including INA 204(c), INA 204(g), and INA 204(a)(2), which address issues involving current and prior marriages.[103]

Note that INA 204(a)(2) applies to self-petitioners who acquire LPR status and subsequently file a family-based spousal petition. This does not apply to a self-petition filed based on a relationship with an abusive LPR spouse.

E. Subjected to Battery or Extreme Cruelty

Self-petitioners must demonstrate that their U.S. citizen or LPR relative battered or subjected them to extreme cruelty during the qualifying relationship.[104] Note that for abused adopted children, the battery or extreme cruelty may be committed by an adoptive parent or a family member of an adoptive parent residing in the same household.[105] For all other self-petitioners, battery or extreme cruelty committed by a third party may constitute abuse where the U.S. citizen or LPR acquiesced to, condoned, or participated in the abusive act(s).[106]

The battery or extreme cruelty must have been committed against the self-petitioner, or for self-petitioning spouses, against their child(ren), and must have taken place during the qualifying relationship. For self-petitioning children, there is also a requirement that the child was residing with the abuser when the abuse occurred.[107] However, residence for a child may also include any period of visitation.[108]

Note that if the self-petitioner is a stepchild or stepparent, the abuse must have occurred during the step-relationship. Evidence, however, of any abuse occurring at any time may be used to establish a pattern of abuse to support the claim.

Period of Battery or Extreme Cruelty

Self-Petitioner	When the battery or extreme cruelty must have taken place
Spouse	During the qualifying marriage
Child	During the claimed relationship while the child was under 21 years old and while the child was residing with or visiting the parent[109]
Parent	During the claimed relationship and while the son or daughter was 21 years old or older

1. Battery and Extreme Cruelty

The definitions for battery and extreme cruelty are flexible and broad. Other terms, such as abuse, acts of violence, and domestic violence, are often used to describe battery and extreme cruelty.

Battery generally includes any offensive touching or use of force on a person without the person's consent.[110] Some examples include, but are not limited to, punching, slapping, spitting, biting, kicking, choking, kidnapping, rape, molestation, forced prostitution, sexual abuse, and sexual exploitation. Other abusive actions may also be physical acts of violence and, under certain circumstances, include acts that in and of themselves may not initially appear violent but that are part of an overall pattern of violence.

Extreme cruelty is a non-physical act of violence or threat of violence demonstrating a pattern or intent on the part of the U.S. citizen or LPR to attain compliance from or control over the self-petitioner.[111] USCIS determines whether a self-petitioner has demonstrated extreme cruelty occurred on a case-by-case basis, and no single factor is conclusive.

Acts of extreme cruelty may include but are not limited to:

- Isolation;
- Humiliation;
- Degradation, use of guilt, minimizing, or blaming;
- Economic control;
- Coercion;
- Threatening to commit a violent act toward the self-petitioner (or the self-petitioner's children);
- Acts intended to create fear, compliance, or submission by the self-petitioner;
- Controlling what self-petitioners do and who they see and talk to;
- Denying access to food, family, or medical treatment;
- Threats of deportation; and
- Threats to remove a child from the self-petitioner's custody.

Battery or extreme cruelty may also include:

- Any act or threatened act of violence, including forced detention, which results or threatens to result in physical or mental injury;
- Psychological or sexual abuse or exploitation, including rape, molestation, incest, or forced prostitution;
- Acts that may not initially appear violent but are a part of an overall pattern of violence;
- Acts aimed at some other person or thing may be considered abuse if the acts were deliberately used to perpetrate extreme cruelty against the self-petitioner or the self-petitioner's child;
- Acts by a third party when the abusive U.S. citizen or LPR acquiesced to, condoned, or participated in the abuse; and

- Spousal abuse, if witnessed by the child of the victim, may be used as the basis for a self-petition by that child.[112]

2. Evidence

Examples of evidence to demonstrate battery or extreme cruelty occurred include but are not limited to:

- Reports and affidavits from police, judges, or other court officials;
- Court records;
- Reports and affidavits from medical personnel;
- Medical records;
- Reports and affidavits from school officials;
- Affidavits from a member of a religious authority;
- Reports and affidavits from social workers or other social service agency personnel;
- Documentation showing the self-petitioner sought safe-haven or services from a domestic violence shelter or other service provider;
- Protection orders;
- Photographs of injuries;
- Psychological evaluations; or
- Any other credible evidence of battery or extreme cruelty.[113]

Self-petitioners who obtained an order of protection against the abuser or have taken other legal steps to end the abuse are strongly encouraged to submit copies of the related legal documents.[114]

Moreover, evidence that the abuse victim sought safe-haven in a domestic violence shelter or similar refuge may also be relevant, as may a combination of documents such as a photograph of the visibly injured self-petitioner supported by affidavits.[115] Evidence of non-abusive acts may also be submitted to establish and demonstrate a pattern of abuse and violence.[116]

The self-petitioner is encouraged to submit a detailed personal statement as evidence supporting the self-petition. The self-petitioner's personal statement should provide as much detailed information as possible addressing specific incidents of battery or extreme cruelty.

F. Residence with the Abusive Relative

The self-petitioner must reside or have resided with the abuser in the past to be eligible for the self-petition. USCIS no longer requires the self-petitioner to have resided with the abuser during the qualifying relationship.[117] Residence is defined as the person's general place of abode or the principal, actual dwelling place of the self-petitioner without regard to intent.[118] A self-petitioner cannot meet the residency requirement by merely visiting the abuser's home while maintaining a general place of abode or a principal dwelling place elsewhere.[119]

Self-petitioners must have resided with the abuser at any point prior to filing the self-petition or reside with the abuser when they file the self-petition. The self-petitioner is not required, however, to have resided with the abuser for any specific length of time, to have resided with the abuser in the United States, or to have resided with the abuser during the qualifying relationship.[120] There is also no requirement for self-petitioners to be living with the abuser at the time they file the self-petition or, for self-petitioning spouses and parents, when the abuse occurred.[121]

For self-petitioning children, there is a requirement that they resided with the abuser when the abuse occurred.[122] However, residence for a child may also include any period of visitation.[123]

If self-petitioners are in the United States at the time they file the self-petition, the shared residence can have occurred either in or outside the United States.[124]

Examples of evidence demonstrating shared residence with the abusive U.S. citizen or LPR may include but are not limited to:

- Leases, deeds, mortgages, or rental agreements listing the self-petitioner and the U.S. citizen or LPR as occupants or owners;
- Insurance policies listing a common address for the self-petitioner and U.S. citizen or LPR;
- Utility invoices listing a common address for the self-petitioner and U.S. citizen or LPR;
- Bank statements or financial documents listing a common address for the self-petitioner and U.S. citizen or LPR;
- Photocopies of income tax filings listing the self-petitioner and the U.S. citizen or LPR;
- School records listing the parent and address of record;
- Medical records or a statement from the self-petitioner's physician;
- Affidavits of friends and family who can verify that the self-petitioner and the U.S. citizen or LPR resided together during the marriage; or
- Any other credible evidence of shared residence.[125]

G. Good Moral Character

1. General Requirements

Self-petitioners must demonstrate that they are persons of good moral character in order to be eligible for a VAWA self-petition.[126] USCIS generally looks at the 3-year period immediately preceding the date the self-petition is filed, and the self-petitioner's conduct is evaluated on a case-by-case basis taking into account the provisions regarding good moral character in INA 101(f) and the standards of the average citizen in the community.[127]

2. Special Considerations for Children Under 14 Years of Age

A self-petitioning child who is under 14 years old is presumed to be a person of good moral character and is not required to submit evidence of good moral character with the self-petition.[128]

The presumption, however, does not preclude USCIS from requesting evidence of good moral character if there is reason to believe that the self-petitioning child may lack good moral character.[129] USCIS has discretion to request evidence of good moral character for a self-petitioning child under 14 years of age and could find that a person under the age of 14 lacks

good moral character.[130]

3. Evaluating Good Moral Character

USCIS evaluates a self-petitioner's claim of good moral character on a case-by-case basis, considering the provisions of INA 101(f) and the standards of the average citizen in the community, and may consider any conduct, behavior, acts, or convictions.[131]

Although the evidentiary requirements for good moral character focus on the 3-year period preceding the filing of the self-petition, the eligibility requirements do not specify a time period during which self-petitioners must demonstrate their good moral character.[132] USCIS may review and request any evidence of good moral character or a lack of good moral character for any time period before or after the filing of the self-petition if USCIS has reason to believe the self-petitioner lacks good moral character.[133]

A self-petitioner is required to maintain good moral character through the time of final adjudication of both the self-petition and the adjustment of status application.[134]

If the results of criminal records checks conducted prior to the approval of the self-petition or adjustment of status application disclose that the self-petitioner is no longer a person of good moral character or that the self-petitioner has not been a person of good moral character in the past, USCIS denies the self-petition if it is pending or revokes the self-petition if it was previously approved.[135]

Permanent and Conditional Bars Under INA 101(f)

INA 101(f) lists the classes of persons who are statutorily barred from being considered a person of good moral character. Self-petitioners who fall under certain categories under INA 101(f) are permanently barred from establishing good moral character.[136]

Permanent bars apply to a self-petitioner:

- Who has at any time on or after November 29, 1990 been convicted of an aggravated felony; or
- Who at any time has engaged in conduct described in INA 212(a)(3)(E) (relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings) or INA 212(a)(2)(G) (relating to severe violations of religious freedom).[137]

Other bars, however, are not permanent in nature and are considered "conditional bars." Conditional bars are triggered by specific acts, offenses, activities, circumstances, or convictions under INA 101(f) that occurred in the 3-year period immediately preceding the filing of the self-petition.[138] When a conditional bar is triggered, USCIS has discretion to make a finding of good moral character despite an act or conviction falling under the conditional bar.

These self-petitioners may still be considered persons of good moral character if:

- The act or conviction is waivable for purposes of determining inadmissibility or deportability; and
- The act or conviction was connected to the self-petitioner's having been battered or subjected to extreme cruelty.[139]

Conditional bars apply to a self-petitioner who, during the 3-year period for which good moral character is required to be established:

- Is or was a habitual drunkard;
- Is or was engaged in prostitution during the past 10 years as described in INA 212(a)(2)(D);
- Is or was involved in the smuggling of a person or persons into the United States as described in INA 212(a)(6)(E);
- Is or was a practicing polygamist;
- Has been convicted or admits committing acts that constitute a crime involving moral turpitude other than a purely political offense, except for certain petty offenses or offenses committed while the person was less than 18 years old as described in INA 212(a)(2)(A)(ii);
- Has committed two or more offenses for which the applicant was convicted, and the aggregate sentence actually imposed was 5 years or more, provided that, if an offense was committed outside the United States, it was not purely a political offense;
- Has violated laws relating to a controlled substance, except for simple possession of 30 grams or less of marijuana;
- Earns income principally from illegal gambling activities or has been convicted of two or more gambling offenses;
- Has given false testimony for the purpose of obtaining immigration benefits; or
- Has been confined as a result of a conviction to a penal institution for an aggregate period of 180 days or more.[140]

USCIS may only look to the judicial records to determine whether the person has been convicted of a crime and may not look behind the conviction to reach an independent determination concerning guilt or innocence.[141]

Acts or Convictions Under INA 101(f) That Occur Outside the 3-Year Period

If a self-petitioner's prior acts or convictions fall under a conditional bar but occurred outside the 3 years immediately preceding the filing of the self-petition, USCIS considers all evidence in the record to make an individualized determination as to whether the self-petitioner has established good moral character.

Officers must consider the totality of the evidence, including all positive and negative factors, to determine whether under the standards of the average citizen of the community self-petitioners established their good moral character.[142] Some relevant considerations may include but are not limited to the severity of the act or conviction and whether the self-petitioner has demonstrated rehabilitation of character.

Unlawful Acts

Self-petitioners who willfully failed or refused to support dependents, committed unlawful acts that adversely reflect on their moral character, or were convicted or imprisoned for such acts but the acts do not fall under INA 101(f) will be considered as lacking good moral character unless they establish extenuating circumstances.[143]

Persons who were subjected to abuse in the form of forced prostitution or who can establish that they were forced to engage in other behavior that could render them inadmissible may still be considered a person of good moral character if they have not been convicted for the commission of the offense.[144]

All Other Conduct and Acts

If there is evidence that a self-petitioner's conduct or acts do not fall under INA 101(f) but are contrary to the standards of the average citizen in the community, the officer must consider all of the evidence in the record and make a case-by-case determination as to whether the self-petitioner has established good moral character under the standards of the average citizen in the community.[145] Some relevant considerations may include but are not limited to the severity of the conduct or act and whether the self-petitioner has demonstrated rehabilitation of character.

Evidence

Primary evidence of good moral character is the self-petitioner's affidavit, which should contain detailed statements regarding the self-petitioner's conduct and behavior establishing good moral character.[146] In addition to the affidavit, the self-petitioner should also submit a local police clearance or a state-issued criminal background check from each locality or state in the United States in which the self-petitioner has resided for 6 or more months during the 3-year period immediately preceding the filing of the self-petition.[147]

If self-petitioners reside or have resided outside the United States, they should submit a police clearance, criminal background check, or similar report issued by the appropriate authority in the foreign country in which they resided for 6 or more months during the 3-year period immediately preceding the filing of the self-petition.[148]

Self-petitioners are encouraged to submit clearances or background checks based on their name and date of birth or based on their fingerprints. If the search conducted is based on a name and date of birth, self-petitioners are encouraged to provide clearances under all their aliases, including any maiden names, if applicable.

If police clearances, criminal background checks, or similar reports are not available for some or all locations, self-petitioners are encouraged to submit a detailed statement explaining the reasons they could not obtain the clearances and why the lack of a police clearance does not adversely reflect upon the self-petitioner's good moral character. Officers may not deny self-petitions for a failure to submit criminal background checks or police clearances if self-petitioners have submitted an affidavit attesting that they have never been arrested.

In addition to the self-petitioner's affidavit and police clearances or criminal background checks, USCIS considers any other credible evidence of good moral character, such as affidavits from responsible persons who can knowledgeably attest to the self-petitioner's good moral character.[149]

Affidavits attesting to good moral character should generally contain the affiant's full name, address, telephone number, date and place of birth, relationship to the parties, if any, and details concerning how the affiant acquired knowledge of the self-petitioner's good moral character.

Self-petitioners who have been arrested, charged, or otherwise have a criminal record should provide the following additional evidence, if available:

- Copies of arrest report(s);
- Certified copies of court documents showing final disposition of any charge(s); and
- Relevant excerpts of law for the jurisdiction where the act took place listing the maximum possible penalty for each charge.

4. Evaluating Acts or Convictions Falling Under the Conditional Bars Listed in INA 101(f)

If a self-petitioner has committed an act or has a conviction that falls under a conditional bar under INA 101(f), then the officer must consider the following:

- Whether a waiver for the act or conviction would be available;
- Whether the act or conviction is connected to battery or extreme cruelty experienced by the self-petitioner; and
- Whether the person warrants a finding of good moral character in the exercise of discretion.[150]

Step 1: Determine Whether a Waiver Would be Available

If the self-petitioner has committed an act or has a conviction that falls under a conditional bar, the officer should first determine whether a waiver would be available. The self-petitioner must submit evidence addressing whether a waiver would be available for the act or conviction at issue.[151]

The officer does not need to consider whether a waiver would be granted, only that a waiver would be available at the time the adjustment of status or immigrant visa application is filed.[152] If officers are uncertain whether a waiver is available, they should seek guidance from the local Office of the Chief Counsel before making a final determination.

Step 2: Determine Whether the Act or Conviction is "Connected" to the Battery or Extreme Cruelty

If a waiver is available for the act or conviction, officers must consider whether the act or conviction is "connected" to the battery or extreme cruelty experienced by the self-petitioner. For an act or conviction to be considered connected to the battery or extreme cruelty, the evidence must establish that the act or conviction has a causal or logical relationship to the battery or extreme cruelty.[153] The connection does not require compulsion or coercion on the part of the self-petitioner. To meet this evidentiary standard, the evidence submitted must demonstrate the following:

- The circumstances surrounding the act or conviction committed by the self-petitioner; and
- The connection between the act or conviction and the battery or extreme cruelty.

When determining whether a connection exists between the self-petitioner's disqualifying act or conviction and the battery or extreme cruelty suffered by the self-petitioner, USCIS considers the full history of abuse in the case. The self-petitioner's qualifying U.S. citizen or LPR relative must have perpetrated the battery or extreme cruelty during the qualifying relationship, but the self-petitioner is not required to establish that the act or conviction occurred during the qualifying relationship.

If the self-petitioner establishes that the battery or extreme cruelty occurred prior to and during the qualifying relationship, the officer may find that the self-petitioner has established the required "connection" between the act or conviction and the battery or extreme cruelty, even if the act or conviction occurred prior to the qualifying relationship.

Step 3: Determine Whether the Self-Petitioner Warrants a Finding of Good Moral Character in the Exercise of Discretion

Whether a self-petitioner is a person of good moral character under the exception at INA 204(a)(1)(C) is a discretionary determination made by USCIS. For example, even if the evidence establishes both that a waiver for the self-petitioner's disqualifying act or conviction is available and that the requisite connection exists between the disqualifying act or conviction and the battery or extreme cruelty, USCIS may nevertheless conclude that the severity or gravity of the self-petitioner's act or conviction warrants a finding of a lack of good moral character.

H. Self-Petitioners Filing from Outside the United States

If self-petitioners are outside the United States when they file the self-petition, they must demonstrate one of the following in addition to the eligibility requirements listed in this chapter:

- The abusive U.S. citizen or LPR is employed abroad by the U.S. government;
- The abusive U.S. citizen or LPR is a member of the U.S. uniformed services stationed outside the United States; or
- The claimed battery or extreme cruelty occurred in the United States.[154]

If USCIS approves the self-petition and a visa is available, the self-petitioner may apply for an immigrant visa to enter the United States as an LPR.[155]

I. Derivative Beneficiaries

Self-petitioning spouses and children may include their child(ren) as derivative beneficiaries on the self-petition.[156] Self-petitioning parents, however, are not eligible to confer derivative benefits to their family members. If self-petitioning parents include a derivative on their self-petition, the self-petition will not be denied. Any listed derivatives, however, are not eligible to derive status and do not receive any benefit under the approved self-petition.

Derivative children must be unmarried and less than 21 years old at the time of filing and otherwise qualify as the self-petitioner's child under immigration law.[157] The statutory definition of "child" includes certain children born in or out of wedlock and certain legitimated children, adopted children, and stepchildren.[158]

Self-petitioners may add an eligible child, including a child born after the self-petition was approved, when the self-petitioner applies for an immigrant visa outside the United States or adjustment of status in the United States.[159] A new petition is not required.

Self-petitioners should submit evidence that the derivative beneficiary is under 21 years old and unmarried at the time of filing as well as evidence of the relationship between the self-petitioner and the child.[160] Derivative beneficiaries are granted the same immigrant classification and priority date as the self-petitioner.[161]

If a child turns 21 years old and is unable to benefit from the Child Status Protection Act (CSPA), as long as the self-petition was filed before the child turned 21 years old, the child is automatically considered a principal self-petitioner if the child turns 21 years old before adjusting status.[162] In such a case, the child receives the priority date of the parent's self-petition.[163] Derivatives do not need to file a separate self-petition; they are placed in the preference category appropriate to their situation.[164]

Footnotes

[^ 1] See Title IV of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322 (PDF), 108 Stat. 1796, 1902 (September 13, 1994). See Title V of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386 (PDF), 114 Stat. 1464, 1518 (October 28, 2000). See Title VIII of the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162 (PDF), 119 Stat. 2960, 3053 (January 5, 2006). See Section 6 of the Violence Against Women and Department of Justice Reauthorization Act of 2005 Technical Amendments, Pub. L. 109-271 (PDF), 120 Stat. 750, 762 (August 12, 2006). See Title VIII of the Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4 (PDF), 127 Stat. 54, 110 (March 7, 2013).

[^ 2] See INA 101(a)(51). Although INA 101(a)(51) includes several benefits under the term "VAWA self-petitioner," this part focuses on self-petitions filed under INA 204(a).

[^ 3] See 8 CFR 204.1(a)(3).

[^ 4] See INA 204(a). See 8 CFR 204.2(c)(1)(i). See 8 CFR 204.2(e)(1)(i). See INA 245(a).

[^ 5] See INA 204(a). See 8 CFR 204.1(a)(3). See 8 CFR 204.2(c)(1). See 8 CFR 204.2(e)(1). Although 8 CFR 204.2(c)(1) and 8 CFR 204.2(e)(1) require self-petitioners to demonstrate extreme hardship to themselves or their children if deported; that they reside in the United States at the time of filing; and that their shared residence with the abuser takes place in the United States, the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386 (PDF), 114 Stat. 1464 (October 28, 2000) removed these as eligibility requirements and supersedes this part of the regulation.

[^ 6] See INA 201(b)(2)(A)(i). See INA 203(a)(2)(A).

[^ 7] See INA 204(a)(1). See 8 CFR 204.2(c)(1). See 8 CFR 204.2(e)(1).

[^ 8] For more information on evidentiary requirements, see Chapter 5, Adjudication, Section B, Review of Evidence, Subsection 2, Any Credible Evidence Provision [3 USCIS-PM D.5(B)(2)].

[^ 9] See INA 204(a)(1)(J). See 8 CFR 103.2(b)(2)(iii). See 8 CFR 204.1(f)(1). See 8 CFR 204.2(c)(2)(i). See 8 CFR 204.2(e)(2)(i). INA 204(a)(1)(J) was not specifically amended to encompass the consideration of secondary evidence submitted by self-petitioning parents. The discussion of evidence found at 8 CFR 103.2(b)(2)(iii) and 8 CFR 204.1(f)(1) regarding self-petitions filed under INA 204(a)(1)(A)(iii) and (iv) and INA 204(a)(1)(B)(ii) and (iii) is applicable to self-petitions filed by abused parents of U.S. citizen sons or daughters under INA 204(a)(1)(A)(vii). For more information about the any credible evidence provision, see Chapter 5, Adjudication, Section B, Review of Evidence, Subsection 2, Any Credible Evidence Provision [3 USCIS-PM D.5(B)(2)].

[^ 10] See 8 CFR 204.1(f)(1).

[^ 11] See INA 204(a)(1)(J). See 8 CFR 204.2(c)(2)(i). See 8 CFR 204.2(e)(2)(i).

[^ 12] See 8 CFR 103.2(b)(1).

[^ 13] See INA 204(a)(1). See 8 CFR 204.2(c)(2)(ii). See 8 CFR 204.2(e)(2)(ii).

[^ 14] Self-petitioning spouses may also include certain intended spouses and former spouses. For more information, see Subsection 2, Self-Petitioning Spouse [3 USCIS-PM D.2(B)(2)]; Chapter 3, Effect of Certain Life Events, Section A, Divorce Prior to Filing the Self-Petition, Subsection 1, Self-Petitioning Spouse's Divorce [3 USCIS-PM D.3(A)(1)]; and Chapter 3, Effect of Certain Life Events, Section D, Death of the U.S. Citizen, Lawful Permanent Resident, or Self-Petitioner [3 USCIS-PM D.3(D)].

[^ 15] See INA 204(a). See 8 CFR 204.2(c)(1)(i)-(iii). See 8 CFR 204.2(e)(1)(i)-(iii).

[^ 16] See 8 CFR 204.2(c)(2)(ii). See 8 CFR 204.2(e)(2)(ii).

[^ 17] See INA 204(a)(1). See 8 CFR 103.2(b)(1).

[^ 18] See INA 204(a)(1)(A)(iii)(II)(aa)(CC)(bbb). See INA 204(a)(1)(A)(iv). See INA 204(a)(1)(A)(vii). See INA 204(a)(1)(B)(ii)(II)(aa)(CC)(aaa). See INA 204(a)(1)(B)(iii). For more information, see Chapter 3, Effect of Certain Life Events, Section E, Loss or Renunciation of U.S. Citizenship or Loss of Lawful Permanent Resident Status [3 USCIS-PM D.3(E)].

[^ 19] See INA 204(a)(1)(A)(vi). See INA 204(a)(1)(B)(v).

[^ 20] See 8 CFR 204.1(g)(1). Note that self-petitioners may submit any credible evidence relevant to the abuser's U.S. citizenship or LPR status.

[^ 21] See 8 CFR 204.1(g)(1). Note that self-petitioners may submit any credible evidence relevant to the abuser's U.S. citizenship or LPR status.

[^ 22] See 8 CFR 103.2(b)(17)(ii). See 8 CFR 204.1(g)(3).

[^ 23] See 8 CFR 103.2(b)(17)(ii). See 8 CFR 204.1(g)(3).

[^ 24] See *Matter of B--*, 6 I&N Dec. 555 (BIA 1955). See *Matter of Ah San* (PDF), 15 I&N Dec. 315 (BIA 1975).

[^ 25] See INA 204(a)(1)(A)(iii)(II)(aa). See INA 204(a)(1)(B)(ii)(II)(aa). See 8 CFR 204.2(c)(1)(i)-(iii).

[^ 26] See INA 204(a)(1)(A)(iii)(II)(aa)(CC). See INA 204(a)(1)(B)(ii)(II)(aa)(CC). For more information, see Chapter 3, Effect of Certain Life Events, Section A, Divorce Prior to Filing the Self-Petition [3 USCIS-PM D.3(A)] and Section D, Death of the U.S. Citizen, Lawful Permanent Resident, or Self-Petitioner [3 USCIS-PM D.3(D)]. Although 8 CFR 204.2(c)(1)(i)(A) requires that the self-petitioner demonstrate an existing marriage to the abuser at the time of filing, the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. 106-386 (PDF), 114 Stat. 1464 (October 28, 2000) amended this requirement to allow abused spouses to remain eligible for VAWA benefits if the marriage was terminated due to divorce or death in certain circumstances. VTVPA supersedes this part of the regulation.

[^ 27] See INA 204(a)(1)(A)(vi). See INA 204(a)(1)(B)(v).

[^ 28] See *Matter of Lovo-Lara* (PDF), 23 I&N Dec. 746 (BIA 2005) and *Matter of Da Silva* (PDF), 15 I&N Dec. 778 (BIA 1976). To determine the validity of a marriage, USCIS considers the same evidence submitted for a spousal-based Petition for Alien Relative, (Form I-130). For more information on Form I-130 and what constitutes a legally valid marriage, see Volume 6, Immigrants, Part B, Family-Based Immigrants [6 USCIS-PM B].

[^ 29] See *Matter of H--* (PDF), 9 I&N Dec. 640 (BIA 1962). A polygamous marriage, even if valid where contracted, is not recognized for immigration purposes.

[^ 30] See 8 CFR 204.2(c)(2)(ii).

[^ 31] See 8 CFR 204.2(c)(2)(ii).

[^ 32] See 8 CFR 204.2(c)(2)(ii).

[^ 33] See INA 204(a)(1)(A)(iii)(II)(aa)(BB). See INA 204(a)(1)(B)(ii)(II)(aa)(BB).

[^ 34] For more information on marriages terminated outside the United States, see Volume 6, Immigrants, Part B, Family-Based Immigrants [6 USCIS-PM B].

[^ 35] See INA 204(a)(1)(A)(iii)(II)(aa)(BB). See INA 204(a)(1)(B)(ii)(II)(aa)(BB).

[^ 36] See INA 204(a)(1)(A)(iii)(II)(aa)(BB). See INA 204(a)(1)(B)(ii)(II)(aa)(BB).

[^ 37] See INA 204(a)(iii)(I)(bb). See INA 204(a)(1)(B)(ii)(I)(bb). See INA 101(b)(1).

[^ 38] See 8 CFR 204.2(c)(2)(ii).

[^ 39] See INA 204(a)(1)(A)(iv). See INA 204(a)(1)(B)(iii). See INA 101(b)(1). See 8 CFR 204.2(e)(1)(ii).

[^ 40] See INA 101(b)(1). See 8 CFR 204.2(e)(1)(ii).

[^ 41] See INA 204(a)(1)(D)(i). See INA 204(a)(1)(D)(v). See INA 201(f). See INA 203(h). For more information, see Chapter 3, Effect of Certain Life Events, Section G, Child Turning 21 Years Old [3 USCIS-PM D.3(G)].

[^ 42] See 8 CFR 204.2(e)(1)(ii). For more information, see Chapter 3, Effect of Certain Life Events, Section B, Self-Petitioner's Marriage or Remarriage [3 USCIS-PM D.3(B)].

[^ 43] See INA 101(b)(1). See 8 CFR 204.2(e)(1)(ii).

[^ 44] For more information, see Volume 6, Immigrants, Part B, Family-Based Immigrants, Chapter 8, Children, Sons, and Daughters [6 USCIS-PM B.8] and Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens, Chapter 3, U.S. Citizens at Birth (INA 301 and 309), Section B, Child Born in Wedlock [12 USCIS-PM H.3(B)].

[^ 45] See 8 CFR 204.2(e)(2)(ii)(A). For more information on acquiring U.S. citizenship at birth, see Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens, Chapter 3, U.S. Citizens at Birth (INA 301 and 309) [12 USCIS-PM H.3].

[^ 46] See 8 CFR 204.2(d)(2)(i). USCIS considers the same evidence submitted to demonstrate a parent-child relationship under 8 CFR 204.2(d)(2) as for a child filing a self-petition. Note that officers should always consider any credible evidence submitted by the self-petitioner in accordance with INA 204(a)(1)(J).

[^ 47] See INA 101(b)(1)(A). See INA 101(b)(1)(C). See INA 101(b)(1)(D). See 8 CFR 204.2(e)(2)(ii)(B)-(D).

[^ 48] See 8 CFR 204.2(e)(2)(ii)(B).

[^ 49] See 8 CFR 204.2(d)(2)(i).

[^ 50] See INA 101(b)(1)(C). See 8 CFR 204.2(e)(2)(ii)(C).

[^ 51] See INA 101(b)(1)(C). See 8 CFR 204.2(d)(2)(ii).

[^ 52] See INA 101(b)(1)(C). See 8 CFR 204.2(d)(2)(ii). For more information on legitimation, see Volume 6, Immigrants, Part B, Family-Based Immigrants [6 USCIS-PM B].

[^ 53] See INA 101(b)(1)(C). See 8 CFR 204.2(e)(2)(ii)(D).

[^ 54] See 8 CFR 204.2(d)(2)(iii).

[^ 55] See 8 CFR 204.2(d)(2)(iii).

[^ 56] See 8 CFR 204.2(d)(2). See 8 CFR 204.2(e)(2)(ii). See INA 204(a)(1)(J). See 8 CFR 204.2(e)(2)(i). For more information on the consideration of evidence, see Chapter 5, Adjudication, Section B, Review of Evidence, Subsection 2, Any Credible Evidence Provision [3 USCIS-PM D.5(B)(2)].

[^ 57] See INA 101(b)(1)(B).

[^ 58] See *Arguijo v. USCIS*, 991 F.3d 736 (7th Cir. 2021), holding that divorce does not terminate a stepchild relationship for the purposes of eligibility for a VAWA self-petition. For more information, see Chapter 3, Effect of Certain Life Events, Section A, Divorce Prior to Filing the Self-Petition, Subsection 2, Termination of a Step-Relationship Due to Divorce or Death [3 USCIS-PM D.3(A)(2)].

[^ 59] See *Matter of Pagnerre* (PDF), 13 I&N Dec. 688 (BIA 1971). This case involves whether a stepdaughter qualifies as a family-based preference category relative of a U.S. citizen under INA 203(a)(3) when the marriage that created the step relationship terminated due to the death of the beneficiary's biological parent. The court found that there was a continuing step relationship in fact between the petitioner and beneficiary after the death of the beneficiary's father and approved the petition for preference classification. For more information, see Chapter 3, Effect of Certain life Events, Section A, Divorce Prior to Filing the Self-Petition, Subsection 2, Termination of a Step-Relationship Due to Divorce or Death [3 USCIS-PM D.3(A)(2)].

[^ 60] See 8 CFR 204.2(e)(2)(ii)(E).

[^ 61] See 8 CFR 204.2(e)(2)(ii)(E).

[^ 62] See INA 204(a)(1). For more information, see Section B, Qualifying Relationship, Subsection 2, Self-Petitioning Spouse [3 USCIS-PM D.2(B)(2)].

[^ 63] See INA 101(b)(1)(E).

[^ 64] See INA 101(b)(1)(E)(i).

[^ 65] See INA 101(b)(1)(E)(i). See INA 204(a)(1)(A)(iv). See INA 204(a)(1)(B)(iii). There are three different ways for a child to immigrate to the United States based on adoption. See INA 101(b)(1)(E). See INA 101(b)(1)(F). See INA 101(b)(1)(G). See 8 CFR 204.2(d)(2)(vii). See 8 CFR 204.301-8 CFR 204.314. The requirements to self-petition as an abused adopted child apply to the family-based process under INA 101(b)(1)(E), INA 204(a)(1)(A)(iv), and INA 204(a)(1)(B)(iii). See Volume 5, Adoptions, Part A, Adoptions Overview, Chapter 4, Adoption Definition and Order Validity [5 USCIS-PM A.4].

[^ 66] See INA 101(b)(1)(E)(i). See INA 101(b)(1)(F). See Volume 5, Adoptions, Part E, Family-Based Adoption Petitions [5 USCIS-PM E].

[^ 67] See INA 101(b)(1)(E)(ii). See Volume 5, Adoptions, Part E, Family-Based Adoption Petitions [5 USCIS-PM E].

[^ 68] See 8 CFR 204.2(e)(2)(ii)(F). Although 8 CFR 204.2(e)(2)(ii)(F) requires that self-petitioners submit evidence that they have been residing with and in the legal custody of the abusive adoptive parent for at least 2 years, the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162 (PDF), 119 Stat. 2960 (January 5, 2006) removed this as an eligibility requirement and supersedes this part of the regulation.

[^ 69] See INA 204(a)(1)(A)(vii). See INA 101(b)(2). USCIS considers the same evidence submitted to establish eligibility for an abused spouse or child under 8 CFR 204.2(c)(2) and 8 CFR 204.2(e)(2) as for an abused parent.

[^ 70] See INA 101(b)(1).

[^ 71] See *Matter of Hassan* (PDF), 16 I&N Dec. 16 (BIA 1976).

[^ 72] See INA 101(b)(1). See INA 101(b)(2). A child is defined as "an unmarried person under 21 years of age" in INA 101(b)(1). INA 101(b)(1)(B) and INA 101(b)(1)(E), (F), and (G) further define a child to include a stepchild and an adopted child, respectively. Similarly, "parent," "father," and "mother" are defined in INA 101(b)(2) to include stepparents and certain adoptive parents. An abused parent, stepparent, or adoptive parent of a U.S. citizen is therefore eligible to apply for VAWA relief under INA 204(a)(1)(A)(vii) provided that the self-petitioner is a "parent" as defined in INA 101(b)(2) and has or had a qualifying relationship to the U.S. citizen son or daughter. USCIS considers the same evidence submitted for a Petition for Alien Relative (Form I-130) for a child or parent as for a self-petitioning parent to establish a qualifying relationship to a U.S. citizen son or daughter. For more information on Form I-130s, see Volume 6, Immigrants, Part B, Family-Based Immigrants [6 USCIS-PM B].

[^ 73] For more information, see Volume 6, Immigrants, Part B, Family-Based Immigrants, Chapter 8, Children, Sons, and Daughters [6 USCIS-PM B.8] and Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens, Chapter 3, U.S. Citizens at Birth (INA 301 and 309), Section B, Child Born in Wedlock [12 USCIS-PM H.3(B)].

[^ 74] See 8 CFR 204.2(e)(2)(ii)(A). See 8 CFR 204.2(f)(2). USCIS considers the same evidence submitted to demonstrate a parent-child relationship as described in 8 CFR 204.2(e) and 8 CFR 204.2(f)(2) as for a parental relationship for parents filing a self-petition under INA 204(a)(1)(A)(vii). Note that officers should always consider any credible evidence submitted by the self-petitioner in accordance with INA 204(a)(1)(J).

[^ 75] See 8 CFR 204.2(f)(2)(i).

[^ 76] See INA 101(b)(1)(A). See INA 101(b)(1)(C). See INA 101(b)(1)(D). See INA 101(b)(2). See 8 CFR 204.2(e)(2)(ii). See 8 CFR 204.2(f)(2).

[^ 77] See 8 CFR 204.2(e)(2)(ii)(B).

[^ 78] See 8 CFR 204.2(f)(2)(i).

[^ 79] See INA 101(b)(1)(C). See 8 CFR 204.2(e)(2)(ii)(C).

[^ 80] See INA 101(b)(1)(C). See 8 CFR 204.2(f)(2)(ii).

[^ 81] See INA 101(b)(1)(C). See 8 CFR 204.2(f)(2)(ii). For more information on legitimation, see Volume 6, Immigrants, Part B, Family-Based Immigrants [6 USCIS-PM B].

[^ 82] See 8 CFR 204.2(f)(2)(iii).

[^ 83] See 8 CFR 204.2(f)(2)(iii).

[^ 84] See 8 CFR 204.2(f)(2)(iii).

[^ 85] See 8 CFR 204.2(e)(2)(ii). See 8 CFR 204.2(f)(2). See INA 204(a)(1)(J). See 8 CFR 204.2(e)(2)(i). For more information on the consideration of evidence, see Chapter 5, Adjudication, Section B, Review of Evidence, Subsection 2, Any Credible Evidence Provision [3 USCIS-PM D.5(B)(2)].

[^ 86] See INA 101(b)(1)(B).

[^ 87] See *Arguijo v. USCIS*, 991 F.3d 736 (7th Cir. 2021), holding that divorce does not terminate a stepchild relationship for the purposes of eligibility for a VAWA self-petition. For more information, see Chapter 3, Effect of Certain Life Events, Section A, Divorce Prior to Filing the Self-Petition, Subsection 2, Termination of a Step-Relationship Due to Divorce or Death [3 USCIS-PM D.3(A)(2)].

[^ 88] See *Matter of Pagnerre* (PDF), 13 I&N Dec. 688 (BIA 1971). This case involves whether a stepdaughter qualifies as a family-based preference category relative of a U.S. citizen under INA 203(a)(3) when the marriage that created the step relationship terminated due to the death of the beneficiary's biological parent. The court found that there was a continuing step relationship in fact between the petitioner and beneficiary after the death of the beneficiary's father and approved the petition for preference classification. For more information, see Chapter 3, Effect of Certain life Events, Section A, Divorce Prior to Filing the Self-Petition, Subsection 2, Termination of a Step-Relationship Due to Divorce or Death [3 USCIS-PM D.3(A)(2)].

[^ 89] See 8 CFR 204.2(e)(2)(ii)(E).

[^ 90] See 8 CFR 204.2(e)(2)(ii)(E).

[^ 91] To meet the definition of a parent under INA 101(b)(2), the parent's child must meet one of the definitions of child under INA 101(b)(1). There are three different ways to meet the definition of child based on adoption. See INA 101(b)(1)(E). See INA 101(b)(1)(F). See INA 101(b)(1)(G). See INA 204(a)(1)(A)(vii). See Volume 5, Adoptions, Part A, Adoption Overview [5 USCIS-PM A].

[^ 92] See Volume 5, Adoptions, Part A, Adoptions Overview, Chapter 4, Adoption Definition and Order Validity [5 USCIS-PM A.4].

[^ 93] See INA 101(b)(1)(E). See INA 101(b)(1)(F). See INA 101(b)(1)(G).

[^ 94] See INA 101(b)(1)(E)(i). In certain circumstances the adoption may take place prior to the child attaining 18 years old if a sibling exception applies. See Volume 5, Adoptions, Part E, Family-Based Adoption Petitions [5 USCIS-PM E].

[^ 95] See INA 101(b)(1)(E).

[^ 96] See INA 101(b)(1)(E). See 8 CFR 204.2(f)(2)(iv). See Volume 5, Adoptions, Part A, Overview, Chapter 4, Adoption Definition and Order Validity [5 USCIS-PM A.4]. USCIS considers the same evidence submitted to demonstrate a parent-child relationship under 8 CFR 204.2(f)(2) as for a parent filing a self-petition. Note that officers should always consider any credible evidence submitted by the self-petitioner in accordance with INA 204(a)(1)(J).

[^ 97] To establish an adoptive relationship if the child was adopted through the orphan process under INA 101(b)(1)(F), see Volume 5, Part C, Child Eligibility Determinations (Orphan) [5 USCIS-PM C]. To establish an adoptive relationship if the child was adopted through the Hague process under INA 101(b)(1)(G), see Volume 5, Part D, Child Eligibility Determinations (Hague) [5 USCIS-PM D].

[^ 98] See INA 204(a)(1)(A)(iii)(I). See INA 204(a)(1)(B)(ii)(I). See 8 CFR 204.2(c)(1)(i)(H). See 8 CFR 204.2(c)(1)(ix).

[^ 99] See 8 CFR 204.2(c)(1)(ix).

[^ 100] See 61 FR 13061, 13068 (PDF) (Mar. 26, 1996). See *Bark v. INS*, 511 F.2d 1200 (9th Cir. 1975). The court stated that evidence of separation, standing alone, cannot support a finding that a marriage was not bona fide when it was entered. The duration of a separation is relevant to, but not dispositive of, an intent to enter a marriage.

[^ 101] See 8 CFR 204.2(c)(2)(vii).

[^ 102] See INA 204(a)(1)(A)(iii)(II)(cc). See INA 204(a)(1)(A)(iv). See INA 204(a)(1)(A)(vii). See INA 204(a)(1)(B)(ii)(II)(cc). See INA 204(a)(1)(B)(iii). See INA 201(b)(2)(A)(i). See INA 203(a)(2)(A). See 8 CFR 204.2(c)(1)(i)(B). See 8 CFR 204.2(e)(1)(i)(B).

[^ 103] See 8 CFR 204.2(c)(1)(iv). See 8 CFR 204.2(e)(1)(iv). For more information, see Chapter 3, Effect of Certain Life Events, Section C, Marriage-Related Prohibitions on Self-Petition Approval [3 USCIS-PM D.3(C)].

[^ 104] See INA 204(a)(1)(A)(iii)(I)(bb). See INA 204(a)(1)(A)(iv). See INA 204(a)(1)(A)(v)(I)(cc). See INA 204(a)(1)(A)(vii)(V). See INA 204(a)(1)(B)(ii)(I)(bb). See INA 204(a)(1)(B)(iii). See INA 204(a)(1)(B)(iv)(I)(cc). See 8 CFR 204.2(c)(1)(i)(E). See 8 CFR 204.2(e)(1)(i)(E).

[^ 105] See INA 101(b)(1)(E).

[^ 106] See 61 FR 13061, 13065 (PDF) (Mar. 26, 1996).

[^ 107] See 8 CFR 204.2(e)(1)(i)(E).

[^ 108] See INA 204(a)(1)(A)(iv).

[^ 109] See 8 CFR 204.2(e)(1)(i)(E).

[^ 110] See Merriam-Webster Dictionary's law definition of "battery."

[^ 111] See *Hernandez v. Ashcroft*, 345 F.3d 824, 840 (9th Cir. 2003). "Non-physical actions rise to the level of domestic violence when 'tactics of control are intertwined with the threat of harm in order to maintain the perpetrator's dominance through fear…' Because every insult or unhealthy interaction in a relationship does not rise to the level of domestic violence...

Congress required a showing of extreme cruelty in order to ensure that [the VAWA suspension statute] protected against the extreme concept of domestic violence, rather than mere unkindness" (internal citations omitted).

[^ 112] See 8 CFR 204.2(c)(1)(vi). See 8 CFR 204.2(e)(1)(vi).

[^ 113] See 8 CFR 204.2(c)(2)(iv). See 8 CFR 204.2(e)(2)(iv).

[^ 114] See 8 CFR 204.2(c)(2)(iv). See 8 CFR 204.2(e)(2)(iv).

[^ 115] See 8 CFR 204.2(c)(2)(iv). See 8 CFR 204.2(e)(2)(iv).

[^ 116] See 8 CFR 204.2(c)(2)(iv). See 8 CFR 204.2(e)(2)(iv).

[^ 117] See INA 204(a)(1)(A)(iii)(II)(dd). See INA 204(a)(1)(A)(iv). See INA 204(a)(1)(A)(vii)(IV). See INA 204(a)(1)(B)(ii)(II)(dd). See INA 204(a)(1)(B)(iii). See 8 CFR 204.2(c)(1)(i)(D). See 8 CFR 204.2(e)(1)(i)(D). USCIS implemented this new interpretation on February 10, 2022 given that several federal courts have recently held that the statutory language does not require shared residence during the qualifying relationship. See *Dartora v. U.S.*, No. 4:20-CV-05161-SMJ (E.D.W.A. June 7, 2021). See *Bait It v. McAleenan*, 410 F. Supp. 3d 874 (N.D. Ill. 2019). See *Hollingsworth v. Zuchowski*, 437 F. Supp. 3d 1231 (S.D. Fla. 2020).

[^ 118] See INA 101(a)(33).

[^ 119] See 61 FR 13061, 13065 (PDF) (Mar. 26, 1996).

[^ 120] Although 8 CFR 204.2(c)(1)(v) states that "[a] self-petition will not be approved if the self-petitioner is not residing in the United States," this portion of the regulation has been superseded by the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386 (PDF), 114 Stat. 1464 (October 28, 2000), which removed the requirement for the self-petitioner to reside in the United States.

[^ 121] See 8 CFR 204.2(c)(1)(v). See 8 CFR 204.2(e)(1)(v).

[^ 122] See 8 CFR 204.2(e)(1)(i)(E).

[^ 123] See INA 204(a)(1)(A)(iv).

[^ 124] For more information on filing a VAWA self-petition from outside the United States, see Section H, Self-Petitioners Filing from Outside the United States [3 USCIS-PM D.2(H)].

[^ 125] See 8 CFR 204.2(c)(2)(iii). See 8 CFR 204.2(e)(2)(iii).

[^ 126] See INA 204(a)(1)(A)(iii)(II)(bb). See INA 204(a)(1)(A)(iv). See INA 204(a)(1)(A)(vii)(II). See INA 204(a)(1)(B)(ii)(II)(bb). See INA 204(a)(1)(B)(iii). See 8 CFR 204.2(c)(1)(i)(F). See 8 CFR 204.2(e)(1)(i)(F).

[^ 127] See 8 CFR 204.2(c)(1)(vii). See 8 CFR 204.2(e)(1)(vii). See 8 CFR 316.10(a)(2).

[^ 128] See 8 CFR 204.2(e)(2)(v). Affirmative evidence of good moral character is required for all self-petitioning children age 14 or older.

[^ 129] See 61 FR 13061, 13066 (PDF) (Mar. 26, 1996).

[^ 130] See 61 FR 13061, 13066 (PDF) (Mar. 26, 1996). The regulation provides that a self-petition filed by a person of any age may be denied or revoked if the evidence establishes that the person lacks good moral character.

[^ 131] See 8 CFR 204.2(c)(1)(vii). See 8 CFR 204.2(e)(1)(vii). See 8 CFR 316.10(a)(2).

[^ 132] See 61 FR 13061, 13066 (PDF) (Mar. 26, 1996). The statute requires all self-petitioners to be persons of good moral character but does not specify the period for which good moral character must be established. The regulations require evidence of good moral character for the 3 years immediately preceding the date the self-petition is filed.

[^ 133] See 61 FR 13061, 13066 (PDF) (Mar. 26, 1996). USCIS is not precluded from choosing to examine the self-petitioner's conduct and acts prior to the 3-year period if there is reason to believe that the self-petitioner may not have been a person of good moral character in the past. See *Matter of P--* (PDF), 8 I&N Dec. 167 (R.C. 1958). See *DeLucia v. INS*, 370 F.2d 305 (7th Cir. 1966). See *Matter of Sanchez-Linn* (PDF), 20 I&N Dec. 362 (BIA 1991). The more serious the past misconduct, the longer the period of good conduct must be to meet the burden of establishing good moral character.

[^ 134] See 8 CFR 204.2(c)(1)(vii). See 8 CFR 204.2(e)(1)(vii).

[^ 135] See 8 CFR 204.2(c)(1)(vii). See 8 CFR 204.2(e)(1)(vii). The self-petitioner may appeal the decision to revoke the approval within 15 days after service of notice of the revocation. See 8 CFR 205.2(d). For more information, see Chapter 6, Post-Adjudicative Matters, Section A, Revocations [3 USCIS-PM D.6(A)].

[^ 136] See INA 101(f)(8)-(9).

[^ 137] See INA 101(f)(8)-(9).

[^ 138] See INA 101(f)(1)-(7). See 61 FR 13061, 13066 (PDF) (Mar. 26, 1996).

[^ 139] See INA 204(a)(1)(C). Note that USCIS applies INA 204(a)(1)(C) to all self-petitioners, including those filing under INA 204(a)(1)(A)(v), INA 204(a)(1)(A)(vii), and INA 204(a)(1)(B)(iv), despite the fact that these self-petitioners are not specifically referenced in INA 204(a)(1)(C).

[^ 140] See INA 101(f).

[^ 141] See 61 FR 13061, 13066 (PDF) (Mar. 26, 1996) (*citing to Pablo v. INS*, 72 F.3d 110, 113 (9th Cir. 1995) and *Gouveia v. INS*, 980 F.2d 814, 817 (1st Cir. 1992)).

[^ 142] See 8 CFR 204.2(c)(1)(vii). See 8 CFR 204.2(e)(1)(vii).

[^ 143] See 8 CFR 204.2(c)(1)(vii). See 8 CFR 204.2(e)(1)(vii).

[^ 144] For example, persons who admitted to having engaged in prostitution under duress but had no prostitution convictions were not excludable as prostitutes under INA 212(a)(2)(D), because they were involuntarily reduced to such a state of mind that they were actually prevented from exercising free will through the use of wrongful, oppressive threats or unlawful means. See *Matter of M-*, 7 I&N Dec. 251 (BIA 1956). See 61 FR 13061, 13066 (PDF) (Mar. 26, 1996).

[^ 145] See INA 101(f). "The fact that any person is not within the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character." See 8 CFR 204.2(c)(1)(vii). See 8 CFR 204.2(e)(1)(vii).

[^ 146] See 8 CFR 204.2(c)(2)(v). See 8 CFR 204.2(e)(2)(v).

[^ 147] See 8 CFR 204.2(c)(2)(v). See 8 CFR 204.2(e)(2)(v).

[^ 148] See 8 CFR 204.2(c)(2)(v). See 8 CFR 204.2(e)(2)(v). For more information, see the Department of State's Foreign Affairs Manual (FAM) for information on the availability of foreign clearances by country.

[^ 149] See 8 CFR 204.2(c)(2)(v). See 8 CFR 204.2(e)(2)(v).

[^ 150] See INA 204(a)(1)(C).

[^ 151] Relevant waivers include those under INA 212(h)(1), INA 212(i)(1), INA 237(a)(7), and INA 237(a)(1)(H)(ii).

[^ 152] See Appendix: Statutory Bars to Establishing Good Moral Character – Waivable Conduct [3 USCIS-PM D.2, Appendices Tab], which includes a quick-reference chart indicating which disqualifying acts and convictions under INA 101(f) have a waiver available.

[^ 153] See *Da Silva v. Attorney General* (PDF), 948 F.3d 629 (3rd Cir. 2020). The court held that "connected to" as it is used in INA 204(a)(1)(C) means "having a causal or logical relationship."

[^ 154] See INA 204(a)(1)(A)(v). See INA 204(a)(1)(B)(iv). There is no statutory requirement that a self-petitioning parent be living in the United States at the time the self-petition is filed. The filing requirements at INA 204(a)(1)(A)(v) relating to a self-petitioning spouse, intended spouse, or child living abroad of a U.S. citizen are applicable to self-petitions filed by an abused parent of a U.S. citizen son or daughter.

[^ 155] See 8 CFR 204.2(c)(3)(i). See 8 CFR 204.2(e)(3)(i).

[^ 156] See INA 204(a)(1)(A)(iii)(I). See INA 204(a)(1)(A)(iv). See INA 204(a)(1)(B)(ii)(I). See INA 204(a)(1)(B)(iii). See 8 CFR 204.2(c)(4). 8 CFR 204.2(e)(4) has been superseded by the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386 (PDF), 114 Stat. 1464 (October 28, 2000), which amended the INA to allow children of child self-petitioners to be classified as derivative beneficiaries under INA 204(a)(1)(A)(iv) and INA 204(a)(1)(B)(iii).

[^ 157] See INA 204(a)(1)(A)(iii)(I). See INA 204(a)(1)(A)(iv). See INA 204(a)(1)(B)(ii)(I). See INA 204(a)(1)(B)(iii). See 8 CFR 204.2(c)(4).

[^ 158] See INA 101(b)(1).

[^ 159] See 61 FR 13061, 13068 (PDF) (Mar. 26, 1996).

[^ 160] See 8 CFR 204.2(c)(4).

[^ 161] See INA 203(d). See 8 CFR 204.2(c)(4).

[^ 162] See INA 204(a)(1)(D)(i)(III). For more information, see Chapter 3, Effect of Certain life Events, Section G, Child Turning 21 Years Old, Subsection 2, Self-Petitioning Child or Derivative Turns 21 Years Old After the Self-Petition is Filed [3 USCIS-PM D.3(G)(2)].

[^ 163] See INA 204(a)(1)(D)(i)(III).

[^ 164] See INA 204(a)(1)(D)(i)(III).

Chapter 3 - Effect of Certain Life Events

A. Divorce Prior to Filing the Self-Petition

1. Self-Petitioning Spouse's Divorce

Generally, a self-petitioning spouse of an abusive U.S. citizen or lawful permanent resident (LPR) must show the existence of a qualifying relationship at the time of filing.[1] If the qualifying marriage was legally terminated[2] prior to filing the self-petition, however, self-petitioning spouses may continue to be eligible if they are otherwise eligible for a self-petition and:

- File a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) within the 2-year period immediately following the termination of the marriage; and
- Can demonstrate that the legal termination of the marriage was connected to the battery or extreme cruelty perpetrated by the U.S. citizen or LPR spouse.[3]

The requirement that a self-petitioner file within 2 years following the termination of the marriage is a condition of eligibility for which there is no waiver or equitable tolling available. The 2-year period cannot be equitably tolled because the statute allows for self-petitioning during the marriage and creates a cut-off date for filing when the marriage has terminated.

Evidence

Self-petitions filed within 2 years of the legal termination of the marriage must include evidence that the marriage was legally terminated, such as a final divorce decree or annulment, and that the termination was connected to the battery or extreme cruelty.[4] The specific legal ground for a divorce or annulment does not need to be abuse.

Examples of evidence demonstrating the connection between the legal termination of the marriage and the battery or extreme cruelty may include, but are not limited to, the following:

- The self-petitioner's own affidavit;
- Affidavits from third parties;

- Final divorce decrees or annulments; or
- Any other credible evidence.

2. Termination of a Step-Relationship Due to Divorce or Death

Divorce

If the marriage between a parent and a stepparent terminates due to divorce, a self-petitioning stepchild and a self-petitioning stepparent continue to be eligible for the self-petition.[5] A stepchild of an abusive U.S. citizen or LPR parent and a stepparent of an abusive U.S. citizen son or daughter may continue to be eligible to self-petition despite the divorce provided that:

- The stepchild had not reached 18 years of age at the time the marriage creating the step relationship occurred;[6] and
- The step relationship existed, by law, at the time of the abuse.

Death

If the marriage between a parent and stepparent terminates due to the death of the biological or legal parent, a self-petitioning stepchild and a self-petitioning stepparent may continue to establish eligibility for the self-petition if they can provide evidence of an ongoing family relationship with the abusive U.S. citizen or LPR stepparent or stepchild, respectively, at the time of filing.[7]

The relationship need not continue after filing.[8] The stepchild or stepparent may continue to be eligible to self-petition despite the termination of the marriage due to the death of the biological or legal parent provided that:

- The stepchild had not reached 18 years of age at the time the marriage creating the step relationship occurred;[9]
- The step relationship existed, by law, at the time of the abuse; and
- The step relationship existed as a matter of fact at the time the self-petition is filed.

Evidence of an ongoing family relationship may include financial and emotional support and any type of communication between the stepchild and stepparent, such as an email, social media post, or any other evidence of contact between them.

B. Self-Petitioner's Marriage or Remarriage

1. Self-Petitioning Child's Marriage

Self-petitioning children must be unmarried when the self-petition is filed and when the self-petition is approved.[10] A self-petitioning child who marries after filing the self-petition and remains married while the self-petition is pending is no longer eligible for immigrant classification as a child, as there are no VAWA provisions for married sons and daughters.[11] However, a self-petitioning child who marries after filing the self-petition but whose marriage terminates prior to a final decision on the self-petition may remain eligible under VAWA.[12]

2. Self-Petitioning Spouse's Remarriage

Self-petitioning spouses may remarry after the self-petition is approved without impacting the approved self-petition or their eligibility for an immigrant visa or adjustment of status. However, if the self-petitioner marries again before approval of the self-petition, the officer must deny the self-petition.[13]

Remarriage of Self-Petitioning Spouse

When the Remarriage Occurs	Impact on Self-Petition
Before approval of the self-petition	USCIS denies the pending self-petition because of the remarriage.[14] If the remarriage is not discovered until after USCIS approves the self-petition, USCIS revokes the approval.[15]
After approval of the self-petition	Remarriage does not affect eligibility.[16]

C. Marriage-Related Prohibitions on Self-Petition Approval

1. Self-Petitioning Spouses – Marriage While in Removal Proceedings

When USCIS adjudicates a spousal self-petition, there are additional considerations on top of the requirements for a qualifying relationship and a good faith marriage. There is, for example, a prohibition on approving a self-petition if the marriage creating the qualifying relationship occurred while the self-petitioner was in removal proceedings.[17]

The self-petitioner may overcome the general prohibition by requesting an exemption in writing with Form I-360 and submitting evidence demonstrating the following:[18]

- The self-petitioner has resided outside the United States for a 2-year period beginning after the date of the marriage;[19] or
- The self-petitioner provides clear and convincing evidence that the marriage was entered into in good faith and in accordance with the laws of the place where the marriage took place, the marriage was not entered into to circumvent immigration laws, and no fee or other consideration was given for the filing of the self-petition.[20]

If USCIS denied a prior filing because the marriage took place during removal proceedings, and the self-petitioner then resided outside the United States for a period of 2 years following the marriage, the self-petitioner may file a new petition after the 2-year period. In addition, a denial does not prevent USCIS from considering a new petition or a motion to reopen if removal proceedings are terminated after the denial for any reason except the self-petitioner's departure from the United States.[21]

Although self-petitioners may submit similar evidence to establish a good faith marriage or to qualify for the good faith marriage exemption while in removal proceedings, they must meet a heightened standard of proof when seeking a good faith marriage exemption.

Generally, self-petitioners must establish that they entered into the marriage in good faith by a preponderance of the evidence.[22] To be eligible for a good faith marriage exemption while in removal proceedings, however, a self-petitioner must establish good faith entry into the marriage by the more stringent clear and convincing evidence standard.[23] The heightened

standard applies only to the good faith marriage exemption determination; all other eligibility requirements are reviewed under the preponderance of the evidence standard.

The requirement that no fee or other consideration was given for the filing of the petition does not refer to fees paid to attorneys, notarios, or other persons who assisted with filing the self-petition.[24] Rather, this refers to instances where a fee or other consideration was paid in connection with a fraudulent marriage. If a fee or other consideration was paid in order to enter into a fraudulent marriage or to obtain an immigration benefit through a fraudulent marriage, the self-petitioner is ineligible for the good faith marriage exemption.

If the self-petitioner seeks a good faith marriage exemption by showing that the marriage was entered into in good faith and not for the purpose of circumventing immigration laws, examples of the types of evidence the self-petitioner may submit include, but are not limited to:

- Documentation showing joint ownership of property;
- A lease showing joint tenancy of a common residence;
- Documentation showing commingling of financial resources;
- Birth certificate of any children born to the self-petitioner and abusive spouse;
- Affidavits from third parties who know about the bona fides of the marital relationship;[25] or
- Any other credible evidence to establish that the marriage was not entered into in order to evade the immigration laws of the United States.

2. Prior Marriage Fraud

Self-petitioning spouses are required to demonstrate a qualifying spousal relationship and that their marriage was entered into in good faith.[26] Even if the self-petitioner meets these two eligibility requirements, USCIS cannot approve the self-petition where it determines with substantial and probative evidence that the self-petitioner previously:

- Had been granted or has sought to be accorded an immediate relative or family-based preference status as the spouse of a U.S. citizen or LPR based on a marriage that USCIS has determined the self-petitioner entered into for the purpose of evading immigration laws; or
- Attempted or conspired to enter into a marriage for the purpose of evading immigration laws.[27]

Where USCIS determines there is substantial and probative evidence that the self-petitioner previously engaged in marriage fraud, the burden shifts to the self-petitioner to overcome the finding.[28] Officers may not rely solely on a prior finding of marriage fraud but must make a separate and independent determination that the self-petitioner previously engaged in marriage fraud.[29]

USCIS provides self-petitioners with an opportunity to rebut the evidence that they entered into or conspired to enter into a prior marriage for the purpose of evading immigration laws by issuing an Request for Evidence (RFE) or a Notice of Intent to Deny (NOID).

D. Death of the U.S. Citizen, Lawful Permanent Resident, or Self-Petitioner

Self-petitioners must demonstrate a qualifying relationship with the abusive U.S. citizen or LPR relative to be eligible for the self-petition.[30] Historically, if a petitioner for a family-based immigrant visa petition died while the petition was pending or after it was approved and the beneficiary had not yet become an LPR, USCIS denied the petition if it was pending or revoked the petition if it was approved.[31]

Over time, however, Congress recognized the inequities this created for some aliens in these situations and created provisions to allow surviving beneficiaries to continue the immigration process despite the death of certain petitioning relatives and principal beneficiaries.[32]

For self-petitioners and their derivatives, the impact of the U.S. citizen, LPR, or self-petitioner's death on the validity of the self-petition depends on who died, who the surviving relative is, and whether the self-petition was filed at the time of the death.

Self-petitioners and derivative beneficiaries must notify USCIS of the death of the qualifying relative or the self-petitioner and submit evidence of the death, such as a death certificate.

1. Abusive U.S. Citizen's Death

Abusive U.S. Citizen Dies Prior to the Filing of the Self-Petition

Self-petitioning spouses or parents whose abusive U.S. citizen relative died before they filed a self-petition continue to remain eligible to file a self-petition for 2 years after the death.[33] The requirement that a self-petitioner file within 2 years following the death of the U.S. citizen relative is a condition of eligibility for which there is no waiver or equitable tolling available. The 2-year period cannot be equitably tolled because the statute allows for self-petitioning while the qualifying relative is living and creates a cut-off date for filing when the relative has died.

Note that for abused parents to be eligible to self-petition, the U.S. citizen son or daughter must have been at least 21 years old when the son or daughter died. If a self-petitioning child's U.S. citizen parent dies before the child files a self-petition, however, the child is ineligible for VAWA benefits.[34]

Abusive U.S. Citizen Relative Dies While the Self-Petition is Pending or Approved

If a self-petitioning spouse, child, or parent had a pending or approved self-petition at the time of the U.S. citizen's death, the death does not impact their eligibility for the pending self-petition or require revocation of an approved self-petition.[35] The self-petitioner remains eligible to apply for an immigrant visa or adjustment of status after the self-petition is approved.[36]

The table below provides a summary of the impact that the death of the abusive U.S. citizen relative has on a self-petition based on the type of self-petition that is filed and if the self-petition was filed at the time of the U.S. citizen's death.

Impact of the U.S. Citizen Relative's Death on the Self-Petition

Self-Petitioner	Petition Not Filed	Petition Pending	Petition Approved
Spouse	Remains eligible to file self-petition up to 2 years after U.S. citizen spouse's death	Remains eligible for self-petition	Self-petition remains approved and self-petitioner remains eligible for immigrant visa or adjustment of status

Self-Petitioner	Petition Not Filed	Petition Pending	Petition Approved
Child	Not eligible for self-petition	Remains eligible for self-petition	Self-petition remains approved and self-petitioner remains eligible for immigrant visa or adjustment of status
Parent	Remains eligible to file self-petition up to 2 years following U.S. citizen son or daughter's death	Remains eligible for self-petition	Self-petition remains approved and self-petitioner remains eligible for immigrant visa or adjustment of status

2. Abusive Lawful Permanent Resident's Death

If the LPR relative dies before an abused spouse or child files a self-petition, the self-petitioning spouse or child is ineligible for VAWA benefits. If the abusive LPR relative dies while a self-petition is pending or was previously approved, USCIS may approve the self-petition or continue adjudication for an adjustment of status application based on an approved self-petition in certain circumstances under INA 204(l) as a matter of discretion.[37] In order to remain eligible for the self-petition under INA 204(l), self-petitioners must demonstrate:

- They resided in the United States when the LPR relative died; and
- They continue to reside in the United States on the date the pending self-petition or adjustment of status application is approved.[38]

When there are derivative children beneficiaries, if the self-petitioner or any one derivative beneficiary meets the residence requirement, then, as a matter of discretion, USCIS may approve the self-petition or application for adjustment of status. The self-petitioner and all beneficiaries may be eligible to immigrate to the same extent that would have been permitted if the LPR relative had not died. It is not necessary for the self-petitioner and each derivative child to meet the residence requirements.

3. Self-Petitioner's Death

If a self-petitioning spouse or self-petitioning child dies while the self-petition is pending or after it is approved, USCIS may approve the self-petition or continue adjudication for an adjustment of status application based on an approved self-petition for any derivative children of the self-petitioner as a matter of discretion under INA 204(l). Derivative beneficiaries do not have to be included on the self-petition to be considered for relief under INA 204(l) as long as they are eligible as derivative beneficiaries.

E. Loss or Renunciation of U.S. Citizenship or Loss of Lawful Permanent Resident Status

A self-petitioner must demonstrate a qualifying relationship to a U.S. citizen or LPR at the time of filing to be eligible for a self-petition.[39] Therefore, historically, if abusive U.S. citizen or LPR relatives had lost or renounced their U.S. citizenship or LPR status, self-petitioners were no longer eligible for the self-petition.

Congress recognized, however, that an abuser's loss of U.S. citizenship or LPR status may have been related to an incident of domestic violence, and that the loss would impact a self-petitioner's eligibility for VAWA benefits. So when Congress passed the Battered Immigrant Women Protection Act (BIWPA) in 2000, it amended the immigration laws to preserve self-petitioning eligibility in certain cases where abusers lost their U.S. citizenship or LPR status for a reason related to an incident of domestic violence, as long as the self-petition is filed within 2 years of the loss or renunciation.[40]

BIWPA also provided that if abusive U.S. citizens or LPRs lost their status after the self-petition was filed, then self-petitioners would retain their eligibility despite the loss of status without having to show a connection between the loss of U.S. citizenship or LPR status and an incident of domestic violence.[41]

Self-petitioners must notify USCIS if their qualifying relative lost or renounced U.S. citizenship or LPR status. Officers may check USCIS electronic systems to confirm the loss or renunciation of citizenship or LPR status.

1. Loss or Renunciation of U.S. Citizenship or Loss of Lawful Permanent Resident Status Prior to Filing

If abusive U.S. citizen or LPR relatives lost or renounced their U.S. citizenship or LPR status before the self-petition was filed, the self-petitioner may remain eligible if the loss or renunciation of status was related or due to an incident of domestic violence. The loss or renunciation must also have occurred within the 2-year period immediately preceding the filing of the self-petition.[42]

The requirement that a self-petitioner file within 2 years following the qualifying relative's loss or renunciation of U.S. citizenship or LPR status is a condition of eligibility for which there is no waiver or equitable tolling available. The 2-year period cannot be equitably tolled because the statute allows for self-petitioning while the qualifying relative maintains U.S. citizenship or LPR status and creates a cut-off date for filing when the qualifying relative has lost U.S. citizenship or LPR status.

Note that for self-petitioning parents, the abusive son or daughter must have been 21 years of age or older when the son or daughter's citizenship was lost or renounced.

USCIS considers the full history of domestic violence when determining whether the abuser's loss or renunciation of status is related to an incident of domestic violence. When considering whether the loss or renunciation of status was related to an incident of domestic violence, USCIS determines whether the evidence submitted establishes:

- The circumstances surrounding the loss or renunciation of status;
- Whether the loss or renunciation of status is related to the incident of domestic violence; and
- The loss or renunciation of status occurred within the 2-year period immediately preceding the filing of the self-petition.

Examples of evidence demonstrating the above requirements may include but are not limited to:

- Self-affidavits;
- Police, child protective services, and other related reports;
- Court records;
- Immigration records; and
- Any other credible evidence of the above requirements.

2. Loss or Renunciation of U.S. Citizenship or Loss of Lawful Permanent Resident Status After Filing

The loss or renunciation of the qualifying relative's U.S. citizenship or LPR status after the self-petition is filed does not impact a self-petitioning spouse or child's eligibility or adversely affect an approved self-petition. There is no requirement to show a relation between the loss or renunciation of U.S. citizenship or LPR status and an incident of battery or extreme

cruelty. The self-petitioner remains eligible for VAWA benefits.[43] In addition, loss or renunciation of the qualifying relative's U.S. citizenship or LPR status does not adversely affect an approved VAWA self-petitioner's ability to adjust status.[44]

Self-petitioning parents, however, whose U.S. citizen sons or daughters have denaturalized or lost or renounced their U.S. citizenship after the self-petition is filed are no longer eligible for the self-petition.[45] If a self-petitioning parent's self-petition was previously approved, it may be revoked in such circumstances.

F. Lawful Permanent Resident's Naturalization

If abusive LPRs naturalize after their spouse or child files a self-petition, the self-petitioning spouse or child is automatically reclassified as the spouse or child of a U.S. citizen.[46] The self-petitioner does not need to file a new self-petition; the reclassification occurs regardless of whether the self-petition remains pending or is approved at the time of the naturalization.[47] The self-petitioner is reclassified even if the abusive spouse or parent acquires citizenship after a divorce or termination of parental rights.[48]

G. Child Turning 21 Years Old

Generally, self-petitioning and derivative children must be under 21 years old and unmarried in order to be eligible as self-petitioners or be included as derivative beneficiaries on the self-petition at the time of filing.[49] If abused children turn 21 years old before they are able to file a self-petition, however, they may continue to remain eligible to file the self-petition as a child in certain circumstances as long as they remain unmarried.[50]

1. Self-Petitioning Child Turning 21 Years Old Before Filing the Self-Petition

In the past, otherwise eligible sons and daughters of U.S. citizens and LPRs were precluded from filing a self-petition if they reached age 21 before the self-petition could be filed. The inability to file a self-petition before turning 21 years old may have been due to a number of reasons, including the nature of the abuse or the time period that the abuse took place.

The Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), however, amended the Immigration and Nationality Act (INA) by adding a new provision that permitted the late filing of a self-petition in certain circumstances to expand protections for abused children who were unable to file a self-petition before turning 21 years old.[51]

Self-petitioning children may remain eligible to file a self-petition as a child even after turning 21 years old but before turning 25 years old if they are unmarried and can demonstrate the following:

- They were eligible to file the self-petition on the day before they turned 21; and
- The abuse was one central reason for the delay in filing.[52]

Self-petitioners must have been qualified to file the self-petition on the day before they turned 21 years old. This means that they must have met all eligibility requirements on that date. For example, if the abuse took place only after they turned 21, then they were not eligible to file the self-petition on the day before they turned 21 years old.

In addition to meeting all of the eligibility requirements as of the day before the self-petitioner turned 21 years old, the abuse must have been "one central reason" for the self-petitioner's delay in filing.[53] The battery or extreme cruelty is not required to be the sole reason for the delay in filing, but the connection between the battery or extreme cruelty and the delay in filing must be more than tangential.

An example where a self-petitioner could potentially meet this requirement may be that the abuse took place so near in time to the self-petitioner turning 21 years old that there was insufficient time to file the self-petition. Another example is that the abuse was so traumatic that the self-petitioner was mentally or physically incapable of filing a self-petition prior to turning 21 years old. These are only hypothetical examples; the abuse must be identifiable as one central reason for the delay.

If self-petitioners are eligible to file after turning 21 years old, USCIS treats them as if the self-petition had been filed on the day before they turned 21 years old. If USCIS approves the self-petition, however, the self-petitioner's continued eligibility and subsequent classification for visa issuance or adjustment of status is governed by the Child Status Protection Act (CSPA) or the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), whichever is appropriate.[54]

Evidence

Self-petitioners must submit evidence that they were eligible to file the self-petition before they turned 21 years old and that the abuse was one central reason for the delay. USCIS considers the totality of the circumstances leading to the delay in filing and the full history of battery or extreme cruelty in the case.

Examples of evidence that may demonstrate that the self-petitioner's abuse was one central reason for the delay may include but are not limited to:

- Reports or affidavits detailing incidents of abuse that occurred prior to the self-petitioner turning 21 years old from police, judges, court officials, medical personnel, counselors, social workers or other social service agency personnel, or school officials;
- Evidence that the self-petitioner sought refuge at a shelter because of the abuse;
- A personal statement describing the battery or extreme cruelty that occurred prior to the self-petitioner turning 21 years old;
- An explanation for how the abuse was one central reason for the delay in filing the self-petition; or
- Any other credible evidence.

2. Self-Petitioning Child or Derivative Turns 21 Years Old After the Self-Petition is Filed

Under CSPA, if a child turns 21 years old after the self-petition is filed but before it is adjudicated, the INA includes protections for self-petitioning and derivative children to retain eligibility after turning 21 years old as long as they remain unmarried.[55] Self-petitioning and derivative children may continue to be classified as children for immigration purposes under the CSPA in certain circumstances.[56]

If children are not eligible under CSPA, they may be eligible under VTVPA, which provides that self-petitioning children who turn 21 years old after the self-petition is filed will automatically be considered self-petitioners for preference status under INA 203 as long as they remain unmarried.[57]

Derivative children who turn 21 years old after the self-petition is filed will automatically be considered a self-petitioner with the same priority date as the self-petitioner who originally filed the self-petition, as long as the child remains unmarried.[58]

No new petition is required for either a self-petitioning or derivative child.[59] Self-petitioning or derivative children may marry after the self-petition is approved and remain eligible for an immigrant visa or adjustment of status in the appropriate preference category to their situation.[60] They do not need to file a new self-petition and will retain the priority date from the approved self-petition.

Footnotes

[^ 1] See 8 CFR 204.2(c)(1)(i). See Chapter 2, Eligibility Requirements and Evidence, Section B, Qualifying Relationship, Subsection 2, Self-Petitioning Spouse [3 USCIS-PM D.2(B)(2)].

[^ 2] USCIS generally recognizes the legal termination of a marriage in cases where the termination is valid under the laws of the jurisdiction where the marriage is terminated, or the jurisdiction of a subsequent marriage recognizes the validity of the termination.

[^ 3] See INA 204(a)(1)(A)(iii)(ii)(aa)(CC)(ccc). See INA 204(a)(1)(B)(ii)(II)(aa)(CC)(bbb).

[^ 4] See INA 204(a)(1)(A)(iii)(ii)(aa)(CC)(ccc). See INA 204(a)(1)(B)(ii)(II)(aa)(CC)(bbb).

[^ 5] See *Arguijo v. USCIS*, 991 F.3d 736 (7th Cir. 2021), holding that divorce does not terminate a stepchild relationship for the purposes of eligibility for a VAWA self-petition.

[^ 6] See INA 101(b)(1)(B).

[^ 7] See *Matter of Pagnerre* (PDF), 13 I&N Dec. 688 (BIA 1971). This case involves whether a stepdaughter qualifies as a family-based preference category relative of a U.S. citizen under INA 203(a)(3) when the marriage that created the step relationship terminated due to the death of the beneficiary's biological parent. The court found that there was a continuing step relationship in fact between the petitioner and beneficiary after the death of the beneficiary's father and approved the petition for preference classification.

[^ 8] See INA 204(a)(1)(A)(vi). See INA 204(a)(1)(B)(v).

[^ 9] See INA 101(b)(1)(B).

[^ 10] See INA 101(b)(1). See 8 CFR 204.2(e)(1)(ii).

[^ 11] See INA 204(a)(1)(A)(iv). See INA 204(a)(1)(B)(iii) requiring eligibility for immigrant classification under INA 201(b)(2)(A)(i) and INA 203(a)(2)(A).

[^ 12] See INA 201(f). See 8 CFR 204.2(e)(1)(ii).

[^ 13] See INA 204(a)(1)(A)(II)(aa). See INA 204(a)(1)(B)(II)(aa). See 8 CFR 204.2(c)(1)(ii). See *Delmas v. Gonzalez*, 422 F.Supp.2d 1299 (S.D. Fla. 2005) (self-petitioner's remarriage prior to filing self-petition was disqualifying). Note that 8 CFR 204.2(c)(1)(ii) states: "The self-petitioning spouse must be legally married to the abuser when the petition is properly filed with the Service. A spousal self-petition must be denied if the marriage to the abuser legally ended through annulment, death, or divorce before that time." This portion of the regulation has been superseded by the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386 (PDF) (October 28, 2000), which removed the requirement for the self-petitioner to remain married to the abuser at the time the self-petition is filed. The remainder of 8 CFR 204.2(c)(1)(ii) remains valid: "After the self-petition has been properly filed, the legal termination of the marriage will have no effect on the decision made on the self-petition. The self-petitioner's remarriage, however, will be a basis for denial of a pending self-petition."

[^ 14] See 8 CFR 204.2(c)(1)(ii).

[^ 15] See 8 CFR 205.1(a)(3)(i)(E). See 8 CFR 205.2.

[^ 16] See INA 204(h).

[^ 17] See INA 204(g). See INA 245(e)(3). See 8 CFR 204.2(c)(1)(iv).

[^ 18] See 8 CFR 204.2(a)(1)(iii). USCIS considers the same evidence submitted for a spousal-based Petition for Alien Relative (Form I-130) under 8 CFR 204.2(a)(1)(iii) for self-petitioning spouses.

[^ 19] See INA 204(g). See 8 CFR 204.2(a)(1)(iii).

[^ 20] See INA 245(e)(3). See 8 CFR 204.2(a)(1)(iii).

[^ 21] See 8 CFR 204.2(a)(1)(iii)(D).

[^ 22] To meet this standard, the alien must prove a claimed fact is more likely than not to be true. See *Matter of Chawathe* (PDF), 25 I&N Dec. 369 (AAO 2010). For more information about the good faith marriage requirement for self-petitioning spouses, see Chapter 2, Eligibility Requirements and Evidence, Section C, Good Faith Marriage (Self-Petitioning Spouses Only) [3 USCIS-PM D.2(C)].

[^ 23] See INA 245(e)(3). See *Matter of Arthur* (PDF), 20 I&N Dec. 475, 478 (BIA 1992) and *Pritchett v. I.N.S.*, 993 F.2d 80, 85 (5th Cir. 1993) (acknowledging clear and convincing evidence as an exacting standard).

[^ 24] See INA 245(e)(3).

[^ 25] See 8 CFR 204.2(a)(1)(iii)(B)(5). Third parties submitting affidavits may be required to testify before a USCIS officer as to the information contained in the affidavit. Affidavits should be sworn to or affirmed by persons not parties to the petition who have personal knowledge of the marital relationship. Each affidavit should generally contain the full names, addresses, and dates and places of birth of the persons providing the affidavit and their relationship to the spouses, if any. The affidavit should contain complete information and details explaining how the affiants acquired knowledge of the marriage. Self-petitioners are not required to demonstrate the unavailability of primary or secondary evidence, but affidavits should be supported, if possible, by one or more types of documentary evidence listed in this section. All evidence submitted, including affidavits are reviewed under the any credible evidence provision described in Chapter 5, Adjudication, Section B, Review of Evidence, Subsection 2, Any Credible Evidence Provision [3 USCIS-PM D.5(B)(2)]. See INA 204(a)(1)(J). See 8 CFR 103.2(b)(2)(iii). See 8 CFR 204.2(c)(2)(i). See 8 CFR 204.2(e)(2)(i).

[^ 26] See INA 204(a)(1)(A)(iii). See INA 204(a)(1)(B)(ii). See 8 CFR 204.2(c)(1)(i).

[^ 27] See INA 204(c). See 8 CFR 204.2(a)(1)(ii). See *Matter of Tawfik* (PDF), 20 I&N Dec. 166 (BIA 1990) and *Matter of R.I. Ortega*, 28 I&N Dec. 9 (BIA 2020). USCIS considers the same evidence submitted for a spousal-based Petition for Alien Relative (Form I-130) under 8 CFR 204.2(a)(1)(ii) for self-petitioning spouses.

[^ 28] See *Matter of Kahy* (PDF), 19 I&N Dec. 803 (BIA 1988) and *Matter of Tawfik* (PDF), 20 I&N Dec. 166 (BIA 1990). Substantial and probative evidence is evidence that would permit a reasonable fact-finder to conclude that a given factual claim is true. See *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). Substantial and probative evidence is more than a preponderance of the evidence, but less than clear and convincing evidence. See *Matter of Singh*, 27 I&N Dec. 598 (BIA 2019). For more information, see Volume 6, Immigrants, Part B, Family-Based Immigrants [6 USCIS-PM B].

[^ 29] See *Matter of Tawfik* (PDF), 20 I&N Dec. 166 (BIA 1990).

[^ 30] See INA 204(a)(1). See 8 CFR 204.2(c)(2)(ii). See 8 CFR 204.2(e)(2)(ii).

[^ 31] See 8 CFR 205.1(a)(3)(i). See *Matter of Sano* (PDF), 19 I&N Dec. 299 (BIA 1985) and *Matter of Varela* (PDF), 13 I&N Dec. 453 (BIA 1970).

[^ 32] See INA 201(b)(2)(A)(i). See INA 204(l). See INA 204(a)(1)(A)(iii)(II)(aa)(CC)(aaa). See INA 204(a)(1)(A)(vii). See INA 204(a)(1)(A)(vi).

[^ 33] See INA 204(1)(A)(iii)(II)(aa)(CC)(aaa). See INA 204(a)(1)(A)(vii). Note that spouses of U.S. citizens who have not legally separated or divorced at the time of the U.S. citizen's death may also be eligible as widow(er)s under INA 201(b)(2)(A)(i) if they file a petition within 2 years of the death.

[^ 34] See INA 204(a)(1)(A)(iv).

[^ 35] See INA 204(a)(1)(A)(vi).

[^ 36] See INA 204(a)(1)(A)(vi).

[^ 37] See INA 204(l)(2)(B).

[^ 38] See INA 204(l). For more information, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 9, Death of Petitioner or Principal Beneficiary [7 USCIS-PM A.9].

[^ 39] See INA 204(a)(1). See 8 CFR 204.2(c)(2)(ii). See 8 CFR 204.2(e)(2)(ii).

[^ 40] See Title V of Pub. L. 106-386 (PDF), 114 Stat. 1464 (October 28, 2000). See INA 204(a)(1)(A)(iii)(II)(aa)(CC)(bbb). See INA 204(a)(1)(A)(iv). See INA 204(a)(1)(A)(vii). See INA 204(a)(1)(B)(ii)(II)(aa)(CC)(aaa)(iii).

[^ 41] See INA 204(a)(1)(A)(vi).

[^ 42] See INA 204(a)(1)(A)(iii)(II)(aa)(CC)(bbb). See INA 204(a)(1)(A)(iv). See INA 204(a)(1)(A)(vii). See INA 204(a)(1)(B)(ii)(II)(aa)(CC)(aaa)(iii).

[^ 43] See INA 204(a)(1)(A)(vi). See INA 204(a)(1)(B)(v)(1).

[^ 44] See INA 204(a)(1)(A)(vi). See INA 204(a)(1)(B)(v)(1).

[^ 45] See INA 204(a)(1)(A) (vi) - (vii). There are no statutory provisions that allow for continued eligibility for self-petitioning parents whose U.S. citizen sons or daughters have denaturalized or lost or renounced their U.S. citizenship after the self-petition is filed.

[^ 46] See INA 204(a)(1)(B)(v)(II).

[^ 47] See INA 204(a)(1)(B)(v)(II).

[^ 48] See INA 204(a)(1)(B)(v)(II).

[^ 49] See INA 101(b)(1). See 8 CFR 204.2(c)(4). See 8 CFR 204.2(e)(1)(ii). 8 CFR 204.2(e)(4) has been superseded by the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386 (PDF) (October 28, 2000), which allows children of child self-petitioners to be classified as derivative beneficiaries under INA 204(a)(1)(A)(iv) and INA 204(a)(1)(B)(iii).

[^ 50] See INA 204(a)(1)(D)(v).

[^ 51] See Section 805(c) of VAWA 2005, Pub. L. 109-162 (PDF), 119 Stat. 2960 (January 5, 2006) and Section 6(a) of the Violence Against Women and Department of Justice Reauthorization Act of 2005 Technical Amendments, Pub. L. 109-271 (PDF), 120 Stat. 750 (August 12, 2006). See INA 204(a)(1)(D)(v).

[^ 52] See INA 204(a)(1)(D)(v).

[^ 53] See INA 204(a)(1)(D)(v).

[^ 54] See Pub. L. 107-208 (PDF), 116 Stat. 927 (August 6, 2002) adding INA 201(f) and INA 203(h) and Title V of Pub. L. 106-386 (PDF), 114 Stat. 1464 (October 28, 2000) adding INA 204(a)(1)(D)(i)(I) and INA 203(a)(1)-(3).

[^ 55] See Pub. L. 107-208 (PDF), 116 Stat. 927 (August 6, 2002) adding INA 201(f) and INA 203(h).

[^ 56] See INA 201(f). See INA 203(h). For more information on CSPA, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 7, Child Status Protection Act [7 USCIS-PM A.7].

[^ 57] See Title V of Pub. L. 106-386 (PDF), 114 Stat. 1464 (October 28, 2000) adding INA 204(a)(1)(D)(i)(I) and INA 203(a)(1)-(3).

[^ 58] See INA 204(a)(1)(D)(i)(III).

[^ 59] See INA 204(a)(1)(D)(i)(I) and (III).

[^ 60] See INA 204(a)(1)(D)(i). See INA 204(h).

Chapter 4 - Filing Requirements

A. Filing Requirements and Initial Review

An alien seeking to self-petition under the Violence Against Women Act (VAWA) must properly file a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) with supporting evidence in accordance with the Form I-360 instructions.[1] USCIS considers Form I-360 as properly filed if it is:

- Submitted on the current edition of the form;
- Filed at the correct filing location; and
- Properly signed.[2]

When initially reviewing the Form I-360, USCIS first determines whether the Form I-360 has been properly filed according to the above criteria. If the self-petition is not properly filed, USCIS rejects the filing and returns it to the self-petitioner.[3] If the self-petition is properly filed, USCIS sends the self-petitioner a receipt notice with a receipt, or filing date. There is no fee when Form I-360 is filed as a VAWA self-petition.[4]

Self-petitioning spouses, children, and parents of U.S. citizens may seek to adjust status as immediate relatives by filing an Application to Register Permanent Residence or Adjust Status (Form I-485) at any time, because visas are always immediately available for immediate relatives.[5]

If, however, the self-petitioner is a spouse or child of a lawful permanent resident (LPR) and seeking to adjust under a family-based preference category, the self-petitioner may need to wait for a visa to become available before filing a Form I-485.[6]

If a visa is immediately available, the self-petitioner may file the Form I-485:

- Together (or “concurrently”) with the Form I-360;
- While the Form I-360 is pending; or
- After the Form I-360 is approved (and remains valid).[7]

1. Priority Dates

The priority date is the date the self-petition is properly filed and is used in conjunction with the Department of State Visa Bulletin to determine whether an immigrant visa is immediately available. For purposes of visa availability, a self-petitioner’s priority date is generally the date the self-petition was filed.

If self-petitioners were beneficiaries of a previously filed Petition for Alien Relative (Form I-130) filed by the abusive qualifying relative, they may retain the priority date from the Form I-130.[8] The earlier priority date may be assigned without regard to the current validity of the visa petition. Officers may verify a claimed filing by searching USCIS electronic systems or other records.[9]

Note that derivative beneficiaries must be under 21 years old and unmarried at the time Form I-360 is filed to be included as derivative beneficiaries, even if they had a previously filed Form I-130 filed for them.[10] If derivative beneficiaries are eligible to be included on the Form I-360 at the time of filing, then they may retain the self-petitioner’s priority date from a previously filed Form I-130.[11]

B. Documentation Requirements

Self-petitioners must file Form I-360 and submit documentation in accordance with the Form I-360 instructions to establish, by a preponderance of the evidence, that they meet the eligibility requirements.[12]

While self-petitioners are encouraged to submit primary evidence, where available, USCIS must consider any credible evidence relevant to the self-petition.[13] The determination of what evidence is credible and the weight to be given that evidence is within the sole discretion of USCIS.[14]

Self-petitioners must submit evidence for each of the eligibility requirements.[15] Documentation should include:

- Evidence of the abusive relative’s U.S. citizenship or LPR status, such as a birth certificate, an unexpired U.S. passport, a Certificate of Naturalization, or a copy of a Permanent Resident Card (Form I-551);[16]
- Evidence of a qualifying relationship that demonstrates a familial, legal relationship to the abuser, such as birth certificates, marriage certificates, and divorce decrees;[17]
- Evidence of having entered the marriage in good faith (for self-petitioning spouses only), such as insurance policies showing one spouse has been listed as the other spouse’s beneficiary; joint property leases, income tax forms, or accounts; or evidence of courtship, a wedding ceremony, shared residence, and other shared experiences;[18]
- Evidence of battery or extreme cruelty perpetrated by the U.S. citizen or LPR during the qualifying relationship (self-petitioning spouses may submit evidence of their child being subjected to battery or extreme cruelty), such as reports and affidavits from police, judges, other court officials, medical personnel, school officials, clergy, social workers, and other social service personnel; court or medical records; or protection orders;[19]
- Evidence of shared residence with the abusive U.S. citizen or LPR, such as leases, deeds, mortgages, or rental agreements listing the abuser and the self-petitioner; utility invoices, bank statements, or financial documents listing a common address; school records listing the parent and address of record; medical records; or income tax filings; and[20]
- Evidence of good moral character if the self-petitioner is 14 years old or older, such as affidavits and a local police clearance or state-issued criminal background check from each locality or state in or outside the United States where the self-petitioner has resided for 6 months or more during the 3-year period immediately preceding the filing of the self-petition.[21]

Footnotes

[^ 1] See 8 CFR 103.2(a)(1). See 8 CFR 106.2(a)(16)(ii). See 8 CFR 204.1(b). See 8 CFR 204.1(a)(3).

[^ 2] See 8 CFR 103.2(a)(2). See Volume 1, General Policies and Procedures, Part B, Submission of Benefit Requests, Chapter 2, Signatures [1 USCIS-PM B.2].

[^ 3] See 8 CFR 103.2(a)(7)(ii).

[^ 4] See Fee Schedule (Form G-1055).

[^ 5] See INA 201(b). See INA 245(a). See 8 CFR 245.2(a)(2)(i).

[^ 6] For information on visa availability, see Visa Availability and Priority Dates, Adjustment of Status Filing Charts, and the Department of State website to view the Visa Bulletin. See Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section B, Definition of Properly Filed, Subsection 4, Visa Availability Requirement [7 USCIS-PM A.3(B)(4)] and Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].

[^ 7] See 8 CFR 245.2(a)(2)(i).

[^ 8] See 8 CFR 204.2(h)(2). See 61 FR 13061, 13069 (PDF) (Mar. 26, 1996). For more information, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability, Subsection 3, Priority Dates [7 USCIS-PM A.6(C)(3)].

[^ 9] See 61 FR 13061, 13069 (PDF) (Mar. 26, 1996).

[^ 10] See 8 CFR 204.2(c)(4).

[^ 11] See 8 CFR 204.2(c)(4).

[^ 12] See INA 204(a). See 8 CFR 204.2(c)(1). See 8 CFR 204.2(e)(1). Although 8 CFR 204.2(c)(1) and 8 CFR 204.2(e)(1) require self-petitioners to demonstrate extreme hardship to themselves or their children if deported; that they reside in the United States at the time of filing; and that their shared residence with the abuser take place in the United States, the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386 (PDF), 114 Stat. 1464 (October 28, 2000) removed these as eligibility requirements and supersedes this part of the regulation.

[^ 13] See INA 204(a)(1)(J). See 8 CFR 103.2(b)(2)(iii). See 8 CFR 204.1(f)(1). See 8 CFR 204.2(c)(2)(i). See 8 CFR 204.2(e)(2)(i). INA 204(a)(1)(J) was not specifically amended to encompass the consideration of secondary evidence submitted by self-petitioning parents. The discussion of evidence found at 8 CFR 103.2(b)(2)(iii) and 8 CFR 204.1(f)(1) regarding self-petitions filed under INA 204(a)(1)(A)(iii) and (iv) and INA 204(a)(1)(B)(ii) and (iii) are applicable to self-petitions filed by abused parents of U.S. citizen sons or daughters under INA 204(a)(1)(A)(vii). For more information about the any credible evidence provision, see Chapter 5, Adjudication, Section B, Review of Evidence, Subsection 2, Any Credible Evidence Provision [3 USCIS-PM D.5(B)(2)].

[^ 14] See INA 204(a)(1)(J). See 8 CFR 204.2(c)(2)(i). See 8 CFR 204.2(e)(2)(i).

[^ 15] See INA 204(a)(1). See 8 CFR 204.2(c)(1). See 8 CFR 204.2(e)(1). For more detailed information on the evidence required for each eligibility requirement, see Chapter 2, Eligibility Requirements and Evidence [3 USCIS-PM D.2].

[^ 16] For more detailed information on the evidence required for this eligibility requirement, see Chapter 2, Eligibility Requirements and Evidence, Section B, Qualifying Relationship, Section 1, Abuser's U.S. Citizenship or Lawful Permanent Resident Status [3 USCIS-PM D.2(B)(1)].

[^ 17] For more detailed information on the evidence required for this eligibility requirement, see Chapter 2, Eligibility Requirements and Evidence, Section B, Qualifying Relationship [3 USCIS-PM D.2(B)].

[^ 18] For more detailed information on the evidence required for this eligibility requirement, see Chapter 2, Eligibility Requirements and Evidence, Section C, Good Faith Marriage (Self-Petitioning Spouses Only) [3 USCIS-PM D.2(C)].

[^ 19] For more detailed information on the evidence required for this eligibility requirement, see Chapter 2, Eligibility Requirements and Evidence, Section E, Subjected to Battery or Extreme Cruelty [3 USCIS-PM D.2(E)].

[^ 20] For more detailed information on the evidence required for this eligibility requirement, see Chapter 2, Eligibility Requirements and Evidence, Section F, Residence with the Abusive Relative [3 USCIS-PM D.2(F)].

[^ 21] For more detailed information on the evidence required for this eligibility requirement, see Chapter 2, Eligibility Requirements and Evidence, Section G, Good Moral Character [3 USCIS-PM D.2(G)].

Chapter 5 - Adjudication

A. Prima Facie Review

After receipting a self-petition, USCIS first determines whether the evidence submitted establishes a prima facie ("at first look") case.[1] Self-petitioning spouses and children and any listed derivative beneficiaries may be considered "qualified aliens" eligible for certain public benefits if they can establish a prima facie case for immigrant classification or have an approved self-petition.[2]

USCIS does not make a prima facie determination for self-petitions filed from outside the United States. Self-petitioners who are outside the United States are not eligible for U.S. public benefits. Note that although USCIS issues prima facie determinations for self-petitioning parents of U.S. citizens, they are not included in the definition of "qualified aliens" in statute and are, therefore, ineligible for public benefits as "qualified aliens."[3]

1. Establishing a Prima Facie Case

To establish a prima facie case, the self-petitioner must submit a completed Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) and evidence to support each of the eligibility requirements for the self-petition.[4] The self-petitioner must merely address each of the eligibility requirements but need not prove eligibility in order to establish a prima facie case.[5]

If USCIS determines that a self-petitioner has demonstrated prima facie eligibility, USCIS issues a Notice of Prima Facie Case (NPFC) to the self-petitioner.[6] The decision to issue an NPFC rests solely with USCIS.[7]

If USCIS determines that the self-petitioner did not establish a prima facie case upon initial review, officers may, in their discretion, issue a Request For Evidence (RFE) seeking additional evidence. If additional evidence is submitted and the self-petitioner establishes a prima facie case upon second review, USCIS issues an NPFC.

Regardless of whether a self-petitioner establishes a prima facie case and receives an NPFC or not, USCIS may discover additional deficiencies while adjudicating the self-petition. For such cases, USCIS may issue an RFE and will consider RFE responses solely to adjudicate the self-petition.[8]

Note that the NPFC does not confer immigration status or a benefit, and a self-petitioner may not apply solely for an NPFC. USCIS' decision to issue or not issue an NPFC is not a consideration in the adjudication of the underlying self-petition, and a prima facie determination, whether favorable or adverse, is not a final adjudication of the self-petition.

A favorable NPFC does not mean the self-petitioner has established eligibility for the underlying self-petition, and additional evidence may be required to establish such eligibility after a favorable NPFC has been issued.[9]

2. Validity Period and Renewals

Self-petitioners may use the NPFC as evidence to establish their eligibility for certain public benefits and are eligible to renew their NPFC, as needed, until USCIS completes adjudication of the self-petition.[10] NPFCs are initially valid for 1 year. If USCIS has not made a decision on the self-petition by the time the NPFC expires, USCIS automatically sends a renewed NPFC within 60 days of the expiration date.

The NPFC is renewed for 180 days and continues to be renewed for 180-day periods until USCIS adjudicates the self-petition. If the Form I-360 is denied, USCIS does not re-issue or extend the NPFC. Filing an appeal of Form I-360 does not extend the validity of an existing NPFC.

B. Review of Evidence

1. Standard of Proof

The standard of proof refers to the quality and weight of the evidence required to prove a fact. The standard of proof to establish eligibility for a self-petition is preponderance of the evidence.[11] Establishing eligibility by a preponderance of the evidence means that it is more likely than not that the self-petitioner qualifies for the benefit. This is a lower standard of proof than both the "clear and convincing" and "beyond a reasonable doubt" standards of proof. The burden is on self-petitioners to demonstrate their eligibility for the self-petition by a preponderance of the evidence.[12]

2. Any Credible Evidence Provision

Generally, petitioners are required to submit primary or secondary evidence with a family-based immigrant visa petition.[13] Although Violence Against Women Act (VAWA) self-petitioners are encouraged to submit primary or secondary evidence whenever possible, an officer must consider any credible evidence a self-petitioner submits to establish eligibility.[14] The determination of what evidence is credible and the weight to be given to the evidence is within the sole discretion of USCIS.[15]

For VAWA self-petitioners, the abusive family member may control access to or destroy necessary documents in furtherance of the abuse, which may prevent the applicant from being able to submit specific documentation. Other self-petitioners may have fled the abusive situation without taking important documents with them.

Congress created the "any credible evidence" standard for VAWA filings in recognition of these evidentiary challenges. Officers should be aware of and consider these issues when evaluating the evidence.

Weighing and Determining the Credibility of Evidence

A self-petition may not be denied for failure to submit a particular piece of evidence.[16] An officer may only deny a self-petition on evidentiary grounds if the evidence that was submitted is not credible or otherwise fails to establish eligibility. Officers may not require that the self-petitioner demonstrate the unavailability of primary evidence or a specific document. An explanation from the self-petitioner, however, regarding the unavailability of such documents may assist officers in adjudicating the case.

Officers determine what evidence is credible on a case-by-case basis. Often, evidence that is credible in one setting will not be so in another. Officers should consider whether the evidence may be credible or not on either an internal or external basis.

For example, evidence that is inconsistent with the other elements of the self-petition is likely not internally credible; and evidence that does not conform to external facts, such as information contained in USCIS electronic databases, is likely not credible on an external basis. Officers should carefully review evidence in both these regards before making a credibility determination. The determination of what is credible will often also be a function of other elements in the case.

For example, if USCIS finds a self-petitioner's testimony in an affidavit to be inconsistent internally or inconsistent with other evidence, officers could determine in their discretion that the evidentiary value of that affidavit may be diminished. However, officers could determine in their discretion that minor inconsistencies regarding information that is not material to the self-petitioner's eligibility would not likely diminish the evidentiary value of the self-petitioner's affidavit.

Some general principles are applicable in making a credibility determination. Officers generally should give more weight to primary evidence and evidence provided in court documents, medical reports, police reports, and other official documents.[17] Self-petitioners who submit affidavits are encouraged, but not required, to provide affidavits from more than one person. Any form of documentary evidence may be submitted, and the absence of a particular form or piece of evidence is not grounds for denial of the self-petition.

USCIS may issue an RFE or a Notice of Intent to Deny to notify self-petitioners of deficiencies in the self-petition and to allow them an opportunity to respond before issuing a final decision.[18]

C. Decision

1. Discretion

The decision to approve or deny a self-petition is not discretionary.[19] If USCIS determines that the alien meets all the eligibility requirements for the self-petition, USCIS approves the self-petition. If derogatory information unrelated to eligibility for the self-petition is discovered, the officer may forward the information to an investigation unit for appropriate action. Unless the derogatory information relates to eligibility for the self-petition, however, such information cannot serve as the basis for a denial.

2. Approvals

If USCIS determines that the facts and information provided with the Form I-360 demonstrate eligibility by a preponderance of the evidence, USCIS approves the self-petition.

Self-petitioning spouses, children, and parents of abusive U.S. citizens are considered immediate relatives and make seek adjustment of status or an immigrant visa immediately after approval of the self-petition, as a visa is immediately available for this category of family-based immigrants.[20] Immediate relatives in the United States also have the option to file an application for adjustment of status concurrently with the self-petition, as the visa is immediately available after the petition is approved.[21]

Self-petitioning spouses and children of abusive LPRs receive a visa number from a family-based preference category when the self-petition is approved and may file an application for adjustment of status or seek an immigrant visa when a visa is available.[22] If a self-petitioner seeks an immigrant visa from outside the United States, USCIS forwards the self-petition to the National Visa Center.[23]

Note that an approved self-petition does not confer immigration status to self-petitioners and their derivative beneficiaries. An approved self-petition provides immigrant classification so that the self-petitioner and any derivative beneficiaries have a basis upon which they may be eligible to apply for lawful permanent resident status.

Employment Authorization

Approved self-petitioners and their derivative beneficiaries are eligible for employment authorization.[24] USCIS may issue an Employment Authorization Document (EAD) to principal self-petitioners upon approval if they requested an EAD on Form I-360.[25]

Derivative beneficiaries may apply for an EAD by submitting an Application for Employment Authorization (Form I-765) and supporting documentation of the principal's approved self-petition and of the qualifying derivative relationship. Persons eligible for employment authorization based on an approved self-petition receive an EAD with a (c)(31) employment authorization code.

Approved principal self-petitioners and derivative beneficiaries must file Form I-765 when renewing their VAWA-based employment authorization.[26] Principal self-petitioners and derivatives who are living outside of the United States are not eligible to receive an EAD.

Deferred Action

Approved self-petitioners and their derivative beneficiaries may be considered for deferred action on a case-by-case basis.[27] Derivative beneficiaries requesting deferred action must include a copy of the self-petitioner's approval notice and evidence of the qualifying derivative relationship with the request.

3. Denials

If USCIS finds that the facts and information provided with the Form I-360 do not demonstrate eligibility by a preponderance of the evidence, then USCIS denies the self-petition. USCIS notifies the self-petitioner of the denial in writing and provides the reason(s) for the denial and the right to appeal the decision.[28] A denial of a self-petition does not prevent the self-petitioner from filing another self-petition.

D. Special Considerations for Self-Petitions Filed Subsequent to Family-Based Immigrant Petition and Adjustment Application

Self-petitioners may have previously been the beneficiary of a Petition for Alien Relative (Form I-130) and filed an Application to Register Permanent Residence or Adjust Status (Form I-485) before filing the self-petition. If the Form I-485 is pending, self-petitioners may notify USCIS either verbally in person or in writing by mail to the local USCIS field office that they filed a self-petition, and request that USCIS hold adjudication of the Form I-485 until the Form I-360 is adjudicated and change the underlying basis of the pending Form I-485 to the self-petition.

If a person intends to file a self-petition, they may notify USCIS either verbally in person or in writing by mail to the local USCIS field office of their intention to file the Form I-360 and request that USCIS hold the adjudication of the Form I-485. The written notification should contain the person's name and A-Number, and a safe address where USCIS can contact them. The person has 30 days from the day USCIS receives notification of the request to file the Form I-360. If the self-petitioner does not file a self-petition within 30 days of the request, USCIS continues adjudication of the Form I-485 based on the Form I-130. Officers may check USCIS electronic systems to confirm that a self-petition was filed.

When a person notifies USCIS that they intend to file a self-petition or have already filed a self-petition, DHS considers the confidentiality protections at 8 U.S.C. 1367(a)(1) to apply to the self-petitioner.[29] However, if the person does not file a self-petition, USCIS concludes they do not want be treated as a VAWA self-petitioner and the protections of 8 U.S.C. 1367 will not apply to the adjudication of any forms.[30]

Footnotes

[^ 1] See 8 CFR 204.2(e)(6).

[^ 2] See the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193 (PDF), 110 Stat. 2105 (August 22, 1996) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208 (PDF), 110 Stat. 3009 (September 30, 1996), which restricted eligibility for public assistance to "qualified aliens."

[^ 3] See Pub. L. 104-193 (PDF), 110 Stat. 2105 (August 22, 1996).

[^ 4] See 8 CFR 204.2(c)(6)(ii). See 8 CFR 204.2(e)(6)(ii). For more information, see Chapter 2, Eligibility Requirements and Evidence [3 USCIS-PM D.2].

[^ 5] See 8 CFR 204.2(c)(6)(ii). See 8 CFR 204.2(e)(6)(ii).

[^ 6] See 8 CFR 204.2(c)(6)(iii). See 8 CFR 204.2(e)(6)(iii).

[^ 7] See 62 FR 60769, 60770 (PDF) (November 13, 1997).

[^ 8] See 8 CFR 103.2(b)(8).

[^ 9] See 8 CFR 204.2(c)(6)(ii). See 8 CFR 204.2(e)(6)(ii).

[^ 10] See 8 CFR 204.2(c)(6)(iii). See 8 CFR 204.2(e)(6)(iii).

[^ 11] See *Matter of Chawathe* (PDF), 25 I&N Dec. 369 (AAO 2010); *Matter of Martinez* (PDF), 21 I&N Dec. 1035, 1036 (BIA 1997); and *Matter of Soo Hoo* (PDF), 11 I&N Dec 151 (BIA 1965). Note that in certain circumstances, the self-petitioner may be required to satisfy a higher standard of proof. See Chapter 3, Effect of Certain Life Events, Section B, Self-

Petitioner's Marriage or Remarriage [3 USCIS-PM D.3(B)].

[^ 12] See INA 291. See *Matter of Brantigan* (PDF), 11 I&N Dec. 493 (BIA 1966).

[^ 13] See 8 CFR 204.1(f).

[^ 14] See INA 204(a)(1)(J). See 8 CFR 204.2(c)(2)(i). See 8 CFR 204.2(e)(2)(i). See 61 FR 13061 (PDF) (March 26, 1996).

[^ 15] See INA 204(a)(1)(J). See 8 CFR 204.2(c)(2)(i). See 8 CFR 103.2(b)(2)(iii). See 8 CFR 204.2(e)(2)(i). See 61 FR 13061 (PDF) (March 26, 1996).

[^ 16] See INA 204(a)(1)(J). See 8 CFR 204.2(c)(2)(i). See 8 CFR 204.2(e)(2)(i). See 61 FR 13061 (PDF) (March 26, 1996).

[^ 17] See 61 FR 13061, 13068 (PDF) (March 26, 1996).

[^ 18] See 8 CFR 103.2(b)(8).

[^ 19] See INA 204(b).

[^ 20] See INA 201(b). See INA 245(a). See 8 CFR 245.2(a)(2)(i). See 8 CFR 245.1(g).

[^ 21] See 8 CFR 245.2(a)(2)(i)(B) and (C).

[^ 22] See INA 203(a). See INA 245(a). See 8 CFR 245.2(a)(2)(i). See 8 CFR 245.1(g). Visa availability depends on several factors, including the self-petitioner's immigrant classification. Information on visa availability and priority dates is available at the Adjustment of Status Filing Charts from the Visa Bulletin web page. For more information, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section B, Definition of Properly Filed, Subsection 4, Visa Availability Requirement [7 USCIS-PM A.3(B)(4)] and Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].

[^ 23] See 8 CFR 204.2(c)(3)(i). See 8 CFR 204.2(e)(3)(i).

[^ 24] See INA 204(a)(1)(K). See INA 204(a)(1)(D)(i)(II). See INA 204(a)(1)(D)(i)(IV).

[^ 25] See INA 204(a)(1)(K). See the Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360).

[^ 26] For additional information on VAWA-based employment authorization, see Instructions for Form I-360 and the Application for Employment Authorization (Form I-765).

[^ 27] See INA 103(a). See INA 204(a)(1)(D)(i)(II). See INA 204(a)(1)(D)(i)(IV). See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Note that deferred action does not permit a person to re-enter the United States lawfully without prior approval if the person were to depart the country.

[^ 28] See 8 CFR 204.2(c)(3)(ii). See 8 CFR 204.2(e)(3)(ii). See 8 CFR 103.3(a).

[^ 29] See 8 U.S.C. 1367. See Implementation of Section 1367 Information Provisions (PDF), DHS Instruction 002-02-001, Revision 00.1, issued November 7, 2013. For more information, see Volume 1, General Policies and Procedures, Part A, Public Services, Chapter 7, Privacy and Confidentiality, Section E, VAWA, T, and U Cases [1 USCIS-PM A.7(E)].

[^ 30] See 8 U.S.C. 1367(a)(1).

Chapter 6 - Post-Adjudicative Matters

A. Revocations

USCIS may revoke the approval of a self-petition with notice to the self-petitioner if, at any time prior to adjustment of status or consular processing, USCIS becomes aware of information that constitutes "good and sufficient cause" warranting revocation.[1] Examples of reasons why the approval of a self-petition may be revoked may include, but are not limited to:

- The self-petitioner is no longer a person of good moral character; or
- The self-petitioner was not eligible for Violence Against Women Act (VAWA) classification at the time of filing.

Unless the revocation is an automatic revocation,[2] USCIS must provide self-petitioners with notice of the intent to revoke the approval of the self-petition and provide them an opportunity to respond.[3]

If USCIS decides to revoke the approval of the self-petition following consideration of the response, the officer must provide written notification of the decision explaining the specific reasons for the revocation.[4] The self-petitioner may appeal the decision to revoke the approval within 15 calendar days after service of the notice of the revocation or 18 days if the decision was sent by mail.[5]

1. Authority to Revoke a Self-Petition

The service centers have sole authority to revoke the approval of a self-petition. Service center officers who adjudicate VAWA self-petitions receive specialized training on domestic violence and abuse and have developed expertise in this subject matter, including expertise in identifying fraud. Therefore, in order to ensure consistency in the adjudication of VAWA self-petitions, USCIS field offices that believe a self-petition should be reviewed for possible revocation must return it to the appropriate service center for review and decision on the revocation.

2. USCIS Field Office – Officer's Request for Review of an Approved Self-Petition

Officers in USCIS field offices adjudicating an Application to Register Permanent Residence or Adjust Status (Form I-485) based on an approved VAWA self-petition generally may not inquire about instances of abuse or extreme cruelty or attempt to re-adjudicate the merits of the underlying approved self-petition. If, however, officers find or obtain new information that leads them to reasonably believe that the approval of the self-petition should be revoked, they must prepare a detailed memorandum for their supervisor.

The officer must explain why the self-petition should be reviewed for possible revocation, and the memorandum must state what the new information is and how USCIS obtained it. Information is not considered new if it was available to the service centers at the time of the approval of the self-petition.

Officers must keep in mind the 8 U.S.C. 1367 confidentiality provisions preventing USCIS from making an adverse determination using information provided solely by an abuser, a family member of the abuser living in the same household, or someone acting on the abuser's behalf, as well as the prohibition on the unauthorized disclosure of information related to a protected person, including acknowledgment that a self-petition exists.[6]

3. USCIS Field Office – Supervisory Review

If after reviewing the officer's memorandum, the supervisor concurs with the officer's recommendation to revoke the approval of the self-petition, the supervisor must sign the memorandum and forward it along with the A-File to the appropriate service center with an attention to "VAWA I-360."

4. Service Center VAWA I-360 Unit – Supervisory Review

A VAWA I-360 supervisor at the service center must review the field office memorandum and the related file to determine whether to initiate the revocation process or to reaffirm the self-petition. If the supervisor disagrees with the recommendation of the field office and decides to reaffirm the self-petition, a separate memorandum must be prepared explaining why the self-petition was reaffirmed. The service center then returns the memorandum to the USCIS field office that made the recommendation. If the supervisor agrees with the recommendation to revoke the approval of the self-petition, the service center issues a notice of intent to revoke the approval to the self-petitioner.

The service center is expected to complete its review process on an expedited basis. In all cases, self-petitions that are sent to a service center from a USCIS field office or to a USCIS field office from a service center must be accompanied by a memorandum that is signed by the appropriate supervisor.

B. Appeals, Motions to Reopen, and Motions to Reconsider

If USCIS denies a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360), and a self-petitioner disagrees with the decision or has additional evidence to show the decision was incorrect, the self-petitioner may file an appeal, a motion to reopen, or a motion to reconsider by submitting a Notice of Appeal or Motion (Form I-290B).[7]

The self-petitioner must file the appeal or motion within 30 days of the denial or 33 days if USCIS sent the denial by mail.[8] There is no exception to the filing period for appeals and motions to reconsider. For a motion to reopen, USCIS may excuse, in its discretion, the self-petitioner's failure to file before this period expires where the self-petitioner demonstrates that the delay was reasonable and beyond their control.[9]

Footnotes

[^ 1] See INA 205. See 8 CFR 205.1(a). See 8 CFR 205.2(a).

[^ 2] See 8 CFR 205.1(a).

[^ 3] See 8 CFR 205.2(b).

[^ 4] See 8 CFR 205.2(c).

[^ 5] See 8 CFR 205.2(d). See 8 CFR 103.8(b). Self-petitioners may appeal the decision to revoke the self-petition by filing a Notice of Appeal or Motion (Form I-290B).

[^ 6] See 8 U.S.C. 1367(a)(1)-(2).

[^ 7] See 8 CFR 103.5.

[^ 8] See 8 CFR 103.5.

[^ 9] See 8 CFR 103.5(a)(1)(i).

Part E - Employment Authorization for Abused Spouses of Certain Nonimmigrants

Part F - Parolees

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures.

See more

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures. We are working quickly to update and incorporate all of the AFM content into the USCIS Policy Manual, the agency's centralized online repository for immigration policies. Until then, we have moved any remaining AFM content to its corresponding Policy Manual Part. To the extent that a provision in the Policy Manual conflicts with remaining AFM content or Policy Memoranda, the updated information in the Policy Manual prevails. If you have questions or concerns about any discrepancies among these resources, contact PolicyFeedback@uscis.dhs.gov.

AFM Chapter 21 - Family-based Petitions and Applications (External)

Chapter 1 - Purpose and Background

A. Purpose

The Immigration and Nationality Act (INA) gives the Secretary of Homeland Security discretionary authority to parole into the United States temporarily, under conditions the Secretary may prescribe, on a case-by-case basis for urgent humanitarian reasons or significant public benefit, any alien applying for admission to the United States, regardless of whether the person is inadmissible to, or removable from, the United States.[1]

Congress did not define the phrase "urgent humanitarian reasons or significant public benefit," entrusting the interpretation and application of these standards to the Secretary.

B. Background

Parole decisions are discretionary determinations made on a case-by-case basis consistent with the INA. To exercise its parole authority, USCIS must determine that parole into the United States is justified by urgent humanitarian reasons or significant public benefit.

USCIS has the authority to impose conditions on the grant of parole, including requiring reasonable assurances that the parolee will appear at all hearings and will depart the United States when required to do so.[2]

In general, if USCIS favorably exercises its discretion to authorize parole for an alien located outside of the United States, then either USCIS or the U.S. Department of State issues a travel document to enable the alien to travel to a U.S. port of entry and request parole from U.S. Customs and Border Protection (CBP). CBP officers make the ultimate determination, upon the alien's arrival at a U.S. port of entry, whether to parole the alien into the United States and for what length of time. Once an alien is paroled into the United States, the parole allows the alien to stay temporarily in the United States.

Parole is not an admission to the United States.[3] When an alien is paroled into the United States, the alien is still deemed to be an applicant for admission.[4]

Parole terminates automatically upon the expiration of the authorized parole period or upon the parolee's departure from the United States.[5] Parole also may be terminated upon written notice to the alien if USCIS determines the purpose for which the parole was authorized has been accomplished or if USCIS determines that neither humanitarian reasons nor public benefit warrant the continued presence of the parolee in the United States. When parole is terminated, the alien is "restored to the status that he or she had at the time of parole."[6]

Generally, an alien who is paroled into the United States is not employment authorized incident to parole.[7] Rather, most parolees must apply for and be granted employment authorization and be issued an Employment Authorization Document (Form I-766) before they may legally work in the United States.[8] The grant of employment authorization is a separate determination from the grant of parole.

C. Legal Authorities [Reserved]

[Reserved]

Footnotes

[^ 1] See INA 212(d)(5)(A). USCIS, U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP) all have authority to authorize parole. See Delegation of Authority to the Commissioner of U.S. Customs and Border Protection, Delegation 7010.3, signed May 11, 2006. See Delegation of Authority to the Assistant Secretary for U.S. Immigration and Customs Enforcement, Delegation 7030.2, signed November 13, 2004 (effective March 1, 2003). See Delegation of Authority to the Bureau of Citizenship and Immigration Services, Delegation 0150.1, signed June 5, 2003 (effective March 1, 2003). See Memorandum of Agreement, *Coordinating the Concurrent Exercise by USCIS, ICE, and CBP, of the Secretary's Parole Authority under INA 212(d)(5)(A) with Respect to Certain Aliens Located Outside of the United States*, signed September 2008.

[^ 2] See 8 CFR 212.5(d).

[^ 3] See INA 101(a)(13)(B). See INA 212(d)(5)(A). See 8 CFR 1.2 ("An arriving alien remains an arriving alien even if paroled pursuant to section 212(d)(5) of the Act, and even after any such parole is terminated or revoked.").

[^ 4] See INA 212(d)(5)(A).

[^ 5] See 8 CFR 212.5(e)(1).

[^ 6] See 8 CFR 212.5(e). See *Hassan v. Chertoff*, 593 F.3d 785, 789 (9th Cir. 2010).

[^ 7] However, certain parolees are employment authorized incident to parole for any employer and other parolees are employment authorized with a specific employer incident to parole. For example, entrepreneurs paroled under 8 CFR 212.19 are employment authorized with a specific employer incident to their parole. See 8 CFR 274a.12(b)(37). In addition, DHS has decided as a matter of policy to provide the benefit of employment authorization incident to parole akin to what is normally accorded to refugees (as well as a no-fee initial and replacement of an initial Employment Authorization Document) to certain Afghan parolees and certain Ukrainian parolees so that they receive similar treatment as refugees, which aligns with the spirit of legislation that states that certain Afghan parolees and certain Ukrainian parolees "shall be eligible for . . . other benefits available to refugees . . . ." See Section 2502(b) of the Extending Government Funding and Delivering Emergency Assistance Act, Pub. L. 117-43 (PDF), 135 Stat. 344, 377 (September 30, 2021), amended by Section 1501 of Division M of the Consolidated Appropriations Act of 2023, Pub. L. 117-328 (PDF), 136 Stat. 4459, 5189 (December 29, 2022), and Section 401(b) of the Additional Ukraine Supplemental Appropriations Act, Pub. L. 117-128 (PDF), 136 Stat. 1211, 1218 (May 21, 2022). For more information on employment eligibility for aliens, see Volume 10, Employment Authorization, Part A, Employment Authorization Policies and Procedures, Chapter 2, Eligibility Requirements [10 USCIS-PM A.2].

[^ 8] See 8 CFR 274a.12(c)(11) and 8 CFR 274a.13.

Part G - International Entrepreneur Parole

Chapter 1 - Purpose and Background

A. Purpose

The international entrepreneur parole regulations provide a framework for DHS to use its parole authority[1] to grant a period of authorized stay, on a case-by-case basis, to alien entrepreneurs who possess a substantial ownership interest in a start-up entity and who can demonstrate that their stay in the United States would provide a significant public benefit through that start-up entity's potential for rapid business growth and job creation.

Although an individual who is paroled into the United States has not been admitted into the United States for purposes of immigration law, parolees may enter and remain in the United States and may be authorized to work.

B. Background

Given the complexities involved in adjudicating applications from entrepreneurs claiming a significant public benefit, DHS established, by regulation, criteria for the case-by-case evaluation of parole applications filed by entrepreneurs of start-up entities. By including such criteria in a regulation, as well as establishing application requirements that are specifically tailored to capture the necessary information for processing parole requests on this basis, DHS facilitated the use of parole in this area.[2]

DHS published a final rule introducing the criteria for entrepreneurs seeking significant public benefit parole on January 17, 2017, with an effective date of July 17, 2017.[3] While DHS subsequently issued a rule with request for comment delaying the effective date of the rule to March 14, 2018,[4] the U.S. District Court for the District of Columbia vacated the delay rule.[5] Subsequently, on May 29, 2018, DHS issued a proposed rule that sought to remove the International Entrepreneur Rule.[6] DHS, however, did not finalize that rule. Instead, it withdrew the proposed removal rule, signifying its support of the program.[7]

On September 13, 2021, consistent with the investment and revenue amount adjustment provision in the final rule, DHS issued a technical amendment of the regulation to adjust the amounts by the Consumer Price Index for All Urban Consumers (CPI-U), effective as of October 1, 2021.[8] On July 25, 2024, DHS issued another technical amendment of the regulation to adjust the amounts once again by the CPI-U, effective as of October 1, 2024.[9]

C. Legal Authorities

- INA 212(d)(5) – Parole
- INA 274A – Unlawful employment of aliens
- 8 CFR 212.19 – Parole for entrepreneurs
- 8 CFR 274a – Control of employment of aliens

Footnotes

[^ 1] See INA 212(d)(5).

[^ 2] See 82 FR 5238 (PDF) (Jan. 17, 2017).

[^ 3] See 82 FR 5238 (PDF) (Jan. 17, 2017).

[^ 4] See 82 FR 31887 (PDF) (Jul. 11, 2017).

[^ 5] See *Nat'l Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5 (D.D.C. Dec. 1, 2017).

[^ 6] See 83 FR 24415 (PDF) (May 29, 2018) (proposed rule).

[^ 7] See 86 FR 25809 (PDF) (May 11, 2021). See 86 FR 8277 (PDF) (Feb. 5, 2021), which directed agencies to identify any agency actions that fail to promote access to the legal immigration system.

[^ 8] See 86 FR 50839 (PDF) (Sept. 13, 2021).

[^ 9] See 89 FR 60298 (Jul. 25, 2024).

Chapter 2 - Requirements for Consideration

A. Applicant and Start-up Entity Criteria

An applicant files an Application for Entrepreneur Parole (Form I-941) to be considered for parole as an international entrepreneur. To be considered for such parole, the applicant must demonstrate that a grant of parole will provide a significant public benefit to the United States based on the applicant's entrepreneurial role with a start-up entity in the United States that has significant potential for rapid growth and job creation.[1]

An applicant need not be outside the United States to apply. Persons outside the United States, persons in the United States in nonimmigrant status, and those who are in the United States not presently maintaining nonimmigrant status may apply.

If their Form I-941 is approved, those applicants who are in the United States would have to depart the United States and would need to appear at a port of entry to request parole into the United States. However, applicants who are in the United States but are not in a lawful status (for example, their Arrival/Departure Record (Form I-94) expired and they are no longer in a nonimmigrant status) may have accrued unlawful presence and may face immigration consequences upon departure from the United States.

1. Applicant Requirements

Central and Active Role

The applicant must have a central and active role in the operations of the start-up entity.[2] Within that role, the applicant must be well-positioned, due to their knowledge, skills, or experience, to substantially assist the entity with the growth and success of its business.[3]

Substantial Ownership Interest

The applicant must also have a substantial ownership in the start-up entity. USCIS considers the applicant to have substantial ownership if the applicant possesses at least a 10 percent ownership interest in the start-up entity at the time of adjudication of the Form I-941.[4] If granted parole, an applicant may reduce their ownership interest below 10 percent during the period of initial parole, so long as the applicant maintains at least a 5 percent ownership interest in the start-up entity during the initial parole period.[5]

While the applicant does not need to be the sole owner, no more than three entrepreneurs may be granted international entrepreneur parole based on the same start-up entity.[6]

2. Start-up Entity Requirements

The applicant's start-up entity must be:

- A corporation, limited liability company, partnership, or other entity that is organized under federal law or the laws of any state, and that conducts business in the United States;
- Not primarily engaged in the offer, purchase, sale or trading of securities, futures contracts, derivatives, or similar instruments;[7]
- Formed within the 5 years immediately preceding the date the applicant filed the initial parole application and lawfully doing business during any period of operation since its date of formation; and

- An entity with substantial potential for rapid growth and job creation.[8]

The Business Structures overview provides more information on the most common business forms or structures, including information on formation, fundamental characteristics, and the tax forms submitted to the Internal Revenue Service.

B. Qualified Investment or Government Award or Grant

1. Investment Option

An applicant can demonstrate the start-up entity's substantial potential for rapid growth and job creation through a qualified investment if, within the 18 months immediately preceding the filing of the Form I-941, one or more qualified investors made qualified investments that together are at least the required amount. The required amount automatically adjusts every 3 years by the Consumer Price Index for All Urban Consumers (CPI-U).[9]

The following table outlines the required amount of investment in the start-up, which varies based on the date the applicant filed the Form I-941.

Required Amount of Investment in the Start-up

Filing Date	Investment Amount
Before October 1, 2021	$250,000
October 1, 2021 through September 30, 2024	$264,147
On or after October 1, 2024	$311,071

Qualified Investment

To be considered a qualified investment, the investment must be made in good faith and not be an attempt to circumvent any limitations imposed on investments under 8 CFR 212.19. The investment must be lawfully derived capital in a start-up entity that is a purchase from such entity of its equity, convertible debt, or other security convertible into its equity commonly used in financing transactions within such entity's industry.

A qualified investment does not include an investment, directly or indirectly, from:

- The entrepreneur;
- The parents, spouse, brother, sister, son, or daughter of such entrepreneur; or
- Any corporation, limited liability company, partnership, or other entity in which such entrepreneur or the parents, spouse, brother, sister, son, or daughter of such entrepreneur directly or indirectly has any ownership interest.

Qualified Investor

While an applicant is not prohibited from personally investing in the start-up entity or otherwise securing additional funding, only investments from a qualified investor count towards the minimum investment amount.

A qualified investor is an individual who is a U.S. citizen or lawful permanent resident (LPR) of the United States, or an organization that is located in the United States and operates through a legal entity organized under the laws of the United States or any state, that is majority owned and controlled, directly and indirectly, by U.S. citizens or LPRs of the United States.

A qualified investor must also regularly make substantial investments in start-up entities that subsequently exhibit substantial growth in terms of revenue generation or job creation by demonstrating that during the preceding 5 years:

- The qualified investor made investments in start-up entities in exchange for equity, convertible debt, or other security convertible into equity commonly used in financing transactions within their respective industries comprising a total in such 5-year period of no less than the investment amount in the chart below; and
- Subsequent to such investment by such individual or organization, at least two such entities each either created at least five qualified jobs or generated revenue of at least the amount in the chart below with average annualized revenue growth of at least 20 percent.[10]

The following table outlines the required amount of investment and revenue for qualified investors' prior investments, which varies based on the date the applicant filed the Form I-941.

Required Investment and Revenue Amounts for Qualified Investors' Prior Investments

Filing Date	Investment Amount	Revenue Amount
Before October 1, 2021	$600,000	$500,000
October 1, 2021 through September 30, 2024	$633,952	$528,293
On or after October 1, 2024	$746,571	$622,142

The term qualified investor does not include an individual or organization that has been:

- Permanently or temporarily enjoined from participating in the offer or sale of a security or in the provision of services as an investment adviser, broker, dealer, municipal securities dealer, government securities broker, government securities dealer, bank, transfer agent or credit rating agency;
- Barred from association with any entity involved in the offer or sale of securities or provision of such services; or
- Otherwise found to have participated in the offer or sale of securities or provision of such services in violation of law.[11]

2. Government Award or Grant Option

An applicant can demonstrate the start-up entity's substantial potential for rapid growth and job creation through a qualified government award or grant. The applicant must show that, within the 18 months immediately preceding the filing of the Form I-941, the start-up entity received one or more qualified government awards or grants of at least the minimum required amount.[12]

Qualified awards or grants include those for economic development, research and development, or job creation (or other similar monetary awards typically given to start-up entities) made by a federal, state, or local government entity (not including foreign government entities) that regularly provides such awards or grants to start-up entities. Contractual commitments for goods or services do not constitute qualifying awards or grants.[13]

The following table outlines the minimum required amount for government awards and grants, which varies based on the date the applicant filed the Form I-941.

Government Awards and Grants Amounts

Filing Date	Award or Grant Amount
Before October 1, 2021	$100,000
October 1, 2021 through September 30, 2024	$105,659
On or after October 1, 2024	$124,429

3. Alternative Option

If the applicant satisfies the criteria demonstrating that they are an entrepreneur in a start-up entity but only partially meets one or both of the criteria for qualified investments or qualified awards or grants, USCIS may still consider the applicant for entrepreneur parole if the applicant provides additional reliable and compelling evidence of the start-up entity's substantial potential for rapid growth and job creation. When considered in totality, the evidence must serve as a compelling validation of the entity's substantial potential for rapid growth and job creation.[14]

C. Significant Public Benefit

There is no statutory or regulatory definition of significant public benefit.[15] Parole determinations are case-by-case discretionary determinations that consider the totality of the circumstances of each case.

Footnotes

[^ 1] See 8 CFR 212.19(b)(2)(i).

[^ 2] See 8 CFR 212.19(a)(1).

[^ 3] See 8 CFR 212.19(a)(1).

[^ 4] See 8 CFR 212.19(a)(1). For information on the percentage of ownership required for re-parole see Chapter 5, Additional Periods of Parole, Section B, Criteria for Consideration [3 USCIS-PM G.5(B)].

[^ 5] See 8 CFR 212.19(a)(1).

[^ 6] See 8 CFR 212.19(f).

[^ 7] See 8 CFR 212.19(a)(9) (defining U.S. business entity).

[^ 8] See 8 CFR 219.12(a)(2).

[^ 9] See 8 CFR 212.19(l).

[^ 10] See 8 CFR 212.19(a)(5). Qualified job means full-time employment located in the United States that has been filled for at least 1 year by one or more U.S. citizens, LPRs, or other immigrants lawfully authorized to be employed in the United States, who is not an entrepreneur of the relevant start-up entity (or the parent, spouse, brother, sister, son, or daughter of such entrepreneur) nor an independent contractor. See 8 CFR 212.19(a)(6) and 8 CFR 212.19(a)(7).

[^ 11] See 8 CFR 212.19(a)(5).

[^ 12] See 8 CFR 212.19(a)(3) and 8 CFR 212.19(b)(2)(ii)(B)(2).

[^ 13] See 8 CFR 212.19(a)(3).

[^ 14] See 82 FR 5238, 5240 (PDF) (Jan. 17, 2017).

[^ 15] However, 8 CFR 212.19 lists some of the factors USCIS considers when determining whether an applicant's proposal would provide a significant public benefit to the United States.

Chapter 3 - Documentation and Evidence

A. Entrepreneur

1. Ownership

The entrepreneur applying for parole is required to have a substantial ownership interest in the start-up entity. USCIS considers at least 10 percent ownership interest to be substantial at the time of the adjudication of the initial grant of parole and 5 percent to be substantial at the adjudication of re-parole.[1]

Relevant, probative, and credible evidence of ownership interest may include, but is not limited to:

- Organizational documents (such as articles of incorporation, bylaws, articles of organization, operating agreement, certificate of partnership, or partnership agreement);
- Equity purchase or grant agreements;
- Equity ledger;
- Equity certificates;

- Contracts;
- Bank records;
- Wire transfers; and
- Any other documentation establishing an ownership interest in the start-up entity.

2. Central and Active Role in a Start-up Entity

The applicant is required to have a central and active role in the start-up entity.[2]

The applicant must provide a detailed and credible description of their central and active role in the start-up entity along with supporting evidence that may include, but is not limited to:

- A copy of the applicant's employment agreement with the start-up entity;
- Documentation from the start-up entity's other founders, the director of human resources, or another employee in a position that can attest to the applicant's role at the start-up entity;
- The applicant's position description; and
- Similar evidence that provides a detailed description of the applicant's central and active role in the start-up entity, including the day-to-day role the applicant is currently performing for the start-up entity.[3]

3. The Applicant is Well-positioned to Substantially Assist with the Start-up Entity's Growth and Success

Within the applicant's central and active role, the applicant must be well-positioned, due to their knowledge, skills, or experience, to substantially assist the start-up entity with the growth and success of its business.[4] Relevant, probative, and credible evidence to demonstrate that the applicant satisfies this threshold may include, but is not limited to:

- The applicant's resume or curriculum vitae (CV);
- Letters from relevant government agencies, qualified investors, or established business associations with an understanding of the applicant's knowledge, skills, or experience that would advance the start-up entity's business;
- News articles or other similar evidence indicating that the applicant has received significant attention and recognition;
- Documentation showing that the applicant or start-up entity has been recently invited to participate in, is currently participating in, or has graduated from one or more established and reputable start-up accelerators;
- Documentation showing that the applicant has played an active and central role in the success of prior start-up entities or other relevant business entities;
- Degrees or other documentation indicating that the applicant has knowledge, skills, or experience that would significantly advance the start-up entity's business;
- Documentation pertaining to intellectual property of the start-up entity, such as a patent, that was obtained by the applicant or as a result of the applicant's efforts and expertise; and
- Similar evidence that the applicant is well-positioned, due to the applicant's knowledge, skills, and experience, to substantially assist the start-up entity with the growth and success of its business.

B. Start-up Entity

A start-up entity is a U.S. business entity that was recently formed (created within the 5 years immediately preceding the filing date of the application), has lawfully done business during any period of operation since its date of formation, and has substantial potential for rapid growth and job creation.[5]

Evidence to demonstrate the company meets the definition of a start-up entity may include, but is not limited to:

- Organizational documents such as articles of incorporation, bylaws, articles of organization, operating agreements, certificates of partnership, partnership agreements, or other evidence of formation, as applicable;
- Tax records;
- Financial records; and
- Similar evidence that the start-up entity has lawfully done business during any period of operation since its date of formation.

The Business Structures overview provides more information on the most common business forms or structures, including information on formation, fundamental characteristics, and the tax forms submitted to the Internal Revenue Service.

C. Qualified Investment, Award, or Grant

1. Investment Option

If the applicant is using a qualified investment to demonstrate the start-up entity's potential for rapid growth and job creation, the applicant must provide evidence that a qualified investor is the source of the investment, as well as evidence of the amount and date of the investment in the start-up entity, rather than in a parent, subsidiary, affiliated, or related company.[6]

Source of the Investment

If the investor is an individual, the applicant must submit evidence showing that the investor is a U.S. citizen or lawful permanent resident (LPR) of the United States. The applicant should submit a copy of a government-issued identity document showing the photograph, name, and date of birth of the investor, along with evidence showing that the investor is a U.S. citizen or LPR of the United States. The copy must clearly show the photo and identity information.

If the investor is an organization, such as a venture capital firm or other U.S. business investing in the start-up entity, the applicant must submit evidence that the organization operates through a legal entity organized under the laws of the United States. Such evidence may include, but is not limited to, organizational documents such as articles of incorporation, bylaws, articles of organization, operating agreement, certificate of partnership, or partnership agreement.

The applicant must also submit evidence showing that the investing organization is majority owned and controlled, directly and indirectly, by U.S. citizens or LPRs of the United States.[7] Such evidence may include an ownership structure chart outlining the direct and indirect ownership of the organization together with evidence that the individuals ultimately owning and controlling a majority of the organization are U.S. citizens or LPRs of the United States. Many investment firms based in the United States, such as venture capital firms, have a wide range of funding from limited partners that vest control in U.S. citizen partners who manage and even control the fund.

While USCIS does not require the applicant to establish that at least 50 percent of the capital contributed to the fund is sourced from U.S. citizens or LPRs, in the venture capital firm context, the applicant must nevertheless show that the firm is majority owned and controlled, directly and indirectly, by U.S. citizens or LPRs.

To demonstrate the individual investor's or organization investor's successful track record of investment in start-up entities, the applicant must submit evidence such as, but not limited to, bank records, wire transfers, debt agreements, equity purchase agreements, equity certificates, equity ledgers, or capitalization tables.

To satisfy the job creation or revenue generation requirement, the applicant must submit documentation, such as tax records, payroll records, Employment Eligibility Verification (Form I-9) records, or audited financial statements.

Receipt of the Investment

The applicant must submit evidence that the start-up entity received the investment.[8] Such evidence may include, but is not limited to:

- Equity purchase agreements;
- Convertible debt agreements;
- Equity certificates;
- Equity ledgers;
- Capitalization tables;
- Audited financial statements;
- Bank records;
- Wire transfers; and
- Other evidence that the investment is a purchase from the start-up entity of its equity, convertible debt, or other security convertible into its equity commonly used in financing transactions within such entity's industry.

These records must demonstrate the trail of lawfully derived capital from a qualified investor into the applicant's start-up entity. The records must demonstrate that the invested capital was used to purchase equity, convertible debt, or other security convertible into an equity interest in the applicant's start-up entity.

2. Government Award or Grant Option

If the applicant is using a qualified government award or grant to establish the start-up entity's substantial potential for rapid growth and job creation, the applicant must submit evidence to establish that the award or grant is for economic development, research and development, or job creation (or other similar monetary award typically given to start-up entities), made by a federal, state, or local government entity that regularly provides such awards or grants to start-up entities.[9] Such evidence may include records such as:

- Copies of grant or award letters or notices;
- Other documentation from the government entity confirming the issuance of the award or grant, including the amount of the award or grant as well as the recipient;
- Information from news articles or websites demonstrating that the government entity regularly makes such awards or grants to start-up entities; and
- Similar evidence showing that a federal, state, or local government entity made a qualified government award or grant to the start-up entity, and that the government entity regularly makes such awards or grants to start-up entities.

3. Alternative Evidence Option

If the applicant provides sufficient evidence to demonstrate that they meet the regulatory definition of entrepreneur and that the entity meets the regulatory definition of a start-up but only partially meets the requirements for a qualified investment or a qualified award or grant, the applicant may provide other reliable and compelling evidence of the start-up entity's substantial potential for rapid growth and job creation.[10]

In the final rule setting forth the criteria for the case-by-case evaluation of parole applications from entrepreneurs, DHS recognized that reliable and compelling evidence of the start-up entity's substantial potential for rapid growth may vary depending on the nature of the business and the industry in which it operates. Therefore, applicants providing other reliable and compelling evidence of the start-up entity's potential are not limited to certain types of evidence.[11]

The preamble to the final rule, however, did recognize that non-monetary contributions and funding from non-U.S. sources are not considered as relevant or probative evidence.[12]

Additional supporting evidence may include, but is not limited to:

- Number of users or customers;
- Revenue generated by the start-up entity;
- Additional investments or fundraising, including through crowdfunding platforms;
- Social impact of the start-up entity;
- National scope of the start-up entity;
- Positive effects on the start-up entity's locality or region;
- Success using alternative funding platforms, including crowdfunding platforms;[13]
- The applicant's academic degrees, with an explanation of how the field relates to the start-up entity's focus;
- The applicant's prior success in operating start-up entities as shown by patented innovations, annual revenue, job creation, or other factors;
- Selection of the start-up entity to participate in one or more established reputable start-up accelerators or incubators; and
- Any other reliable and compelling evidence that the start-up entity has substantial potential for rapid growth and job creation.

D. Significant Public Benefit

In addition to meeting the investment, grant, or award criteria, the applicant should submit additional supporting evidence describing their start-up and demonstrating its substantial potential for rapid growth and job creation. Such supporting evidence may include:

- Evidence of investments from any investors (including those that do not meet the definition of qualified investor), or government awards or grants (including those that do not meet the definition of qualified government awards or grants). Such evidence could include bank records, wire transfers, equity purchase agreements, equity certificates, equity ledgers, or capitalization tables;
- Evidence of revenue generation;

- Letters from relevant government agencies, qualified investors, or established business associations with knowledge of the start-up entity's research, products or services. Letters from the same organizations or individuals confirming that the applicant's knowledge, skills, or experience would advance the start-up entity's business;
- Newspaper articles or other similar evidence that the applicant or their start-up entity have received significant attention or recognition;
- Evidence that the applicant or their start-up entity have been recently invited to participate in, are currently participating in, or have graduated from one or more established and reputable start-up accelerators;
- Patent awards or other documents indicating that the applicant or their start-up entity are focused on developing new technologies or cutting-edge research;
- Evidence that the start-up entity is furthering the development of a critical and emerging technology or other science, technology, engineering, and math (STEM) area important to U.S. competitiveness;[14]
- Evidence that the applicant has played an active and central role in the success of prior start-ups, such as letters from relevant government agencies, qualified investors, or established business associations with knowledge of the applicant's prior start-up activities;
- Academic degrees or other documentation indicating that the applicant has the knowledge, skills, or experience that would significantly advance their start-up entity's business;
- Tax or payroll records, I-9 records, or other documents indicating that the applicant's start-up entity has created qualified jobs before the applicant filed for parole;
- Any other reliable evidence indicating the applicant's start-up entity's potential for growth and the applicant's ability to advance their start-up entity's business in the United States; or
- Any other evidence that a grant of parole would provide a significant public benefit to the United States based on the applicant's role as the entrepreneur of a start-up entity, if the other listed evidence does not apply to the applicant's entrepreneurial activities.

Footnotes

[^ 1] See 8 CFR 212.19(a)(1).

[^ 2] See 8 CFR 212.19(a)(1).

[^ 3] See 82 FR 5238, 5246 (PDF) (Jan. 17, 2017).

[^ 4] See 8 CFR 212.19(a)(1).

[^ 5] See 8 CFR 212.19(a)(2).

[^ 6] See 8 CFR 212.19(a)(5).

[^ 7] See 8 CFR 212.19(a)(19).

[^ 8] See 8 CFR 212.19(b)(2)(ii)(B)(1). For investment threshold amounts according to the application's filing date, see Chapter 2, Requirements for Consideration, Section B, Qualified Investment or Government Award or Grant, Subsection 1, Investment Option [3 USCIS-PM G.2(B)(1)].

[^ 9] See 8 CFR 212.19(a)(3).

[^ 10] See 8 CFR 212.19(b)(2)(iii).

[^ 11] See 82 FR 5238, 5248 (PDF) (Jan. 17, 2017).

[^ 12] See 82 FR 5238, 5249, 5251-52 (PDF) (Jan. 17, 2017).

[^ 13] While the International Entrepreneur Rule does not exclude any type of funding source for purposes of alternative evidence, it limits the types of investment that will be considered a qualifying investment because the qualifying investment serves in part as an objective way to help ensure and validate that the start-up entity's activities will benefit the United States. See 82 FR 5238, 5251 (PDF) (Jan. 17, 2017).

[^ 14] To identify a critical and emerging technology field, USCIS considers governmental, academic, and other authoritative and instructive sources, and all other evidence submitted by the applicant. One such governmental source is the Critical and Emerging Technologies List Update (PDF) published by the National Science and Technology Council.

Chapter 4 - Adjudication

A. Discretion

USCIS' authority to grant international entrepreneur parole (IEP) is discretionary and decided on a case-by-case basis. The officer determines, based on the totality of the evidence, whether an applicant's presence in the United States will provide a significant public benefit and that the applicant otherwise merits a favorable exercise of discretion.

In determining whether an applicant's presence in the United States will provide a significant public benefit and whether a favorable exercise of discretion is warranted, USCIS considers and weighs all evidence, including any derogatory evidence or information, such as, but not limited to, evidence of criminal activity and national security concerns.[1]

B. Decision

1. Approvals

If the applicant establishes that the applicant's presence in the United States will provide a significant public benefit, USCIS may, in its discretion, approve the application for the applicant to be paroled into the United States for a period of up to 30 months. After approval of the application, the applicant may appear at a port of entry to request to be paroled into the United States.[2] The process after approval of the application is as follows:

Applicants in the United States

If the applicant is currently in the United States when USCIS approves or conditionally approves the application, the applicant must depart the United States before appearing at a U.S. port of entry for a final parole determination by U.S. Customs and Border Protection (CBP). A pending, approved, or conditionally approved application does not authorize the applicant, if they are present in the United States in nonimmigrant status, to remain in the United States beyond the expiration of their authorized period of stay.

USCIS requires the applicant's biometrics to be collected and on file before approving the application. If the applicant requests to receive their parole documentation at their U.S. mailing address, USCIS sends a biometrics appointment notice. If the applicant requests to receive their parole documentation at a U.S. embassy or consulate, USCIS may make a preliminary

decision on the application and issue a conditional approval notice with instructions on how to appear for biometrics submission and identity verification, generally at that U.S. embassy or consulate as part of the process for obtaining travel documentation.

Applicants Outside the United States

For those other than Canadian nationals traveling directly from Canada, if the applicant is outside the United States when USCIS conditionally approves the application, the applicant must visit a U.S. embassy or consulate to obtain travel documentation before appearing at a U.S. port of entry for a final parole determination. USCIS may make a preliminary decision on the application before collecting biometrics and issue a conditional approval notice with instructions on how to appear for biometrics submission and identity verification at the requested U.S. embassy or consulate. The applicant would be subject to U.S. Department of State (DOS) rules pertaining to the process for obtaining travel documentation.

A Canadian national traveling directly from Canada to a U.S. port of entry may present an approved or conditionally approved Application for Entrepreneur Parole (Form I-941) at the U.S. port of entry without first obtaining travel documentation from DOS. However, USCIS still requires the applicant to submit biometrics before parole may be authorized. The conditional approval notice includes options and instructions on how to complete the biometrics requirement in such circumstances.

Grant of Parole

Although advance authorization of parole by USCIS does not guarantee that the applicant will be issued travel documentation by DOS or paroled by CBP upon their appearance at a port of entry, with a grant of advance parole, the applicant is issued a document authorizing travel (in lieu of a visa) indicating that, so long as circumstances do not meaningfully change after USCIS conditionally approves Form I-941, and DHS does not discover material information that was previously unavailable, CBP's discretion to parole the individual at a port of entry will likely be exercised favorably.

Work Authorization

An entrepreneur who is paroled into the United States is authorized for employment with the start-up entity incident to the conditions of the parole.[3] It is not necessary for the parolee to apply for an Employment Authorization Document.

2. Denials

If the applicant fails to establish that the applicant's presence in the United States will provide a significant public benefit and that a favorable exercise of discretion is warranted, the officer denies the application and notifies the applicant in writing of the specific reasons for a denial.[4] An applicant may not appeal or move to reopen or reconsider a denial of international entrepreneur parole.[5] However, USCIS may reopen or reconsider a denial on its own motion.[6]

Footnotes

[^ 1] See 8 CFR 212.19(d)(1).

[^ 2] See 8 CFR 212.19(d)(2).

[^ 3] See 8 CFR 212.19(g) and 8 CFR 274a.12(b)(37).

[^ 4] See 8 CFR 103.3(a)(1).

[^ 5] See 8 CFR 212.19(d)(4).

[^ 6] See 8 CFR 103.5(a)(5).

Chapter 5 - Additional Periods of Parole

In general, the parolee may be considered for a single period of re-parole for up to 30 months[1] as an international entrepreneur if the parolee demonstrates that a grant of parole will continue to provide a significant public benefit to the United States based on their role as an entrepreneur of a start-up entity.[2]

A. Filing

Before expiration of the initial period of parole, an entrepreneur parolee may request an additional period of parole based on the same start-up entity that formed the basis for the initial period of parole. To request such parole, an entrepreneur parolee must timely file an Application for Entrepreneur Parole (Form I-941).[3]

B. Criteria for Consideration

A parolee seeking re-parole must demonstrate that the parolee continues to be an entrepreneur and that the entity continues to be a start-up entity.[4]

The applicant is no longer required to demonstrate an ownership interest of 10 percent when applying for re-parole. Instead, as of the date USCIS adjudicates the application for re-parole, the parolee must have retained at least a 5 percent ownership in the start-up entity.[5]

1. General Criteria

The parolee may seek re-parole by establishing that during the initial parole period the entity has:

- Received a qualified investment, qualified government grants or awards, or a combination of such funding, of at least the amounts specified in the table below;
- Created at least five qualified jobs with the start-up entity; or
- Reached annual revenue in the United States of at least the amount specified in the table below and averaged 20 percent in annual revenue growth.[6]

The following table outlines the required amount of investment, grants, awards, or revenue, which varies based on the date the applicant filed the Form I-941.

Amount Thresholds for Re-Parole

Filing Date	Investment, Grants, Awards, or Revenue Amount

Filing Date	Investment, Grants, Awards, or Revenue Amount
Before October 1, 2021	$500,000
October 1, 2021 through September 30, 2024	$528,293
On or after October 1, 2024	$622,142

2. Alternative Criteria

A parolee who partially meets one or more of the general criteria above may alternatively provide other reliable and compelling evidence of the start-up entity's substantial potential for rapid growth and job creation.[7]

C. Decision

1. Approval

If the applicant establishes that applicant's continued presence in the United States will provide a significant public benefit, USCIS may approve a single request for re-parole in its discretion.

If the entrepreneur is in the United States at the time that USCIS approves the request for re-parole, such approval is considered a grant of re-parole. If the entrepreneur is outside the United States at the time that USCIS approves the request for re-parole, the entrepreneur must appear at a port of entry to be granted parole by Customs and Border Protection (CBP), in lieu of admission.[8]

2. Denial

If the applicant fails to establish that the applicant's presence in the United States will provide a significant public benefit and that a favorable exercise of discretion is warranted, the officer denies the application and notifies the applicant in writing of the specific reasons for a denial.[9]

An applicant may not appeal or move to reopen or reconsider a denial of international entrepreneur parole.[10] However, USCIS may reopen or reconsider a denial on its own motion.[11]

Footnotes

[^ 1] See 8 CFR 212.19(d)(3).

[^ 2] See 8 CFR 212.19(c)(2)(i).

[^ 3] See 8 CFR 212.19(c)(1).

[^ 4] See 8 CFR 212.19(c)(2)(ii)(A).

[^ 5] See 8 CFR 212.19(a)(1).

[^ 6] See 8 CFR 212.19(c)(2)(ii)(B).

[^ 7] See 8 CFR 212.19(c)(2)(iii). For more discussion of consideration of alternative evidence, see Chapter 3, Documentation and Evidence, Section C, Qualified Investment, Award, or Grant, Subsection 3, Alternative Evidence Option [3 USCIS-PM G.3(C)(3)].

[^ 8] See 8 CFR 212.19(d)(3).

[^ 9] See 8 CFR 103.3(a)(1).

[^ 10] See 8 CFR 212.19(d)(4).

[^ 11] See 8 CFR 103.5(a)(5).

Chapter 6 - Family Members

An entrepreneur parolee's spouse and children may also apply for parole.[1] The spouse and children of an entrepreneur parolee may be granted parole for no longer than the period of parole granted to the entrepreneur.[2]

A. Application

The entrepreneur's spouse and children who are seeking parole as derivatives must individually file an Application for Travel Documents, Parole Documents, and Arrival/Departure Records (Form I-131) with evidence that the applicant has a qualifying relationship to the entrepreneur and otherwise merits a grant of parole in the exercise of discretion.[3] The applicant is required to appear for a biometrics services appointment.[4]

B. Work Authorization

The spouse of the entrepreneur parolee, after being paroled into the United States, may be eligible for employment authorization on the basis of parole under this section. To request employment authorization, an eligible spouse paroled into the United States must file an Application for Employment Authorization (Form I-765).[5] The applicant must submit evidence establishing eligibility, including evidence of the spousal relationship.[6]

A child of the entrepreneur parolee may not be authorized for and may not accept employment on the basis of parole.[7]

Footnotes

[^ 1] See 8 CFR 212.19(h).

[^ 2] See 8 CFR 212.19(h)(2).

[^ 3] See 8 CFR 212.19(h)(1).

[^ 4] See 8 CFR 212.19(e).

[^ 5] See 8 CFR 212.19(h)(3).

[^ 6] See 8 CFR 212.19(h)(3).

[^ 7] See 8 CFR 212.19(h)(4).

Chapter 7 - Conditions on Parole and Termination

USCIS may impose reasonable conditions in its sole discretion with respect to any parolee and may request verification of the parolee's compliance with any such condition at any time.[1] Violation of any condition of parole may lead to termination of the parole or denial of re-parole.[2]

USCIS, in its discretion, may terminate a grant of international entrepreneur parole at any time and without prior notice or opportunity to respond if it determines that the entrepreneur's continued parole in the United States no longer provides a significant public benefit.[3]

Alternatively, USCIS, in its discretion, may provide the entrepreneur notice and an opportunity to respond before terminating the parole.[4]

A. Conditions

As a condition of international entrepreneur parole, a parolee must maintain household income that is greater than 400 percent of the federal poverty guidelines for their household size as defined by the U.S. Department of Health and Human Services.[5]

B. Reporting of Material Changes

Parolees are required to report any material changes to USCIS immediately.

If the entrepreneur will no longer be employed by the start-up entity or will cease to possess a qualifying ownership stake, the entrepreneur must immediately notify USCIS in writing.

If the start-up entity continues to employ the entrepreneur, who maintains a qualifying ownership interest, the entrepreneur must submit the Application for Entrepreneur Parole (Form I-941) with the applicable fee to notify USCIS of the material change.[6]

A material change is any change in facts that could reasonably affect the outcome of the determination whether the entrepreneur provides, or continues to provide, a significant public benefit to the United States. Such changes include, but are not limited to:

- Any criminal charge, conviction, plea of no contest, or other judicial determination in a criminal case concerning the entrepreneur or start-up entity;
- Any complaint, settlement, judgment, or other judicial or administrative determination concerning the entrepreneur or start-up entity in a legal or administrative proceeding brought by a government entity;
- Any settlement, judgment, or other legal determination concerning the entrepreneur or start-up entity in a legal proceeding brought by a private individual or organization other than proceedings primarily involving claims for damages not exceeding 10 percent of the current assets of the entrepreneur or start-up entity;
- A sale or other disposition of all or substantially all of the start-up entity's assets;
- The liquidation, dissolution, or cessation of operations of the start-up entity;
- The voluntary or involuntary filing of a bankruptcy petition by or against the start-up entity;
- A significant change with respect to ownership and control of the start-up entity; and
- A cessation of the entrepreneur's qualifying ownership interest in the start-up entity or the entrepreneur's central and active role in the operations of that entity.[7]

C. Automatic Termination

International entrepreneur parole or re-parole[8] automatically terminates without notice upon the expiration of the time for which parole was authorized, unless, during the initial parole period, the parolee timely files a non-frivolous application for re-parole.[9]

Before the expiration, USCIS automatically terminates parole when USCIS receives written notice from the entrepreneur parolee that the parolee will no longer be employed by the start-up entity or will cease to possess a qualifying ownership stake in the start-up entity.[10]

When the entrepreneur's parole automatically terminates, the parole of the spouse or child of the entrepreneur also automatically terminates without notice.[11] Any employment authorization based on terminated parole is automatically revoked.[12]

D. Termination on Notice

USCIS may terminate the period of parole or re-parole upon written notice to the entrepreneur or the entrepreneur's spouse or children, as applicable, of its intent to terminate parole if USCIS believes that:

- The facts or information contained in the request for parole were not true and accurate;
- The parolee failed to timely file or otherwise comply with the material change reporting requirements;[13]
- The entrepreneur parolee is no longer employed in a central and active role by the start-up entity or ceases to possess a qualifying ownership stake in the start-up entity;
- The parolee otherwise violated the terms and conditions of parole; or
- Parole was erroneously granted.[14]

1. Notices of Intent to Terminate

A notice of intent to terminate generally identifies the grounds for termination of the parole and provides a period of up to 30 days for the parolee's written rebuttal.[15] The parolee may submit additional evidence in support of the rebuttal, when applicable, and USCIS considers all relevant evidence presented in deciding whether to terminate the parole.[16] Failure to timely respond to a notice of intent to terminate will result in termination of the parole.[17]

2. Charging Documents

If a charging document is served on the parolee, the charging document will constitute written notice of termination of parole (if parole has not already been terminated), unless otherwise specified.[18]

3. Termination Decisions

An applicant may not appeal or move to reopen or reconsider a termination of international entrepreneur parole.[19] However, USCIS may reopen or reconsider a termination on its own motion.[20]

Footnotes

[^ 1] See 8 CFR 212.19(i).

[^ 2] See 8 CFR 212.19(i).

[^ 3] See 8 CFR 212.19(k)(1).

[^ 4] See 8 CFR 212.19(k)(1).

[^ 5] See 8 CFR 212.19(i).

[^ 6] See 8 CFR 212.19(j).

[^ 7] See 8 CFR 212.19(a)(10).

[^ 8] For more on re-parole, see Chapter 5, Additional Periods of Parole [3 USCIS-PM G.5].

[^ 9] See 8 CFR 212.19(k)(2). For more on applying for re-parole, see Chapter 5, Additional Periods of Parole [3 USCIS-PM G.5].

[^ 10] See 8 CFR 212.19(k)(2).

[^ 11] See 8 CFR 212.19(k)(2).

[^ 12] See 8 CFR 212.19(k)(2).

[^ 13] See 8 CFR 212.19(j).

[^ 14] See 8 CFR 212.19(k)(3).

[^ 15] See 8 CFR 212.19(k)(4).

[^ 16] See 8 CFR 212.19(k)(4).

[^ 17] See 8 CFR 212.19(k)(4).

[^ 18] See 8 CFR 212.19(k)(4).

[^ 19] See 8 CFR 212.19(k)(4).

[^ 20] See 8 CFR 103.5(a)(5).

Part H - Deferred Action

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures.

See more

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures. We are working quickly to update and incorporate all of the AFM content into the USCIS Policy Manual, the agency's centralized online repository for immigration policies. Until then, we have moved any remaining AFM content to its corresponding Policy Manual Part. To the extent that a provision in the Policy Manual conflicts with remaining AFM content or Policy Memoranda, the updated information in the Policy Manual prevails. If you have questions or concerns about any discrepancies among these resources, contact PolicyFeedback@uscis.dhs.gov.

AFM Chapter 21 - Family-based Petitions and Applications (External)

Part I - Reserved

Part J - Temporary Protected Status

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Part K - Reserved

Volume 4 - Refugees and Asylees

Part A - Reserved

Part B - Reserved

Part C - Relative Petitions

Chapter 1 - Purpose and Background

A. Purpose

Aliens admitted as refugees[1] or granted asylee status[2] may petition for a qualifying spouse or child to be granted derivative refugee or asylee status. USCIS is responsible for adjudicating these petitions.

There are different ways for refugees and asylees to bring qualifying family members to the United States. This Part only discusses the Refugee/Asylee Relative Petition (Form I-730) process.

B. Background

An alien admitted to the United States as a principal refugee[3] or an alien who is a principal asylee[4] in the United States, may file a Form I-730 to request that their qualifying spouse[5] and unmarried children[6] receive derivative refugee or asylee status.

If USCIS approves the Form I-730, a spouse or child beneficiary receives derivative refugee or derivative asylee status, depending on whether the petitioner received refugee or asylum status. The beneficiary of a Form I-730 filed by a refugee petitioner is referred to as a following-to-join refugee (FTJ-R), and the beneficiary of a Form I-730 filed by an asylee petitioner is referred to as a following-to-join asylee (FTJ-A).

The term following-to-join, in this context, refers to the process of the qualifying family member receiving refugee or asylum status after the petitioner, regardless of whether the qualifying family member resides in or outside the United States. A spouse or child who was not included as a derivative on the principal refugee's Registration for Classification as Refugee (Form I-590), the principal asylee's Application for Asylum and for Withholding of Removal (Form I-589), or the Record of Determination/Credible Fear Worksheet (Form I-870), and who did not accompany the petitioner, may receive following-to-join benefits.

For beneficiaries residing outside the United States for whom USCIS has approved the Form I-730 and who are approved to travel, U.S. Customs and Border Protection makes the decision whether to admit such beneficiaries in derivative refugee or asylee status at the port of entry.

C. Legal Authorities

- INA 207(c)(2) – Admission status of spouse or child (of refugees)
- INA 208(b)(3) – Treatment of spouse and children (of asylees)
- INA 101(a)(35) – Definition of wife, spouse, or husband
- INA 101(b)(1)(A); INA 101(b)(1)(B); INA 101(b)(1)(C); INA 101(b)(1)(D); and INA 101(b)(1)(E) – Definitions of child
- INA 101(b)(2) – Definition of parent, father, or mother
- 8 CFR 103.2 – Submission and adjudication of benefit requests
- 8 CFR 103.3 – Denials, appeals, and precedent decisions
- 8 CFR 103.5 – Reopening or reconsideration
- 8 CFR 207.7 – Derivatives of refugees
- 8 CFR 208.21 – Admission of the asylee's spouse and children

Footnotes

[^ 1] See INA 207(c)(2). See 8 CFR 207.7.

[^ 2] See INA 208(b)(3). See 8 CFR 208.21.

[^ 3] See 8 CFR 207.7(d).

[^ 4] See 8 CFR 208.21(c) and 8 CFR 208.21(d).

[^ 5] See Chapter 2, Eligibility Requirements, Section D, Beneficiaries, Subsection 1, Spousal Beneficiaries [4 USCIS-PM C.2(D)(1)].

[^ 6] See Chapter 2, Eligibility Requirements, Section D, Beneficiaries, Subsection 2, Child Beneficiaries [4 USCIS-PM C.2(D)(2)].

Chapter 2 - Eligibility Requirements

The Immigration and Nationality Act (INA) provides for the admission of alien spouses and children (derivatives) of asylees, refugees, and lawful permanent residents (LPRs) who received this status as a principal refugee or principal asylee.[1]

A. General Eligibility Requirements

An eligible petitioner may petition for their spouse and children by filing a Refugee/Asylee Relative Petition (Form I-730). The petitioner must file a separate Form I-730 for each qualifying family member.[2]

1. Petitioners

For a petitioner to be eligible to file a Form I-730, the petitioner must:

- Be a principal refugee or asylee, or have LPR status based on being a principal refugee or asylee;
- File a separate Form I-730 for each qualifying family member within 2 years of the date on which the petitioner was admitted as a refugee into the United States, or the petitioner was approved as an asylee;[3] and
- File based upon a relationship with a qualifying family member.

For general eligibility, the relationship between a petitioner and a qualifying family member must exist:

- On the date the petitioner was approved for asylum[4] or admitted as a refugee;[5]
- On the date the petitioner filed the Form I-730;[6]
- On the date USCIS adjudicates the Form I-730;[7] and
- On the date the beneficiary is admitted into the United States, if the beneficiary resided abroad when USCIS approved the Form I-730.[8]

2. Beneficiaries

Qualifying family members for purposes of a Form I-730 include a spouse[9] and unmarried children.[10] A spouse or child may be living inside or outside of the United States.

Spouses generally include persons recognized as married under the laws where the marriage took place (the place of celebration).[11] However, the INA does not recognize unconsummated proxy marriages[12] and polygamous marriages.[13] The INA limits spousal relationships for immigration purposes to those where the parties to a marriage were both present during the marriage ceremony or consummated the marriage following the ceremony if the parties were not present together.[14] Generally, to demonstrate a qualifying spousal relationship for Form I-730, the petitioner must provide evidence of a legally recognized marriage to the alien spouse.

In limited circumstances, a marriage may violate the strong public policy of the United States or the state in which the couple resides and may therefore not be valid for U.S. immigration purposes.[15] Some examples of when a marriage may violate public policy include polygamous marriages, marriage between close relatives, and marriage involving minors.[16] If the petitioner or beneficiary was previously married, the petitioner must also establish by a preponderance of the evidence that any prior marriage was legally terminated.

Eligible children must be under age 21 on the date the petitioner files an application for asylum or applies for refugee status. The child of an asylee continues to be a child for Form I-730 eligibility if the child is under 21 years of age on the date on which the parent applied for asylum.[17] The child of a refugee continues to be a child for Form I-730 eligibility if the child is under 21 years of age on the date that the parent applied for refugee status, which is the date that USCIS first interviews the principal refugee applicant.[18]

Eligible children include children born in wedlock, out of wedlock, adopted children, legitimated children, and stepchildren.[19] Children who are conceived but not yet born before the petitioner's admission as a refugee or asylum approval are also eligible.[20]

Asylee beneficiaries must not be subject to certain bars to asylum.[21] Refugee beneficiaries must be admissible or eligible for a waiver of inadmissibility, and they must not have engaged in persecution as described in the second sentence of INA 101(a)(42).[22]

B. Two-Year Filing Deadline and Humanitarian Waiver

By regulation, the petitioner must file the Form I-730 within 2 years of the petitioner's admission as a refugee or grant of asylum.[23]

USCIS may waive the 2-year filing deadline for humanitarian reasons on a case-by-case basis.[24] If USCIS determines that humanitarian reasons exist for extending the filing deadline, USCIS may do so, and there is no set limit on the length of extension that USCIS may approve.

The petitioner may directly request a waiver or USCIS may approve a waiver on its own accord if there are sufficient humanitarian reasons. In general, the petitioner should initiate the request for a humanitarian waiver of the 2-year filing deadline.

The petitioner should provide a letter or explanation and all appropriate evidence that supports the waiver request. Although the following is not an exhaustive list, USCIS may consider the following factors in determining whether to approve a waiver request:

- Significant harm is likely to occur to the beneficiary if not allowed to join family in the United States;
- Petitioner's earlier belief that a relative was deceased or missing, but the petitioner later learned the relative was alive;
- Mental or physical health of the petitioner and impact on the petitioner's ability to know, understand, and comply with filing requirements;
- Age of the beneficiary;
- Advanced age of the petitioner;
- Educational background of the petitioner and ability to understand the Form I-730 or form instructions;
- Petitioner's diligence in trying to obtain competent assistance to complete Form I-730;
- Availability of competent assistance to the petitioner;
- Ineffective assistance of counsel or other representative;
- Whether the petitioner willfully or recklessly disregarded the Form I-730 filing deadline;
- Whether the petitioner previously filed a timely Form I-730 that was ultimately abandoned or denied;
- Existence of significant misinformation that the petitioner received that contributed to the petitioner's belief that the petitioner was ineligible to file a Form I-730;

- Circumstances that have generated public confusion generally about the ability of the petitioner to file Form I-730 (for example, when the petitioner had a conditional asylum approval, and there was uncertainty as to when the relationship needed to have been in existence to meet following to join criteria), or other statutory or regulatory immigration changes that may create confusion and uncertainty;
- Community attention and presence of sympathetic factors (for example, the beneficiary or family members have been victims of highly publicized crime or natural disaster); or
- Other public interest factors.

C. Petitioners

Principal asylees or principal refugees are eligible to file a Form I-730. Petitioners who acquire LPR status after they are admitted to the United States as a principal refugee or approved as a principal asylee are also eligible to file a Form I-730.

An asylee or refugee who becomes a naturalized citizen is not eligible to file a Form I-730.[25] However, if the petitioner became a naturalized U.S. citizen after filing the Form I-730, USCIS will generally continue to process the petition.

A refugee petitioner must have been admitted to the United States as a principal refugee. The primary[26] classes of admission that would qualify a petitioner to be eligible to file a Form I-730 are:

- RE1; or
- RE6 (approved as principal on a refugee application).

D. Beneficiaries

The relationship between the petitioner and the family member must exist:

- On the date the petitioner was approved for asylum[27] or admitted as a refugee[28] (except for children who were conceived but not yet born when their parent was admitted as a refugee or approved for asylee status);[29]
- On the date the petitioner filed a Form I-730;[30]
- On the date USCIS adjudicates the Form I-730;[31] and
- On the date the beneficiary is admitted into the United States, if the beneficiary resided abroad when USCIS approved the Form I-730.[32]

Relationships created after the petitioner was admitted as a refugee or acquired asylee status do not qualify for Form I-730 petition purposes. However, a principal refugee or asylee may be eligible to file a Petition for Alien Relative (Form I-130) for a spouse or child if the principal refugee or asylee becomes an LPR.[33]

1. Spousal Beneficiaries

A spouse must meet the INA's definition of a spouse.[34] In general, the legal validity of a marriage is determined by the law of the place where the marriage was celebrated ("place-of-celebration rule"). Under this rule, a marriage is valid for immigration benefit purposes where the marriage is valid under the law of the jurisdiction in which it is performed.[35]

Generally, USCIS does not recognize the following relationships as marriages, even if valid in the place of celebration:

- Relationships where one party is not present during the marriage ceremony (proxy marriages) unless the parties later consummate the marriage;[36] or
- Relationships that are contrary to public policy in the United States, including those involving certain minors, polygamy, or incest.[37]

2. Child Beneficiaries

Definition of a Child

For purposes of Form I-730 eligibility, a child is an unmarried person under 21 years of age who is:

- A child born in wedlock[38] to the petitioner;
- The legitimated[39] child of the petitioner who was under 18 and in the legal custody of the legitimating parent or parents at the time of legitimation;
- The stepchild[40] of the petitioner who was under 18 at the time of the marriage creating the step relationship;
- A child adopted while under age 16 (or 18 if the sibling exception applies[41]) who has been in the legal custody of and jointly resided with the petitioner for at least 2 years;[42] or
- A child born out of wedlock to a natural[43] parent. If the petitioning parent is the natural father and the child has not been legitimated, the natural father and child must have had a bona-fide parent-child relationship before the child reached the age of 21.[44]

Child's Marital Status

To receive derivative asylum or refugee status, the child must be unmarried at the time:

- The petitioner files the Form I-730; and
- USCIS adjudicates the petition (and, if the child beneficiary is outside the United States, at the time the beneficiary is admitted into the United States).[45]

As long as a beneficiary child is unmarried at these points in time, an intervening marriage and divorce or termination through an annulment does not result in their ineligibility.

Child's Age

Congress enacted the Child Status Protection Act (CSPA) to protect certain children from aging out of certain immigration benefits, including beneficiaries of Form I-730 petitions. The CSPA went into effect on August 6, 2002.[46] Under the CSPA, USCIS continues to classify a child who is under 21 at the time their parent applied for refugee[47] or asylum[48] status to be a child regardless of their actual age at the time of the adjudication of Form I-730.

For asylees, USCIS continues to classify children who turn 21 years old after the petitioning parent files an asylum application, but before USCIS adjudicates the Form I-730, to be children and remain eligible for derivative asylum status.[49]

For refugees, USCIS continues to classify children who turn 21 years old after the petitioning parent applies for refugee status, but before USCIS adjudicates the Form I-730, to be children and remain eligible for derivative refugee status.[50]

If the petitioner filed an application for refugee or asylum status before August 6, 2002, and their child turned 21 years of age before that date, that application must have been pending on August 6, 2002, for the child to continue to be classified as a child.[51]

Children In Utero

A child who was conceived, but not yet born on the date the petitioner was admitted to the United States as a refugee or approved for asylum is eligible for derivative refugee or asylum status as a Form I-730 beneficiary.[52]

Accordingly, a child who was born within approximately 9 months after the date on which the petitioner acquired status may be eligible to be a beneficiary, so long as the beneficiary falls within one of the definitions of a child.[53]

Non-Biological Parent-Child Relationship

A child might qualify as the child of the principal refugee or asylee even if the petitioner is not the biological parent. For example, the petitioner may have been married to the child's mother when the child was born and may also have been in the United States continuously since before the earliest possible date of the child's conception, preventing the father's biological paternity. Although not the biological child of the petitioning father, the beneficiary could meet the definition of an in-wedlock child or stepchild.

USCIS considers a child to be born in wedlock when the child's legal parents are married to one another at the time of the child's birth and at least one of the legal parents has a genetic or gestational relationship to the child. As such, a petitioning father or mother's nonbiological child with a lawful spouse meets the definition of an in-wedlock child if the law of the jurisdiction in which the child was born recognizes the petitioner and spouse as the child's legal parents.[54]

Additionally, even if the law does not establish a legal parental relationship, when a child is born as the legal child of only one partner of a married couple, USCIS considers the child to be the stepchild of the other partner for immigration purposes.[55] Because the child qualifies as the petitioner's stepchild,[56] USCIS does not need to decide if the child otherwise meets the definition of a child.[57]

E. Beneficiaries in Removal Proceedings

1. Beneficiaries in Removal Proceedings or with a Final Order of Removal

USCIS may approve beneficiaries in the United States who are in removal proceedings or have a final order of removal for derivative asylum or refugee status if the beneficiaries meet all other eligibility requirements for Form I-730.[58]

If a Form I-730 beneficiary has a removal order, a Form I-730 approval provides the beneficiary with derivative refugee or derivative asylee status, and the removal order becomes unenforceable.[59]

2. Beneficiaries Who Re-Entered the United States After Removal

In general, an alien who re-enters the United States without prior authorization after having been previously removed or having departed voluntarily while under an order of exclusion, deportation, or removal from the United States, is subject to reinstatement of removal.[60] USCIS does not have the authority to reinstate prior orders of removal.

When adjudicating Form I-730, if an officer encounters an applicant who has re-entered without prior authorization after a prior order of removal, USCIS contacts U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations (ICE ERO) about potential reinstatement of the order of removal. ICE ERO can choose to complete and effectuate service of a Notice of Intent/Decision to Reinstate Prior Order (Form I-871).

Similarly, if a beneficiary has re-entered without inspection and ICE ERO has already signed and served a Form I-871, USCIS generally denies the Form I-730.

Footnotes

[^ 1] See INA 207(c)(2)(A) and INA 208(b)(3).

[^ 2] See 8 CFR 207.7(d), 8 CFR 208.21(c), and 8 CFR 208.21(d).

[^ 3] See 8 CFR 207.7(d), 8 CFR 208.21(c), and 8 CFR 208.21(d).

[^ 4] See 8 CFR 208.21(b).

[^ 5] See 8 CFR 207.7(c).

[^ 6] See 8 CFR 207.7(c) and 8 CFR 208.21(b).

[^ 7] See 8 CFR 207.7(c) and 8 CFR 208.21(b).

[^ 8] See 8 CFR 207.7(c) and 8 CFR 208.21(b). U.S. Customs and Border Protection (CBP) determines whether a beneficiary is eligible for admission or parole at the port of entry.

[^ 9] See INA 101(a)(35).

[^ 10] See INA 101(b)(1)(A)-(E).

[^ 11] See *Matter of P-*, 4 I&N Dec. 610, 613 (Acting A.G. 1952) ("But, apart from saying that picture and proxy marriages will not create the status of 'wife' for immigration purposes, the Congress has not said what will. In the absence of such legislative provision, the generally accepted rule is that the validity of a marriage is governed by the law of the place of celebration.").

[^ 12] See INA 101(a)(35).

[^ 13] See INA 101(a)(35). See *Matter of H-* (PDF), 9 I&N Dec. 640 (BIA 1962) (holding that polygamous marriages are not recognized for immigration purposes, even if recognized as lawful in the jurisdiction where the marriage took place).

[^ 14] See INA 101(a)(35), which excludes proxy marriage from meeting the qualifications of a spouse, wife, or husband. USCIS does not consider a marriage to be valid for immigration purposes if both contracting parties to the marriage were not physically present together during the marriage ceremony, unless the parties have consummated the marriage.

[^ 15] See *Matter of H-* (PDF), 9 I&N Dec. 640 (BIA 1962); *Matter of Zappia* (PDF), 12 I&N Dec. 439 (BIA 1967); and *Matter of Da Silva* (PDF), 15 I&N Dec. 778, 779 (BIA 1976) (A marriage complying with all the requirements of the state of celebration is invalid if it violates the strong public policy of the state where one of the parties is domiciled at the time of the marriage and where the couple intends to reside after the marriage.). However, the Board of Immigration Appeals in *Matter of Hirabayashi* (PDF), 10 I&N Dec. 722 (BIA 1964) determined a marriage may be valid if evidence establishes that the parties did not travel to the state of celebration with a primary purpose of evading prohibitions in their state of residence.

[^ 16] There are no statutory minimum age requirements for the petitioner or beneficiary of a spousal immigration petition. However, USCIS evaluates whether the age of the beneficiary or petitioner, or both, at the time of marriage, violates the law of the place of celebration or violates the law or public policy of the state where the couple will reside.

[^ 17] See INA 208(b)(3)(B).

[^ 18] See INA 207(c)(2)(B).

[^ 19] See INA 101(b)(1)(A)-(E).

[^ 20] See 8 CFR 207.7(c) and 8 CFR 208.21(b).

[^ 21] See Chapter 3, Admissibility and Waiver Requirements [4 USCIS-PM C.3]. See INA 208(b)(2)(A)(i)-(v). See 8 CFR 208.21(a).

[^ 22] See Chapter 3, Admissibility and Waiver Requirements [4 USCIS-PM C.3]. See INA 207(c)(2)(A).

[^ 23] Before February 28, 1998, there was no 2-year deadline in 8 CFR 207.7 or 8 CFR 208.21. Therefore, if a petitioner acquired their status on or before February 27, 1998, the petitioner could have filed their Form I-730 at any time before February 28, 2000.

[^ 24] See 8 CFR 207.7(d), 8 CFR 208.21(c), and 8 CFR 208.21(d).

[^ 25] See, for example, INA 208(b)(3) ("A spouse or child . . . of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.").

[^ 26] RE4 and REF have also previously been used for a refugee class of admission codes, including some principal applicants, but are no longer in use for newly admitted refugees.

[^ 27] See 8 CFR 208.21(b).

[^ 28] See 8 CFR 207.7(c).

[^ 29] See 8 CFR 207.7(c) and 8 CFR 208.21(b).

[^ 30] See 8 CFR 207.7(c) and 8 CFR 208.21(b).

[^ 31] See 8 CFR 207.7(c) and 8 CFR 208.21(b).

[^ 32] See 8 CFR 207.7(c) and 8 CFR 208.21(b). CBP determines whether a beneficiary is eligible for admission at the port of entry.

[^ 33] See 8 CFR 204.2.

[^ 34] See INA 101(a)(35).

[^ 35] See, for example, *Matter of Lovo-Lara*, 23 I&N Dec. 746 (BIA 2005); *Matter of Da Silva*, 15 I&N Dec. 778 (BIA 1976); and *Matter of H-*, 9 I&N Dec. 640 (BIA 1962). This guidance is effective for the Refugee/Asylee Relative Petition (Form I-730), Application for Asylum and for Withholding of Removal (Form I-589), and Registration for Classification as Refugee (Form I-590) as of March 3, 2025, and applies to requests pending or filed on or after that date.

[^ 36] See INA 101(a)(35).

[^ 37] See *Matter of H-* (PDF), 9 I&N Dec. 640 (BIA 1962) (holding that polygamous marriages are not recognized for immigration purposes, even if recognized as lawful in the jurisdiction where the marriage took place).

[^ 38] See INA 101(b)(1)(A). See Volume 6, Immigrants, Part B, Family-Based Immigrants, Chapter 8, Children, Sons, and Daughters, Section A, Definition of a Child, Subsection 1, Child Born In or Out of Wedlock [6 USCIS-PM B.8(A)(1)].

[^ 39] See Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens, Chapter 2, Definition of Child and Residence for Citizenship and Naturalization, Section B, Legitimated Child [12 USCIS-PM H.2(B)]. A child can be legitimated under the laws of the child's residence or domicile, or under the laws of the father's residence or domicile. See INA 101(b)(1)(C). A person's residence is the person's place of general abode, that is, the principal, actual dwelling place without regard to intent. See INA 101(a)(33). A person's domicile refers to a "person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere." See Black's Law Dictionary (12th ed. 2024). In most cases, a person's residence is the same as a person's domicile. A legitimated child includes a child of a Form I-730 petitioner who is the child's genetic parent, or their gestational parent at the time of the child's birth, if the relevant jurisdiction recognizes the gestational parent as the child's legal parent.

[^ 40] See INA 101(b)(1)(B).

[^ 41] See INA 101(b)(1)(E)(ii).

[^ 42] See INA 101(b)(1)(E).

[^ 43] A natural parent may be a genetic parent, or a gestational parent (who carries and gives birth to the child) if the relevant jurisdiction recognizes the gestational parent as the child's legal parent. See INA 101(b).

[^ 44] See INA 101(b)(1)(D).

[^ 45] See INA 101(b)(1). See 8 CFR 207.7(c) and 8 CFR 208.21(b).

[^ 46] See Pub. L. 107-208 (PDF) (August 6, 2002).

[^ 47] See INA 207(c)(2)(B).

[^ 48] See INA 208(b)(3)(B).

[^ 49] See INA 208(b)(3)(B). For purposes of determining a beneficiary's eligibility under the CSPA, the petitioning parent's asylum application is either an Application for Asylum and for Withholding of Removal (Form I-589), or the written record of the petitioning parent's positive credible fear determination if USCIS grants asylum through the Asylum Merits Interview (AMI) process. For aliens who receive their grant of asylum through the AMI process, USCIS considers the date USCIS serves the positive credible fear determination on the alien to be the asylum application date.

[^ 50] See INA 207(c)(2)(B). See Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 7, Child Status Protection Act, Section E, Derivative Refugees, Subsection 2, Determining Child Status Protection Act Age [7 USCIS-PM A.7(E)(2)]. USCIS considers the date a USCIS officer interviews the principal refugee parent for Registration for Classification as Refugee (Form I-590), as the date that the parent applied for refugee status.

[^ 51] See Child Status Protection Act, Pub. L. 107-208 (PDF) (August 6, 2002).

[^ 52] See 8 CFR 207.7(c) and 8 CFR 208.21(b).

[^ 53] See INA 101(b)(1).

[^ 54] See Volume 6, Immigrants, Part B, Family-Based Immigrants, Chapter 8, Children, Sons, and Daughters, Section A, Definition of a Child, Subsection 1, Child Born In or Out of Wedlock [6 USCIS-PM B.8(A)(1)].

[^ 55] See INA 101(b)(1)(B) (Stepchildren are included in the INA definition of a child so long as the parents married when the stepchild, or the spouse's biological child, was under the age of 18.).

[^ 56] See INA 101(b)(1)(B).

[^ 57] See INA 101(b)(1)(A), INA 101(b)(1)(C), and INA 101(b)(1)(D).

[^ 58] See 8 CFR 208.21(c) (explaining that an otherwise eligible beneficiary may be approved "regardless of the status of that spouse or child in the United States").

[^ 59] See 8 CFR 208.22.

[^ 60] See INA 241(a)(5).

Chapter 3 - Admissibility and Waiver Requirements

Derivative asylees and derivative refugees are subject to different grounds of ineligibility. These bars and grounds of inadmissibility are summarized below.

Derivative asylees are subject to most asylum bars while derivative refugees are subject to certain grounds of inadmissibility. Both derivative asylees and refugees are subject to the persecutor bar.

A. Following-to-Join Asylee Bars to Asylum

Following-to-join asylee (FTJ-A) beneficiaries are subject to the first five asylum bars noted in the Immigration and Nationality Act (INA).[1] The sixth bar regarding firm resettlement does not apply.[2] The five applicable bars include:

- Persecution of another person on account of race, religion, nationality, membership in a particular social group, or political opinion;[3]
- Convicted of a particularly serious crime that makes the alien a danger to the community of the United States;[4]
- Serious reasons to believe the alien has committed a serious non-political crime outside of the United States before the alien arrived in the United States;[5]
- Reasonable grounds for regarding the alien as a danger to the security of the United States;[6] and
- All terrorism-related inadmissibility grounds (TRIG) in INA 212(a)(3)(B)(i)(I) - (IV), INA 212(a)(3)(B)(i)(VI) and INA 237(a)(4)(B) (encompassing all TRIG except for INA 212(a)(3)(B)(i)(V)), unless in the case of an alien described in INA 212(a)(3)(B)(i)(IV), the Attorney General determines in their discretion that there are not reasonable grounds for regarding the alien as a danger to the security of the United States.[7]

B. Following-to-Join Refugee Grounds of Inadmissibility and Waivers

Following-to-join refugee (FTJ-R) beneficiaries must not have ordered, incited, assisted, or otherwise participated in the persecution of another, and must be otherwise admissible as an immigrant.[8] A few exemptions to admissibility requirements apply and FTJ-R beneficiaries may seek a waiver for other applicable inadmissibility grounds.

1. Exemptions

The following grounds of inadmissibility do not apply to refugees, including derivatives:

- Public charge;[9]
- Labor certification;[10] and
- Documentation for immigrants.[11]

2. Applicable Inadmissibility Grounds

- Health-related;[12]
- Crime-related;[13]
- Security-related;[14]
- Illegal entrants and immigration violators;[15]
- Ineligibility for citizenship;[16]
- Aliens previously removed;[17] and
- Miscellaneous.[18]

3. Waivers

USCIS may waive all applicable inadmissibility grounds listed above for humanitarian purposes, to assure family unity, or when it is in the public interest, except for controlled substance traffickers[19] and security-related grounds.[20]

Footnotes

[^ 1] See INA 208(b)(2)(A)(i)-(v). See 8 CFR 208.21(a).

[^ 2] See INA 208(b)(2)(A)(vi).

[^ 3] See INA 208(b)(2)(A)(i).

[^ 4] See INA 208(b)(2)(A)(ii).

[^ 5] See INA 208(b)(2)(A)(iii).

[^ 6] See INA 208(b)(2)(A)(iv).

[^ 7] See INA 208(b)(2)(A)(v). See the Terrorism-Related Inadmissibility Grounds (TRIG) webpage.

[^ 8] See INA 207(c)(2)(A).

[^ 9] See INA 212(a)(4).

[^ 10] See INA 212(a)(5).

[^ 11] See INA 212(a)(7)(A).

[^ 12] See INA 212(a)(1).

[^ 13] See INA 212(a)(2).

[^ 14] See INA 212(a)(3).

[^ 15] See INA 212(a)(6).

[^ 16] See INA 212(a)(8).

[^ 17] See INA 212(a)(9).

[^ 18] See INA 212(a)(10).

[^ 19] See INA 212(a)(2)(C).

[^ 20] See INA 212(a)(3)(A), INA 212(a)(3)(B), INA 212(a)(3)(C), and INA 212(a)(3)(E).

Chapter 4 - Documentation and Evidence

A. Filing

The petitioner must file the Refugee/Asylee Relative Petition (Form I-730) in accordance with the form instructions.[1] The petitioner must file a separate petition for each qualifying family member.[2]

The petitioner must file Form I-730 within 2 years of the petitioner's refugee admission or asylum approval.[3] USCIS may exercise discretion to waive the filing deadline for humanitarian reasons.[4]

B. Burden of Proof

The petitioner bears the burden of establishing that their qualifying spouse and children[5] are eligible to receive following-to-join benefits.[6] The petitioner must establish that the beneficiaries meet all eligibility requirements at the time of filing through adjudication.[7]

C. Standard of Proof

The standard of proof is the amount of evidence needed to establish eligibility for the benefit sought. USCIS evaluates the Form I-730 under the preponderance of the evidence standard.[8] Therefore, even if there is some doubt with respect to eligibility criteria, if the petitioner submits relevant, probative, and credible evidence that leads an officer to believe that the claim is probably true or more likely than not true, then the petitioner has satisfied the standard of proof.[9]

However, with respect to following-to-join refugees (FTJ-Rs), there is one exception to the preponderance of the evidence standard. If there is evidence that would permit a reasonable person to conclude that the FTJ-R beneficiary may be inadmissible, the petitioner or beneficiary must demonstrate that the beneficiary is admissible under the higher "clearly and beyond doubt" standard.[10] Thus, if evidence of an FTJ-R beneficiary's inadmissibility emerges, then the petitioner or beneficiary bears the burden to establish that the beneficiary is clearly and beyond a doubt entitled to be admitted and is not inadmissible under Section 212(a) of the Immigration and Nationality Act (INA).

The clearly and beyond doubt standard is higher than the preponderance of the evidence standard. This means that evidence must be stronger and more persuasive to meet the clearly and beyond doubt standard than the evidence necessary to satisfy the lower preponderance of evidence standard.[11] If the petitioner has not met the required standard, the officer may request additional evidence, issue a Notice of Intent to Deny, or deny the case.[12]

D. Evidence

To meet the burden of proof by a preponderance of the evidence, the petitioner must submit evidence of the qualifying spouse or child relationship.[13] The regulations provide that the petitioner should submit primary documentation of the qualifying relationship where possible, and the regulations also allow for USCIS to consider secondary evidence, affidavits, and credible oral testimony if civilly issued documents are not available to the petitioner.[14]

1. Petitions for a Spouse

The petitioner should list the spouse on the petitioner's application for refugee or asylum status. While the lack of the claimed spouse's information on those applications may raise doubts regarding the claimed relationship, the petitioner's failure to list a spouse on these applications is not a bar to approving the petition for the spouse beneficiary. Officers should elicit testimony and consider any other relevant evidence as to whether a qualifying relationship exists.

The petitioner may still meet their burden of demonstrating eligibility by the preponderance of the evidence where there is a reasonable explanation for not including the spouse on the previously filed application, or where the absence of the spouse's name on the form was factually accurate at the time of filing.

Primary evidence for a petitioning spouse is generally a civilly issued marriage certificate from the country where the marriage occurred and, if applicable, evidence of the legal termination of previous marriages, such as a divorce or death certificate.[15] The petitioner should also submit evidence of any legal name change of either spouse, if applicable.

2. Petitions for Children

The petitioner should generally have listed their children on the petitioner's application for refugee or asylum status. While the lack of the claimed child's information on those applications may raise doubts regarding the claimed relationship, the petitioner's failure to list a child on these applications is not a bar to approving the petition for the child beneficiary. Officers should elicit testimony and consider any other relevant evidence as to whether a qualifying relationship exists.

The petitioner may still meet their burden of demonstrating eligibility by the preponderance of the evidence where there is a reasonable explanation for not including the child on the previously filed application, or where the absence of the child's name on the application was factually accurate at the time of filing.

Primary Evidence

Primary evidence for a petitioning parent on behalf of a child depends on whether the petitioner is the father or mother and whether the beneficiary child is a child born in wedlock, a stepchild, a legitimated child, an out-of-wedlock child, or an adopted child.[16]

Primary evidence for a petitioning mother on behalf of a natural child, whether the child was born in or out of wedlock, is generally a birth certificate showing both the child's name and the petitioning mother's name.[17] If applicable, the petitioner should submit evidence of any legal name change.[18]

Whether born in or out of wedlock, primary evidence of a father-child relationship generally includes the child's birth certificate showing both the child's name and the petitioning father's name.[19]

For a child born in wedlock where the father is the petitioner, primary evidence is generally a marriage certificate showing the petitioning father is married to the beneficiary's mother.[20] If applicable, the petitioning father must also submit evidence of the legal termination of any prior marriages and the beneficiary's mother's previous marriages, such as a divorce or death certificate.[21]

For a child born out of wedlock, the petitioning father must submit:

- Evidence that the child was legitimated under the laws of the jurisdiction of the petitioner or beneficiary child's residence;[22] or
- Evidence that a bona fide father-child relationship exists or existed between the father and beneficiary child.[23]

Evidence of a bona fide father-child relationship should demonstrate emotional and financial ties to the child, and that the petitioner has shown genuine interest in the child's general welfare. Evidence of a bona fide father-child relationship may include, but is not limited to, the following:

- Money order receipts or canceled checks showing financial support of the child;
- Income tax returns in which the petitioner claims the child as a dependent and a member of their household;
- Medical or insurance records that include the child as a dependent;
- School records for the child that include the petitioner's name;
- Correspondence between the petitioner and the child;
- Notarized affidavits of reliable persons who are knowledgeable about the relationship; or
- If applicable, the petitioner must submit evidence of any legal name change related to the relationship.

Primary evidence for a stepchild generally includes the child's birth certificate and the marriage certificate between the petitioner and the child's natural parent showing the marriage occurred before the beneficiary child turned 18 years old.[24]

If the petitioner or the child's natural parent were ever previously married to other people, the petitioner must submit evidence of the legal termination of the previous marriages.[25] The petitioner must also submit evidence of any legal name changes, if applicable.[26]

Primary evidence for an adopted child generally includes a copy of the adoption order demonstrating the adoption was finalized before the child's 16th birthday and evidence that the child resided with the petitioner and was in the petitioner's legal custody for at least 2 years.[27] Primary evidence of legal custody usually consists of a court order for legal custody or the adoption order.[28]

Evidence that the child resided with the petitioner in a familial relationship usually consists of documents demonstrating parental control like the adoptive parents owning or maintaining the property where the child resides and providing support and day-to-day supervision.[29]

USCIS considers the total period of legal custody in the aggregate, like it does for joint residence. Therefore, a break in legal custody or joint residence does not affect time already fulfilled.[30] The petitioner must also submit evidence of any legal name changes, if applicable.[31]

3. Secondary Evidence

If the petitioner is not able to obtain primary documentation such as a civilly registered marriage or birth certificate, the petitioner may submit secondary evidence in support of the qualifying relationship.[32] It is not necessary for the petitioner to submit a statement from the civil authority certifying document unavailability for secondary evidence to meet the petitioner's burden.

Additionally, it is not necessary for a document to be listed as "unavailable" in the U.S. Department of State (DOS) reciprocity table for USCIS to consider secondary evidence submitted by the petitioner.[33] Whether primary or secondary evidence, however, a certified English translation must accompany all documents that are not in English.[34]

USCIS considers secondary evidence to meet the petitioner's burden of proof if primary documentation is not available to the petitioner. This secondary evidence may include baptismal certificates, school records, hospital records, census records, and affidavits. Petitioners may also voluntarily submit parentage testing (DNA) where reliable evidence is otherwise unavailable.

Affidavits are written statements from third parties that the petitioner may provide to meet the burden of proof. Petitioners relying on affidavits should generally submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances.[35] The author of an affidavit does not have to be physically present in the United States, have lawful status in the United States, or be a U.S. citizen.

Affidavits should contain the following information regarding the affiant:

- Full name;
- Address;
- Date and place of birth;
- Their relationship to the petitioner or beneficiary;
- Full information concerning the event; and
- Complete details explaining how the affiant acquired personal knowledge of the event.

The lack of a sworn statement, lack of the affiant's address, or lack of personal knowledge is not disqualifying, but the affidavit may be considered as less probative and may not be sufficient evidence to meet the petitioner's burden without other secondary evidence.

Footnotes

[^ 1] See 8 CFR 103.2(a)(1). See instructions for the Refugee/Asylee Relative Petition (Form I-730).

[^ 2] See 8 CFR 207.7(d), 8 CFR 208.21(c), and 8 CFR 208.21(d).

[^ 3] See 8 CFR 207.7(d), 8 CFR 208.21(c), and 8 CFR 208.21(d).

[^ 4] See 8 CFR 207.7(d), 8 CFR 208.21(c), and 8 CFR 208.21(d).

[^ 5] See 8 CFR 207.7(e) and 8 CFR 208.21(f).

[^ 6] See 8 CFR 207.7(e) and 8 CFR 208.21(f).

[^ 7] See 8 CFR 207.7(c), 8 CFR 208.21(b), and 8 CFR 103.2(b)(1).

[^ 8] See 8 CFR 207.7(e) and 8 CFR 208.21(f).

[^ 9] See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (defining more likely than not as a greater than 50 percent probability of something occurring). See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 4, Burden and Standards of Proof, Section B, Standards of Proof [1 USCIS-PM E.4(B)].

[^ 10] USCIS generally applies the "clearly and beyond doubt" standard in INA 235(b)(2)(A) and INA 240(c)(2) to admissibility determinations. See *Matter of Bett* (PDF), 26 I&N Dec. 437, 440 (BIA 2014).

[^ 11] See *Matter of Patel* (PDF), 19 I&N Dec. 774, 783 (BIA 1988) (citing *Matter of Carrubba* (PDF), 11 I&N Dec. 914, 917 (BIA 1966)).

[^ 12] For more information, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 13] See 8 CFR 207.7(e) and 8 CFR 208.21(f).

[^ 14] See 8 CFR 207.7(e) and 8 CFR 208.21(f) (cross-referencing to relevant sections of 8 CFR 204.2). See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence [1 USCIS-PM E.6].

[^ 15] See 8 CFR 204.2.

[^ 16] See 8 CFR 204.2(d)(2).

[^ 17] See 8 CFR 207.7(e) and 8 CFR 208.21(f).

[^ 18] See 8 CFR 207.7(e) and 8 CFR 208.21(f).

[^ 19] See 8 CFR 207.7(e) and 8 CFR 208.21(f).

[^ 20] See 8 CFR 207.7(e) and 8 CFR 208.21(f).

[^ 21] See 8 CFR 207.7(e) and 8 CFR 208.21(f).

[^ 22] See 8 CFR 207.7(e) and 8 CFR 208.21(f).

[^ 23] See 8 CFR 207.7(e) and 8 CFR 208.21(f).

[^ 24] See 8 CFR 207.7(e) and 8 CFR 208.21(f).

[^ 25] See 8 CFR 207.7(e) and 8 CFR 208.21(f).

[^ 26] See 8 CFR 207.7(e) and 8 CFR 208.21(f).

[^ 27] See 8 CFR 207.7(e) and 8 CFR 208.21(f).

[^ 28] See 8 CFR 207.7(e) and 8 CFR 208.21(f).

[^ 29] See 8 CFR 207.7(e) and 8 CFR 208.21(f).

[^ 30] See 8 CFR 207.7(e) and 8 CFR 208.21(f).

[^ 31] See 8 CFR 207.7(e) and 8 CFR 208.21(f).

[^ 32] See 8 CFR 207.7(e) and 8 CFR 208.21(f) (stating, "[w]here possible [evidence] will consist of the documents specified in [8 CFR] 204.2(a)(1)(i)(B), (a)(1)(iii)(B), (a)(2), (d)(2), and (d)(5) of this chapter"). Therefore, Form I-730 petitioners are not subject to the general presumption of ineligibility at 8 CFR 103.2(b)(2)(i) since 8 CFR 207.7(e) and 8 CFR 208.21(f) supersede that general rule.

[^ 33] See DOS's U.S. Visa: Reciprocity and Civil Documents by Country webpage for country-specific information on the availability and reliability of various foreign documents.

[^ 34] See 8 CFR 103.2(b)(3) ("Any document containing foreign language submitted to USCIS [must] be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that [the translator] is competent to translate from the foreign language into English.").

[^ 35] See 8 CFR 207.7(e) and 8 CFR 208.21(f) (cross-referencing to relevant sections of 8 CFR 204.2). See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence [1 USCIS-PM E.6].

Chapter 5 - Adjudication

In general, the Refugee/Asylee Relative Petition (Form I-730) adjudication process has the following steps when the U.S. Department of State (DOS) interviews the beneficiary at a location where USCIS does not have a presence:

- Receipt;
- Initial domestic processing;
- USCIS decision;
- Beneficiary interview; and
- Travel eligibility determination.[1]

In general, the Refugee/Asylee Relative Petition (Form I-730) adjudication process has the following steps when USCIS interviews the beneficiary at an international or domestic field office:

- Receipt;
- Initial domestic processing;
- Beneficiary interview; and
- USCIS decision.

USCIS has multiple directorates involved in processing Form I-730 petitions. After receipt and intake, USCIS generally completes initial domestic processing.

If the beneficiary is located within the United States, USCIS forwards the petition to the appropriate USCIS domestic field office based on the beneficiary's residence to interview the beneficiary and adjudicate the petition.

If the beneficiary is located outside of the United States, USCIS sends the petition through the DOS National Visa Center (NVC) to a USCIS international field office or a DOS embassy or consulate. If the Form I-730 beneficiary is located outside of the United States in a country where USCIS has an international field office presence, USCIS interviews the beneficiary at the appropriate international field office and adjudicates the petition.[2]

If the Form I-730 beneficiary is located outside of the United States in a country with no USCIS international field office presence, USCIS adjudicates the petition before sending it to a DOS embassy or consulate. DOS interviews and completes processing of the beneficiary on USCIS' behalf and determines the beneficiary's eligibility to travel to the United States.

If the Form I-730 beneficiary completes an interview and additional processing at a DOS embassy or consulate and the DOS consular officer determines the beneficiary is ineligible to travel to the United States, DOS returns the Form I-730 petition to the USCIS domestic processing office with a consular return memo outlining the ineligibility reasons.

The USCIS initial domestic processing office then reviews the information provided by DOS and determines whether to reaffirm the initial approval of the Form I-730 petition or reopen and reconsider the approval and issue a Notice of Intent to Deny (NOID) to the Form I-730 petitioner.

A. Receipt

By regulation, all Form I-730 petitions must be filed with and adjudicated by USCIS.[3] USCIS receives all Form I-730 filings and enters the Form I-730 data into USCIS systems. USCIS then routes the petitions to an officer depending on two main factors:

- Whether the petitioner received refugee or asylee status; and
- Where the beneficiary is currently located.

B. Initial Domestic Processing

During initial domestic processing of Form I-730 petitions, USCIS conducts an initial eligibility review for eligibility, timeliness, and completeness.

During the initial eligibility review, an officer:

- Determines whether the petitioner is eligible to file the Form I-730 petition;[4]
- Determines whether the petitioner timely filed the Form I-730 petition;[5]
- Determines whether a qualifying family relationship exists between the petitioner and beneficiary listed on the Form I-730;[6] and
- Reviews preliminary security checks.

If the petitioner has not submitted all required evidence or the evidence in the record does not establish eligibility, the officer may issue a Request for Evidence (RFE) or a NOID. The officer issues a denial notice if the officer determines that the petitioner is not eligible to file the Form I-730 petition or the beneficiary is not eligible for following-to-join status.[7]

If USCIS does not issue a denial for a Form I-730 petition during initial domestic processing, and the petition is proceeding to adjudication, USCIS forwards the petition or adjudicates it, depending on whether a USCIS domestic or international field office or DOS embassy or consulate will complete the next processing steps.

If USCIS has a domestic field office or international field office with jurisdiction over the country where the beneficiary is located, USCIS forwards the unadjudicated Form I-730 to a local office for a beneficiary interview and adjudication by a USCIS officer. USCIS sends the Form I-730 petitioner a transfer notice listing the USCIS domestic or international field office where the beneficiary will be interviewed. The petitioner may also be requested to appear for an in-person interview at a USCIS field office on a case-by-case basis.

If the beneficiary lives outside of the United States and USCIS does not have an international field office with jurisdiction over the country where the beneficiary is located, USCIS adjudicates the Form I-730 petition and forwards it to the DOS embassy or consulate where the beneficiary is located, for the beneficiary interview and verification of travel eligibility.

When initial domestic processing is complete, USCIS issues an approval notice to the Form I-730 petitioner stating that USCIS has forwarded the petition to the NVC to be sent to the appropriate DOS embassy or consulate.

C. Beneficiary Interview

Generally, USCIS does not require interviews for Form I-730 petitioners. However, USCIS retains the discretion to interview petitioners on a case-by-case basis.[8]

As a matter of policy, USCIS or DOS interviews Form I-730 beneficiaries to determine their eligibility.[9] The purpose of the interview is for the USCIS or DOS officer to verify the beneficiary's identity and claimed relationship to the petitioner. The officer also elicits information to determine if the beneficiary is barred or inadmissible.

1. Beneficiaries Located Within the United States

USCIS has jurisdiction over Form I-730 for a beneficiary who lives in the United States. After USCIS completes initial intake, receipt, and initial domestic processing, USCIS forwards the petition to the appropriate domestic USCIS field office with jurisdiction for further processing and adjudication. USCIS interviews and adjudicates both following-to-join refugee (FTJ-R) and following-to-join asylee (FTJ-A) petitions for beneficiaries who live in the United States.

If the petitioner filed a Form I-730 petition for a beneficiary who was located abroad but then later enters the United States, the petitioner should notify USCIS that the beneficiary has relocated to the United States in order for USCIS to re-route the petition for further domestic processing.[10] If USCIS has not adjudicated the Form I-730 petition, USCIS notifies the petitioner that it is transferring the petition to another USCIS office and sends the unadjudicated petition to the appropriate domestic field office for interview and adjudication.

If an I-730 beneficiary is in the United States, USCIS generally requests that the beneficiary appear for an interview. USCIS sends a written notice of the date, time, and place of the scheduled interview to the beneficiary.

2. Beneficiaries Located Outside the United States

After USCIS completes initial domestic processing for a beneficiary living outside of the United States, USCIS sends the petition to the NVC for forwarding to the appropriate DOS office or USCIS international field office.[11]

USCIS interviews beneficiaries located outside of the United States in locations abroad where there is a USCIS international field office with jurisdiction. DOS consular officers interview beneficiaries in locations abroad without USCIS international field office jurisdiction. USCIS or DOS notifies the beneficiary of the date, time, and place of their interview. Subject to local office or DOS embassy or consulate policy, USCIS or DOS may require the beneficiary to bring their own interpreter.

3. Interviews

Documentation for Interviews

The beneficiary must provide a certified English translation for any documents provided in support of the Form I-730 if the documents are not in English.[12]

USCIS Interviews

USCIS staff contact and schedule Form I-730 beneficiaries for an interview in a location abroad with a USCIS international field office. During the beneficiary interview, the USCIS officer:

- Confirms the beneficiary's identity;
- Reviews documentation;

- Completes required biographic and biometric checks (which may require coordination with DOS and other vetting partners);
- Verifies the qualifying family relationship;
- Determines whether any mandatory bars or inadmissibility grounds apply; and
- Arranges medical examination and sponsorship assurance (for Form I-730 FTJ-R beneficiaries only).

If the USCIS international office determines that the Form I-730 beneficiary is eligible for following-to-join benefits, USCIS or DOS provides the beneficiary with travel documentation.

DOS Interviews

When the Form I-730 beneficiary resides in a location abroad where there is no USCIS presence or jurisdiction, staff from the DOS embassy or consulate contact the beneficiary to schedule their interview. DOS processing of Form I-730 petitions is similar to USCIS processing of Form I-730 petitions.

However, DOS does not have the authority to adjudicate Form I-730 petitions, and instead conducts a travel eligibility determination of the petition that USCIS previously approved. Generally, a travel eligibility interview by DOS is similar to a USCIS interview; however, DOS officers refer to the Foreign Affairs Manual (FAM) for agency procedures. If DOS determines that the Form I-730 beneficiary is eligible for travel, DOS issues travel documentation to the beneficiary.

D. USCIS Approval

For FTJ-R beneficiaries, if the Form I-730 petitioner files timely and meets all eligibility requirements, and the beneficiary meets all eligibility requirements and admissibility requirements, the USCIS officer approves the petition.[13]

For FTJ-A beneficiaries, if the Form I-730 petitioner files timely and meets all eligibility requirements, and the beneficiary meets all eligibility requirements and admissibility requirements, the USCIS officer may approve the petition as a matter of discretion.[14]

The location of a beneficiary of a Form I-730 determines when USCIS approves a Form I-730 petition.

- For a beneficiary in a location with a USCIS domestic or international field office jurisdiction, the USCIS domestic or international field office adjudicates the Form I-730 petition.
- For a beneficiary abroad in a location without a USCIS presence or jurisdiction, if the petitioner and beneficiary appear eligible and the petitioner establishes the qualifying relationship during initial domestic processing of the Form I-730 petition, USCIS approves the Form I-730 petition and forwards it to the NVC. The NVC then transfers the Form I-730 petition to the appropriate DOS embassy or consulate to interview the beneficiary and verify travel eligibility.

1. Travel Document Issuance

Approved Form I-730 beneficiaries located abroad need a transportation letter or boarding foil from USCIS or DOS to travel to the United States. These documents provide assurance to airline carriers that they may transport the Form I-730 beneficiary to the United States without liability.[15]

Form I-730 beneficiaries who complete processing with USCIS international field offices may receive either a transportation letter or a boarding foil. Form I-730 beneficiaries who complete processing with a DOS embassy or consulate receive a boarding foil.

The Form I-730 beneficiary presents the transportation letter or boarding foil to the U.S. Customs and Border Protection official at the port of entry to be admitted to the United States.

E. Final Eligibility Determination and Department of State Consular Returns

When USCIS interviews Form I-730 beneficiaries domestically or abroad, the USCIS officer approves the petition after all interview and procedural steps have been completed. Processing steps include:

- Verifying the beneficiary's identity and qualifying family relationship;
- For Form I-730 FTJ-R beneficiaries, determining that the beneficiary has not engaged in the persecution of others and applicable inadmissibility grounds do not apply, and that the beneficiary does not have an existing grant of asylum or refugee status by the United States that remains valid;
- For Form I-730 FTJ-A beneficiaries, determining that no mandatory bars apply, and the beneficiary merits a favorable exercise of discretion;
- Confirming that USCIS has completed all required vetting, biometric, and biographic checks and the checks are current; and
- Confirming that the beneficiary has cleared medical requirements through a valid medical exam.

When DOS consular officers interview Form I-730 beneficiaries abroad, the USCIS initial domestic processing office approves the Form I-730 petition before sending the petition to DOS. At the beneficiary interview, if the DOS consular officer does not find the Form I-730 beneficiary eligible to travel to the United States, the officer then completes a consular return memo.

1. Consular Returns

If, during the DOS travel eligibility determination, a DOS consular officer uncovers adverse information that suggests USCIS should not have approved a Form I-730 petition, or that grounds of ineligibility apply, DOS completes a consular return memo and returns the petition to the USCIS office responsible for initial domestic processing for further action.[16]

To facilitate this process, the DOS consular officer prepares a consular return memo outlining the specific issue and reason for returning the petition to USCIS for reconsideration of the approval decision.[17]

When USCIS receives a consular return memo, the USCIS office responsible for initial domestic processing reviews the DOS consular officer's determination. If USCIS finds the reason for the return insufficient to reopen the approval, USCIS reaffirms the petition and sends it to NVC for forwarding to the DOS embassy or consulate for further processing with a memorandum explaining why the reason for the consular return was insufficient to reopen the approved petition.

If USCIS concurs with the ineligibility finding, USCIS issues a motion to reopen and NOID to notify the petitioner of the derogatory information and of the agency's intent to reopen and deny the previously approved Form I-730 petition.[18] Depending on the evidence the petitioner provides, USCIS may then reapprove the petition and return it to DOS for continued processing or deny the petition.

Unless the petitioner withdraws a reopened Form I-730 petition or USCIS denies the petition, USCIS must forward the petition and all accompanying documents to the DOS embassy or consulate responsible for interviewing the beneficiary. USCIS explains how the petitioner overcame DOS's ineligibility finding in the consular return memo in a memorandum attached to the re-approved petition.

When USCIS receives a consular return for a beneficiary and the sole issue is the beneficiary's failure to appear at the interview, the USCIS officer administratively closes the case and sends a notice to the petitioner of the administrative closure. If the beneficiary is still interested in joining the petitioner in the United States and is available to appear at the DOS embassy or consulate, the petitioner may contact USCIS to request that USCIS reopen and resume processing of the petition.[19]

F. Denial

When a petitioner fails to establish eligibility, or the beneficiary fails to meet eligibility requirements, USCIS denies the petition and notifies the petitioner of the reasons in writing.[20] The petitioner cannot appeal the denial of a Form I-730.[21] USCIS explains the specific reasons for the denial in the denial decision[22] and informs the petitioner of the opportunity to file a motion to reopen or reconsider.[23]

1. Denial on the Merits

If, after evaluating all evidence submitted (including in response to an RFE or NOID, if applicable), the officer determines that eligibility has not been established, the officer denies the Form I-730 on the basis of the applicable ineligibility ground or grounds.[24]

2. Denial Solely for Abandonment

If the petitioner fails to respond to an RFE or NOID, the officer may deny the Form I-730 for abandonment only (and not on the merits) after verifying that USCIS followed appropriate notice procedures.[25]

3. Denial for Abandonment and the Merits

The officer may deny the Form I-730 based both upon the merits and for abandonment if:[26]

- The officer determines that the totality of the evidence does not establish eligibility; and
- The petitioner failed to reply to an RFE or NOID, if applicable.

G. Administrative Closures

USCIS administratively closes approved Form I-730 petitions when the beneficiary fails to appear for an interview and the DOS embassy or consulate returns the approved Form I-730 to the USCIS domestic office. When a beneficiary fails to appear for interview, USCIS issues a notice to the petitioner that USCIS has administratively closed the case.[27]

If the petitioner responds that the beneficiary can appear for an interview within 6 months of the date of the response, USCIS reopens, resumes processing and sends the Form I-730 to the appropriate DOS embassy or consulate for additional processing.

If the petitioner does not respond, indicates the beneficiary is unable to appear for an interview, or is unable to specify when the beneficiary can appear, the case remains administratively closed. To request that the petition resume processing, the petitioner must contact USCIS. There is no fee to request that processing of the petition resume.[28]

H. Withdrawals

For beneficiaries located outside of the United States, the petitioner may withdraw their Form I-730 petition at any time until the beneficiary is admitted to or has arrived in the United States. For beneficiaries located inside the United States, the petitioner may withdraw their Form I-730 petition at any time up until the beneficiary is granted derivative asylee or refugee status. A withdrawal may not be retracted.[29]

Only the petitioner can request withdrawal of the Form I-730. The beneficiary can defer or refuse to travel but cannot withdraw the Form I-730.[30]

The petitioner should sign and date the withdrawal request. An unsigned request from the petitioner to withdraw the petition, or a request to withdraw the petition signed by someone other than the petitioner, including an attorney or accredited representative, is generally insufficient.

If the withdrawal request is insufficient, USCIS should contact the petitioner and inform the petitioner that their request was insufficient for USCIS to accept the withdrawal and, if the petitioner wishes to withdraw the petition, the petitioner should submit a written withdrawal request signed and dated by the petitioner.

I. Appeals and Motions to Reopen or Reconsider

A petitioner may not appeal the denial of a Refugee/Asylee Relative Petition (Form I-730).[31] However, a petitioner may file a Notice of Appeal or Motion (Form I-290B) to request that USCIS reopen the case or reconsider the decision.[32]

The petitioner must file the Form I-290B within 30 days from the date USCIS issued the denial notice (or 33 days if the petitioner received the notice by mail). The filing must include the appropriate filing fee, or fee waiver request, and other documentation in support of the motion.[33]

Footnotes

[^ 1] As a matter of law, authority to adjudicate and process affirmative asylum applications, including Form I-730 following-to-join derivatives of asylees, rests exclusively with DHS. See INA 207 and INA 208. The eligibility determination could include DOS initiating a consular return, as appropriate, to ask USCIS to reconsider the grant. See Section E, Final Eligibility Determination and Department of State Consular Returns, Subsection 1, Consular Returns [4 USCIS-PM C.5(E)(1)].

[^ 2] See the International Immigration Offices webpage for a list of the current field offices outside the United States. Note that there are some countries in which USCIS does not have an international field office, but an office retains jurisdiction over Form I-730 processing. For example, the USCIS Nairobi international field office processes following-to-join refugee petitions in Uganda and Burundi.

[^ 3] See 8 CFR 207.7 and 8 CFR 208.21.

[^ 4] See Chapter 2, Eligibility Requirements, Section A, General Eligibility Requirements, Subsection 1, Petitioners [4 USCIS-PM C.2(A)(1)].

[^ 5] See Chapter 2, Eligibility Requirements, Section A, General Eligibility Requirements, Subsection 1, Petitioners [4 USCIS-PM C.2(A)(1)].

[^ 6] See Chapter 2, Eligibility Requirements, Section A, General Eligibility Requirements, Subsection 1, Petitioners [4 USCIS-PM C.2(A)(1)].

[^ 7] See Section F, Denial [4 USCIS-PM C.5(F)].

[^ 8] See 8 CFR 103.2(b)(9) ("USCIS may require any applicant, petitioner, sponsor, beneficiary, or individual filing a benefit request, or any group or class of such persons submitting requests, to appear for an interview and/or biometric collection.").

[^ 9] See 8 CFR 103.2(b)(9) ("USCIS may require any applicant, petitioner, sponsor, beneficiary, or individual filing a benefit request, or any group or class of such persons submitting requests, to appear for an interview and/or biometric collection.").

[^ 10] If USCIS is not informed of an address change for the Form I-730 beneficiary, the Form I-730 may remain pending until notification.

[^ 11] See 8 CFR 208.21(d) ("USCIS also will send the approved request to the Department of State for transmission to the U.S. Embassy or Consulate having jurisdiction over the area in which the asylee's spouse or child is located.").

[^ 12] See 8 CFR 103.2(b)(3).

[^ 13] See 8 CFR 207.7(a).

[^ 14] See 8 CFR 208.21(a).

[^ 15] See INA 273(b), which requires the airline carrier to examine travel documents before boarding passengers.

[^ 16] A USCIS international office may also issue a consular return memo if the office is processing a petition that was approved during initial domestic processing. This may occur in situations where the petition was treated as a travel eligibility case during initial domestic processing with the expectation that the beneficiary would be interviewed abroad by DOS, and intervening circumstances (for example, beneficiary relocation or USCIS international office opening) resulted in the beneficiary instead being interviewed by USCIS.

[^ 17] See 8 CFR 103.5(a)(5)(ii).

[^ 18] See 8 CFR 103.2(b)(16).

[^ 19] See Section G, Administrative Closures [4 USCIS-PM C.5(G)].

[^ 20] See 8 CFR 103.3(a).

[^ 21] See 8 CFR 207.7(g) and 8 CFR 208.21(e).

[^ 22] See 8 CFR 103.3(a)(1)(i), 8 CFR 207.7(g), and 8 CFR 208.21(e).

[^ 23] See 8 CFR 103.5.

[^ 24] See 8 CFR 103.2(b)(8).

[^ 25] See 8 CFR 103.2(b)(13) and 8 CFR 103.2(b)(15).

[^ 26] See 8 CFR 103.2(b)(13).

[^ 27] USCIS follows the terms of the *Tsamcho* settlement agreement when administratively closing an I-730 petition if the beneficiary fails to appear for an interview. See the Important Notice of Proposed Class Action Settlement for Individuals Who Have Filed a Refugee/Asylee Relative Petition (Form I-730 Petition) on Behalf of a Relative webpage. See *Tsamcho v. Napolitano*, 1:10-cv-02029 (E.D.N.Y. Feb. 25, 2013).

[^ 28] Petitioners are not required to submit an Application for Action on an Approved Application or Petition (Form I-824) in order to resume processing of Form I-730.

[^ 29] See 8 CFR 103.2(b)(6).

[^ 30] See 8 CFR 103.2(b)(6).

[^ 31] See 8 CFR 207.7(g) and 8 CFR 208.21(e).

[^ 32] See 8 CFR 207.7(g).

[^ 33] For filing requirements, see 8 CFR 103.5.

Volume 5 - Adoptions

Part A - Adoptions Overview

Chapter 1 - Purpose and Background

A. Purpose

Each year, thousands of U.S. citizens and lawful permanent residents adopt children from other countries. The adoption or legal custody of a foreign-born child alone does not convey U.S. immigration status to the child or enable the child to travel to the United States. Congress enacted legislation so that eligible foreign-born adoptees can obtain citizenship or lawful immigration status in the United States.

B. Scope

This volume addresses requirements for prospective adoptive parents (PAPs) and adoptive parents to submit immigrant petitions to USCIS on behalf of adopted children so they can obtain lawful immigration status in the United States.

This guidance does not address:

- Other adoption-related requirements, such as those of the child's country of origin,[1] state of proposed residence,[2] or other federal agencies, such as the U.S. Department of State (DOS);[3]
- The specific requirements for an adopted child to obtain U.S. citizenship;[4] or
- Requirements for stepparents to file a petition based on the stepparent-stepchild relationship (and not based on an adoptive relationship).[5]

C. Background

1. Adoption Processes

There are three different ways for a child to immigrate to the United States based on adoption. The laws, regulations, and eligibility requirements that govern immigration based on adoption depend on which of the processes the adoptive parent (petitioner) follows. The processes are:

- Hague Adoption Convention – for children from a country that is party to the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption;[6]
- Orphan (non-Hague) – for children from a country that is not party to the Hague Adoption Convention; and
- Family-based petition – for certain adopted children who have been in the legal custody of and jointly resided with the adoptive parent(s) for at least 2 years.

A child may only immigrate through the family-based process if the child was already adopted.[7] The orphan and Hague Adoption Convention processes provide the option for a child to immigrate to the United States after an adoption outside of the United States or for the purpose of adoption in the United States.

2. Federal Agency Roles

Both USCIS and DOS play a role in the intercountry adoption and immigration process.

USCIS Roles

USCIS determines the:

- Eligibility and suitability of the adoptive parents (for the Hague Adoption Convention and orphan processes);
- Eligibility of a child to immigrate to the United States (for all three of the processes); and
- Eligibility of adoptees to receive a certificate of citizenship or to naturalize.

DOS Roles

The roles of DOS in intercountry adoption include the following:

- Serves as the U.S. Central Authority for the Hague Adoption Convention. This role includes monitoring accrediting entities to ensure that adoption service providers perform their functions consistent with the Hague Adoption Convention and the Intercountry Adoption Act.[8]
- Determines the eligibility of a child to immigrate to the United States for certain orphan petitions filed outside the United States, completes the Determination on Child for Adoption (Form I-604) for certain orphan petitions, and completes the final adjudication of certain Hague Adoption Convention petitions at consular posts.
- Adjudicates visa applications for adopted children to immigrate to the United States.
- Adjudicates applications for U.S. passports.

3. Legislative History

The Displaced Persons Act of 1948 contained the first laws relating to the immigration of foreign-born orphans. In enacting legislation on foreign-born orphans and adoptees, Congress was primarily concerned with the welfare of the children. Since then, Congress has enacted several acts and amendments related to orphans and intercountry adoption. The table below provides an overview of major legislation and international treaties related to intercountry adoption.

Intercountry Adoption: Overview of Acts, Amendments, and Treaties

Acts and Amendments	Key Changes or Provisions
Displaced Persons Act of 1948[9]	• Contained the first laws relating to the immigration of foreign-born orphans.
The Act of September 26, 1961[10]	• Defined the term eligible orphan.
Immigration and Nationality Act of 1965[11]	• Defined the term orphan.
Immigration and Nationality Act Amendment of 1999[12]	• Amended the definition of a child to provide that an adopted child who is age 16 or over (but less than 18 years of age) may be considered a child under the Immigration and Nationality Act (INA) if adopted with or after a sibling who is a child under INA 101(b)(1)(E) or INA 101(b)(1)(F).

Acts and Amendments	Key Changes or Provisions
Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention)	• An international treaty that provides safeguards to protect the best interests of children involved in intercountry adoptions. By setting clear procedures and prohibiting improper financial gain, the Convention provides greater security, predictability, and transparency for all parties to the adoption, including children, birth parents, and adoptive parents. • Entered into force for the United States on April 1, 2008.
Intercountry Adoption Act (IAA 2000)[13]	• Added INA 101(b)(1)(G). Implemented the Hague Adoption Convention provisions in the United States on April 1, 2008. Requires the Hague process to be followed for any petition filed on or after April 1, 2008, by a U.S. citizen habitually resident in the United States seeking to adopt a child who is habitually resident in a foreign country that is a party to the Hague Adoption Convention. It also requires that individuals or bodies be accredited or approved to provide adoption services.
International Adoption Simplification Act of 2010[14]	• Amended INA 101(b)(1)(G) to allow the birth sibling of an adopted child described in INA 101(b)(1)(E)(i), INA 101(b)(1)(F)(i), or INA 101(b)(1)(G)(i) to qualify as a Hague Adoption Convention adoptee if a petition is filed before the birth sibling's 18th birthday.
Intercountry Adoption Universal Accreditation Act of 2012 (UAA)[15]	• Amended requirements for orphan cases related to home studies, certain regulatory definitions, the duty of disclosure, and identifying a primary provider. Unless a limited exception applies,[16] requirements for home studies for Hague Adoption Convention and orphan cases are now very similar. • Requires that adoption service providers (ASPs) providing adoption services in orphan cases follow the same accreditation or approval process required of ASPs providing such services in Hague Adoption Convention cases. • Assures that ASPs will comply with the same standards of practice and ethical conduct, regardless of the country from which the child will be adopted. • Made certain portions of the regulations governing adoptions completed under the Hague Adoption Convention applicable to (non-Hague) orphan cases.[17]
Consolidated Appropriations Act of 2014 (CAA)[18]	• Changed the INA definition of an orphan so that only one adoptive parent in a married couple has to personally see and observe the orphan before or during the adoption proceedings in order for the adoption to be considered full and final for immigration purposes.

D. Legal Authorities

- INA 101(b)(1)(E) – Definition of a child adoptee for family-based process
- INA 101(b)(1)(F) – Definition of a child adoptee for orphan process
- INA 101(b)(1)(G) – Definition of a child adoptee for Hague Adoption Convention process
- INA 201(b)(2)(A)(i) – Immediate relatives
- INA 203(a) – Preference allocation for family-sponsored immigrants
- INA 204 – Procedure for granting immigrant status
- 8 CFR 204.1 – General information about immediate relative and family-sponsored petitions
- 8 CFR 204.2(d) – Petition for a child or son or daughter
- 8 CFR 204.3 - Orphan cases under section 101(b)(1)(F) of the Act (non-Hague cases)
- 8 CFR 204 Subpart C – Intercountry adoption of a Convention adoptee
- 8 CFR 103.2 – Submission and adjudication of benefit requests

Footnotes

[^ 1] For general information on other countries' requirements, see the U.S. Department of State (DOS)'s Country Information webpage. USCIS has country-specific processing for certain countries. For USCIS country-specific adoption information, see the USCIS Country-Specific Processing webpage.

[^ 2] For general information about state laws, see the Child Welfare Information Gateway's State Laws Related to Adoption webpage.

[^ 3] For DOS guidance, see the Foreign Affairs Manual.

[^ 4] For guidance on citizenship for adopted children, see Part F, Citizenship for Adopted Children [5 USCIS-PM F]. For more information, see Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens [12 USCIS-PM H].

[^ 5] A stepparent is not required to adopt the stepchild in order for USCIS to approve a Petition for Alien Relative (Form I-130) or Refugee/Asylee Relative Petition (Form I-730). For information on filing a Form I-130 based on a non-adoptive relationship, see Form I-130 instructions. For information on filing a Form I-730, see Form I-730 instructions. For guidance on citizenship for stepchildren, see Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens [12 USCIS-PM H].

[^ 6] The Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption is referred to in this Volume as the Hague Adoption Convention.

[^ 7] The adoption may have occurred in or outside of the United States. Certain restrictions may apply if the child is from a Hague Convention country. See Chapter 2, Adoption Processes [5 USCIS-PM A.2] for information on determining which adoption process (Hague Adoption Convention, orphan, or family-based) applies, depending on the PAP's circumstances.

[^ 8] See Pub. L. 106-279 (PDF) (October 6, 2000).

[^ 9] See Pub. L. 80-774 (PDF) (June 25, 1948).

[^ 10] See Pub. L. 87-301 (PDF) (September 26, 1961).

[^ 11] See Pub. L. 89-236 (PDF) (October 3, 1965).

[^ 12] See Pub. L. 106–139 (PDF) (December 7, 1999).

[^ 13] See Pub. L. 106-279 (PDF) (October 6, 2000).

[^ 14] See Pub. L. 111-287 (PDF) (November 30, 2010).

[^ 15] See Pub. L. 112-276 (PDF) (January 14, 2013).

[^ 16] The UAA does not apply to cases that meet certain criteria (for example, UAA-grandfathered cases). See Guidance on the Implementation of the Intercountry Adoption Universal Accreditation Act of 2012 and the Consolidated Appropriations Act, 2014 in Intercountry Adoption Adjudications, PM-602-0103, issued June 30, 2014.

[^ 17] The regulations at 8 CFR 204.3(e) and certain definitions in 8 CFR 204.3(b) no longer apply in orphan cases that are subject to the UAA. See 8 CFR 204.301 for the definitions of adult member of the household, home study preparer, suitability as adoptive parent(s), officer, adoption, and applicant, which includes both a married U.S. citizen and the citizen's spouse. See 8 CFR 204.311 for home study requirements.

[^ 18] See Pub. L. 113-76 (PDF) (January 17, 2014).

Chapter 2 - Adoption Processes

The primary elements that determine which adoption process (Hague Adoption Convention, orphan, or family-based) an adoptive parent (petitioner) may follow include:

- The child's country of habitual residence;
- The petitioner's citizenship and country of habitual residence;
- The date of any adoption or legal custody order; and
- The length of time the child has been in the legal custody of and jointly resided with the petitioner.

The following table describes which process a petitioner generally must follow to petition for a child to immigrate based on adoption.

General Applicability of Adoption Processes

Process	General Principles
Hague Adoption Convention	Generally for U.S. citizens adopting children habitually resident in a Hague Adoption Convention country.[1]
Orphan	Generally for U.S. citizens adopting children who are not habitually resident in a Hague Adoption Convention country.
Family-Based Petition	Open to both U.S. citizens and lawful permanent residents (LPRs) of the United States. A U.S. citizen cannot, however, use the family-based petition process for a child that is from a Hague Adoption Convention country unless they can establish that the Convention does not apply.

A. Hague Adoption Convention[2]

1. Applicability

The petitioner must follow the Hague Adoption Convention process if:[3]

- The petitioner is a U.S. citizen who is habitually resident in the United States; and
- The petitioner seeks to adopt a child who is habitually resident in a Hague Adoption Convention country (other than the United States) based on an adoption occurring on or after April 1, 2008, and on or after the Hague Adoption Convention entered into force in the other country.[4]

If the child is from a Hague Adoption Convention country, a U.S. citizen petitioner cannot pursue the orphan or family-based petition process unless the petitioner establishes that the Hague Adoption Convention does not apply. The U.S. Hague Adoption Convention process does not apply if:

- USCIS determines that the U.S. citizen petitioner was not habitually resident in the United States at the time of the adoption;
- The child was not deemed to be habitually resident in a Hague Adoption Convention country at the time of the adoption;
- The petitioner was not a U.S. citizen at the time of the adoption;
- The U.S. citizen petitioner completed the adoption before the Hague Adoption Convention went into effect for the United States (April 1, 2008) or the other country;[5] or
- The U.S. citizen petitioner filed an orphan-based adoption petition or application[6] whose period of approval or extension had not expired before the date the Hague Adoption Convention went into effect for the United States or the other country, provided that the laws of the child's country of origin permits continuation under the orphan process.[7]

Habitual Residence Determinations - Prospective Adoptive Parent(s)

In general, for the purposes of petitioning for a Hague Convention adoptee, USCIS considers a U.S. citizen petitioner to be habitually resident in the United States at the time of the adoption unless:

- The petitioner adopted the child outside the United States and completed the 2-year legal custody and 2-year joint residence requirements for a family-based petition by living with the child outside the United States;[8] or
- The petitioner establishes that the petitioner was not domiciled in the United States and did not intend to bring the child to the United States as an immediate consequence of the adoption.

Habitual Residence Determinations - Child

In general, USCIS considers a child's country of citizenship to be the child's country of habitual residence. USCIS may consider the child to be habitually resident in a country other than that of the child's citizenship if:

- The child actually resides in that country; and
- The Central Authority[9] of the country the child is residing in, or another competent authority in either a Hague Adoption Convention or non-Hague country, determines that the child's status in that country is sufficiently stable to make it appropriate for that country to exercise jurisdiction over the adoption of the child.[10]

Children who are Physically Present in the United States

USCIS deems a child who is present in the United States, but whose habitual residence was in another Hague Adoption Convention country before the child came to the United States, to be habitually resident in the other Hague Adoption Convention country.[11] Therefore, a petitioner in this situation must generally follow the Hague Adoption Convention process,[12] even if the child is already in the United States.[13]

The petitioner may file a Hague Adoption Convention petition if the other Hague Adoption Convention country is willing to complete the Hague Adoption Convention process.[14] If, however, the petitioner can establish[15] that the Hague Adoption Convention and the implementing regulations no longer apply,[16] then the petitioner may follow the family-based process.

2. Process

For the Hague Adoption Convention process, the petitioner must file both a suitability application[17] and a petition[18] for the child. The following table provides a summary of requirements to obtain lawful immigration status in the United States for the child through the Hague process.

Summary of Requirements

Requirement	Related Form	For More Information
USCIS must find that the prospective adoptive parent(s) (PAP(s)) is suitable and eligible to adopt.	Application for Determination of Suitability to Adopt a Child from a Convention Country (Form I-800A)	See Part B, Adoptive Parent Suitability Determinations [5 USCIS-PM B].
USCIS and the U.S. Department of State (DOS) must find that the child meets Hague Convention adoptee eligibility requirements.	Petition to Classify Convention Adoptee as an Immediate Relative (Form I-800)	See Part D, Child Eligibility Determinations (Hague) [5 USCIS-PM D]

B. Orphan

1. Applicability

The petitioner may follow the orphan process if:

- At least one of the PAPs is a U.S. citizen; and
- The child is not from a Hague Adoption Convention country.[19]

If the child is from a Hague Adoption Convention country, a U.S. citizen cannot pursue the orphan petition process unless the petitioner establishes that the Hague Adoption Convention does not apply.[20]

2. Process

For the orphan process, the petitioner must file a suitability application[21] and a petition[22] for the child. The following table provides a summary of requirements to obtain lawful immigration status in the United States for the child through the orphan process.

Summary of Requirements

Requirement	Form	For More Information
USCIS must find that the PAP(s) is suitable and eligible to adopt.	Application for Advance Processing of an Orphan Petition (Form I-600A)	See Part B, Adoptive Parent Suitability Determinations [5 USCIS-PM B].
USCIS (and DOS, as applicable) must find that the child meets orphan eligibility requirements.	Petition to Classify Orphan as an Immediate Relative (Form I-600)	See Part C, Child Eligibility Determinations (Orphan) [5 USCIS-PM C].

C. Family-Based

1. Applicability

Generally, the petitioner may follow the family-based[23] petition process if:

- The adoptive parent petitioner is a U.S. citizen or LPR;
- The petitioner establishes the Hague Adoption Convention does not apply;[24]
- A final adoption was completed before the child turned 16 (or 18 if the sibling exception applies);[25] and
- The child has been in the legal custody of and jointly resided with a U.S. citizen or LPR adoptive parent for at least 2 years at the time of filing the petition.

USCIS does not have the authority to waive the 2-year legal custody and 2-year joint residence requirement for a family-based petition, except for certain battered children.[26]

If a U.S. citizen petitioner who was not habitually resident in the United States at the time of adoption decides to move to the United States, USCIS cannot approve a family-based petition for the child before the petitioner has satisfied the 2 year legal custody and 2 year joint residence requirements.[27]

If the child is from a Hague Adoption Convention country, a U.S. citizen petitioner cannot follow the family-based petition process unless the petitioner establishes that the Hague Adoption Convention does not apply.[28]

2. Process

The family-based petition process involves a USCIS determination that the child is eligible to immigrate as the adopted child, son, or daughter[29] of the petitioner. In contrast to the other two processes, the family-based petition process does not involve a USCIS determination of the adoptive parent's suitability.

To pursue the family-based petition process, the petitioner may file a Petition for Alien Relative (Form I-130).[30]

The adoptive parent-child relationship[31] is recognized in all applicable immigration requests under U.S. immigration law, including, but not limited to:

- Refugee/Asylee Relative Petition (Form I-730);
- Application for Certificate of Citizenship (Form N-600);
- Application for Citizenship and Issuance of Certificate Under Section 322 (Form N-600K); or
- A claim to eligibility for an immigrant visa as a derivative.[32]

Adoption Between Hague Adoption Convention Countries Other Than the United States

An officer may encounter a petition or application related to an adoption in a Hague Adoption Convention country (other than the United States) for a child who is habitually resident in another Hague Adoption Convention country (other than the United States). The immigration laws of the United States determine whether an adoption properly certified according to the Hague Adoption Convention (by the Central Authorities of the other countries involved in the adoption) may form the basis for a U.S. immigration benefit.[33]

Footnotes

[^ 1] For a list of countries that are party to the Hague Adoption Convention, see the U.S. Department of State (DOS)'s Convention Countries webpage.

[^ 2] See Part D, Child Eligibility Determinations (Hague) [5 USCIS-PM D].

[^ 3] See 8 CFR 204.303.

[^ 4] For a list of countries that are party to the Hague Adoption Convention, see the U.S. Department of State (DOS)'s Convention Countries webpage. For information on the entry into force date for each country, see the Hague Conference on Private International Law's webpage, Status Table.

[^ 5] If the petitioner acquired custody of the child for purposes of emigration and adoption before April 1, 2008, but did not actually complete the adoption before April 1, 2008, the adoption of the child on or after April 1, 2008, is governed by the Hague Adoption Convention.

[^ 6] See Application for Advance Processing of an Orphan Petition (Form I-600A) or a Petition to Classify Orphan as an Immediate Relative (Form I-600).

[^ 7] If the child's country of habitual residence agrees, such cases may proceed under the orphan process (known as transition cases). See Part C, Child Eligibility Determinations (Orphan) [5 USCIS-PM C].

[^ 8] See 8 CFR 204.2(d)(2)(vii)(D) and (E).

[^ 9] Central authority means the entity designated as such under Article 6(1) of the Hague Adoption Convention by any Convention country, or, in the case of the United States, DOS. See 22 CFR 96.2.

[^ 10] See 8 CFR 204.303(b).

[^ 11] See 8 CFR 204.2(d)(2)(vii)(F).

[^ 12] See Part D, Child Eligibility Determinations (Hague) [5 USCIS-PM D].

[^ 13] However, a child from a Hague Adoption Convention country who is admitted to the United States as a refugee or granted asylum is no longer considered habitually resident in the child's prior country of citizenship or residence because the purpose of the child's travel to the United States was not in connection with an adoption, and would therefore not circumvent the Hague Adoption Convention. Restrictions on the approval of a Form I-130 for a child from a Hague Adoption Convention country do not apply to children admitted as refugees or granted asylum as they are no longer considered habitually resident in their country of citizenship or residence.

[^ 14] See 8 CFR 204.309(b)(4).

[^ 15] For information on related evidence the petitioner must file, including when the other country is not willing to complete the Hague Adoption Convention process, see Part E, Family-Based Adoption Petitions [5 USCIS-PM E].

[^ 16] USCIS can conclude that 8 CFR 204.2(d)(2)(vii)(F) no longer applies if there is a sufficient basis to establish that the Hague Adoption Convention and the implementing regulations no longer apply to a child who came to the United States from another Hague Adoption Convention country. USCIS interprets 8 CFR 204.303(b) to permit a finding that a child is habitually resident in the United States, even if, under 8 CFR 204.2(d)(2)(vii)(F), the child is initially presumed to be habitually resident in another Hague Adoption Convention country. For more information on requirements for making a determination that a child is not habitually resident in the Convention country, see Criteria for Determining Habitual Residence in the United States for Children from Hague Convention Countries, PM 602-0095, issued November 20, 2017.

[^ 17] See the Application for Determination of Suitability to Adopt a Child from a Convention Country (Form I-800A).

[^ 18] See the Petition to Classify Convention Adoptee as an Immediate Relative (Form I-800).

[^ 19] For a list of countries that are party to the Hague Adoption Convention, see DOS's Convention Countries webpage. For information on the entry into force date for each country, see the Hague Conference on Private International Law's Status Table webpage.

[^ 20] See Section A, Hague Adoption Convention, Subsection 1, Applicability [5 USCIS-PM A.2(A)(1)].

[^ 21] See the Application for Advance Processing of an Orphan Petition (Form I-600A). PAPs typically file the suitability application before the petition to determine the child's eligibility to immigrate based on the adoption. If the PAP has already identified a child for adoption, the PAP may apply for the suitability determination at the same time as the petition to determine

the child's eligibility (known as a combination or concurrent filing), by filing evidence in support of the suitability determination with the Petition to Classify Orphan as an Immediate Relative (Form I-600).

[^ 22] See the Petition to Classify Orphan as an Immediate Relative (Form I-600).

[^ 23] See INA 101(b)(1)(E).

[^ 24] See Section A, Hague Adoption Convention, Subsection 1, Applicability [5 USCIS-PM A.2(A)(1)].

[^ 25] See Part E, Family-Based Adoption Petitions, Chapter 2, Eligibility, Section B, Qualifying Relationship [5 USCIS-PM E.2(B)].

[^ 26] See INA 101(b)(1)(E)(i).

[^ 27] If it becomes necessary to return to the United States before the 2-year legal custody and 2-year joint residence requirements are met, the petitioner may try to pursue the orphan process (if the child is not from a Hague Adoption Convention country) or the Hague Adoption Convention process instead of the family-based adoption process. The petitioner may encounter issues, however, if the child was adopted before the completion of the Hague Adoption Convention process. See Part D, Child Eligibility Determinations (Hague), Chapter 7, Required Order of Immigration and Adoption Steps [5 USCIS-PM D.7].

[^ 28] See Section A, Hague Adoption Convention, Subsection 1, Applicability [5 USCIS-PM A.2(A)(1)].

[^ 29] See Part E, Family-Based Adoption Petitions, Chapter 2, Eligibility, Section A, Age, Marital Status, and Immigration Status Requirements [5 USCIS-PM E.2(A)].

[^ 30] See Part E, Family-Based Adoption Petitions [5 USCIS-PM E].

[^ 31] As described in INA 101(b)(1)(E).

[^ 32] See INA 203(d).

[^ 33] See INA (101)(b)(1).

Chapter 3 - U.S. Citizens Residing Outside the United States

Options for a child to obtain U.S. immigration status based on adoption by a U.S. citizen prospective adoptive parent (PAP) who resides outside of the United States depend on many factors, including:

- Whether the family will continue to reside outside the United States or will reside in the United States before the child turns age 18;
- The laws of the country where the PAP resides; and
- The laws of the country where the child resides (if different from the PAP's country of residence).

Before initiating an adoption or legal custody, the PAP should contact the competent authority (for non-Hague countries) or Central Authority (for Hague Adoption Convention countries) in the country where the PAP resides and where the child resides (if different). These authorities may provide more information to assist the PAP in understanding the process a U.S. citizen residing in that foreign country may be required to follow regarding the adoption and immigration of the child.[1]

A domestic adoption or legal custody of a child in the child's country of origin alone does not convey U.S. immigration status to the child or enable the child to travel to the United States. If a U.S. citizen[2] PAP residing outside of the United States wishes to secure lawful U.S. immigration status for the PAP's adopted child, the PAP generally may use one of the U.S. immigration processes (Hague Adoption Convention, orphan, or family-based).

The following table explains which U.S. immigration process a PAP who resides outside of the United States generally may pursue,[3] based on whether the child resides in a country that is a party to the Hague Adoption Convention.

Immigration Options for Adopted Children of U.S. Citizens Residing Outside the United States

If child resides in…	U.S. immigration processes[4] generally available
Non-Hague country	• Orphan process (using the Application for Advance Processing of an Orphan Petition (Form I-600A) or Petition to Classify Orphan as an Immediate Relative (Form I-600)); or • Family-based petition process (using Petition for Alien Relative (Form I-130))
Hague Adoption Convention country	• Hague Adoption Convention process (using the Application for Determination of Suitability to Adopt a Child from a Convention Country (Form I-800A) or Petition to Classify Convention Adoptee as an Immediate Relative (Form I-800)); or • Family-based petition process (Form I-130) if the PAP can establish that the Hague Adoption Convention does not apply

This table does not address the process to obtain U.S. citizenship for the child.[5]

Additional Considerations for Children from a Hague Adoption Convention Country

Generally, a U.S. citizen who adopts a child from a Hague Adoption Convention country must use the Hague Adoption Convention process.[6] The U.S. Hague Adoption Convention process is generally available to any U.S. citizen residing outside the United States.[7]

The Hague Adoption Convention requires a determination of the U.S. citizen PAP's habitual residence. If the PAP resides in a Hague Adoption Convention country, the Central Authority of the PAP's country of residence generally determines whether it considers the PAP to be habitually resident in that country for the purpose of adoption under the Hague Adoption Convention process.

If the Central Authority of that country determines the PAP is habitually resident in the country where the PAP resides, and it is the receiving country for the purposes of adoption of a child from another Hague Adoption Convention partner country, the PAP generally must follow the Hague Adoption Convention process of the country where the PAP is habitually resident.

The PAP may also be able to simultaneously pursue the U.S. Hague Adoption Convention process to immigrate the child to the United States if the PAP is able to obtain the required Convention documents from the Central Authority in the child's country of origin. However, if the PAP is not able to obtain the required Convention documents, the U.S. Hague Adoption Convention process may not be available.

Footnotes

[^ 1] For information about the competent or central adoption authorities in each country and to determine if a particular country is party to the Hague Adoption Convention, see the U.S. Department of State's webpage, Country Information.

[^ 2] A lawful permanent resident of the United States may follow the family-based process, if otherwise eligible.

[^ 3] The same processes that are available to PAPs who reside in the United States are generally available to PAPs who reside outside of the United States. For more information on applicability of adoption processes, see Chapter 2, Adoption Processes [5 USCIS-PM A.2].

[^ 4] For information on how to secure U.S. citizenship for the adopted child of a U.S. adoptive parent residing outside the United States, see Part F, Citizenship for Adopted Children [5 USCIS-PM F]. For more information, see Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens [12 USCIS-PM H].

[^ 5] For information on citizenship for adopted children, see Part F, Citizenship for Adopted Children [5 USCIS-PM F]. For more information, see Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens [12 USCIS-PM H]. For information on the naturalization process for children who reside outside of the United States, see Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens, Chapter 5, Child Residing Outside the United States (INA 322) [12 USCIS-PM H.5].

[^ 6] The petitioner may encounter issues, however, if the child was adopted before the completion of the Hague Adoption Convention process. See Part D, Child Eligibility Determinations (Hague), Chapter 7, Required Order of Immigration and Adoption Steps [5 USCIS-PM D.7].

[^ 7] See 8 CFR 204.303.

Chapter 4 - Adoption Definition and Order Validity

A child may be eligible to immigrate through the orphan or Hague Adoption Convention process if otherwise eligible and:

- The child was adopted, and the adoption meets the definition of an adoption for immigration purposes; or
- The child is not yet the subject of a final adoption[1] but meets certain criteria to come to the United States for adoption.[2]

Unlike the Hague Adoption Convention and orphan processes, a child may only immigrate through the family-based process if the child was already adopted (and is otherwise eligible).

Definition of Adoption

To meet the definition of adoption for immigration purposes, an adoption must create a legal status comparable to that of a natural legitimate child between the adopted child and the adoptive parent.[3] An adoption must be valid under the law of the country or place granting the order and must:

- Terminate the legal parent-child relationship between the child and the prior legal parent(s);
- Create a legal permanent parent-child relationship between the child and the adoptive parent; and
- Comply with the law of the country or place granting the adoption.

A. Determining the Validity and Effect of an Adoption

In general, USCIS accepts an adoption decree or order as primary evidence of an adoption. The validity of an adoption is relevant to the eligibility of a child to immigrate to the United States on the basis of adoption.[4] The law of the jurisdiction that issued the adoption order determines the validity of the adoption.[5]

USCIS may question the validity of the adoption order if there is credible and probative evidence that:

- The adoption was flawed in its execution, such as when the court (or other official body) granting the adoption appears to have lacked jurisdiction over the adoption, when the prior legal parent(s) did not consent to the adoption, or were not given proper notice of the termination of parental rights;
- The adoption was granted due to official corruption or the use of fraud or material misrepresentation; or
- The adoption order document is fraudulent.[6]

If there is credible and probative evidence that the adoption may be invalid for one of these reasons, the burden falls on the petitioner to establish that the adoption is valid under the law of the jurisdiction where the adoption order was issued.

1. Adoption as Judicial or Administrative Act

The law of the jurisdiction that issued the adoption order governs what official act constitutes an adoption in that jurisdiction. In many countries, adoption is a judicial process. The evidence of the adoption is therefore a court order. In other countries, adoption is an administrative process, not a judicial process. For example, in some countries, adoption is accomplished by adding the adopted child to one's Family Registry.[7] In some countries, a legal adoption can be accomplished according to legal custom, without a court or administrative order.

2. Whether Adoption is Legally Possible in a Given Jurisdiction

The law of the jurisdiction where the adoption order was issued governs whether or not a legal parent-child relationship can be created by adoption.

Islamic Law

With some limited exceptions,[8] in countries that follow traditional Islamic law, adoption in the sense required for immigration purposes generally does not exist.[9] Typically, a Kafala order is issued in countries that follow traditional Islamic law, and while the Kafala order may grant legal custody sufficient for purposes of emigration for adoption, they generally do not terminate the legal parent-child relationship with their prior parents. For that reason, a Kafala order generally would not qualify as an adoption for immigration purposes. In countries which follow traditional Islamic Law, the specific laws of that country must be applied in considering the legal effect of an adoption order, and its validity for immigration purposes.

Multi-Ethnic or Multi-Religious Countries

In some multi-ethnic or multi-religious countries, the personal status laws for each ethnic or religious group governs adoptions. In such countries, different bodies of law govern adoption for different children, even within the same neighborhood. For example, an adoption valid for immigration purposes may not be available for a Muslim child under Islamic family law but may be available for another child under Jewish or Christian family law.

3. Customary Adoption

In some countries, customary adoption may exist instead of, or in addition to, adoption through a judicial or administrative procedure. If a customary adoption terminates the legal parent-child relationship with the prior parents and creates a legal parent-child relationship with the adoptive parent under local law, then that customary adoption is valid for immigration purposes.[10]

The petitioner has the burden to show that the law of the jurisdiction where the adoption order was issued actually creates a valid adoption for immigration purposes.[11] The petitioner must establish that the customary adoption complies with the requirements of the relevant customary law and meets the definition of adoption for immigration purposes.[12]

4. Simple Adoption

Some countries have a type of adoption commonly called simple adoption, in addition to another type that may be called full, plenary, or perfect adoption. Whether simple adoption is valid for immigration purposes depends on the law of the jurisdiction where the adoption order was issued.[13]

Even if a simple adoption might be more easily terminated than a full adoption, the petitioner may still establish that a permanent relationship was created by the simple adoption. A simple adoption may be valid for immigration purposes if it meets the definition of an adoption for immigration purposes and the parent-child relationship cannot be terminated for other than serious or grave reasons. If a simple adoption creates a permanent legal parent-child relationship, it might be valid for immigration purposes.[14]

5. Contact with Birth or Prior Parents After the Adoption

The mere fact that contact between the adoptee and the birth or prior parents (as in open adoptions) is ongoing does not mean that the legal parent-child relationship with the prior legal parent(s) was not terminated. As long as the adoptive parents, rather than the prior parents, exercise full parental authority over the child as a result of the adoption, the adoption order may be valid to form the basis of granting an immigration benefit under U.S. immigration law (if otherwise eligible).

6. Adoptive Stepparents

In some jurisdictions, the law allows a stepparent to adopt the child(ren) of the stepparent's spouse if the legal parent-child relationship with the other legal or birth parent has been terminated by death or legal action. Such termination may meet the requirement that the legal parent-child relationship between the child and the prior legal parent(s) was terminated. The continuing legal parent-child relationship between the child and the adopting stepparent's spouse does not preclude recognition of the adoption.

7. Evidence About the Applicable Adoption Law

The law of the jurisdiction where the adoption order was issued is a question of fact that the petitioner must prove with evidence.[15] If the evidence of record does not clearly show that an adoption creates a permanent legal parent-child relationship, the officer issues a request for evidence (RFE) or notice of intent to deny (NOID) asking for a copy of the relevant laws, along with properly certified English translations.[16] In this way, the officer provides the petitioner with notice and an opportunity to respond before denying a petition based on information about the jurisdiction's adoption law that the petitioner may not be aware of.[17]

B. Effect of an Adoption

If the requirements for an adoptions-based petition have been met, the adoptee is considered to be the child, son, or daughter of the adopting parent(s), not the birth parent(s), for immigration purposes.[18] Similarly, the adoptee is considered the sibling of the adoptive parent's other legal children, but not of the birth parent's children.[19]

Petition by Adopted Child for Birth Parent(s) Prohibited

An adoption that meets the requirements in immigration law and terminates any prior legal parent-child relationship[20] precludes the birth parent(s) from gaining any immigration benefit from that child.[21] Accordingly, such child is prohibited from petitioning for the child's birth parent(s), since the relationship between the child and the birth parent(s) was severed at the time of the adoption.

If, however, the adoption in question did not terminate the legal parent-child relationship with the birth parent, then the relationship between the child and the birth parent(s) was not severed, and the child is not prohibited from petitioning for such birth parent(s). A natural parent-child relationship can again be recognized for immigration purposes following the legal termination of an adoption if the petitioner can establish that:

- No immigration benefit was obtained or conferred through the adoptive relationship;
- A natural parent-child relationship meeting the requirements of INA 101(b) once existed;
- The adoption has been lawfully terminated under applicable law; and
- The natural relationship has been reestablished by law.[22]

C. Effect of Legal Termination of an Adoption

The law of the jurisdiction where the legal termination of the adoption was ordered governs the validity of a termination of an adoption.

Termination of an adoption does not necessarily mean that the legal parent-child relationship has actually been restored with the prior legal parent(s).[23] Even if the child received no immigration benefits as a result of the adoption, the evidence must show that the legal relationship to the prior legal parent(s) is re-established according to law in order for that relationship to form the basis for granting a benefit under U.S. immigration law.

Footnotes

[^ 1] Not all countries grant a final adoption for immigration purposes. The petitioner may also obtain a legal custody order for purposes of emigration and adoption.

[^ 2] For criteria for orphan cases, see Part C, Child Eligibility Determinations (Orphan), Chapter 5, Qualifying Adoptive or Custodial Relationship [5 USCIS-PM C.5]. For criteria for Hague Adoption Convention cases, see Part D, Child Eligibility Determinations (Hague), Chapter 5, Qualifying Adoptive or Custodial Relationship [5 USCIS-PM D.5].

[^ 3] See *Matter of Mozeb (PDF)*, 15 I&N Dec. 430 (BIA 1975).

[^ 4] See Guidance for Determining if an Adoption is Valid for Immigration and Nationality Act (INA) Purposes, PM 602-0070.1, issued November 6, 2012.

[^ 5] See *Matter of T-*, 6 I&N Dec. 634 (1955).

[^ 6] Not recognizing an adoption in one of these situations is consistent with legal principles generally observed by courts in the United States with respect to foreign country judgments. See Sections 482(2)(a)-(c) of Restatement (Third) Foreign Relations Law of the United States.

[^ 7] See *Matter of Cho (PDF)*, 16 I&N Dec. 188 (BIA 1977).

[^ 8] See Guidance for Determining if an Adoption is Valid for Immigration and Nationality Act (INA) Purposes, PM 602-0070.1, issued November 6, 2012.

[^ 9] See *Matter of Mozeb (PDF)*, 15 I&N Dec. 430 (BIA 1975). See *Matter of Ashree, Ahmed and Ahmed (PDF)*, 14 I&N Dec. 305 (BIA 1973).

[^ 10] See *Matter of Lee (PDF)*, 16 I&N Dec. 511 (BIA 1978).

[^ 11] See *Matter of Annang (PDF)*, 14 I&N Dec. 502 (BIA 1973).

[^ 12] See *Matter of Kodwo (PDF)*, 24 I&N Dec. 479 (BIA 2008).

[^ 13] For example, in *Matter of Kong (PDF)*, 15 I&N Dec. 224 (BIA 1975), *Matter of Kong (PDF)* 14 I&N Dec. 649 (BIA 1974) and *Matter of Chang (PDF)*, 14 I&N Dec. 720 (BIA 1974), the Board of Immigration Appeals (BIA) held that “Appatitha,” a form of simple adoption in Burma, did not create a legal parent-child relationship.

[^ 14] See *Matter of Chin (PDF)*, 12 I&N Dec. 240 (BIA 1967).

[^ 15] See *Matter of Annang (PDF)*, 14 I&N Dec. 502 (BIA 1973).

[^ 16] See Volume 1, General Policies and Procedures, Part E, Adjudications [1 USCIS-PM E].

[^ 17] See 8 CFR 103.2(b)(16).

[^ 18] See INA 101(b)(1).

[^ 19] See *Matter of Li (PDF)*, 20 I&N Dec. 700 (BIA 1993).

[^ 20] See Guidance for Determining if an Adoption is Valid for Immigration and Nationality Act (INA) Purposes, PM 602-0070.1, issued November 6, 2012.

[^ 21] See INA 101(b)(1). See *Matter of Li (PDF)*, 20 I&N Dec. 700 (BIA 1993).

[^ 22] See *Matter of Xiu Hong Li (PDF)*, 21 I&N Dec. 13, 13 (BIA 1995).

[^ 23] As the Board noted in *Xiu Hong Li*, “We do not assume that natural relationships are automatically reestablished solely by virtue of the fact that an adoption has been lawfully terminated.” See *Matter of Xiu Hong Li (PDF)*, 21 I&N Dec. 13 (BIA 1995).

Chapter 5 - Authorized Adoption Service Providers

The Intercountry Universal Accreditation Act of 2012 (UAA) requires that all agencies or persons providing adoption services in orphan and Hague Adoption Convention cases be accredited or approved, unless a limited exception applies.[1] Supervised providers, exempted providers, public domestic authorities, and public foreign authorities do not require accreditation or approval.

Adoption service means any one of the following six services:[2]

- Identifying a child for adoption and arranging an adoption;
- Securing the necessary consent to termination of parental rights and to adoption;
- Performing a background study on a child or a home study on a prospective adoptive parent(s) (PAP(s)), and reporting on such a study;
- Making non-judicial determinations of the best interests of a child and the appropriateness of an adoptive placement for the child;
- Monitoring a case after a child has been placed with PAP(s) until final adoption; or
- When necessary, because of a disruption before final adoption, assuming custody and providing (including facilitating the provision of) childcare or any other social service pending an alternative placement.

A primary adoption service provider is the accredited agency or approved person who is responsible under 22 CFR 96 for ensuring all six adoption services defined in 22 CFR 96.2 are provided according to the law, for supervising and being responsible for supervised providers when used,[3] and for developing and implementing a service plan in accordance with 22 CFR 96.44.[4] PAPs provide primary adoption service provider information on the petition for orphan and Hague cases.

Footnotes

[^ 1] See the Intercountry Adoption Universal Accreditation Act of 2012, Pub. L. 112-276 (PDF) (January 14, 2013). See Guidance on the Implementation of the Intercountry Adoption Universal Accreditation Act of 2012 and the Consolidated Appropriations Act, 2014 in Intercountry Adoption Adjudications, PM-602-0103, issued June 30, 2014 and USCIS’ Universal Accreditation Act webpage. See the U.S. Department of State (DOS) Accreditation Regulations at 22 CFR 96. For a list of accredited agencies and approved persons, see DOS’ Adoption Service Provider Search webpage.

[^ 2] Defined at 22 CFR 96.2.

[^ 3] See 22 CFR 96.14.

[^ 4] See 22 CFR 96.

Part B - Adoptive Parent Suitability Determinations

Chapter 1 - Purpose and Background

A. Purpose

USCIS must find that a prospective adoptive parent (PAP)[1] is suitable and eligible to adopt for a PAP to complete the intercountry adoption process, whether through the Hague Adoption Convention[2] or orphan (non-Hague) process. Congress gave this authority to USCIS to ensure that only people who can provide proper parental care are approved for intercountry adoption.

USCIS has the sole authority to determine the suitability and eligibility of PAPs for intercountry adoption. USCIS makes suitability determinations based on the evidence in the record, including the PAP's home study and the results of criminal background and security checks.

B. Scope

The guidance in this Part only applies to Hague Adoption Convention and orphan cases. Certain children may be eligible to immigrate based on a family-based adoption petition,[3] which does not require a USCIS determination of the adoptive parent's suitability.

C. Background

USCIS must be satisfied that the PAP remains suitable and eligible to adopt a child throughout the intercountry adoption process. This involves a USCIS suitability determination at all the following points:

- Before USCIS can approve any suitability application, extension request, request for an updated approval notice, or change of country request;[4]
- Before USCIS (or the U.S. Department of State (DOS), where designated) can approve any intercountry adoption-related petition; and
- Before DOS issues any immigrant visa and the child immigrates to the United States.

Both DHS and DOS have rules that govern home studies for intercountry adoptions. The Intercountry Adoption Universal Accreditation Act of 2012 (UAA),[5] effective July 14, 2014, impacted requirements for home studies in orphan cases, including home study preparation, home study elements, and the duty of disclosure.[6] As a result and unless an exception applies,[7] Hague Adoption Convention and orphan suitability determinations are now very similar.

D. Legal Authorities

- INA 101(b)(1)(F) – Definition of a child for orphan process
- INA 101(b)(1)(G) – Definition of a child for Hague Adoption Convention process
- 8 CFR 204.3 – Orphan cases under section 101(b)(1)(F) of the Act (non-Hague cases)
- 8 CFR 204 Subpart C – Intercountry adoption of a Convention adoptee (Hague Adoption Convention cases)
- 22 CFR 96 – Intercountry adoption accreditation of agencies and approval of persons

Footnotes

[^ 1] In this Part, the term PAP refers to the applicant or petitioner and the PAP's spouse, if any.

[^ 2] The Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption is referred to in this Part as the Hague Adoption Convention.

[^ 3] See Part E, Family-Based Adoption Petitions [5 USCIS-PM E].

[^ 4] Extension requests, requests for an updated approval notice, and change of country requests are all requests for action on an approved and valid suitability application. For more information on these types of requests, see Chapter 5, Action on Pending or Approved Suitability Determinations [5 USCIS-PM B.5].

[^ 5] See Pub. L. 112-276 (PDF) (January 14, 2013).

[^ 6] The UAA superseded parts of the orphan regulations at 8 CFR 204.3 and made certain portions of the regulations governing adoptions completed under the Hague Adoption Convention at 8 CFR 204.300 through 8 CFR 204.314 applicable to orphan cases.

[^ 7] See the Intercountry Adoption Universal Accreditation Act of 2012, Pub. L. 112-276 (PDF) (January 14, 2013). For more information on when this Act applies, see The Universal Accreditation Act of 2012 webpage.

Chapter 2 - Eligibility, Documentation, and Evidence (Orphan Process)

A. Eligibility

A prospective adoptive parent (PAP) is eligible to adopt if the PAP meets the following requirements:

- The applicant[1] is a U.S. citizen;
- If married, the applicant's spouse must:
  - Intend to also adopt the child; and
  - Be in lawful immigration status if residing in the United States.[2]
- If single, is at least 24 years old when filing the suitability application,[3] and at least 25 years old when filing the immigration petition;[4] and
- Establish that they will provide proper parental care.

B. Filing

1. Advanced Processing

To apply to have the suitability determination processed in advance, the PAP must file an Application for Advance Processing of an Orphan Petition (Form I-600A), in accordance with the form instructions and include all applicable supplements,[5] evidence, and the appropriate fee.[6]

2. Combination Filing

PAPs typically file the suitability application before the petition to determine the child's eligibility to immigrate based on adoption. If the PAP has already identified a child for adoption, the PAP may apply for the suitability determination at the same time as the petition to determine the child's eligibility (known as a combination or concurrent filing).

To submit a combination filing, the PAP should file the supporting documentation and evidence for the suitability determination (in addition to the documentation relating to the identified child), with the petition to determine the child's eligibility[7] and any appropriate fee.[8]

C. Documentation and Evidence

The PAP must submit evidence in accordance with the form instructions.[9] The following is a summary of the evidence the PAP must provide.

1. Proof of the Applicant's U.S. Citizenship

The applicant must submit proof of U.S. citizenship. Examples of such proof include a birth certificate, an unexpired U.S. passport, a certificate of naturalization, or a certificate of citizenship. If such primary evidence is unavailable, USCIS may consider secondary evidence.[10]

2. Proof of the Spouse's Immigration and Citizenship Status (If Applicable)

If the applicant is married, the applicant must submit evidence that the applicant's spouse is a U.S. citizen, a national (but not citizen) of the United States, or is otherwise in a lawful immigration status, provided the spouse resides in the United States. Examples of evidence of U.S. citizenship or U.S. national status include a birth certificate, an unexpired U.S. passport, a certificate of naturalization, or a certificate of citizenship. Examples of evidence of lawful immigration status may consist of a Permanent Resident Card (Form I-551), a foreign passport with an I-551 stamp, a foreign passport with an unexpired visa and a valid admission stamp, a valid Arrival/Departure Record (Form I-94), or other evidence of lawful status in the United States.

3. Proof of Marriage (If Applicable)

If married, the PAP must submit a copy of their marriage certificate.

If previously married, the PAP must include evidence of the termination of any prior marriages. Examples of such proof include, but are not limited to, a divorce decree, annulment decree, other legal termination of the marriage, or death certificate of previous spouse.

4. Proof of Compliance with Pre-Adoption Requirements (If Applicable)

If the suitability application or combination filing indicates that the child will be coming to the United States for adoption, the PAP must establish that any pre-adoption requirements of the state of the child's intended residence have been or will be met. USCIS considers an orphan to be coming to the United States for adoption if:

- Neither parent personally saw and observed the child before or during the adoption;
- The PAP will not complete the adoption outside the United States (and will therefore need to complete the adoption in the United States); or
- In the case of a married couple, only one of the adoptive parents adopts the child outside of the United States (therefore, the spouse will need to adopt the child in the United States).

5. Biometrics

The PAPs and any adult members of the household[11] must submit biometrics.[12]

For those residing in the United States, USCIS schedules biometrics collection at an Application Support Center (ASC). Persons residing outside of the United States must submit biometrics at a USCIS international field office, U.S. embassy, consulate, or military installation.

USCIS considers biometric based background check results to be valid for a period of 15 months. The PAP or additional adult member of the household (AMH) may need to update their biometrics during the intercountry adoption process.[13]

Unclassifiable Biometrics

USCIS submits biometrics to the Federal Bureau of Investigation (FBI) for criminal history background checks. On occasion, the FBI is unable to provide USCIS with a criminal history based on biometrics submitted. When this happens, the FBI refers to the biometrics as "unclassifiable." If USCIS receives two consecutive sets of unclassifiable biometrics,[14] USCIS issues a Request for Evidence (RFE) to the PAP or adult household member for police clearances[15] for all residences (domestic or foreign) for the last 5 years. If a U.S. state record is available, it is required in place of a clearance from a local police department:

- When an arrest record is needed to provide information about a conviction;
- To document that there were no arrests; or
- To document that an arrest did not lead to court action.

Police clearances are not available from certain countries.[16] If a police clearance is generally available, but a country is unable to provide one, the PAP or adult household member must provide a letter from the appropriate foreign authority stating that it is not available.

Like other criminal history results, police clearance letters are also valid for a period of 15 months from the date of issuance. If more than one letter is submitted, the date of the earlier letter becomes the validity period start date.

6. Home Study[17]

The PAP must submit a valid, original[18] home study to USCIS within 1 year of filing the suitability application.[19] If the PAP makes a combination (or concurrent) filing, the PAP must submit the home study with the filing.

The PAP may need to update the home study during the intercountry adoption process.[20] The home study, or the most recent update of the home study, cannot be more than 6 months old at the time of submission to USCIS.[21]

This means that no more than 6 months have passed since the home study preparer signed and dated the home study. If a home study will be more than 6 months old at the time of submission to USCIS, the PAP must ensure that it is updated by the home study preparer before submission.[22]

Footnotes

[^ 1] The applicant refers to the person who is filing the suitability application or the petitioner who is filing a combination or concurrent filing. For information on combination filings, see Section B, Filing, Subsection 2, Combination Filings [5 USCIS-PM B.2(B)(2)].

[^ 2] If the spouse is not a U.S. citizen, a national (but not citizen) of the United States, or a lawful permanent resident (LPR), the officer should evaluate the impact of this status on the stability and suitability of the home. For example, a U.S. citizen who ordinarily resides outside the United States could be temporarily assigned to a job in the United States and the U.S. citizen's spouse may be eligible for a valid nonimmigrant status during the term of the U.S. citizen's temporary assignment to the United States. Generally, the lack of LPR status of the spouse would not preclude a favorable suitability determination. Similarly, USCIS factors a spouse who resides outside the United States into the suitability determination.

[^ 3] See Application for Advance Processing of an Orphan Petition (Form I-600A). See Application for Determination of Suitability to Adopt a Child from a Convention Country (Form I-800A).

[^ 4] See the Petition to Classify Orphan as an Immediate Relative (Form I-600).

[^ 5] See Listing of Adult Member of the Household (Supplement 1 for Form I-600A and I-600). See Consent to Disclose Information (Supplement 2 for Form I-600A and I-600).

[^ 6] See 8 CFR 103.2(a)(1). See Fee Schedule (Form G-1055).

[^ 7] See Petition to Classify Orphan as an Immediate Relative (Form I-600). See Volume 1, General Policies and Procedures, Part B, Submission of Benefit Requests, Chapter 6, Submitting Requests, Section D, Filing Periods Ending on Weekends or Federal Holidays [1 USCIS-PM B.6(D)] for more information on filing timeframes.

[^ 8] See Fee Schedule (Form G-1055) to determine if a fee is needed for a combination filing.

[^ 9] See instructions for Application for Determination of Suitability to Adopt an Orphan (Form I-600A).

[^ 10] For more information on secondary evidence, see 8 CFR 204.1(g)(2). See instructions for Application for Advance Processing of an Orphan Petition (Form I-600A).

[^ 11] See 8 CFR 204.301.

[^ 12] For more information on biometrics collection, see Volume 1, General Policies and Procedures, Part C Biometrics Collection and Security Checks, Chapter 2, Biometrics Collection [1 USCIS-PM C.2].

[^ 13] For information on biometrics validity and updates, see Chapter 5, Action on Pending or Approved Suitability Determinations, Section E, Biometrics Validity and Updates [5 USCIS-PM B.5(E)].

[^ 14] The physical condition of certain hands or fingers may make it difficult to collect a useable set of fingerprints. For example, a person could have a medical or skin condition or may have worked with chemicals that damaged the surface of their fingers. If the FBI deems a person's fingerprints unclassifiable, that person must provide a second set of biometrics unless USCIS grants an exemption.

[^ 15] The term police clearance means official evidence of a record of arrests, lack of arrests, or confirmation that an arrest did not result in court action from a local police department or from a state agency responsible for maintaining arrest records.

[^ 16] Officers must check DOS's reciprocity tables to determine a country's police clearance availability.

[^ 17] For information on USCIS' home study requirements, see Chapter 4, Home Studies [5 USCIS-PM B.4].

[^ 18] USCIS requires an original home study (not a photocopy) with original signature.

[^ 19] If the PAP does not submit the requisite home study within 1 year of filing the suitability application for an orphan case, USCIS must deny the suitability application. See 8 CFR 204.3(h)(5). USCIS applies the definition of day at 8 CFR 1.2 to deadlines for submitting the home study or any related documentation or evidence. See Volume 1, General Policies and Procedures, Part B, Submission of Benefit Requests, Chapter 6, Submitting Requests, Section D, Filing Periods Ending on Weekends or Federal Holidays [1 USCIS-PM B.6(D)] for more information on filing timeframes.

[^ 20] For examples of reasons that require a home study update and home study update requirements, see Chapter 5, Action on Pending or Approved Suitability Determinations [5 USCIS-PM B.5]. If the PAP submits an updated home study, the PAP must include a copy of the original home study that is being updated, including any prior updates.

[^ 21] See Volume 1, General Policies and Procedures, Part B, Submission of Benefit Requests, Chapter 6, Submitting Requests, Section D, Filing Periods Ending on Weekends or Federal Holidays [1 USCIS-PM B.6(D)] for more information on filing timeframes.

[^ 22] See Chapter 5, Action on Pending or Approved Suitability Determinations, Section B, Validity Periods and Extensions [5 USCIS-PM B.5(B)].

Chapter 3 - Eligibility, Documentation, and Evidence (Hague Process)

A. Eligibility

A prospective adoptive parent (PAP) is eligible to adopt if the PAP meets the following requirements:

- The applicant[1] is a U.S. citizen who is habitually resident in the United States;[2]
- If married, the applicant's spouse must:
  - Intend to also adopt the child; and
  - Be in lawful immigration status if residing in the United States;[3]
- If single, is at least 24 years of age when filing the suitability application,[4] and at least 25 years old when filing the adoption petition;[5] and
- Establishes that they will provide suitable parental care.

B. Filing

To apply for a suitability determination, the PAP must file an Application for Determination of Suitability to Adopt a Child from a Convention Country (Form I-800A) in accordance with the form instructions, and include all applicable supplements,[6] evidence, and the appropriate fee.[7]

C. Documentation and Evidence

The PAP must submit evidence in accordance with the form instructions.[8] The following is a summary of the evidence the PAP must provide.

1. Proof of Applicant's U.S. Citizenship

The applicant must submit proof of U.S. citizenship. Examples of such proof include a birth certificate, an unexpired U.S. passport, a certificate of naturalization, or a certificate of citizenship. If such primary evidence is unavailable, USCIS may consider secondary evidence.[9]

2. Proof of Spouse's Immigration and Citizenship Status (If Applicable)

If the applicant is married, the applicant must submit evidence that the applicant's spouse is a U.S. citizen, a national (but not citizen) of the United States, or is otherwise in a lawful immigration status, provided the spouse resides in the United States. Examples of evidence of U.S. citizenship or U.S. national status include a birth certificate, an unexpired U. S. passport, a certificate of naturalization, or a certificate of citizenship. Examples of evidence of lawful immigration status may consist of a Permanent Resident Card (Form I-551), a foreign passport with an I-551 stamp, a foreign passport with an unexpired visa and a valid admission stamp, a valid Arrival/Departure Record (Form I-94), or other evidence of lawful status in the United States.

If the spouse does not reside in the United States, the PAP must submit evidence of the spouse's name, identity, and citizenship. An example of such proof is a copy of the spouse's passport from the country of citizenship.

3. Proof of Marriage

If married, the PAP must submit proof of marriage. This includes evidence of the termination of any prior marriages.

4. Proof of Compliance with Pre-Adoption Requirements (If Applicable)

If the suitability application indicates that the child will be coming to the United States for adoption, the applicant must establish that any pre-adoption requirements of the state of the child's intended residence have been or will be met. USCIS considers a Convention adoptee to be coming to the United States for adoption if:

- The PAP will not complete the adoption outside the United States (and will therefore need to complete the adoption in the United States); or
- In the case of a married couple, only one of the adoptive parents adopts the child outside the United States (therefore, the spouse will need to adopt the child in the United States).

5. Biometrics

The PAPs and any adult members of the household[10] must submit biometrics.

For those residing in the United States, USCIS schedules biometrics collection at an Application Support Center (ASC). Persons residing outside of the United States must submit biometrics at a USCIS international field office, U.S. embassy, consulate, or military installation.

USCIS considers biometric based background check results to be valid for a period of 15 months. The PAP or additional adult member of the household (AMH) may need to update their biometrics during the intercountry adoption process.[11]

Unclassifiable Biometrics

USCIS submits biometrics to the Federal Bureau of Investigation (FBI) for criminal history background checks. On occasion, the FBI is unable to provide USCIS with a criminal history based on biometrics submitted. When this happens, the FBI refers to the biometrics as "unclassifiable." If USCIS receives two consecutive sets of unclassifiable biometrics,[12] USCIS issues a Request for Evidence (RFE) to the PAP or adult household member for police clearances[13] for all residences (domestic or foreign) for the last 5 years. If a U.S. state record is available, it is required in place of a clearance from a local police department:

- When an arrest record is needed to provide information about a conviction;
- To document that there were no arrests; or
- To document that an arrest did not lead to court action.

Police clearances are not available from certain countries.[14] If a police clearance is generally available, but a country is unable to provide one, the PAP or AMH must provide a letter from the appropriate foreign authority stating that it is not available.

Like other criminal history results, police clearance letters are also valid for a period of 15 months from the date of issuance. If more than one letter is submitted, the date of the earlier letter becomes the validity period start date.

6. Home Study[15]

A PAP must submit a valid, original[16] home study to USCIS with the suitability application.[17]

The PAP may need to update the home study during the intercountry adoption process.[18] The home study, or the most recent update of the home study, cannot be more than 6 months old at the time of submission to USCIS.[19]

This means that no more than 6 months have passed since the home study preparer signed and dated the home study. If a home study will be more than 6 months old at the time of submission to USCIS, the PAP must ensure that it is updated by the home study preparer before submission.[20]

Footnotes

[^ 1] The applicant refers to the person who is filing the suitability application.

[^ 2] For information on which process a PAP may follow and habitual residence determinations, see Part A, Adoptions Overview, Chapter 2, Adoption Processes [5 USCIS-PM A.2].

[^ 3] If the spouse is not a U.S. citizen, a national (but not citizen) of the United States, or a lawful permanent resident (LPR), the officer should evaluate the impact of this status on the stability and suitability of the home. For example, a U.S. citizen who ordinarily resides outside the United States could be temporarily assigned to a job in the United States and the U.S. citizen's spouse may be eligible for a valid nonimmigrant status during the term of the U.S. citizen's temporary assignment to the United States. Generally, the lack of LPR status of the spouse would not preclude a favorable suitability determination. Similarly, USCIS factors a spouse who resides outside the United States into the suitability determination.

[^ 4] See Application for Determination of Suitability to Adopt a Child from a Convention Country (Form I-800A).

[^ 5] See the Petition to Classify Convention Adoptee as an Immediate Relative (Form I-800).

[^ 6] See Listing of Adult Member of the Household (Form I-800A Supplement 1). See Consent to Disclose Information (Form I-800A Supplement 2).

[^ 7] See Fee Schedule (Form G-1055) to determine if a fee is needed for Form I-800A and its supplements.

[^ 8] See instructions for Application for Determination of Suitability to Adopt a Child from a Convention Country (Form I-800A). See 8 CFR 103.2(b)(1).

[^ 9] For more information on secondary evidence, see 8 CFR 204.1(g)(2).

[^ 10] See 8 CFR 204.301.

[^ 11] For information on biometrics validity and updates, see Chapter 5, Action on Pending or Approved Suitability Determinations, Section E, Biometrics Validity and Updates [5 USCIS-PM B.5(E)].

[^ 12] The physical condition of certain hands or fingers may make it difficult to collect a useable set of fingerprints. For example, a person could have a medical or skin condition or may have worked with chemicals that damaged the surface of their fingers. If the FBI deems a person's fingerprints unclassifiable, that person must provide a second set of biometrics unless USCIS grants an exemption.

[^ 13] The term police clearance means official evidence of a record of arrests, lack of arrests, or confirmation that an arrest did not result in court action from a local police department or from a state agency responsible for maintaining arrest records.

[^ 14] Officers must check DOS's reciprocity tables to determine a country's police clearance availability.

[^ 15] For more information on home study requirements, see Chapter 4, Home Studies [5 USCIS-PM B.4].

[^ 16] USCIS requires an original home study (not a photocopy) with original signature.

[^ 17] The PAP may submit the suitability application without the home study only if an exception applies because the PAP's state of residence must review and directly forward the home study to USCIS. See instructions for Application for Determination of Suitability to Adopt a Child from a Convention Country (Form I-800A).

[^ 18] For examples of reasons that require a home study update and home study update requirements, see Chapter 5, Action on Pending or Approved Suitability Determinations [5 USCIS-PM B.5]. If the PAP submits an updated home study, the PAP must include a copy of the original home study that is being updated, including any prior updates.

[^ 19] For more information on filing timeframes, see Volume 1, General Policies and Procedures, Part B, Submission of Benefit Requests, Chapter 6, Submitting Requests, Section D, Filing Periods Ending on Weekends or Federal Holidays [1 USCIS-PM B.6(D)].

[^ 20] See Chapter 5, Action on Pending or Approved Suitability Determinations, Section B, Validity Periods and Extensions [5 USCIS-PM B.5(B)].

Chapter 4 - Home Studies

A. Purpose and Scope

A home study is a process where a licensed or authorized home study preparer screens and prepares prospective adoptive parents (PAPs) for adoption. A home study concludes with a report that makes recommendations about a PAP's suitability to adopt based on the assessments described in this chapter. Home studies must address all required content,[1] but USCIS does not have a required format. Home studies must comply with applicable laws and policies in the:

- PAP's place of residence (U.S. state or territory, or foreign country);
- Child's country of origin; and
- United States (federal laws governing adoption and immigration).[2]

Summary of Home Study Requirements

Requirement	Summary

Requirement	Summary
Authorized home study preparers	Only licensed or authorized persons or agencies may conduct home studies.
Visits and interviews	The home study preparer must conduct at least one interview in-person and at least one home visit with the PAP, at least one interview with any adult member of the household (AMH), and observe any children in the home, when possible.
Household member information	The home study preparer must assess the impact of each household member (PAP, AMH, and child in the home) on the suitability of the PAP's household.
Family history	The home study preparer must assess the PAP's family and parenting history.
Living accommodations	The home study preparer must assess the suitability of the PAP's living accommodations.
PAP immigration status	The home study preparer must ask the PAPs about their citizenship and immigration status. If the applicant's spouse resides in the United States and does not have lawful permanent resident status, the home study preparer should address any impact this may have on the stability of the home so USCIS can evaluate if the family's situation is sufficiently stable to be found suitable.
Financial resources	The home study preparer must assess the PAP's ability to financially support adopted child(ren).
Physical, medical, emotional, and behavioral health	The home study preparer must assess the physical, mental, emotional, and behavioral health of all household members (the PAP, AMH, and children in the home, as applicable).
Criminal history and history of abuse or violence	The home study preparer must assess if any household member (the PAP, AMH, and children in the home, as applicable) has a criminal history or history of abuse or violence as an offender, including child abuse, sexual abuse, family or domestic violence, substance abuse and criminal activity, and if so, the impact on suitability.
Child abuse registry check	The home study preparer must ensure a check has been done with any available child abuse registries[3] for any state, territory, or foreign country in which a PAP or any AMH has resided since their 18th birthday.
Evidence of rehabilitation	If the PAP or any household member has a criminal history, or a history of any kind of abuse or violence as an offender, the home study preparer may only make a favorable finding if the person has achieved appropriate rehabilitation.
Prior home studies	The home study preparer must evaluate the relevance of any prior or terminated home studies on suitability.
Preparation and training	The home study preparer must ensure the PAP receives the required number of hours of preparation and training unless an exemption applies. The home study should summarize training provided and plans for any future training and preparation.
Country-specific requirements	The home study preparer must assess the PAP's suitability specific to each country from which they may adopt.
State-specific requirements	The home study preparer must prepare the home study according to the requirements that apply to a domestic adoption in the state of residence if the PAP's actual or proposed residence is in the United States.
Special needs-specific requirements	If the PAP seeks to adopt a child with special needs, the home study preparer must assess the PAP's ability to care for a child with special needs.
Specific recommendation for adoptions	The home study preparer must make specific recommendations for adoption based on their assessment of the PAP's suitability. The home study preparer must address any potential problem areas in their assessment. This includes making a referral to an appropriate licensed professional for an evaluation and written report.
Duty of disclosure	The home study preparer must advise the PAP and any AMH of the ongoing duty of disclosure throughout the intercountry adoption process.
Review, signature, and attestation	An accredited agency[4] must review and approve the home study if not performed in the first instance by an accredited agency, unless a public domestic or public foreign authority conducted the home study.
Validity	The home study, or the most recent update, cannot be more than 6 months old at the time of submission to USCIS. If a home study will be more than 6 months old at the time of submission to USCIS, it must be updated before submission.

Authorized Home Study Preparers: Requirements

Only licensed or authorized persons or agencies may conduct home studies.[5] The home study preparer (other than a public domestic or public foreign authority) must hold any license or other authorization required under the law of the jurisdiction where the home study provider conducts the home study.[6] The following table provides an overview of who can be an authorized home study preparer for PAPs who reside in the United States and for those who reside outside of the United States.[7]

Overview of Authorized Home Study Preparers

Home Study Preparer	PAPs Residing in the United States	PAPs Residing Outside the United States
Accredited Agency	X	X
Approved Person	X	X
Supervised Provider	X	X
Exempted Provider	X	
Public Domestic Authority	X	

Home Study Preparer	PAPs Residing in the United States	PAPs Residing Outside the United States
Public Foreign Authority		X

Statement of Home Study Preparer's Authority

The home study preparer must include a statement of the preparer's authority to conduct home studies.[8] The statement must:

- Specify the state, territory, or country under whose authority the home study preparer is licensed or authorized;
- Cite the specific law or regulation authorizing the preparer to conduct home studies;
- Indicate the license number and expiration date, if any, of the home study preparer's authorization or license; and
- Specify the basis[9] for this authorization.

B. Visits and Interviews

1. Requirements

Prospective Adoptive Parents

The home study preparer must conduct at least one interview in-person and at least one home visit with the PAP.[10]

Adult Members of the Household

The home study preparer must conduct at least one interview with any additional adult member of the household (AMH).[11] The interview should be in-person, unless the home study preparer determines that an in-person interview is not reasonably feasible and explains the reason for this conclusion.[12]

Children in the Home

When possible, the home study preparer should observe in-person any child in the home during the home visit or at some point during the home study process. If observation is not possible, the home study preparer should explain why.

2. Required Home Study Content

The home study must address[13] the:

- Number of interviews and home visits;
- Participants, dates, and locations of each contact, interview, and visit; and
- If the home study preparer did not interview an AMH in person or observe a child in the home, an explanation of why it was not feasible.

C. Household Member Information

1. Required Assessment

The home study preparer must assess the impact of each household member (both children and adults) on the suitability of the PAP's household.[14] An adult household member may also include a person who is not yet 18 years old, or a person who does not actually live at the same residence, but whose presence in the household impacts suitability.[15]

2. Required Home Study Content

The home study must identify each household member (PAP, AMH, and child in the home) by name, alien registration number (if any), date of birth, and country of birth. For any AMH and child in the home, the home study must also indicate the relationship to the PAP.[16]

The home study must describe each household member, including how the household member's characteristics impact the overall suitability of the household and the PAP's ability to care for adopted children. The home study preparer should include the following:

- Each person's overall well-being, including physical, mental, emotional, and behavioral health;
- Any special needs;
- Any criminal history or history of arrest or investigation;
- Any history of abuse (sexual, substance, or child abuse) or family violence as an offender even if it did not result in an arrest or conviction;
- Any evidence of rehabilitation;
- Any potential problems areas; and
- Any additional information about the person that is relevant to the overall suitability of the home and the applicant's ability to care for adopted children.

D. Family History

1. Required Assessment

To assess the PAP's family history and ability to parent adopted children,[17] the home study preparer must assess the PAP's family and parenting history. This includes any biological children and any children for whom the PAP was the primary care provider,[18] even if such children no longer reside in the PAP's home.

2. Required Home Study Content

The home study must discuss the PAP's parenting experience with any such children, including the relationship to the PAP, the circumstances of the relationship, and the termination of such relationship (if applicable).

E. Living Accommodations

1. Required Assessment

The home study preparer must assess the suitability of the PAP's living accommodations.[19]

2. Required Home Study Content

The home study must include:

- A detailed description of the PAP's current living accommodations;
- A description of the PAP's intended living accommodations (if moving or if the PAP lives outside the United States and intends to move to an identified residence in the United States);
- A determination of which properties the PAP uses as a primary residence and which properties are used for other purposes (if the PAP owns more than one property);
- A determination of whether the living space meets any applicable state requirements, or a statement that no requirements exist; and
- An assessment of the suitability of the living accommodations.

F. PAP Immigration Status

1. Assessments

The home study preparer should ask the PAPs their citizenship and immigration status.[20]

If the applicant's spouse resides in the United States and does not have lawful permanent resident (LPR) status,[21] the home study preparer should ask for an explanation of lawful immigration status.

2. Home Study Content

The home study should indicate the reported U.S. citizenship or immigration status of the PAPs.

If the applicant's spouse resides in the United States and does not have LPR status, the home study preparer should indicate the reason for this so the officer can evaluate if the family's situation is sufficiently stable to be found suitable.[22]

G. Financial Resources

1. Required Assessment

The home study preparer must assess the PAP's ability to financially support adopted children.[23]

Any income designated for the support of children in the PAP's care (such as foster care subsidies), or any income designated for the support of another member of the household, cannot be counted towards the financial resources available for the support of the prospective adoptive children. In addition, financial contributions from other family members (such as AMHs) cannot be counted towards the PAP's financial resources.

2. Required Home Study Content

The home study must include:

- A description of the PAP's income, financial resources, debts, and expenses;
- A statement summarizing the evidence the home study preparer considered in verifying the PAP's financial resources; and
- An assessment of the PAP's financial suitability.

H. Physical, Medical, Emotional, and Behavioral Health

1. Required Assessment

The home study preparer must assess the physical, mental, emotional, and behavioral health of all household members (the PAP, any AMH, and any children in the home).[24]

2. Required Home Study Content

The home study must include the following as it relates to all household members:

- A general description of their current physical, mental, emotional, and behavioral health; and
- A description of any history of illness or mental, emotional, psychological, or behavioral instability that may adversely impact the suitability of the home.[25]

I. Criminal History and History of Abuse or Violence

1. Required Assessment

The home study provider must assess if any household member (PAP, AMH, or children in the home) has a criminal history or history of abuse or violence as an offender.[26] USCIS considers someone to have a history of abuse or violence even if it only happened once, and even if the incident did not result in an arrest or conviction. The home study preparer must assess the history of all types of abuse, violence, or criminal history as an offender, including:

- Child abuse (including neglect and unregulated custody transfer);
- Sexual abuse;
- Family or domestic violence;
- Drug or alcohol abuse (substance abuse); and
- Criminal activity.

The home study provider must ask the PAP and any AMH to disclose any criminal history and any history of abuse or violence as an offender.[27] The home study provider should also ask if any of the child household members have any criminal history or any other history of abuse or violence as an offender by asking the child's parents or the child (if age appropriate).

Child Abuse Registries

The home study provider must ensure a check has been done with any available child abuse registries[28] for any state, territory, or foreign country in which a PAP or any AMH has resided since their 18th birthday.[29] If a country no longer exists or if its name has changed, the home study preparer must identify the geographic location where the PAP or any AMH lived to determine what country it is now and check its child abuse registry. If a country's border has changed, the home study preparer must generally check with both the new and former country.

The following table outlines how a home study provider should conduct the registry check and secure consents, depending on the applicable law.

Child Abuse Registry Check

If the law of the state, territory, or foreign country where the PAP or AMH resided …	Then (for the PAP and any AMH)…
Allows the home study preparer to access the child abuse registry information[30]	The home study preparer must submit a written records request to the child abuse registry.
Only allows a home study preparer to check a child abuse registry with a person's consent	The home study preparer must obtain the PAP's and AMH's consent and submit a written records request to the child abuse registry.[31]
Only allows the release of child abuse registry information to the subject of the record	The PAP and any AMH must obtain the information from the registry and provide it to the home study preparer.[32]
Does not allow the release of registry information to the home study preparer or the subject of the record	The home study preparer must address the unavailability of the information in the home study.

A home study provider may proceed with the home study without the results of available child abuse registries if at least 6 months have gone by since making the request, and the jurisdiction has not released the information. The home study preparer must address the unavailability of the information in the home study, including efforts made to obtain the results.[33]

Child abuse registry checks cannot be more than 15 months old[34] at the time the home study preparer signs the home study.

Child Abuse or Neglect and Custody Transfers

As part of the home study preparer's assessment of any history of child abuse or neglect, the home study preparer must assess the involvement of the PAP and any AMH in any custody transfers of children, including:

- Unregulated custody transfers (also known as rehoming);[35] and
- Terminations of prior adoptive placements (known as an adoption disruption or dissolution).[36]

Not all custody transfers of children involve child abuse or neglect. The home study preparer must ask the PAP and any AMH if they ever transferred or received permanent custody of a child. The home study preparer must then ask more narrow questions to determine if the custody transfer was an unregulated custody transfer or involved other child abuse or neglect.

If the PAP or any AMH has been involved in an unregulated custody transfer or an adoption disruption or dissolution, the home study preparer must assess the impact on the suitability and address whether the PAP or any AMH involved has been appropriately rehabilitated, as applicable.

Substance Abuse

The home study preparer must evaluate suitability in light of any history of substance abuse by the PAP or any member of the household, including child household members, as age appropriate.[37] USCIS considers a person to have a history of substance abuse if current or past use of alcohol, controlled substances,[38] or other substances impaired or impairs the person's ability to fulfill obligations at work, school, or home, or creates other social or interpersonal problems that may adversely affect suitability.

Rehabilitation

If the PAP or any household member has a criminal history, or a history of any kind of abuse or violence as an offender, the home study preparer may only make a favorable finding if the person has achieved appropriate rehabilitation.

A home study preparer[39] cannot make a favorable recommendation based on rehabilitation while the PAP or household member is on probation, parole, supervised release, or other similar arrangement for a conviction.[40]

2. Required Home Study Content

Required Questions

The home study must include responses for PAPs and AMHs to the questions listed below. USCIS requires each person's direct response to the questions on their history. For child household members, USCIS permits the information to come from the child's parents or legal guardians, or the child, as is age appropriate. The questions include:

- Whether the person has any arrests, convictions, or investigations in the United States or outside the United States (other than minor traffic and parking violations);[41] and
- Whether the person has a history as an offender of substance abuse, sexual or child abuse (including any unregulated custody transfers), or family violence even if it did not result in an arrest or conviction.[42]

Child Abuse Registries and Background Check Results

The home study must include results of the child abuse registry checks[43] for every state, territory, or foreign country in which the PAP or any AMH has resided since the person's 18th birthday. The home study must indicate that each check:

- Was completed and:
  - A record was found and a summary of the results; or
  - No record was found to exist; or
- Was not completed because the state, territory, or foreign country:
  - Will not release information to the home study preparer or anyone in the household,
  - Has not released the information and at least 6 months have passed since the request was made; or
  - The state, territory, or foreign country does not have a child abuse registry.

Child Abuse or Neglect and Custody Transfers

The home study must indicate if the PAP or any AMH has ever been involved in a child custody transfer, and if so, describe the circumstances. The home study must indicate if circumstances involved an unregulated child custody transfer or other child abuse or neglect, and if so, discuss the impact on suitability and rehabilitation of the PAP or AMH involved.

Description and Summary of Each Incident

For each household member's incident of abuse, violence, or criminal activity (even if the person was not arrested or convicted) and for each arrest or conviction, the home study must include the:[44]

- Relevant dates or time periods;
- Details of any mitigating circumstances; and
- A statement whether the information was disclosed by the PAP, AMH, or child (as age appropriate) or if it was discovered by the home study preparer.

Impact on Suitability and Rehabilitation Assessment

The home study must contain an evaluation of suitability in light of any household member's criminal history or history of abuse or violence as an offender.[45] This must include a discussion of any rehabilitation that demonstrates suitability, including:[46]

- An evaluation of the seriousness of any relevant arrest(s), conviction(s), and history of abuse;
- The number of such incidents;
- The length of time since the last incident;
- The offender's acceptance of responsibility for the offender's conduct; and
- Any counseling or rehabilitation programs the person has successfully completed or a written opinion by an appropriate licensed professional.

3. Required Supporting Documentation

The PAP must submit the following to the home study preparer for consideration in the preparer's assessment:[47]

- A statement disclosing and describing any history of abuse, violence, or criminal history as an offender, including mitigating circumstances, signed under penalty of perjury, by the household member that committed the abuse, violence, or criminal activity; and
- A certified copy of the documentation showing the final disposition of each incident which resulted in arrest, indictment, conviction, or any other judicial or administrative action.

The PAP must also attach this documentation to the home study for USCIS' review.

J. Prior Home Studies

1. Required Assessment

The home study preparer must evaluate the relevance of any prior home studies on suitability.[48] The home study preparer must ask each PAP and all AMH whether the person previously underwent any sort of home study assessment for any form of custodial care (domestic or intercountry), whether or not it was completed, and the outcome. If so, the home study preparer must review any prior home study reports as part of their assessment, if the report is available.

2. Required Home Study Content

The home study must:

- Include the PAP's and any AMH's response to the question on whether they have been the subject of any prior home studies;
- If applicable, identify the agency involved in each prior or terminated home study and the dates the prior home study process began and ended;
- If applicable, indicate the outcome of the home study, including whether a favorable recommendation was made, or if the home study was terminated before a recommendation was made, why it was terminated;
- If applicable, indicate if the prior home study is available, and if not, include an explanation why; and
- If applicable, include an evaluation of the relevance of any prior unfavorable or incomplete home study on the PAP's suitability.

3. Supporting Documentation

The PAP or any AMH must submit to the home study preparer, for the home study preparer to consider in the home study assessment, a copy of any previous rejections or unfavorable home studies. Copies of any such available prior home studies must be attached to the home study.

K. Preparation and Training

1. Required Assessment

The PAP must receive the required number of hours of preparation and training unless an exemption applies.[49] The home study preparer must ensure the PAP receives the required preparation and training necessary to promote a successful intercountry adoption,[50] including discussing with the PAP:

- The intercountry adoption process, including the requirements, expenses, challenges, and timeframes; and
- The adjustment of adopted children and parenting.

The home study preparer must tailor the preparation and training to the PAP's particular situation.[51]

2. Required Home Study Content

The home study must contain a summary of:[52]

- The preparation and training given to the PAP(s);
- Plans for future preparation and training; and
- Any plans for post-placement monitoring, in the event the child will be adopted in the United States rather than outside the United States.

L. Country-Specific Requirements

1. Required Assessment

The home study preparer must assess the PAP's suitability as it specifically relates to each country from which the PAP may adopt.[53]

2. Required Home Study Content

The home study must be tailored to the specific country from which the PAP intends to adopt.[54] This means that the home study should include a full and complete statement of all facts relevant to the PAP's eligibility for adoption in that country, in light of the country's specific requirements (if any).[55] If the PAP may adopt from more than one country, the home study must separately assess the PAP's suitability to each specific country.

M. State-Specific Requirements

1. Required Assessment

The home study preparer must prepare the home study according to the requirements that apply to a domestic adoption in the state[56] of the PAP's actual or proposed residence in the United States.[57] If the PAP resides outside of the United States and has no actual or proposed residence in the United States, then state law standards generally do not apply unless the PAP intends to finalize the child's adoption in the United States.[58]

If the child will be coming to the United States for adoption, then the home study preparer must discuss with the PAP, the PAP's ability to comply with any pre-adoption and post-adoption requirements in the state in which the child will reside.[59] Children come to the United States for adoption if:

- The PAP will not complete the adoption outside the United States (but will only obtain legal custody for the purposes of emigration to the United States for adoption);
- Only one parent of a married couple adopts the child outside the United States; or
- In orphan cases, neither parent saw or observed the child before or during the adoption proceedings.

2. Required Home Study Content

The home study must:

- Comply with any requirements of the PAP's state of residence; and
- Indicate if the child will be coming to the United States for adoption.

If the child will be coming to the United States for adoption, the home study must also:

- Describe any pre-adoption requirements for any state(s) in which the child will reside, and:
  - Cite any relevant state statutes and regulations and the steps the PAP has taken or will take to comply; or
  - Explain that the state(s) of intended residence do not have any pre-adoption requirements;[60] and
- Describe plans for post-placement monitoring.[61]

N. Special Needs-Specific Requirements

1. Required Assessment

If the PAP seeks to adopt a child with special needs, the home study preparer must assess the PAP's ability to care for a child with special needs.[62]

2. Required Home Study Content

The home study must include a discussion of the preparation, willingness, and the PAP's ability to provide proper care to a child with special needs.[63]

O. Specific Recommendation for Adoption

1. Required Assessment

The home study preparer must make specific recommendations for adoption based on the preparer's assessment of the PAP's suitability.[64]

The home study preparer must address any potential problem areas in the assessment.[65] This includes making a referral to an appropriate licensed professional for an evaluation and written report if:[66]

- The home study preparer determines that there are issues beyond the preparer's expertise that need to be further assessed; or
- The state law of the PAP's actual or proposed place of residence would require such a referral for a domestic adoption.

2. Required Home Study Content

The home study must include a specific recommendation and discussion of the reasons for the recommendation.[67] The recommendation must state:

- The number of children the PAP is recommended to adopt;
- The country or countries from which the PAP is recommended to adopt;
- Any specific restrictions, such as age, sex, or other characteristics (for example, special needs) of the child(ren) the PAP is recommended to adopt; and
- If the PAP has been specifically approved to adopt a child with special needs (if applicable).

The home study recommendations must address suitability in light of any potential problems. This includes indicating if the home study preparer made any referrals for additional or outside evaluations, and if so, the home study preparer's assessment of the impact of the outside report on the suitability.[68]

3. Supporting Documentation

The PAP must submit to the home study preparer, for the home study preparer to consider in the home study assessment, a copy of any outside evaluation(s) that was conducted to help assess suitability (such as a psychological or psychiatric exam). Such outside evaluations must be attached to the home study.[69]

P. Duty of Disclosure

1. Requirements

The home study preparer must advise the PAP and any AMH of the duty of disclosure.[70] This duty includes the need for the PAP and any AMH to:

- Give true and complete information to the home study preparer;
- Disclose any other relevant information, such as physical, mental, or emotional health problems or behavioral issues;
- Disclose any arrest, conviction, or other criminal history, whether in the United States or outside the United States, even if the record of the arrest, conviction, or other criminal history was expunged, sealed, pardoned, or otherwise cleared;[71]
- Disclose any history of substance abuse, sexual abuse, child abuse or neglect, or family violence as an offender,[72] even if closed or unsubstantiated; and
- Notify the home study preparer and USCIS of any new event or information that might require them to submit an updated home study.[73]

The PAP and any AMH have an ongoing duty of disclosure throughout the intercountry adoption process.[74] The duty of disclosure continues until:[75]

- There is a final decision admitting the child to the United States with a visa; or
- Final approval of the immigration petition for PAPs who reside outside the United States and do not intend to immediately seek an immigrant visa for their child.[76]

USCIS requires the PAP and any AMH to notify the home study preparer and USCIS of any of the above outlined significant changes. The PAP should provide this notification within the timeframes outlined in the following table.

Notification Timeframes

If…	Then the PAP should notify USCIS and the home study preparer…[77]
The suitability application or request for action on an approved suitability application is pending	Immediately
USCIS has approved the suitability application or request for action on an approved suitability application, but the PAP has not yet filed the child's petition	• As soon as practical (generally within 30 days of the event), if the change is related to criminal history or other history of abuse or violence as an offender; or • Within 30 days of the event, or at the next suitability determination point,[78] if the change is *not* related to criminal history or other history of abuse or violence as an offender
The child's petition is pending or approved, but the child has not yet been admitted to the United States[79]	Immediately

2. Required Home Study Content

The home study preparer must sign under penalty of perjury that they have advised the PAP and any AMH of the duty of disclosure.[80]

Q. Review, Signature, and Attestation

1. Requirements

The home study preparer must sign the home study, include a declaration, and date the home study (and any updates). The home study preparer's signature on the home study (and any updates) must be original.

An accredited agency must review and approve the home study if not completed in the first instance by an accredited agency, unless a public domestic or public foreign authority conducted the home study.[81] Therefore, if an approved person, supervised provider, or exempted provider conducted the home study, an accredited agency must review and approve the home study before the PAP submits it to USCIS.[82]

If the PAP resides in a state that requires the state's (child welfare) authorities to review the home study, such review must occur and be documented before the home study is submitted to USCIS.[83]

2. Required Home Study Content

The home study preparer (or if the home study is prepared by an entity, the officer or employee who has authority to sign the home study for the entity) must personally sign the home study. The preparer must declare, under penalty of perjury under U.S. law, that:

- The home study was either conducted or supervised by the person signing as the home study preparer. If the home study preparer did not conduct the study, then the home study must identify the person who conducted the home study;[84]
- The factual statements in the home study are true and correct, to the best of the signer's knowledge;[85] and
- The home study preparer has advised the PAP and any AMH of the duty of disclosure, and that their duty to disclose is ongoing until there is a final decision admitting the child to the United States with a visa, or if the PAP resides outside the United States and does not intend to immediately seek an immigrant visa for the child, until petition approval.[86]

The home study must indicate whether the PAP's state of residence requires the state's (child welfare) authorities to review the home study.[87]

3. Supporting Documentation

The home study preparer must attach evidence of:

- The home study preparer's certification;
- Review of the home study by the state's competent authority (to review home studies), if the PAP resides in a state which requires such review; and
- Review and approval by an accredited agency, if required.

Footnotes

[^ 1] See 8 CFR 204.311. See 22 CFR 96.47.

[^ 2] Regardless of whether the PAP resides within or outside of the United States, the home study must meet all applicable USCIS and U.S. Department of State (DOS) requirements. See 8 CFR 204.311. See 22 CFR 96.47.

[^ 3] See the Child Abuse Registries in Foreign Countries and Geographic Entities webpage.

[^ 4] See DOS's Adoption Service Provider Search webpage.

[^ 5] See 22 CFR 96.

[^ 6] See 8 CFR 204.311(b).

[^ 7] See 8 CFR 204.301 and 22 CFR 96.2 for definitions related to home study preparers. The Hague Adoption Convention and the DOS regulations at 22 CFR 96 distinguish between an agency (a private non-profit organization) and a person (an individual person or for-profit entity).

[^ 8] See 8 CFR 204.311(s). See 22 CFR 96. If the PAP resides outside the United States, the home study provider may first contact the central authority in a Hague Adoption Convention country, or the competent adoption authority in a non-Hague country, to determine what laws might apply in a particular jurisdiction outside the United States. If the foreign country does not have any laws on the subject, then the home study preparer need only comply with U.S. requirements and should indicate this in the statement. Since the home study preparer must be licensed or authorized to complete home studies in the jurisdiction where the home study is completed, the license or authorization in the foreign jurisdiction may require the home study preparer to also apply the local jurisdiction's home study standards. For example, the home study might also evaluate suitability in accordance with the local standards where the PAP resides outside the United States.

[^ 9] See 22 CFR 96.

[^ 10] See 8 CFR 204.311(g)(1). USCIS does not require that the home study preparer conduct more than one in-person interview or home visit unless the family has moved, the law of the jurisdiction requires it, or the home study preparer requires it. For information on requirements for updated home studies, see Chapter 5, Action on Pending or Approved Suitability Determinations [5 USCIS-PM B.5]. If the PAP temporarily resides outside the United States during the adoption process, but intends to return to the United States after the adoption, it may be possible to facilitate the requirements of the home study by traveling to the United States or coordinating with the home study preparer to conduct a personal interview outside the United States.

[^ 11] See 8 CFR 204.311(c)(3). See 8 CFR 204.311(g)(2).

[^ 12] See 8 CFR 204.311(g)(2).

[^ 13] See 8 CFR 204.311(c)(7). See 8 CFR 204.311(g).

[^ 14] See 8 CFR 204.311(c)(3). See 8 CFR 204.311(g)(3).

[^ 15] See the definition of adult member of the household at 8 CFR 204.301 which includes a person under 18 years of age if USCIS determines the person impacts the suitability of the household.

[^ 16] See 8 CFR 204.311(c)(2).

[^ 17] See 8 CFR 204.311(g)(3).

[^ 18] For example, experience as a foster parent or kinship care provider.

[^ 19] See 8 CFR 204.311(o).

[^ 20] The applicant must be a U.S. citizen. For more information on immigration status eligibility requirements for the orphan process, see Chapter 2, Eligibility, Documentation and Evidence (Orphan Process) [5 USCIS-PM B.2]. For more information on immigration status eligibility requirements for the Hague process, see Chapter 3, Eligibility, Documentation and Evidence (Hague Process) [5 USCIS-PM B.3].

[^ 21] If married, the applicant's spouse must be in lawful immigration status if residing in the United States. For more information on PAP immigration status eligibility requirements for the orphan process, see Chapter 2, Eligibility, Documentation and Evidence (Orphan Process) [5 USCIS-PM B.2]. For more information on PAP immigration status eligibility requirements for the Hague process, see Chapter 3, Eligibility, Documentation and Evidence (Hague Process) [5 USCIS-PM B.3].

[^ 22] See 8 CFR 204.307(a)(3).

[^ 23] See 8 CFR 204.311(h).

[^ 24] See 8 CFR 204.311(c)(15). See 8 CFR 204.311(m). See 8 CFR 204.311(d)(1)(iii).

[^ 25] For information on outside professional evaluations if a PAP's or AMH's history of psychiatric care or other abuse requires further assessment, see Section O, Specific Recommendation for Adoption [5 USCIS-PM B.4(O)].

[^ 26] For information on outside professional evaluations if a PAP's or AMH's criminal history or history of abuse or violence as an offender requires further assessment, see Section O, Specific Recommendation for Adoption [5 USCIS-PM B.4(O)].

[^ 27] See 8 CFR 204.311(j) and 8 CFR 204.311(k). See 8 CFR 204.311(d)(1)(ii).

[^ 28] See the Child Abuse Registries in Foreign Countries and Geographic Entities webpage.

[^ 29] See 8 CFR 204.311(i).

[^ 30] See 8 CFR 204.311(i)(1).

[^ 31] See 8 CFR 204.311(i)(2).

[^ 32] See 8 CFR 204.311(i)(3).

[^ 33] See 8 CFR 204.311(i)(4).

[^ 34] For more information on child abuse registry checks, see the Guidance on Determining Suitability of Prospective Adoptive Parents for Intercountry Adoption, PM-602-0165, issued November 9, 2018.

[^ 35] An unregulated custody transfer occurs when a parent places a child in the care of other persons with the intent to transfer permanent custody of the child, or receives a child with the intent to gain permanent custody, without involving child welfare authorities or following the law of their place of residence. USCIS considers unregulated custody transfers to be a form of child abuse or neglect. The Child Abuse Prevention and Treatment Act (CAPTA) identifies a minimum set of acts or behaviors that define child abuse and neglect, which include: "any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation" or "an act or failure to act which presents an imminent risk of serious harm." See CAPTA Reauthorization Act of 2010, Pub. L. 111-320 (PDF) , 124 Stat. 3482 (December 20, 2010). See the Child Welfare Information Gateway's Definitions of Child Abuse & Neglect webpage.

[^ 36] An adoption disruption occurs when a PAP (or a custodian escorting the child on the PAP's behalf) is granted legal custody of the child, but the placement terminates before the PAP finalizes the adoption. An adoption dissolution occurs when the legal relationship between the child and the adoptive parent(s) is severed, either voluntarily or involuntarily, after the adoption is legally finalized.

[^ 37] See 8 CFR 204.311(c)(14).

[^ 38] See 21 U.S.C 802 for federal definition of "controlled substance."

[^ 39] For information on when USCIS cannot make a favorable recommendation, see Chapter 6, Adjudication, Section B, USCIS Actions and Decisions, Subsection 4, Denials [5 USCIS-PM B.6(B)(4)].

[^ 40] See 8 CFR 204.311(l).

[^ 41] See 8 CFR 204.311(k).

[^ 42] See 8 CFR 204.311(j).

[^ 43] See 8 CFR 204.311(i).

[^ 44] See 8 CFR 204.311(d). See 8 CFR 204.311(j)(1)-(3). 8 CFR 204.311(k).

[^ 45] See 8 CFR 204.311(c)(14).

[^ 46] See 8 CFR 204.311(l).

[^ 47] See 8 CFR 204.311(j).

[^ 48] See 8 CFR 204.311(n).

[^ 49] See 22 CFR 96.48(a) (hours requirement). See 22 CFR 96.48(g) (exemption).

[^ 50] For information on required preparation and training, see 22 CFR 96.48.

[^ 51] See 8 CFR 204.311(c)(1).

[^ 52] See 8 CFR 204.311(c)(8).

[^ 53] The child's country of origin determines how to apply its own adoption requirements in a given case.

[^ 54] See 8 CFR 204.311(c)(1). See 8 CFR 204.311(q).

[^ 55] For general information on other countries' requirements, see DOS's Country Information webpage.

[^ 56] See the Child Welfare Information Gateway's State Laws Related to Adoption webpage.

[^ 57] See 8 CFR 204.311(e).

[^ 58] The PAP is also not required to provide a permanent or temporary address in the United States in order to complete a home study.

[^ 59] See 8 CFR 204.305. See 8 CFR 204.311(c)(8).

[^ 60] See 8 CFR 204.3(c)(1)(iv). See 8 CFR 204.305. See 8 CFR 204.310(a)(3)(vii). See 8 CFR 204.311(u)(1)(vii).

[^ 61] See 8 CFR 204.311(c)(8). See 22 CFR 96.50.

[^ 62] See 8 CFR 204.311(p).

[^ 63] See 8 CFR 204.311(p).

[^ 64] See 8 CFR 204.311(r).

[^ 65] See 8 CFR 204.311(c)(5).

[^ 66] See 8 CFR 204.311(g)(4).

[^ 67] See 8 CFR 204.311(r).

[^ 68] See 8 CFR 204.311(g)(4). See 8 CFR 204.311(c)(5). See 8 CFR 204.311(c)(9).

[^ 69] See 8 CFR 204.311(c)(5).

[^ 70] See 8 CFR 204.311(f)(3).

[^ 71] See 8 CFR 204.311(d)(ii). The fact that an arrest or conviction or other criminal history was expunged, sealed, pardoned, or the subject of any other amelioration does not relieve the PAP or additional member of the household of the obligation to disclose. See 8 CFR 204.309(a). See 8 CFR 204.3(h)(4).

[^ 72] See 8 CFR 204.309(a)(1).

[^ 73] See Chapter 5, Action on Pending or Approved Suitability Determinations [5 USCIS-PM B.5].

[^ 74] See 8 CFR 204.311(d).

[^ 75] For a list of these significant events, see Chapter 5, Action on Pending or Approved Suitability Determinations, Section C, Significant Changes [5 USCIS-PM B.5(C)].

[^ 76] For a PAP who resides outside the United States, the duty of disclosure continues until the child has been admitted. However, if a PAP does not intend to immediately seek an immigrant visa for the child, this duty of disclosure will generally be limited to the petition approval.

[^ 77] For more information on filing timeframes, see Volume 1, General Policies and Procedures, Part B, Submission of Benefit Requests, Chapter 6, Submitting Requests, Section D, Filing Periods Ending on Weekends or Federal Holidays [1 USCIS-PM B.6(D)].

[^ 78] For a summary of suitability determination points, see Chapter 1, Purpose and Background, Section C, Background [5 USCIS-PM B.1(C)].

[^ 79] If the PAP resides outside the United States and immediately seeks an immigrant visa for the child, the PAP must notify USCIS and the home study provider of a significant change.

[^ 80] See 8 CFR 204.311(f)(3).

[^ 81] For information on how to search for accredited agencies and approved persons, see DOS's Adoption Service Provider webpage. If home study review and approval is needed, the date of the home study preparer's signature (and not the reviewer and approver's signature) is the applicable date for the purposes of the requirement that the home study be no more than 6 months old at the time it is submitted to USCIS.

[^ 82] See 22 CFR 96.47(c).

[^ 83] See 8 CFR 204.311(t).

[^ 84] See 8 CFR 204.311(f)(1).

[^ 85] See 8 CFR 204.311(f)(2).

[^ 86] See 8 CFR 204.311(f)(3). For a PAP who resides outside the United States and does not intend to immediately seek an immigrant visa for the child, the notice requirement extends to the Form I-600 or Form I-800 approval. However, the duty of disclosure continues until the child is admitted to the United States with a visa. If circumstances change and a PAP seeks a visa for the admission of the child to the United States the PAP should notify USCIS and the home study provider of a significant change.

[^ 87] See 8 CFR 204.311(t).

Chapter 5 - Action on Pending or Approved Suitability Determinations

A. Overview

Throughout the intercountry adoption process, USCIS must be satisfied that the prospective adoptive parent (PAP) remains suitable to adopt a child. Therefore, it may be necessary for the PAP to request action on a pending or approved suitability determination.

The PAP must submit an updated home study[1] when any of the following occur before the child immigrates to the United States or before final approval of the child's immigration petition if the child and PAP will reside outside the United States and do not seek an immigrant visa for the child:

- The PAP wants to request an extension of the suitability application approval or submit a new suitability application after the approval has expired; or
- There is a significant change (that was not previously assessed).[2]

USCIS does not limit the number of times a home study preparer can update a home study.

PAPs and adult members of the households (AMHs) also may need to update their biometrics throughout the intercountry adoption process.[3] PAPs and AMHs are not required to maintain continuous biometric validity. However, all biometric background check results must be valid for USCIS to approve a:

- Suitability application;
- Request for action on an approved suitability application; or
- Immigration petition (for the child).[4]

B. Validity Periods and Extensions

1. Home Study Validity

The home study, or the most recent update of the home study, cannot be more than 6 months old at the time of submission to USCIS.[5] If a home study will be more than 6 months old at the time of submission to USCIS, the PAP must ensure that it is updated by the home study preparer before submission.

USCIS considers a home study that is valid at the time of submission, to remain valid until the suitability application approval expires or there is a significant change (that was not previously assessed).[6]

2. Suitability Approval

Initial Approval

The initial approval of the suitability application[7] expires 15 months after the date of the approval unless approval is revoked.[8]

Extensions

PAPs seeking a first or second no-fee extension of their suitability application approval must submit a Request for Action on Approved Form I-600A/I-600 (Form I-600A/I-600 Supplement 3) (for the orphan process), or Request for Action on Approved Form I-800A (Form I-800A Supplement 3) (for the Hague Adoption Convention process) and an updated home study before their approval expires and may do so up to 90 days before its expiration. There is no fee for the first or second extension request, but there is a fee for subsequent extensions.[9]

USCIS does not limit the number of extensions that a PAP may request. However, if the PAP's suitability application approval expires before the PAP submits the request, the PAP must file a new suitability application or combination filing (for orphan cases), with the appropriate fee.[10] To request an extension, the PAP files a Request for Action on Approved Form I-600A/I-600 (Form I-600A/I-600 Supplement 3) (for the orphan process) or Request for Action on Approved Form I-800A (Form I-800A Supplement 3) (for the Hague Adoption Convention process) in accordance with form instructions, with the applicable fee.

If USCIS does not approve a request for an extension of an approved suitability application, it does not serve as a revocation or denial of the original approval notice. However, the notice of approved suitability lapses 15 months from the approval of the application. The PAP cannot appeal or challenge the USCIS decision on the extension request. The PAP may file a new suitability application,[11] with the required fee and documentation even if USCIS denied the extension request.

Impact of Filing the Child's Petition

Once a PAP files the child's Petition to Classify Orphan as an Immediate Relative (Form I-600) or Petition to Classify Convention Adoptee as an Immediate Relative (Form I-800), they do not need to continue to extend or file new suitability applications. However, the PAP and any adult household member have an ongoing duty of disclosure throughout the intercountry adoption process, and need to continue to notify USCIS and their home study preparer of any significant changes.

Duplicate Approval Notices

The PAP may obtain a duplicate approval notice by filing a Request for Action on Approved Form I-600A/I-600 (Form I-600A/I-600 Supplement 3) (for the orphan process) or Request for Action on Approved Form I-800A (Form I-800A Supplement 3) (for the Hague Adoption Convention process).[12]

C. Significant Changes

USCIS has the discretion to consider any new information or event that might affect a PAP's suitability to be a significant change that necessitates an updated home study. PAPs must notify USCIS of any significant changes.[13] Significant changes include, but are not limited to, the following:

- A significant change in the PAP's household such as a change of residence, marital status, criminal history, significant decrease in financial resources, or a change in the number or identity of children in the home or of AMHs;[14]
- A change in the number or characteristics of the child(ren) the PAP intends to adopt that was not previously assessed (such as age, sex, nationality, or special needs):[15]
- A change that requires that the home study preparer address state pre-adoption requirements or address a new state's requirements if the child will be coming to the United States for adoption and the last home study submitted did not address these requirements;[16] or
- A change in the country from which the PAP seeks to adopt if the last home study submitted to USCIS did not recommend the PAP for the new country.[17]

If a significant change occurs, the PAP must notify USCIS and submit an updated home study that reflects the significant change, in accordance with the form instructions.[18]

1. Significant Change in the PAP's Household

While the request for a suitability determination[19] is pending, the PAP must notify USCIS in writing of any significant change. After the request for a suitability determination is approved, the PAP must submit a Request for Action on Approved Form I-600A/I-600 (Form I-600A/I-600 Supplement 3) (for the orphan process) or Request for Action on Approved Form I-800A (Form I-800A Supplement 3) (for the Hague Adoption Convention process) to report a significant change with fee,[20] if applicable.

There is no fee associated with requesting an updated suitability approval due to a significant change before the approval of the suitability application. There is a fee for requesting an updated suitability determination based on a significant change after USCIS has made the suitability determination (unless being submitted at the same time as a first-time or second-time request for either an extension or change of country).[21] For any request for an updated suitability approval due to a significant change, the PAP must submit an updated home study.

Significant changes include, but are not limited to, a change in marital status, household composition, residence, financial resources, or criminal history.[22]

Change in Marital Status

If the significant change that occurs is a change in marital status, the PAP must submit a new suitability application with an updated home study. If the PAP is married, the spouse must also sign the new form. If the change in marital status takes place before USCIS approves the suitability application or combination filing, there is no fee. However, if the change in marital status takes place after USCIS has approved the suitability application, combination filing, or request, the PAP must submit a new version of the appropriate form or request with any appropriate fee.[23]

Household Composition

The PAP must submit an updated home study if there is any change in the number or identity of children or AMHs in the PAP's household.

Financial Resources

USCIS generally only considers a change in financial resources to be a significant change if there is significant decrease in the PAP's financial resources that causes reasonable concern about the PAP's financial suitability. This includes, but is not limited to:

- Any decrease or loss of assets that impacts the PAP's financial suitability or puts the PAP's income below the U.S. Department of Health and Human Services' (HHS) poverty guidelines; or
- A significant increase in debts or expenses that would impact the PAP's financial suitability or put the family below the HHS poverty guidelines.[24]

Pregnancy

USCIS generally does not consider pregnancy a significant change unless it significantly impacts the household member's physical, mental, emotional, or behavioral health or significantly decreases the PAP's financial resources.

Once the household member gives birth, if the child is part of the household, USCIS considers this a change in household composition that counts as a significant change.

Miscarriage

USCIS generally does not consider miscarriage a significant change unless it significantly impacts the household member's physical, mental, emotional, or behavioral health or significantly decreases the PAP's financial resources.

Serious Health Conditions

USCIS considers a household member's development of a serious health condition to be a significant change. Serious health conditions include, but are not limited to, heart attacks, heart conditions requiring operation, cancers, strokes, conditions requiring extensive therapy or surgical procedures, chronic obstructive pulmonary disease, severe respiratory conditions or nervous disorders, mental disorders or dementia, and severe injuries.

History as an Offender

USCIS considers any change in criminal history or the history of abuse or violence as an offender (substance use, sexual abuse, child abuse or neglect, or family violence), whether or not it resulted in an arrest or criminal charges, to be a significant change.

Child Placement or Adoption

If multiple children are adopted and enter the household at different times throughout the suitability application validity period, an updated home study addressing the addition of a child into the home and an updated suitability application approval is required.

2. Change of Country

A PAP must request an updated suitability approval to reflect a change of country if the PAP seeks to adopt from a country that is different than what the PAP indicated on the suitability application. A PAP may file for a change of country at any time. USCIS does not limit the number of change of country requests that the PAP may submit.

While the suitability application is pending, the PAP must notify USCIS in writing to request a change of country.[25] After the suitability application is approved, the PAP must submit a Request for Action on Approved Form I-600A/I-600 (Form I-600A/I-600 Supplement 3) (for the orphan process) or Request for Action on Approved Form I-800A (Form I-800A Supplement 3) (for the Hague Adoption Convention process) to request a change of country, with fee,[26] if applicable. There is no fee associated with changes of country before the approval of the suitability application or for the first or second change of country request after the suitability application is approved.[27] There is a fee for any subsequent change of country request.[28] The PAP must submit an updated home study if the prior home study submitted to USCIS did not recommend the PAPs for adoption of a child from the new country.

3. Summary of Change and Update Requirements

The following tables provide a summary of the change and update requirements associated with suitability determinations for either orphan or Hague cases.

Suitability-Related Actions

Requested Action	Type of Request	PAP Submits to USCIS[29]	Fee Requirement
Extend the validity of an approved suitability application	First or second extension	A Request for Action on Approved Form I-600A/I-600 (Form I-600A/I-600 Supplement 3) (for the orphan process) or Request for Action on Approved Form I-800A (Form I-800A Supplement 3) (for the Hague Adoption Convention process)[30]	No fee
Extend the validity of an approved suitability application	Third or subsequent extensions	A Form I-600A/I-600 Supplement 3 or Form I-800A Supplement 3	With fee
Change the country from which the PAP is approved to adopt	Before approval of suitability application	A written notification	No fee
Change the country from which the PAP is approved to adopt[31]	After suitability application is approved – first or second request	A Form I-600A/I-600 Supplement 3 or Form I-800A Supplement 3	No fee
Change the country from which the PAP is approved to adopt[32]	After suitability application is approved – third or additional request	A Form I-600A/I-600 Supplement 3 or Form I-800A Supplement 3	With fee
Notify USCIS of a significant change	Before approval of suitability application or Form I-600 combination filing suitability determination	A written notification	No fee
Notify USCIS of a significant change	After approval of suitability application or Form I-600 combination filing suitability determination	A Form I-600A/I-600 Supplement 3 or Form I-800A Supplement 3	No fee
Notify USCIS of a change in marital status	Before approval of suitability application or Form I-600 combination filing suitability determination	A new suitability application or Form I-600 combination filing	No fee
Notify USCIS of a change in marital status	After approval of suitability application or Form I-600 combination filing suitability determination	A new suitability application or Form I-600 combination filing	With fee

D. Home Study Update Requirements

1. Contact Requirements

USCIS does not require that the home study preparer conduct another home visit unless the PAP has moved,[33] the law of the jurisdiction requires it, or the home study preparer requires it. The home study preparer may conduct the home study update by any means of contact.

The home study update must describe the contacts made to update the home study, including the:

- Number of interviews and visits;

- Participants;
- Date(s); and
- Location and type of each contact (such as home visit, other location, telephonic, email, or video conference).

2. Format

USCIS does not prescribe a set format or length for home study updates. A home study update may be either:

- An update that just addresses the circumstance(s) that require the update; or
- A new and complete home study.

USCIS does not accept addendums or corrections that do not address all necessary requirements.

3. Required Screening and Assessments

The home study preparer must assess if anything has changed since the last home study or home study update. If so, the home study preparer must assess what changed, and any impact on suitability.

The home study preparer must update the required screenings,[34] which requires that the home study preparer:

- Re-ask the questions about abuse or violence;[35]
- Re-ask the questions about criminal history, and if applicable, rehabilitation;[36] and
- Update the child abuse registry checks.[37]

For a home study update, the home study preparer only needs the results of such child abuse registry checks for the current residence and any state or foreign country the PAP or any AMH has resided in since the prior home study or home study update. The home study preparer does not need to recheck child abuse registries for prior residences that were included in a prior home study or prior home study update unless the PAP or any AMH have resided in that state or foreign country since the last check was completed. Child abuse registry checks for the PAP's state of residence and any place they have resided in since the prior home study (or home study update) must be current[38] at the time the home study preparer signs the home study update.

The home study update must:

- Include the dates and results of the required screenings and assessments (the updated child abuse registry check and responses to the questions on criminal history or history of abuse or violence);
- Fully address anything that has changed since the last home study or home study update; and
- Confirm that the other areas of the last home study or home study update have not changed.

4. Recommendation, Signature, and Attestations

The home study update must:

- Include a statement from the preparer that the preparer has reviewed the home study being updated and is personally and fully aware of its contents; and
- Address whether the preparer recommends the PAP and the specific reasons for the recommendation.

The home study preparer must sign and date the home study update. The home study preparer's signature on an update must be original.[39]

5. Supporting Documentation

The home study update must be accompanied by a copy of the home study that is being updated.

E. Biometrics Validity and Updates[40]

PAP and AMH biometric-based background check results are valid for 15 months.

In its discretion, USCIS may update or refresh a biometric-based background check result one-time, without fee, for intercountry adoption cases if the 15-month validity period has or will expire before final adjudication of a PAP's case.[41] When USCIS receives a no-fee extension or a one-time, no-fee biometrics request, USCIS first attempts to refresh PAP and AMH biometrics rather than requiring a new biometrics submission at an Application Support Center (ASC).[42] If, for any reason, USCIS is unable to update or refresh a biometric-based background check result, that person is required to submit biometrics again or failure to do so may result in a denial for abandonment.[43]

F. Hague Adoption Convention Transition Cases

When the Hague Adoption Convention enters into force for a country, cases that meet certain criteria are generally permitted by the new Convention country to proceed as transition cases under the non-Hague Adoption Convention process.[44] Provided that the new Convention country agrees with the transition criteria, USCIS will generally consider a case to be a transition case if, before the date the Convention entered into force for the country, the PAP:

- Filed an Application for Advance Processing of an Orphan Petition (Form I-600A) that designated the transition country as the intended country of adoption or did not designate a specific country and filed the Form I-600 while the Form I-600A approval was still valid;
- Filed a Form I-600 on behalf of a child from the transition country; or
- Completed the adoption in accordance with the country of origins laws and procedures of a child from the transition country.

If the case does not qualify as a transition case, the PAP will generally need to follow the Hague Adoption Convention process with the filing of an Application for Determination of Suitability to Adopt a Child from a Convention Country (Form I-800A) and Petition to Classify Convention Adoptee as an Immediate Relative (Form I-800). There are certain limitations on when a Request for Action on an Approved Form I-600A/I-600 (Form I-600A/I-600 Supplement 3) can be used in the context of transition cases including:

- PAPs may only request a one-time extension of their suitability application approval as a qualified transition case;

- PAPs who designated a non-transition country on their Form I-600A or previously changed countries to a non-transition country generally may not change their Form I-600A approval to a transition country for purposes of being considered a transition case; and
- PAPs with transition cases generally may not request an increase in the number of children they are approved to adopt from a transition country.[45] However, unless prohibited by the new Convention country, PAPs may request an updated suitability approval notice to increase the number of children they are approved to adopt as a transition case only to pursue the adoption of a birth sibling, provided that birth siblings are identified and the Form I-600 petition is filed before the Form I-600A approval expires.[46]

Footnotes

[^ 1] This Part uses the term updated home study or home study update, rather than amended home study or home study amendment. See 8 CFR 204.311(u).

[^ 2] See Section C, Significant Changes [5 USCIS-PM B.5(C)].

[^ 3] For more information, see Chapter 5, Action on Pending or Approved Suitability Determinations, Section E, Biometrics Validity and Updates [5 USCIS-PM B.5(E)].

[^ 4] See the Petition to Classify Orphan as an Immediate Relative (Form I-600). See the Petition to Classify Convention Adoptee as an Immediate Relative (Form I-800).

[^ 5] This means that no more than 6 months have passed since the home study preparer signed and dated the home study. For more information on filing timeframes, see Volume 1, General Policies and Procedures, Part B, Submission of Benefit Requests, Chapter 6, Submitting Requests, Section D, Filing Periods Ending on Weekends or Federal Holidays [1 USCIS-PM B.6(D)].

[^ 6] The jurisdiction where the PAP resides and the country from which they are adopting may have additional requirements for home study updates.

[^ 7] For the Hague Adoption Convention process, see the Application for Determination of Suitability to Adopt a Child from a Convention Country (Form I-800A). For the orphan process, see the Application for Advance Processing of an Orphan Petition (Form I-600A).

[^ 8] See 8 CFR 204.3(h)and 8 CFR 204.312(e).

[^ 9] See Fee Schedule (Form G-1055).

[^ 10] See 8 CFR 106.2(a)(32).

[^ 11] For the Hague Adoption Convention process, see the Form I-800A. For the orphan process, see the Form I-600A.

[^ 12] See 8 CFR 106.2(a)(32) and 8 CFR 106.2(a)(48).

[^ 13] See Chapter 4, Home Studies, Section P, Duty of Disclosure [5 USCIS-PM B.4(P)].

[^ 14] See 8 CFR 204.311(u)(1)(i)-(iii). See the Guidance on Determining Suitability of Prospective Adoptive Parents for Intercountry Adoption, PM-602-0165, issued November 9, 2018.

[^ 15] See 8 CFR 204.311(u)(1)(iv).

[^ 16] See 8 CFR 204.311(u)(1)(vii).

[^ 17] See 8 CFR 204.311(u)(1)(v).

[^ 18] See instructions for the Application for Advance Processing of an Orphan Petition (Form I-600A). See instructions for the Application for Determination of Suitability to Adopt a Child from a Convention Country (Form I-800A). See USCIS' Updated Home Studies and Significant Changes webpage. See USCIS' Change of Country webpage.

[^ 19] For the Hague Adoption Convention process, see the Form I-800A. For the orphan process, see the Form I-600A or the Form I-600 for combination filings.

[^ 20] See Fee Schedule (Form G-1055).

[^ 21] See Fee Schedule (Form G-1055).

[^ 22] See 8 CFR 204.311(u)(1).

[^ 23] See 8 CFR 204.312(e)(2)(i).

[^ 24] PAPs generally need to demonstrate income at 125 percent of the poverty level for their household size unless the 100 percent exemption applies. The HHS poverty guidelines are a key tool that USCIS uses when evaluating financial resources but are not the sole factor.

[^ 25] See the USCIS Adoption Contact Information webpage.

[^ 26] See Fee Schedule (Form G-1055).

[^ 27] See Fee Schedule (Form G-1055).

[^ 28] See Fee Schedule (Form G-1055).

[^ 29] For information on how to submit certain written requests and notifications that are not made on a specific USCIS form, see the USCIS Adoption Contact Information webpage.

[^ 30] For the Hague Adoption Convention process, see the Form I-800A Supplement 3. For the orphan process, see the Form I-600A/I-600 Supplement 3.

[^ 31] This refers to a change from one orphan country to another orphan country, or from one Hague Adoption Convention country to another Hague Adoption Convention country. Form I-600A/I-600 Supplement 3 and Form I-800A Supplement 3 cannot be used to request a change in suitability approval from an orphan country to a Hague Adoption Convention country, or vice versa. PAPs must file a Form I-600A to change from a Hague Adoption Convention country to an orphan country, or a Form I-800A to change from an orphan country to a Hague Adoption Convention country.

[^ 32] This refers to a change from one orphan country to another orphan country, or from one Hague Adoption Convention country to another Hague Adoption Convention country. Form I-600A/I-600 Supplement 3 and Form I-800A Supplement 3 cannot be used to request a change in suitability approval from an orphan country to a Hague Adoption Convention country, or vice versa. PAPs must file a Form I-600A to change from a Hague Adoption Convention country to an orphan country, or a Form I-800A to change from an orphan country to a Hague Adoption Convention country.

[^ 33] If the PAP has a new permanent residence outside the United States and the adopted child will reside with the PAP there, the home study preparer must complete at least one home visit. The home study update must include a detailed description of where the PAP resides at the time of the update. The primary provider may use a foreign supervised provider (holding any license or other authorization that may be required to conduct adoption home studies in that country) to prepare that portion of the updated home study. An accredited agency must review and approve that portion of the home study. Alternatively, a public foreign authority may complete the update in compliance with U.S. regulations.

[^ 34] See 8 CFR 204.311(i)-(l). For more information on required screenings, see Chapter 4, Home Studies, Section I, Criminal History and History of Abuse or Violence [5 USCIS-PM B.4(I)].

[^ 35] See 8 CFR 204.311(j).

[^ 36] See 8 CFR 204.311(k)-(l).

[^ 37] See 8 CFR 204.311(i).

[^ 38] For more information on child abuse registry checks, see the Guidance on Determining Suitability of Prospective Adoptive Parents for Intercountry Adoption, PM-602-0165, issued November 9, 2018.

[^ 39] For more information on home study review and signature requirements, see Chapter 4, Home Studies, Section Q, Review, Signature, and Attestation [5 USCIS-PM B.4(Q)].

[^ 40] USCIS follows standard operating procedures when refreshing biometric results.

[^ 41] For more information, see the Background Checks webpage.

[^ 42] Since there are no ASCs abroad, PAPs who reside abroad must submit a completed Applicant Fingerprint Card (Form FD-258) or appear for biometrics collection where available.

[^ 43] For information on unclassifiable prints for the orphan process, see Chapter 2, Eligibility, Documentation, and Evidence (Orphan Process) [5 USCIS-PM B.2]. For information on unclassifiable prints for the Hague process, see Chapter 3, Eligibility, Documentation, and Evidence (Hague Process) [5 USCIS-PM B.3]. For information on failure to appear for interview or biometrics capture, see 8 CFR 103.2(b)(13).

[^ 44] See the Form I-600A and the Form I-600.

[^ 45] See USCIS' Transition Cases webpage.

[^ 46] See 8 CFR 106.2(a)(32).

Chapter 6 - Adjudication

A. Review and Independent Decision

The adjudicating officer must make an independent evaluation of the merits of the case. The officer who is adjudicating the suitability determination must be satisfied that proper care will be provided for the child.[1] This evaluation is based on review of the application or combination filing, home study, background checks, and any other evidence the officer is aware of.

1. Home Study Review

Although a favorable home study is required to establish eligibility, it is not the end of the officer's review. If there is reason to believe that a favorable home study was based on inadequate or erroneous evaluation of all of the facts, the officer must attempt to resolve these issues with the home study preparer, the prospective adoptive parent (PAP), and the state agency that reviewed the home study (if any). Issues that may need to be addressed include, but are not limited to, PAP or adult member of the household (AMH): criminal history, history of abuse or violence as an offender, disabilities, financial issues, and inappropriate behavior when interacting with USCIS that raises questions about the PAP's suitability.

2. Background Check Review

All background checks on the PAP and AMHs must be completed and current before the officer can make a final decision.[2] The officer must follow all required procedures regarding biometrics. USCIS issues a Request for Evidence (RFE) if:

- A PAP's or AMH's fingerprints are expired (and they already received their one-time, no fee fingerprints refresh); or
- An additional person needs to provide biometrics.

The officer must check the PAP's and AMH's responses from the home study on the questions on criminal history and history of abuse or violence as an offender against the background checks. USCIS may deny the suitability application if the PAP or AMH failed to disclose an arrest, conviction, or history of substance, sexual abuse, child abuse, or domestic violence to the agency conducting the home study and to USCIS.

B. USCIS Actions and Decisions

1. Communication

USCIS sends communication of its actions and decisions directly to the PAP for all case-related matters.

If a Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28) or Notice of Entry of Appearance as Attorney in Matters Outside the Geographical Confines of the United States (Form G-28I) is completed by an attorney or by an accredited representative,[3] the officer also sends a copy of USCIS decision notices to such authorized attorney or accredited representative.[4] A person representing an organization such as non-profit or charitable organization must first be accredited by the Board of Immigration Appeals. In general, adoption agencies do not qualify as Accredited Representatives.

Information about the particulars of any case can only be given to the PAP, or to an attorney or accredited representative with a Form G-28 or Form G-28I on file. The Privacy Act forbids disclosing information about the case to anyone else unless the PAP has signed a written consent[5] to the disclosure or such disclosure is not prohibited by law.[6]

2. Requests for Evidence and Notices of Intent to Deny

The officer issues an RFE or Notice of Intent to Deny (NOID), as appropriate, if any of the required home study elements or other required evidence is missing or deficient.[7]

USCIS may issue an RFE if a PAP or AMH is on probation, parole, supervised release, or other similar arrangement for any conviction, or if criminal charges are pending or adjudication is deferred.[8] USCIS does not make a favorable suitability determination if there are pending criminal charges or deferred decisions against the PAP or any AMH. If the person completes the period of probation, parole, supervised release, or other arrangement, resolves the pending or deferred criminal adjudication, and the PAP provides a favorable home study recommending that the person has been appropriately rehabilitated within the RFE response period, USCIS may consider the person to have been appropriately rehabilitated.[9]

3. Approvals

If the officer approves the suitability application, the officer sends a notice of approval to the PAP and the PAP's legal representative, if any.[10]

4. Denials

The officer denies the case if:[11]

- Any of the eligibility requirements are not met;[12]
- The officer is not satisfied that the PAP will provide proper care to the child;[13]
- The PAP or any AMH failed to disclose to the home study preparer or to USCIS, or concealed or misrepresented, any fact(s) about the PAP or any additional member of the household concerning the arrest, conviction, or history or substance abuse, sexual abuse, child abuse, or family violence, or any other criminal history as an offender;[14]
- The PAP or any AMH failed to cooperate in having available child abuse registries checked; or[15]
- The PAP or any AMH failed to disclose any prior home studies, whether completed or not, including those that did not favorably recommend for adoption or custodial care, the person(s) to whom the prior home study related.[16]

If the officer cannot approve the suitability application, the officer must explain in writing the specific reasons for denial.[17]

C. Revocations

USCIS may revoke an approved suitability application automatically or upon notice as described in corresponding regulations.[18]

D. Appeals and Motions to Reopen or Reconsider

A PAP may file a Notice of Appeal or Motion (Form I-290B) to request that USCIS reopen or reconsider an adverse decision.[19]

Footnotes

[^ 1] See 8 CFR 204.3(h)(2).

[^ 2] For information on submitting biometrics for the orphan process, see Chapter 2, Eligibility, Documentation, and Evidence (Orphan Process) [5 USCIS-PM B.2]. For information on submitting biometrics for the Hague process, see Chapter 3, Eligibility, Documentation, and Evidence (Hague Process) [5 USCIS-PM B.3]. For information on biometrics validity and updates, see Chapter 5, Action on Pending or Approved Suitability Determinations, Section E, Biometrics Validity and Updates [5 USCIS-PM B.5(E)].

[^ 3] See 8 CFR 292.2.

[^ 4] See 8 CFR 103.2(b)(19).

[^ 5] A PAP following the Hague Adoption Convention process may use the Form I-800, Supplement 1, Consent to Disclose Information (Supplement 1). USCIS does not have a disclosure form for the orphan process. A PAP following the orphan process who wishes to consent to the disclosure of information about the case may submit a signed, written waiver that specifies the information USCIS is explicitly authorized to release and to whom.

[^ 6] See Privacy Act of 1974, Pub. L. 93-579 (PDF), 88 Stat. 1896 (December 31, 1974) (codified at 5 U.S.C. 552a).

[^ 7] For more information on RFEs or NOIDs, see Volume 1, General Policies and Procedures, Part E, Adjudications [1 USCIS-PM E].

[^ 8] See 8 CFR 204.311(l).

[^ 9] Although a favorable home study is required to establish suitability and eligibility, USCIS is not bound by the recommendation in the home study and makes the ultimate decision whether a PAP is suitable and eligible to adopt. See Section A, Review and Independent Decision [5 USCIS-PM B.6(A)].

[^ 10] See the Notice of Favorable Determination Concerning Application for Advance Processing of Orphan Petition (Form I-171H) or Notice of Action (Form I-797). See the Form I-600 Notice of Suitability Determination (Form I-171S). For more information on approvals, see Volume 1, General Policies and Procedures, Part E, Adjudications [1 USCIS-PM E].

[^ 11] See 8 CFR 204.312(c). See 8 CFR 204.3(h).

[^ 12] See 8 CFR 204.3. See 8 CFR 204.3(h)(6). See 8 CFR 204 Subpart C. See 8 CFR 204.307.

[^ 13] See 8 CFR 204.312(c)(ii). See 8 CFR 204.3(h)(2). In order to help determine suitability, a home study is required. For Hague Adoption Convention cases, the PAP must submit the home study with the suitability application. For orphan cases, if the PAP does not submit the home study within 1 year of filing the suitability application, USCIS denies the case. See 8 CFR 204.3(h)(5).

[^ 14] A PAP cannot submit a new petition or application for reconsideration until a 1-year period has elapsed from a denial on this basis. See 8 CFR 204.309(a). See 8 CFR 204.3(h)(4). In Hague cases, the one-year bar also applies to a failure to disclose all prior home studies.

[^ 15] USCIS denies any new application or petition filed within a year of such denial. See 8 CFR 204.311. See 8 CFR 204.3(h)(4).

[^ 16] See 8 CFR 204.311.

[^ 17] See 8 CFR 103.3. For more information on denials, see Volume 1, General Policies and Procedures, Part E, Adjudications [1 USCIS-PM E].

[^ 18] See 8 CFR 204.312(e)(2)(i). See 8 CFR 204.3(h)(14). See 8 CFR 205.1. See 8 CFR 205.2. For more information on revocation, see Volume 1, General Policies and Procedures, Part E, Adjudications [1 USCIS-PM E].

[^ 19] For more information, see Volume 1, General Policies and Procedures, Part F, Motions and Appeals [1 USCIS-PM F]. See 8 CFR 204.314.

Part C - Child Eligibility Determinations (Orphan)

Chapter 1 - Purpose and Background

A. Purpose

In enacting legislation regarding orphans, Congress was primarily concerned with the welfare of the children. The orphan process is one of three different ways for a child to immigrate to the United States based on adoption.[1] The prospective adoptive parent (PAP) generally may pursue the orphan process[2] if:

- The child is not habitually resident in a Hague Adoption Convention Country;[3] and
- At least one of the PAPs is a U.S. citizen.

The orphan process involves a USCIS determination of the PAP's suitability[4] and eligibility to adopt and a determination of the child's eligibility to immigrate as an orphan.

B. Background

The Displaced Persons Act of 1948 contained the first laws relating to the immigration of orphans. Since then, Congress has enacted several acts and amendments related to orphans and intercountry adoption. Significant recent changes include the:

- Intercountry Adoption Universal Accreditation Act of 2012 (UAA),[5] which requires that adoption service providers (ASPs) providing adoption services in orphan cases follow the same accreditation or approval process required of ASPs providing such services in Hague Adoption Convention cases; and
- Consolidated Appropriations Act of 2014 (CAA),[6] which changed the Immigration and Nationality Act (INA) definition of an orphan so that only one adoptive parent in a married couple has to personally see and observe the orphan before or during the adoption proceedings in order for the adoption to be considered "full and final" for immigration purposes.[7]

C. Legal Authorities

- INA 101(b)(1)(F) – Definition of an orphan child
- INA 101(b)(2) – Definition of parent, father, or mother
- INA 201(b)(2)(A)(i) – Immediate relatives
- INA 204(d) – Recommendation of valid home study
- 8 CFR 204.1 – General information about immediate relative and family-sponsored petitions
- 8 CFR 204.3 – Orphan cases under section 101(b)(1)(F) of the Act
- 8 CFR 204.301 – Definitions
- 8 CFR 204.311 – Convention adoption home study requirements
- 8 CFR 205.1 – Automatic revocation
- 8 CFR 205.2 – Revocation on notice

Footnotes

[^ 1] See Part A, Adoptions Overview [5 USCIS-PM A] for information on determining which adoption process (Hague Adoption Convention, orphan, or family-based) a prospective adoptive parent (PAP) should follow.

[^ 2] See the Application for Advance Processing of an Orphan Petition (Form I-600A) or a Petition to Classify Orphan as an Immediate Relative (Form I-600).

[^ 3] For a list of countries that are party to the Hague Adoption Convention, see the U.S. Department of State (DOS)'s Convention Countries webpage.

[^ 4] See Part B, Adoptive Parent Suitability Determinations [5 USCIS-PM B].

[^ 5] See Pub. L. 112-276 (PDF) (January 14, 2013).

[^ 6] See Section 7083 of the CAA, Pub. L. 113-76 (PDF), 128 Stat. 5, 567 (January 17, 2014).

[^ 7] For more information, see 9 FAM 502.3-3(B)(3)(U)(1), Adoption or Intent to Adopt. See 9 FAM 502.3-3(B)(7)(U)(c), Immediate Relative (IR-3 vs. IR4) Orphan Classifications and the Child Citizenship Act.

Chapter 2 - Eligibility

A child[1] must qualify as an orphan[2] to be eligible to immigrate using the orphan process. The table below reflects the general eligibility criteria for the orphan process.

Summary of Eligibility Criteria

Requirement	For More Information
The prospective adoptive parents (PAPs) are suitable and eligible to adopt.	See Part B, Adoptive Parent Suitability Determinations [5 USCIS-PM B].
The child meets age and identity requirements.	See Chapter 3, Identity and Age [5 USCIS-PM C.3].
The child meets specific requirements for eligibility as an orphan.	See Chapter 4, Eligibility Requirements Specific to Orphans [5 USCIS-PM C.4].
The child has a qualifying adoptive or custodial relationship as a child to a U.S. citizen parent.	See Chapter 5, Qualifying Adoptive or Custodial Relationship [5 USCIS-PM C.5].
There must be no child-buying, fraud, misrepresentation, or non-bona fide intent.	See Chapter 6, Additional Requirements, Section A, No Child-Buying, Fraud, Misrepresentation, or Non-Bona Fide Intent [5 USCIS-PM C.6(A)].
The child must match the characteristics that the PAP has been approved to adopt.	See Chapter 6, Additional Requirements, Section B, Child Matches Characteristics that Prospective Adoptive Parent Is Approved For [5 USCIS-PM C.6(B)].
The PAP must have identified a primary adoption service provider (unless a limited exception applies).	See Chapter 6, Additional Requirements, Section C, Primary Provider [5 USCIS-PM C.6(C)].

Footnotes

[^ 1] To meet the definition of a child under INA 101(b)(1), the child must be unmarried and under the age of 21.

[^ 2] See INA 101(b)(1)(F).

Chapter 3 - Identity and Age

A. Identity

The child's identity must be properly documented.[1]

B. Age

Even if the prospective adoptive parent (PAP) has not yet completed the adoption or obtained all of the required supporting documentation, the PAP must file the Petition to Classify Orphan as an Immediate Relative (Form I-600) before the child turns 16[2] unless one of the following exceptions apply.[3]

Sibling Exception

A child 16 years of age or older qualifies for the sibling exception if the child is under the age of 18 at the time the petition is filed and that child's birth[4] sibling:

- Is or was previously classified as an orphan[5] while under the age of 16 and is coming to the United States to be adopted by the same PAP(s); or
- Meets the definition of adopted child for a family-based adoption petition[6] and was under the age of 16 at the time of adoption by the same PAP(s).

Suitability Application Exception for Certain 15-Year-Olds

USCIS deems the suitability application[7] filing date to be the petition filing date if both of the following requirements are met:[8]

- The PAP filed the suitability application after the child's 15th birthday, but before the child's 16th birthday (or, if the sibling exception applies, after the child's 17th birthday but before the child's 18th birthday); and
- The PAP files the petition not more than 180 days after the initial approval of the suitability application.

Footnotes

[^ 1] See Chapter 7, Documentation and Evidence, Section B, Required Evidence [5 USCIS-PM C.7(B)].

[^ 2] For more information on filing timeframes, see Volume 1, General Policies and Procedures, Part B, Submission of Benefit Requests, Chapter 6, Submitting Requests, Section D, Filing Periods Ending on Weekends or Federal Holidays [1 USCIS-PM B.6(D)].

[^ 3] USCIS generally issues a Request for Evidence for the remaining supporting documentation. See Chapter 8, Adjudication, Section E, Decisions and Actions, Subsection 3, Requests for Evidence and Notices of Intent to Deny [5 USCIS-PM C.8(E)(3)].

[^ 4] In this Volume, USCIS uses birth and natural synonymously.

[^ 5] See INA 101(b)(1)(F).

[^ 6] See INA 101(b)(1)(E).

[^ 7] See Application for Advance Processing of an Orphan Petition (Form I-600A).

[^ 8] While regulations at 8 CFR 204.3 do not directly address the relationship between the separate filing of a Form I-600A and the statutory requirement to file the petition while the child is under the age of 16 (or, as permitted in INA 101(b)(1)(F)(ii), under the age of 18), this exception is consistent with the regulations for Hague Adoption Convention cases.

Chapter 4 - Eligibility Requirements Specific to Orphans

A. Eligibility Requirements

To meet the specific orphan eligibility requirements and meet the definition of orphan under the Immigration and Nationality Act (INA), a child must either have:

- No legal parents because of the death or disappearance of, abandonment or desertion by, or separation from or loss of both parents; or
- A sole or surviving legal parent who is incapable of providing proper care.[1]

The loss of each of the child's parents must meet the definition of at least one of these terms under immigration law. The child is not required to have lost each parent in the same way. For example, one parent may have been separated from the child, while the other parent may have abandoned the child to an orphanage.

Generally, USCIS first evaluates whether the child has no legal parents because of abandonment, desertion, disappearance, loss, death, or separation. USCIS generally conducts a sole or surviving parent analysis only if a child does not meet any of those definitions and when:

- There has been a direct relinquishment of the child by the birth mother, or by the birth father as a surviving parent, to the prospective adoptive parent (PAP); or
- The child has been released or relinquished in anticipation of, or preparation for, adoption to a third party providing custodial care to the child who is not authorized to provide custodial care[2] under the child welfare laws of the foreign-sending country.[3]

Definitions

Foreign official documents and laws may use different terms from those used in U.S. immigration law or use the same terms but with different meanings. A child must meet the definition of an orphan as defined by U.S. immigration law.[4] To determine if the child meets one of the below definitions under U.S. immigration law, USCIS considers the laws of the child's country of origin and what actions the foreign competent authorities must take. USCIS also considers the actual facts and circumstances of the case as supported by the evidence of record.

B. No Legal Parent

1. Abandonment

Abandonment must include not only the intention to surrender all parental rights, obligations, and claims to the child, and control over and possession of the child, but also the actual act of surrendering such rights, obligations, claims, control, and possession. Abandonment means that the child's parent(s):

- Willfully forsake all parental rights, obligations, and claims to the child, as well as all control over and possession of the child; and
- Acted without intending to transfer or without transferring these rights to any specific person(s).

If the parent(s) released the child to a third party to provide custodial care prior to the adoption, the third party was authorized under the child welfare laws of the foreign-sending country.

Abandonment does not include a release or relinquishment by one or both parents:

- Directly to the PAP;[5]
- To an authorized third party for a specific adoption;
- To a third party that is not authorized under the child welfare laws of the foreign-sending country to accept released or relinquished children in anticipation of or preparation for adoption; or
- For temporary placement in an orphanage if the parent(s) express an intention to retrieve the child, are contributing or attempting to contribute to the support of the child, or otherwise exhibit ongoing parental interest in the child.

Release to an Orphanage

U.S. immigration law generally considers a child whose parent(s) have unconditionally released him or her to an authorized orphanage to be abandoned.

It is not uncommon for parents in some countries to entrust their children to the care of orphanages temporarily without intending to abandon the child or for the child to be adopted. USCIS does not consider such releases to be unconditional, and they do not meet the definition of abandoned under U.S. immigration law.

Ongoing Contact

A child can still meet the abandonment definition even if the birth parent(s) show an interest in ongoing contact or the adoption service provider and the PAP commits to ongoing contact with birth parents. However, USCIS may further investigate if:

- There is any indication that the birth parent(s) did not understand the finality of adoption; or
- The release was not unconditional.

2. Desertion

Desertion means:

- The parent(s) have willfully forsaken the child;
- The parent(s) have refused to carry out their parental rights and obligations; and
- As a result, the child has become a ward of a competent authority in accordance with the laws of the foreign-sending country.

Desertion does not mean that the parents have disappeared, but rather that they refuse to carry out their parental rights and obligations towards the child. Desertion differs from abandonment in that the parents have not taken steps to divest themselves of parental duties, but the parents' inaction has caused a local authority to step in to assume custody of the child.

3. Disappearance

Disappearance means:

- The parent(s) have unaccountably or inexplicably passed out of the child's life;
- The parent(s)' whereabouts are unknown;
- There is no reasonable hope of the parent(s)' reappearance; and

- A competent authority determined reasonable efforts were made to locate the parent(s) as required by the laws of the foreign-sending country.

4. Loss

Loss means the involuntary severance or detachment of the child from the child's parents:

- In a manner that is permanent;
- That is caused by a natural disaster, civil unrest, or other calamitous events beyond the control of the parents; and
- Is verified by a competent authority in accordance with the laws of the foreign-sending country.

5. Death

Death means one or both parents are legally deceased. A child meets orphan requirements if:

- The child's parent(s) are legally deceased; and
- The child has not acquired another parent (such as a stepparent or legal adoptive parent) as defined by U.S. immigration law.

6. Separation

Separation (commonly known as termination of parental rights) means:

- The involuntary severance of the child from the child's parents by action of a competent authority for good cause (such as child abuse or neglect) and in accordance with the laws of the foreign-sending country;
- The competent authority properly notified the parents and granted the opportunity to contest such action; and
- The termination of all parental rights and obligations is permanent and unconditional.

C. Sole or Surviving Parent

1. Sole Parent

Only a birth mother can be a sole parent. The birth mother may qualify as a sole parent if:

- The birth mother was unmarried at the time of the child's birth (child was born out of wedlock);[6]
- The child was not legitimated while in the legal custody of the birth father (as described in the legitimation section below);
- The birth father is unknown, or has disappeared, abandoned, or deserted the child, or irrevocably released the child for emigration and adoption (in writing), in accordance with the laws of the foreign-sending country;
- The child does not have any other legal parents within the meaning of U.S. immigration law;[7]
- The birth mother is incapable of providing proper care (is unable to provide for the child's basic needs, consistent with the local standards of the foreign-sending country);[8]and
- The birth mother, in writing, irrevocably releases the child for emigration and adoption, in accordance with the laws of the foreign-sending country.

Legitimation

The birth mother cannot be a sole parent if the child was legitimated while in the legal custody of the birth father. Legitimation means "placing a child born out of wedlock in the same legal position as a child born in wedlock."[9] The law of the child's residence or domicile, or the law of the father's residence or domicile, is the relevant law to determine whether a child has been legitimated. It is not necessary to consider whether a child has been legitimated unless the birth father ever had sole or joint legal custody of the child. [10]

An officer must evaluate legitimation, paternity, and legal custody separately under the laws of the particular country. It is possible for a child's paternity to be established, but for the child to not be legitimated. It is also possible for a child's paternity to be established, but for the child's father to never have had legal custody. Legitimation, however, cannot be established unless paternity has been established.[11]

2. Surviving Parent

Surviving parent means a child's living parent when the child's other parent is dead and the child has not acquired another parent within the meaning of U.S. immigration law.[12]

Essential elements include:

- One living parent;
- One deceased parent;
- The child has not acquired a new legal parent;[13]
- The living parent is incapable of providing proper care;[14] and
- The living parent has, in writing, irrevocably released child for emigration and adoption in accordance with the laws of the foreign-sending country.

D. Other Legal Parents

USCIS considers a parent to include any person who is related to a child as the child's legal parent, mother, or father as specified in the definition under U.S. immigration law.[15] The officer must determine for each parent whether the person has legal rights to the child in accordance with the laws of the foreign-sending country. If the officer determines a parent is a legal parent, the officer must determine whether the child has lost the parent.

Stepparents

USCIS must consider the existence of a stepparent in determining whether a child is an orphan.[16] The officer must determine whether the stepparent has legal rights to the child in accordance with the laws of the foreign-sending country.

If an officer determines that the child has a stepparent, the officer should request additional evidence from the PAP, including:

- A copy (with a certified English translation) of the relevant statutes, regulations, court judgments, or other legal authority from the foreign-sending country addressing whether a stepparent has a legal parent-child relationship to the stepchild; and
- A statement from the stepparent (with a certified English translation) indicating that the stepparent has neither adopted the stepchild nor obtained any other form of legal custody of the stepchild and has no interest in doing so.

USCIS considers a stepparent to be a parent for purposes of adjudication of an orphan petition if:

- The stepparent actually adopted the stepchild as specified in U.S. immigration law;[17]
- Under the law of the foreign-sending country, the marriage between the parent and stepparent creates a legal parent-child relationship between the stepparent and stepchild; or
- The stepparent has obtained legal custody of the stepchild so that the stepparent does have a legal relationship to the stepchild.

In some jurisdictions, a stepparent does not have a legal parent-child relationship to a stepchild and would therefore not have any legal standing to perform any action terminating the non-existent rights and duties. USCIS does not consider a stepparent to be a child's parent for purposes of an orphan petition if the PAP establishes that, under the law of the foreign-sending country, the stepparent has no legal parent-child relationship to a stepchild.

The burden is on the PAP to establish that a stepparent has no legal parent-child relationship to the child. The PAP may not simply assert that the stepparent has no legal parental rights in relation to the child.

If the officer determines the stepparent is a legal parent, the officer must determine whether the child has lost the stepparent (in addition to the birth father and birth mother).

Footnotes

[^ 1] See INA 101(b)(1)(F).

[^ 2] Custodial care prior to an adoption must be provided without transferring these rights to any specific person(s). USCIS considers placement of a child with a third party that is not authorized to provide custodial care in anticipation of, or preparation for, adoption, to be a direct relinquishment. Direct relinquishments are excluded from the definition of abandonment.

[^ 3] That is, the country of the child's citizenship, or if the child is not permanently residing in the country of citizenship, the country of the child's habitual residence. This excludes a country to which the child travels temporarily, or to which the child travels either as a prelude to, or in conjunction with, adoption or immigration to the United States. See 8 CFR 204.3(b).

[^ 4] See INA 101(b)(1)(F). See 8 CFR 204.3(b).

[^ 5] To be considered abandonment, a direct relinquishment by a sole or surviving parent must meet the requirements for an irrevocable release by a sole or surviving parent, as well as that the parent is incapable of providing proper care. See Section C, Sole or Surviving Parent [5 USCIS-PM C.4(C)].

[^ 6] In November 1995, a statutory amendment changed references in INA 101(b)(1)(A), (1)(D), and INA 101(b)(2) from “legitimate” and “illegitimate” children to “children born in wedlock” and “children born out of wedlock,” respectively. See Pub. L. No. 104-51 (PDF) (Nov. 15, 1995). Guidance was issued concerning the adjudication of orphan petitions in Immigration and Naturalization Service (INS) Cable HQ 204.21-P, 204.22-P. This INS guidance remains in effect for USCIS. The definition in 8 CFR 204.3 has not yet been updated to reflect the statutory amendment.

[^ 7] See INA 101(b)(2).

[^ 8] Incapable of providing proper care means that a sole or surviving parent is unable to provide for the child's basic needs, consistent with the local standards of the foreign-sending country. This determination is not limited to economic or financial concerns. A parent could be unable to provide proper care due to a number of reasons, including, but not limited to: extreme poverty; medical, psychological, or emotional difficulties; or long-term incarceration. See 8 CFR 204.3(b).

[^ 9] See *Matter of Moraga* (PDF), 23 I&N Dec. 195, 197 (BIA 2001).

[^ 10] The natural father of the child will be presumed to have had legal custody of that child at the time of legitimation, in the absence of affirmative evidence indicating otherwise. See *Matter of Rivers* (PDF), 17 I&N Dec. 419 (BIA 1980). However, it is possible for a child to have been legitimated by operation of law, but for the father to never have had legal custody.

[^ 11] However, the establishment of paternity may or may not result in the birth father having legal custody, depending on the laws where the child or birth father resides and any applicable court decisions.

[^ 12] See INA 101(b)(2).

[^ 13] See Section D, Other Legal Parents [5 USCIS-PM C.4(D)].

[^ 14] Incapable of providing proper care means that a sole or surviving parent is unable to provide for the child's basic needs, consistent with the local standards of the foreign-sending country. This determination is not limited to economic or financial concerns. A parent could be unable to provide proper care due to a number of reasons, including, but not limited to, extreme poverty; medical, psychological, or emotional difficulties; or long-term incarceration. See 8 CFR 204.3(b).

[^ 15] See INA 101(b)(2).

[^ 16] Under the law of some jurisdictions, a stepparent may adopt the stepparent’s spouse's children without terminating the legal parent-child relationship between the children and their other parent. The adoptive stepparent may then qualify as a parent through INA 101(b)(1)(E), as well as 101(b)(1)(B).

[^ 17] See INA 101(b)(1)(E).

Chapter 5 - Qualifying Adoptive or Custodial Relationship

A prospective adoptive parent (PAP) must have one of the following to petition for a child to immigrate based on an adoption:

- A final adoption granted by the foreign-sending country, or
- Legal custody of the child granted by the foreign-sending country for emigration and adoption in the United States.[1]

A. Final Adoption

A child may qualify to immigrate based on a final adoption if:

- The adoption meets USCIS requirements for a final adoption (is valid under the law of the foreign-sending country, creates a legal permanent parent-child relationship, and terminates the prior legal parent-child relationship);[2]
- The petitioner (and spouse, if married) adopted the child; and
- The petitioner (or spouse, if married) personally saw and observed the child before or during the adoption proceedings abroad.

If these requirements are met, the child may qualify for an IR-3 visa (child adopted outside the United States by U.S. citizen)[3] based on a valid final adoption in accordance with the laws of the foreign-sending country. USCIS considers a final adoption that meets these requirements a “full and final” adoption.

A child does not, however, meet requirements to immigrate based on a “full and final” adoption if the petitioner is married and neither the petitioner nor the spouse actually saw and observed the child before or during the adoption proceedings.[4] Additionally, a child does not meet the requirements if only one parent of a married couple adopted the child. USCIS may, however, consider the final foreign adoption to have established legal custody for emigration and adoption and the child may be eligible for an IR-4 visa (child to be adopted in the United States by U.S. citizen).[5]

B. Legal Custody for Emigration and Adoption

Not all countries grant what USCIS considers final adoptions abroad for immigration purposes.[6] A child may, however, be eligible on the basis of legal custody for the purpose of emigration and adoption if the following criteria are met:

- The PAP secured legal custody in accordance with the laws of the foreign-sending country;
- The person, organization, or competent authority that has legal custody or control over the child irrevocably released the child for emigration and adoption;
- The PAP is in compliance with all state pre-adoption requirements, if any; and
- If there was an adoption outside the United States that did not meet the requirements for a “full and final” adoption for U.S. immigration purposes, the child’s proposed state of residence allows re-adoption or provides for judicial recognition of the foreign adoption.

If the child meets these requirements, the child may qualify for an IR-4 visa to come to the United States for adoption.[7]

Footnotes

[^ 1] Some countries will not allow a child to emigrate without a final adoption decree. To determine the specific laws of a foreign-sending country, see the U.S. Department of State’s Country Information webpage.

[^ 2] For more information on what qualifies as a final adoption for immigration purposes, see Part A, Adoptions Overview, Chapter 4, Adoption Definition and Order Validity [5 USCIS-PM A.4].

[^ 3] Visa category for an immediate relative under INA 201(b) and INA 204(a)(1), as a child adopted abroad by a U.S. citizen.

[^ 4] An adoption in which neither adoptive parent actually saw and observed the child before or during the adoption is known as a proxy adoption. If the laws of the foreign-sending country allow proxy adoptions, U.S. citizen petitioners may complete an adoption abroad without ever traveling to a foreign-sending country or meeting the child before the child's entry into the United States. This type of adoption may be fully valid in the United States as a matter of domestic relations law, however, a child adopted through this process is not eligible to immigrate under the basis of a “full and final” adoption and receive an IR-3 visa. Instead, a child with a final adoption order that is not considered “full and final” may be eligible to immigrate and receive an IR-4 visa.

[^ 5] Visa category for an immediate relative under INA 201(b) and INA 204(a)(1), as a child coming to be adopted in the United States by a U.S. citizen.

[^ 6] For example, guardianships, simple adoptions, or Kafala orders in countries that follow traditional Islamic law may not qualify as final adoptions abroad. Such guardianship, Kafala, or other custody orders may, however, be sufficient to establish that the PAPs have secured legal custody of the child. See 8 CFR 204.3(d)(1)(iv)(B)(1). If the legal custody is for emigration and adoption and all other requirements are met, such an order could support approval of an orphan petition.

[^ 7] For information on citizenship for adopted children, see Part F, Citizenship for Adopted Children [5 USCIS-PM F]. For more information, see Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens [12 USCIS-PM H]. A U.S. adoptive parent needs to take additional steps to secure U.S. citizenship for a child entering with an IH-4 visa because the adoption of the child has to be finalized in the United States or recognized under state law, unlike in cases of children entering with IH-3 visas on the basis of “full and final” adoptions.

Chapter 6 - Additional Requirements

In addition to meeting general eligibility requirements, the following requirements also must be met:

- There is no child-buying, fraud, misrepresentation, or non-bona fide intent;
- The child matches the characteristics that the prospective adoptive parent (PAP) has been approved to adopt; and
- The petitioner has identified a primary adoption service provider (unless a limited exception applies).

A. No Child-Buying, Fraud, Misrepresentation, or Non-Bona Fide Intent

The officer must determine whether there are allegations or indications of child-buying, fraud, misrepresentation, or non-bona fide intent (that is, the PAP does not intend to form a parent-child relationship).

1. Child-Buying

Child-buying is when the PAP(s) or a person or entity working on their behalf gave or will give money or other consideration, either directly or indirectly, to the child's parent(s), agent(s), other person(s), or entity as payment for the child or as an inducement to release the child.[1]

An orphan petition must be denied or revoked if there is evidence of child-buying demonstrating the PAP has not established eligibility by a preponderance of the evidence. Officers must review any allegations of child-buying or other evidence that indicates child-buying took place in the case and determine whether it constitutes child-buying.

Child-buying does not include reasonable payment for necessary activities such as administrative, court, legal, translation, or medical services related to the adoption proceedings. Foreign adoption services are sometimes expensive and the costs may seem disproportionately high in comparison with other social services. In many countries, there may be a network of legitimate adoption facilitators, each playing a transparent role in processing a case and reasonably expecting to be paid for their services.

The U.S. Department of State (DOS) works closely with foreign governments to identify costs related to intercountry adoption in particular countries.[2] In most intercountry adoption cases, the expenses incurred can be explained in terms of reasonable payments. Even cash given directly to a birth mother may be justifiable if it relates directly to expenses such as pre-natal or neo-natal care, transportation, lodging, or living expenses.

2. Fraud or Misrepresentation

Fraud in the adoption context typically involves concealment of a material fact to obtain an official document or judgment by a court or authorized entity (for example, an adoption decree). To meet the requirement of materiality, evidence of fraud must be documented and generally relate to the child's eligibility as an orphan.

B. Child Matches Characteristics that Prospective Adoptive Parent Is Approved For

During the suitability application process (or orphan petition process, if there was no prior suitability application), the officer determined that the PAP was a suitable adoptive parent for a child with specific characteristics.[3] The child must match the characteristics that the PAP has been approved to adopt (such as age, sex, nationality, and special needs).

If the child does not match the characteristics for which USCIS has approved the PAP to adopt, then the officer should issue a Request for Evidence (RFE)[4] for an updated home study and any related documents.

1. Special Needs

The officer should review evidence to verify whether the child has any special needs (such as a significant disability or medical condition). The officer should:

- Ensure that any significant or serious disability or medical condition of the child is not excluded by special conditions established in the suitability application approval; and
- Verify that the PAP is aware of and accepts any significant medical, physical, or mental condition.

If an officer discovers that the child has a significant disability or medical condition that the PAP is not aware of, the officer must:

- Furnish the PAP with all pertinent details concerning the impairment, disability, or condition. This is especially important in cases where the PAP has not personally observed the child; and
- Halt adjudication of the case until the PAP submits an updated home study recommending the PAP to provide proper care for such child and USCIS determines the PAP is suitable to provide proper care for such child.[5]

2. Age

The child must meet the age range listed on the suitability application approval at the time the referral or match was accepted by the PAP, or if the accepted referral or match date cannot be established, the filing date of the orphan petition.[6] If the child does not match the age range for which USCIS has approved the PAP to adopt, then the officer should issue an RFE[7] for an updated home study and any related documents.

C. Primary Provider

The PAP must indicate a primary service provider on the orphan petition, unless a limited exception applies.[8] If the officer determines that the PAP has not sufficiently identified a primary adoption service provider on the orphan petition, the officer may issue an RFE.[9]

If an officer receives notice or learns that the PAP's primary adoption service provider has withdrawn from the PAP's case, the officer should issue an RFE for proof that either the current primary adoption service provider remains as such or the PAP has identified a new primary adoption service provider.[10]

Footnotes

[^ 1] See 8 CFR 204.3(i).

[^ 2] DOS posts general information about adoption-related costs on their Country Information webpage.

[^ 3] See Part B, Adoptive Parent Suitability Determinations [5 USCIS-PM B].

[^ 4] For more information on RFEs, see Chapter 8, Adjudication, Section E, Decisions and Actions [5 USCIS-PM C.8(E)].

[^ 5] See Part B, Adoptive Parent Suitability Determinations, Chapter 5, Action on Pending or Approved Suitability Determinations [5 USCIS-PM B.5].

[^ 6] For example, if a suitability determination states that the PAP is approved to adopt a child aged 0-4 years old, then a child who is 4 years old but not yet 5 at the time the PAP accepted a match (or alternatively the filing date of the orphan petition) would meet this age range. This is true even if the child has turned 5 by the time the officer is adjudicating the application. See The Jurisdiction of Amended Home Studies and the Application of Home Study Age Restrictions for Prospective Adoptive Child(ren) in Intercountry Adoption Cases Policy Memo, PM-602-0071.1, issued November 5, 2012.

[^ 7] For more information on RFEs, see Chapter 8, Adjudication, Section E, Decisions and Actions [5 USCIS-PM C.8(E)].

[^ 8] See Part A, Adoptions Overview, Chapter 5, Authorized Adoption Service Providers [5 USCIS-PM A.5].

[^ 9] For more information on RFEs, see Chapter 8, Adjudication, Section E, Decisions and Actions [5 USCIS-PM C.8(E)].

[^ 10] For more information see the If Your Adoption Service Provider Is No Longer Accredited or Approved webpage.

Chapter 7 - Documentation and Evidence

A. Filing

A prospective adoptive parent (PAP) files the Petition to Classify Orphan as an Immediate Relative (Form I-600) once the PAP has identified an orphan to adopt. The PAP must file the petition, required evidence, and any required supplements, in accordance with form instructions and any applicable fees.[1] The PAP may file an orphan petition in the United States, or outside the United States if the PAP meets certain criteria.[2] If the PAP files the petition while there is a suitability application[3] pending or within 15 months of a favorable decision on a suitability application, there is no new filing fee for one child or for more than one child if they are birth siblings.[4]

Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act)[5]

A petitioner who has been convicted of a specified offense against a minor is prohibited from filing a family-based petition[6] on behalf of any family-based beneficiary.[7]

B. Required Evidence

The PAP must submit the following evidence to petition for the PAP's adopted child's immigration into the United States:

- Evidence that must be submitted with a suitability application (if not previously submitted with an Application for Advance Processing of an Orphan Petition (Form I-600A));
- Evidence the PAP has a primary provider (unless a limited exception applies);[8]
- Proof of the child's age and identity;
- Evidence the child is an orphan;
- Certified copy of the adoption or custody decree and certified translation; and
- Proof of compliance with pre-adoption requirements (if any).

1. Evidence to Support Suitability Application

If a PAP previously submitted a suitability application[9] with the required evidence, the PAP does not need to re-submit it (unless requested by USCIS).

If a PAP did not submit a suitability application before filing the petition, USCIS considers the PAP to be filing both the suitability application and petition as a combination filing.[10] This means the PAP must submit the following documents that USCIS requires for a suitability application,[11] in addition to the documents that USCIS requires for the orphan petition:

- Proof of the petitioner's U.S. citizenship;
- Proof of the petitioner's spouse's U.S. citizenship or lawful immigration status (if married and the spouse resides in the United States);
- Proof of the marriage between the petitioner and the spouse (if married) and evidence of the termination of any prior marriages (if previously married); and
- Home study.

2. Evidence the Prospective Adoptive Parent has a Primary Provider

The PAP must identify a primary provider (unless a limited exception applies) and provide evidence that the PAP has a primary provider.[12]

If a home study is prepared by an accredited agency or approved person, or is reviewed and approved by an accredited agency, and the same agency or approved person is listed on the petition, the officer may accept this as evidence of a primary provider. If a different accredited agency or approved person is listed on the petition as the primary provider or the officer is uncertain as to who is serving as the primary provider, the officer must request additional evidence to establish that the accredited agency or approved person is acting as the primary provider.

Evidence of the PAP's primary adoption service provider may include, but is not limited to:

- A letter from the primary adoption service provider stating that the accredited or approved adoption service provider is acting as the primary provider in the case, or demonstrating that the accredited or approved adoption service provider is involved in the provision of an adoption service if only one accredited agency or approved person is involved in providing adoption services in the case;
- A copy of the service plan (detailing the six adoption services); or
- A copy of the contract between the petitioner and the primary adoption service provider demonstrating that the accredited agency or approved person is acting as the primary provider in the case.

3. Proof of Orphan's Identity and Age

The PAP must submit a copy of the orphan's birth certificate, or if such a certificate is not available, an explanation together with other proof of the child's identity and age.[13] Such secondary evidence could include medical records, school records, church records, entry in a family Bible, orphanage intake sheets, or affidavits from persons with first-hand knowledge of the event(s) to which they are testifying. If there is a doubt that the child is the birth child of the purported birth parent, USCIS may provide the PAP the option of submitting DNA evidence in compliance with USCIS standards to establish the claimed relationship.[14]

Delayed Birth Certificates

Generally, USCIS does not give the same weight to delayed birth certificates as birth certificates issued at the time of birth due to the potential for fraud.[15] Certain jurisdictions, however, may not issue birth certificates to children until they become involved in an intercountry adoption. An officer must determine the reliability of the facts contained in the delayed certificate, for an orphan child, in light of the other evidence in the record and should not reject the delayed certificate's evidentiary value simply because it was not issued at the time of the child's birth. Officers should check the U.S. Department of State (DOS)'s Country Reciprocity Schedule to determine a document's availability and reliability.

4. Evidence Child is an Orphan

The PAP must submit evidence that the child is an orphan as defined under U.S. immigration law:[16]

- No legal parent - If the child does not have a sole or surviving parent, the PAP must submit evidence that the child is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from the child's parents. It is not necessary to establish that each parent is gone for the same reason.
- Sole parent - If the orphan is a child of a sole parent, the PAP must submit evidence that the birth mother[17] is a sole parent, is incapable of providing proper care for the child, and has irrevocably released the child for emigration and adoption in writing.
- Surviving parent - If the orphan is a child of a surviving parent, the PAP must submit evidence that the other parent is deceased, the surviving parent is incapable of providing proper care for the child, and the surviving parent has irrevocably released the child for emigration and adoption in writing.

Incapable of Providing Proper Care of the Child

Evidence that a parent is incapable of providing proper care of a child may consist of:

- Proof of the parent's wages in comparison to the local area's average wages for a family of the same size;
- Medical records of the child's or parent's psychological or physical difficulties;
- Court records or other proof that the parent is incarcerated and the duration of the sentence;
- A social welfare report submitted to the adoption authority in support of an adoption that discusses the background and living situation of the child;[18] or
- Any other documentation that demonstrates the inability of the parent to provide proper care for the child.

Irrevocable Release of Child for Emigration and Adoption

Proof that the sole or surviving parent has irrevocably (knowingly and voluntary) released the child for emigration and adoption must be a written release that is:

- In a language the parent is capable of reading and signing or marking (if the parent is illiterate, an interview can establish that the parent had full knowledge of the contents of the document and understood its irrevocable nature);
- Irrevocable; and
- Without stipulations or conditions.

The release may identify the person to whom the parent is releasing the child, even if that person is a PAP.[19]

Death

Primary evidence of death is a death certificate in the name of the deceased parent.[20]

If a death certificate is not available, an officer should consider the explanation of why such a certificate is unavailable, along with secondary evidence provided by the PAP, such as funeral details, obituaries, newspaper articles, church records, or affidavits from persons with first-hand knowledge of the parent's death.[21] The officer may also consider the length of time since the child's parent(s) are reported to have died, and during which time, the parent has not been seen or heard from, and if relatives have cared for the child since the parent(s) died.

Abandonment, Disappearance, Desertion, Loss, or Separation

Primary evidence of abandonment, disappearance, desertion, loss, or separation is a decree from a court or other competent authority[22] unconditionally divesting the parent(s) of all parental rights over the child because of such abandonment, disappearance, desertion, loss, or separation.[23] A valid court order terminating parental rights over the objections of one or both parents is sufficient if the parents received notice and an opportunity to contest such action.

In the case of abandonment, primary evidence may also include a written release by the parent(s)[24] of a child to an authorized orphanage (or other third party authorized under the child welfare laws of the foreign-sending country to provide custodial care in anticipation of or preparation for adoption) demonstrating that the parent(s) gave up all parental rights to the child and physically gave up control and possession unconditionally to the orphanage or other third party.

5. Certified Copy of Adoption or Custody Decree and Certified Translation

If the PAP met the requirements for a "full and final" adoption of the child abroad,[25] the PAP must submit:

- A legible, certified copy of the final adoption decree showing that the PAP (and the PAP's spouse, if married) adopted the child; and
- Evidence that the petitioner (or spouse, if married) personally saw and observed the child before or during the adoption proceedings.[26]

If the PAP did not meet the requirements for a "full and final" adoption of the child abroad, but did obtain a final adoption or legal custody, the PAP must submit:

- A certified copy of the adoption decree or custodial decree, showing that the PAP secured legal custody in accordance with the laws of the foreign-sending country; and
- Evidence that the person, organization, or competent authority that has legal custody or control over the child has irrevocably released the child for emigration and adoption. This may be evidenced by a court order or release by the previous legal custodian of the child giving the child up for adoption to the named PAP(s) with their U.S. residence clearly incorporated into the order.

6. Proof of Compliance with Pre-Adoption and State Requirements

If the PAP did not meet the requirements for a "full and final" adoption of the child abroad,[27] the PAP must submit:

- Evidence that the state of the child's proposed residence allows (re)adoption or provides for judicial recognition of the adoption abroad; and
- Evidence of compliance with all state pre-adoption requirements, if any. If state law prevents the PAP from complying with any pre-adoption requirements before the child's arrival in the United States, the PAP must note the missing requirements and provide an explanation. USCIS does not, however, approve orphan petitions for a specific child without evidence of compliance with requirements or an explanation why the PAP cannot meet the requirements before the child's arrival.

C. Primary and Secondary Evidence

A PAP should submit primary evidence when available. Primary evidence is evidence that, on its face, proves a fact. For example, primary evidence of death is a death certificate.

Not all countries, however, have the same kind of documentary practices as the United States. If primary evidence is not available, a PAP must demonstrate its unavailability and should submit secondary evidence.[28] If both primary and secondary evidence are unavailable, the PAP must demonstrate the unavailability of the primary and secondary evidence and submit two or more affidavits that are sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances.[29]

Footnotes

[^ 1] See 8 CFR 103.2. See Fee Schedule (Form G-1055). See instructions for Petition to Classify Orphan as an Immediate Relative (Form I-600). For more information on filing timeframes, see Volume 1, General Policies and Procedures, Part B, Submission of Benefit Requests, Chapter 6, Submitting Requests, Section D, Filing Periods Ending on Weekends or Federal Holidays [1 USCIS-PM B.6(D)].

[^ 2] See 8 CFR 204.3(g). See the Filing Instructions for Form I-600, Petition to Classify Orphan as an Immediate Relative webpage.

[^ 3] See Application for Advance Processing of an Orphan Petition (Form I-600A).

[^ 4] See Fee Schedule (Form G-1055).

[^ 5] See Pub. L. 109-248 (PDF) (July 27, 2006).

[^ 6] This includes the Petition to Classify Orphan as an Immediate Relative (Form I-600).

[^ 7] See INA 204(a)(1)(A)(i). See INA 204(a)(1)(B)(i). See INA 101(a)(15)(K). See Volume 6, Immigrants, Part C, Adam Walsh Act [6 USCIS-PM C].

[^ 8] See Part A, Adoptions Overview, Chapter 5, Authorized Adoption Service Providers [5 USCIS-PM A.5].

[^ 9] See the Application for Advance Processing of an Orphan Petition (Form I-600A).

[^ 10] See Part B, Adoptive Parent Suitability Determinations, Chapter 2, Eligibility, Documentation and Evidence (Orphan Process), Section B, Filing, Subsection 2, Combination Filing [5 USCIS-PM B.2(B)(2)].

[^ 11] See instructions for the Petition to Classify Orphan as an Immediate Relative (Form I-600).

[^ 12] See Part A, Adoptions Overview, Chapter 5, Authorized Adoption Service Providers [5 USCIS-PM A.5].

[^ 13] See 8 CFR 204.3(d)(1)(ii). When possible, the PAP should submit the birth certificate showing the child's birth parent(s), and not only a new birth certificate issued after the adoption.

[^ 14] See DNA Evidence of Sibling Relationships, PM-602-0106.1, issued April 17, 2018.

[^ 15] See *Matter of Bueno-Almonte* (PDF), 21 I&N Dec. 1029, 1032-33 (BIA 1997). See *Matter of Ma* (PDF), 20 I&N Dec. 394 (BIA 1991). See *Matter of Serna* (PDF), 16 I&N Dec. 643 (BIA 1978).

[^ 16] See Chapter 4, Eligibility Requirements Specific to Orphans [5 USCIS-PM C.4].

[^ 17] The father of an orphan is ineligible for classification as a sole parent as defined in 8 CFR 204.3(b).

[^ 18] See *Matter of Rodriguez* (PDF), 18 I&N Dec. 9, 11 (Reg. Comm. 1980) which cites a social welfare agency study as evidence of a sole parent's inability to provide proper care.

[^ 19] This is different from the definition of abandonment, which does not allow a release to be made directly to a PAP.

[^ 20] To determine whether a document may be available in a particular country, see DOS's Country Reciprocity Schedule webpage.

[^ 21] See 8 CFR 103.2(b)(2)(i).

[^ 22] This could be a separate decree or incorporated into the adoption decree itself.

[^ 23] In the case of desertion or disappearance, the decree must also make the child a ward of the state because of such disappearance or desertion.

[^ 24] This includes a subsequent guardian who becomes the legal adoptive parent of the child.

[^ 25] For information on "full and final" adoptions for orphan cases, see Chapter 5, Qualifying Adoptive or Custodial Relationship [5 USCIS-PM C.5]. For general information on what qualifies as a final adoption for immigration purposes, see Part A, Adoptions Overview, Chapter 4, Adoption Definition and Order Validity [5 USCIS-PM A.4].

[^ 26] If the petitioner is married, only one spouse needs to have seen and observed the child before or during the adoption proceedings.

[^ 27] See Chapter 5, Qualifying Adoptive or Custodial Relationship [5 USCIS-PM C.5].

[^ 28] See 8 CFR 103.2(b)(2)(i).

[^ 29] See 8 CFR 103.2(b)(2)(i)-(ii).

Chapter 8 - Adjudication

A. General Guidelines for Adjudication

The following table outlines steps an officer uses to make a decision on an orphan petition.

General Guidelines for Adjudication of Orphan Petition
• Ensure the prospective adoptive parent (PAP) meets suitability determination and eligibility requirements.[1]
• Verify the child's identity.
• Determine if the child meets age requirements.
• Determine if any of the terms in the orphan definition apply to the child.[2]
• Determine if there is evidence of a "full and final" adoption or legal custody for emigration and adoption in the United States.[3]
• Verify there is no material evidence of fraud, child-buying, other misrepresentation, or non-bona fide intent that impacts eligibility.
• Confirm the child matches the characteristics that the PAP has been approved to adopt.
• Verify the petitioner has identified an accredited primary adoption service provider or approved person (unless a limited exception applies), and that they are providing adoption services.[4]
• Send the case to the corresponding U.S. government office to complete the orphan determination.[5]

B. Burden and Standard of Proof

In matters involving immigration benefits, the petitioner always has the burden of proving eligibility for the immigration benefit sought.[6] This determination may include questions of foreign law. When a PAP relies on foreign law to establish eligibility for the beneficiary, the application of the foreign law is a question of fact, which must be proved by the PAP. Therefore, the burden of proof is on the PAP to establish that the child is eligible.[7]

The standard of proof relates to the persuasiveness of the evidence necessary to meet the eligibility requirements for a particular benefit.[8]

The standard of proof for establishing eligibility for orphan petitions is that of a preponderance of the evidence.[9] The PAP meets this standard if the evidence permits a reasonable person to conclude that the claim that the child is an orphan is probably true.[10]

The PAP satisfies the standard of proof if:	The PAP does not satisfy the standard of proof if:
The PAP submits relevant, probative, and credible evidence that leads USCIS to believe that the claim is probably true or more likely than not to be true.[11]	USCIS can articulate a material doubt based on the evidence that leads USCIS to believe that the claim is probably not true.[12]

C. Weight and Reliability of Evidence

1. Weight of Evidence

In applying the preponderance of the evidence standard (to determine whether it is more likely than not that the child is eligible for orphan classification), an officer must consider all the evidence and make a determination based on the totality of the evidence.

If there are inconsistencies in the record, the officer should investigate and request more information[13] to resolve any inconsistencies and give appropriate weight to the evidence in question. The officer must determine whether:

- The court or local authority was aware of any potentially derogatory information;[14]
- Gaps or inconsistencies in the record are material; and
- The inconsistencies are overcome by other evidence in the record indicating the child meets the definition of an orphan.

If the inconsistencies or omissions are…	Then the inconsistencies or omissions…
Minor and not material to the determination of orphan status	Generally do not support a denial or make an otherwise approvable orphan petition not clearly approvable.
Not minor (such as multiple inconsistences or omissions) and are material to the determination of orphan status	May lead to a denial or a not clearly approvable finding.

If additional investigative steps do not reasonably explain an inconsistency or omission or no plausible explanation exists, then the officer should issue an additional Request for Evidence (RFE) or a Notice of Intent to Deny (NOID), as appropriate.[15]

2. Reliability of Evidence

Officers should carefully weigh the evidence and may assign differing weight to evidence in the record, depending on the reliability of that evidence.

An officer should consider all evidence regarding the circumstances of the child's eligibility, not just a foreign court order, decree, or certificate. For example, an officer should consider secondary evidence, such as police reports or administrative or lower court documents that led to the foreign government's decision to terminate parental rights.

USCIS generally accepts a foreign decree or order on its face as primary evidence of a determination by a foreign court. Absent specific material information that a court decree is legally invalid[16] or was obtained by fraud, an officer may generally rely on such authentic decrees as evidence of a determination by a foreign government. An officer may, however, question the validity of a decree or order for various reasons, such as:

- Lack of jurisdiction by the foreign court or authority;
- Lack of parental consent to the adoption;
- No or improper notice of termination of parental rights;
- Evidence of corruption, fraud, or material misrepresentation;
- Lack of due process or appropriate safeguards in the country or jurisdiction issuing the order; or
- Other credible and probative evidence to question the reliability of the documentation.

If there is reason to doubt the validity of the decree or order, the officer may request additional evidence.

D. Orphan Determination

1. Purpose

The Determination on Child for Adoption (Form I-604) (also known as an orphan determination or Form I-604) must be completed in every orphan case.[17] The Form I-604 determination:

- Verifies that the child meets the eligibility criteria to be classified as an orphan under U.S. immigration law; and
- Ensures that the PAP meets all the immigration-related legal requirements to petition for a child to immigrate to the United States.

Generally, DOS completes the Form I-604 orphan determinations on behalf of USCIS in the child's country of origin or where the adoption or grant of legal custody is completed to provide integrity in the orphan adjudication and to ensure that foreign documents submitted to support the orphan petition are sufficient.

2. U.S. Government Agency Roles

Domestically-Filed Petitions with USCIS

When a PAP files an orphan petition domestically (in the United States), the orphan determination is normally completed after USCIS has approved the orphan petition. However, if USCIS has articulable concerns that can only be resolved through the orphan determination, then the adjudicating officer may request that the orphan determination be completed before the final adjudication of the orphan petition.[18] Generally, a consular officer in the child's country of origin completes the orphan determination.

Petitions Filed Outside the United States with U.S. Department of State

If the petitioner filed the orphan petition outside the United States with the U.S. Department of State (DOS) at a U.S. embassy or consulate, the consular officer completes the orphan determination before completing the adjudication of the orphan petition and visa.

E. Decisions and Actions

1. Federal Agency Roles

The adjudication of orphan petitions and the completion of orphan determinations are the exercise of the DHS Secretary's authority, delegated to USCIS.[19] DHS further delegated authority to DOS consular officers to approve orphan petitions and to complete orphan determinations under certain circumstances.[20]

Under this delegated authority, a consular officer has the authority to approve, but not deny, an orphan petition. In addition, while consular officers may ask PAPs for additional information, a consular officer is not authorized to issue an RFE, a NOID, or a Notice of Intent to Revoke (NOIR). If the consular officer believes that an orphan petition filed at the post is not clearly approvable, the consular officer must refer the orphan petition to USCIS.[21]

2. Approvals

USCIS may approve an orphan petition if:

- The petition was properly filed;
- The PAP meets suitability determination and eligibility requirements;[22]
- All security checks are current at the time of approval;[23] and
- The PAP has met the PAP's burden of proving by a preponderance of the evidence that the beneficiary is eligible for classification as an orphan.

If the officer approves the petition, the officer sends a notice of approval[24] to the PAP and the PAP's legal representative, if any.[25]

3. Requests for Evidence and Notices of Intent to Deny

If USCIS is adjudicating the orphan petition and any of the required evidence is missing, deficient, or adverse, or the eligibility requirements have otherwise not been demonstrated,[26] the officer issues an RFE or NOID, as appropriate.

4. Not Clearly Approvable Cases

If the consular officer reviews the record and it does not establish by a preponderance of the evidence the child meets the U.S. immigration definition of an orphan, the consular officer must refer the petition to USCIS as a not clearly approvable case.

A case is not clearly approvable if the record does not establish the child is eligible for classification as an orphan. This may happen when:

- There is a change that necessitates an RFE for an updated home study;[27]

- Any state pre-adoption requirements have not been met for IR-4 cases;
- There is not enough information in the record to meet the preponderance of evidence standard and make a favorable determination;
- There is materially inconsistent or conflicting information in the record that must be reconciled; or
- There is adverse information in the record, such as evidence of child-buying, fraud (including fraudulent documentation), misrepresentation, or non-bona fide intent.

Consular officers cannot issue RFEs or NOIDs. A consular officer must refer any orphan petition that is not clearly approvable to the USCIS office with jurisdiction over its adjudication, along with the supporting documents, the completed orphan determination, and any other relevant documentation.[28] Consular officers may contact USCIS before referring a case as not clearly approvable. This may be especially important in circumstances where there is a compelling medical or humanitarian need.

Once USCIS receives a not clearly approvable case, USCIS consults with the consular post and DOS's Visa Office as necessary to understand the consular officer's concerns before proceeding. Then the USCIS officer does one of the following:

- If the available evidence is sufficient to establish that the child is an orphan by a preponderance of the evidence, the officer approves the petition and returns the petition to the consular post for visa adjudication.
- If the evidence is insufficient, the officer issues an RFE or NOID.[29] The PAP has the opportunity to respond to the RFE or NOID with additional information. The officer must then assess the totality of the evidence in the record to determine if the PAP has met the burden of proving that the child beneficiary qualifies as an orphan.
- If there is no possibility that the petitioner can rebut the reason for the denial, the officer issues a denial.[30]

5. Consular Returns

In some cases, after USCIS approves the orphan petition, a consular officer discovers adverse information during the orphan determination or visa process. If a consular officer discovers probative evidence[31] that would have led USCIS to deny the petition had USCIS been aware of the information at the time of adjudication, the consular officer returns the petition to USCIS for possible revocation. A consular officer cannot revoke an approved orphan petition or issue a NOIR.

The DOS Foreign Affairs Manual contains DOS policies related to consular returns. In general, to recommend revocation of an orphan petition, the consular officer sends the orphan petition to USCIS, via the National Visa Center, along with a revocation memo, case-specific evidence, the completed orphan determination, and any other relevant documentation. Consular officers may contact USCIS to enhance coordination.

Once USCIS receives a consular return case, a USCIS officer consults with the consular post as necessary to understand the consular officer's concerns. USCIS may then:

- Issue a NOIR;[32] or
- Reaffirm the orphan petition and send the case back to the appropriate U.S. consulate or embassy, via the National Visa Center, for visa adjudication.

If USCIS reaffirms a petition but the consular officer believes that the applicant is not eligible for a visa or discovers new evidence that the consular officer believes would result in a revocation request, the DOS's Foreign Affairs Manual guides the consular officer's next steps.[33]

6. Revocation

Automatic Revocation

An approved suitability application or orphan petition is automatically revoked as of the date of approval if any one of the circumstances below occurs before the final decision on a child's application for admission with an immigrant visa or for adjustment of status:

- A change in the PAP's marital status;[34] or
- Any of the circumstances for automatic revocation of an immediate relative or family-sponsored petitions applies.[35]

USCIS issues a notice to the petitioner of such revocation.[36]

Revocation on Notice

An orphan petition must be revoked when information is discovered that would have resulted in denial had it been known at the time of adjudication.[37] Only USCIS officers have authority to revoke approval of an orphan petition.[38]

Before revoking an orphan petition, an officer generally must provide the PAP with a NOIR.[39] USCIS can properly issue a NOIR when:

- There is good and sufficient cause; and
- The evidence of record at the time of the NOIR issuance, if unexplained and unrebutted, would warrant denial of the petition based upon the PAP's failure to meet the PAP's burden of proof.[40]

A NOIR gives the petitioner an opportunity to submit evidence sufficient to overcome the intended revocation. If USCIS has properly issued a NOIR, the PAP bears the burden of establishing that the child qualifies for the benefit sought.[41] If the PAP fails to overcome the grounds for revocation stated in the NOIR in the PAP's response, or the PAP fails to respond, USCIS may revoke the approval of the orphan petition if USCIS establishes good and sufficient cause for revocation.

Good and sufficient cause for revocation must be based upon adverse information, including errors of fact or law, which would have resulted in a denial had the information been known to USCIS at the time the petition was adjudicated because the PAP would have failed to meet the burden of proof at that time.[42] Generally, such adverse information must be specific and material to the case and based upon detailed evidence. Concerns that are conclusory, speculative, equivocal, and irrelevant to eligibility do not warrant revocation.[43] Only factual allegations that are supported by probative evidence[44] in the record and that call the beneficiary's eligibility into question can support revocation.[45]

7. Denials

If the officer cannot approve the orphan petition, the officer must explain in writing the specific reasons for denial.[46] A NOID is not required unless an intended denial is based upon information or evidence of which the applicant is unaware.[47] The denial notice must include information about appeal rights and the opportunity to file a motion to reopen or reconsider.[48]

8. Communication and Correspondence

USCIS sends communication of its actions and decisions directly to the PAP for all case-related matters.

If a Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28) or Notice of Entry of Appearance as Attorney in Matters Outside the Geographical Confines of the United States (Form G-28I) is completed by an attorney or by an accredited representative,[49] the officer also sends a copy of USCIS decision notices to such authorized attorney or accredited representative.[50] A person representing an organization such as a non-profit or charitable organization must first be accredited by the Board of Immigration Appeals. In general, adoption agencies do not qualify as accredited representatives.

Information about the particulars of any case can only be given to the PAP, or to an attorney or accredited representative with a Form G-28 or Form G-28I on file. The Privacy Act forbids disclosing information about the case to anyone else, unless the PAP has signed a written consent[51] to the disclosure or such disclosure is not prohibited by law.[52]

Footnotes

[^ 1] See Part B, Adoptive Parent Suitability Determinations [5 USCIS-PM B].

[^ 2] The officer examines the actual circumstances to determine whether the child meets the conditions for an orphan under U.S. immigration law. See Chapter 5, Qualifying Adoptive or Custodial Relationship [5 USCIS-PM C.5].

[^ 3] See Chapter 5, Qualifying Adoptive or Custodial Relationship [5 USCIS-PM C.5].

[^ 4] See Part A, Adoptions Overview, Chapter 5, Authorized Adoption Service Providers [5 USCIS-PM A.5].

[^ 5] See Section D, Orphan Determination [5 USCIS-PM C.8(D)].

[^ 6] See INA 291. See *Matter of Brantigan* (PDF), 11 I&N Dec. 493 (BIA 1966). See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 4, Burden and Standards of Proof [1 USCIS-PM E.4].

[^ 7] See *Matter of Kodwo* (PDF), 24 I& N Dec. 479, 482 (BIA 2008) (citing *Matter of Fakalata* (PDF) 18 I&N Dec. 213 (BIA 1982) and *Matter of Annang* (PDF), 14 I&N Dec. 502 (BIA 1973)).

[^ 8] See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 4, Burden and Standards of Proof [1 USCIS-PM E.4].

[^ 9] See *Matter of Chawathe* (PDF), 25 I&N Dec. 369, 375 (AAO 2010).

[^ 10] See *Matter of Chawathe* (PDF), 25 I&N Dec. 369, 376 (AAO 2010). See *Matter of E-M-* (PDF), 20 I&N Dec. 77, 80 (Comm. 1989).

[^ 11] See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), which defines more likely than not as a greater than 50 percent probability of something occurring.

[^ 12] See *Matter of Chawathe* (PDF), 25 I&N Dec. 369, 376 (AAO 2010).

[^ 13] If USCIS is adjudicating the case, see Section E, Decisions and Actions, Subsection 3, Requests for Evidence and Notices of Intent to Deny [5 USCIS-PM C.8(E)(3)]. If a consular officer is adjudicating the case, see Section E, Decisions and Actions, Subsection 4, Not Clearly Approvable Cases [5 USCIS-PM C.8(E)(4)] and Subsection 5, Consular Returns [5 USCIS-PM C.8(E)(5)].

[^ 14] If there are any indicators of fraud, see Chapter 6, Additional Requirements, Section A, No Child-Buying, Fraud, Misrepresentation, or Non-Bona Fide Intent [5 USCIS-PM C.6(A].

[^ 15] For a full discussion on RFEs and NOIDs, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 16] An order may be legally invalid if the order was issued by an entity without proper authority to issue such orders or if the court invalidated its order.

[^ 17] See 8 CFR 204.3(k)(1).

[^ 18] See 8 CFR 204.3(k)(1).

[^ 19] See INA 103(a). See INA 204(b).

[^ 20] See 8 CFR 204.3(k)(2).

[^ 21] See 8 CFR 204.3(k)(2).

[^ 22] See Part B, Adoptive Parent Suitability Determinations [5 USCIS-PM B].

[^ 23] See Part B, Adoptive Parent Suitability Determinations [5 USCIS-PM B].

[^ 24] See Notice of Approval of Relative Visa Petition (Form I-171) or the Notice of Action (Form I-797).

[^ 25] For more information on approvals, see Volume 1, General Policies and Procedures, Part E, Adjudications [1 USCIS-PM E].

[^ 26] See Volume 1, General Policies and Procedures, Part E, Adjudications [1 USCIS-PM E].

[^ 27] See Part B, Suitability Determinations, Chapter 5, Action on Pending or Approved Suitability Determinations [5 USCIS-PM B.5].

[^ 28] See 8 CFR 204.3(h)(11).

[^ 29] See Subsection 3, Requests for Evidence and Notices of Intent to Deny [5 USCIS-PM C.8(E)(3)].

[^ 30] See Subsection 7, Denials [5 USCIS-PM C.8(E)(7)].

[^ 31] Probative evidence is evidence which proves or helps prove a fact or issue.

[^ 32] See Subsection 6, Revocation [5 USCIS-PM C.8(E)(6)].

[^ 33] For more information, see 9 FAM 502.3-3(C)(7), Orphan Visa Applications.

[^ 34] See 8 CFR 204.3(h)(14).

[^ 35] See 8 CFR 205.1(a)(3)(i).

[^ 36] See 8 CFR 205.1(b).

[^ 37] See 8 CFR 205.2. See 8 CFR 204.3(h)(14). For more information on revocations, see Volume 1, General Policies and Procedures, Part E, Adjudications [1 USCIS-PM E].

[^ 38] See 8 CFR 205.2(b).

[^ 39] See 8 CFR 205.2(b). A NOIR is not required when the petitioner or beneficiary dies or when some other automatic ground for revocation applies. See 8 CFR 205.1. See 8 CFR 205.2(b).

[^ 40] See INA 205. See 8 CFR 205.2. See 8 CFR 204.3(h)(14). See *Matter of Estime* (PDF), 19 I&N Dec. 450 (BIA 1987).

[^ 41] See *Matter of Cheung* (PDF), 12 I&N Dec. 715 (BIA 1968).

[^ 42] See *Matter of Estime* (PDF), 19 I&N Dec. 450, 451 (BIA 1987).

[^ 43] See *Matter of Arias* (PDF), 19 I&N Dec. 568, 570-51 (BIA 1988).

[^ 44] Probative evidence is evidence which proves or helps prove a fact or issue.

[^ 45] See *Matter of Estime* (PDF), 19 I&N Dec. 450, 451 (BIA 1987).

[^ 46] A DOS consular officer does not have the authority to deny an orphan petition. For more information on denials, see Volume 1, General Policies and Procedures, Part E, Adjudications [1 USCIS-PM E].

[^ 47] See 8 CFR 103.2(b)(16).

[^ 48] For more information on appeals and motions, see Volume 1, General Policies and Procedures, Part F, Motions and Appeals [1 USCIS-PM F].

[^ 49] Under 8 CFR 292.2.

[^ 50] See 8 CFR 103.2(b)(19).

[^ 51] See Consent to Disclose Information (Supplement 2 for Form I-600A and I-600).

[^ 52] See Privacy Act of 1974, Pub. L. 93-579 (PDF), 88 Stat. 1896 (December 31, 1974) (codified at 5 U.S.C. 552a).

Chapter 9 - Pre-Adoption Immigration Review Programs

In certain countries, USCIS and the U.S. Department of State (DOS) have implemented Pre-Adoption Immigration Review (PAIR) programs, which require the orphan determination to be completed before the final adoption or grant of custody in the child's country of origin. The sections below outline when the orphan determination is conducted and who conducts it in each country that has a PAIR program.

A. Ethiopia

USCIS may accept orphan petitions filed on behalf of a child from, and physically located in, Ethiopia who is not yet the subject of a final legal custody order or final adoption by a prospective adoptive parent (PAP).[1] PAPs adopting such children may file[2] the orphan petition for a preliminary determination before traveling to and adopting a child in Ethiopia.

B. Taiwan

USCIS accepts orphan petitions filed on behalf of a child from, and physically located in, Taiwan who is not yet the subject of a final legal custody order or final adoption by a PAP.[3] PAPs adopting such children are encouraged to file[4] the orphan petition with USCIS in the United States before traveling to and adopting a child in Taiwan. The American Institute in Taiwan (AIT) may accept orphan petitions but forwards such petitions to USCIS in the United States for a preliminary determination of eligibility.

A PAP should file with USCIS a completed orphan petition together with all required evidence, except the adoption decree or grant of legal custody.[5] In addition, a PAP adopting from Taiwan should submit:

- Evidence of availability for intercountry adoption generated by the Taiwan island-wide database;
- Signed adoption agreement between birth parents and PAPs for use in Taiwan district family courts; and
- Power of attorney appointing the Taiwan adoption service provider to represent the PAPs.

A USCIS officer reviews the petition and supporting evidence and requests that AIT conduct the necessary orphan determination to determine whether the child appears to qualify as an orphan and is otherwise likely eligible to immigrate to the United States based on the orphan petition. If USCIS makes a favorable preliminary determination that the child appears to meet the definition of an orphan[6] and otherwise appears eligible to immigrate, USCIS issues a PAIR letter. This preliminary eligibility determination is not a final adjudication of the orphan petition and is not binding on USCIS. USCIS then forwards the file to AIT.

After the adoption or grant of legal custody is completed, the PAP submits the adoption decree or legal custody order and required identity documents for the child to AIT. AIT then issues the final approval of the orphan petition, if approvable. If AIT determines that the orphan petition is not clearly approvable at that time, AIT returns the orphan petition to USCIS for further processing.[7]

Footnotes

[^ 1] For information on the current viability of intercountry adoption from Ethiopia, see DOS's Ethiopia webpage. The PAP may be residing in the United States, overseas, or have traveled overseas to complete an adoption.

[^ 2] For filing instructions, see the Petition to Classify Orphan as an Immediate Relative (Form I-600) webpage.

[^ 3] The PAP may be residing in the United States, overseas, or have traveled overseas to complete an adoption.

[^ 4] For filing instructions, see the Form I-600 webpage.

[^ 5] See 8 CFR 103.2.

[^ 6] See INA 101(b)(1)(F) for the definition of an orphan.

[^ 7] See Chapter 8, Adjudication, Section E, Decisions and Actions, Subsection 4, Not Clearly Approvable Cases [5 USCIS-PM C.8(E)(4)].

Part D - Child Eligibility Determinations (Hague)

Chapter 1 - Purpose and Background

A. Purpose

The Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption[1] is an international treaty that provides a framework of safeguards to protect the best interests of children and families involved in intercountry adoptions. By setting clear procedures and prohibiting improper financial gain, the Convention provides greater security, predictability, and transparency for all parties to the adoption, including children, birth parents, and adoptive parents.

The Convention also ensures the appropriate authorities in a child's country of origin deem a child eligible for adoption and give due consideration to an adoption placement within the child's country of origin, before placing the child for intercountry adoption.

The Convention applies to the adoption of a child who:

- Is habitually resident in one Convention country (the country of origin) and is being adopted by a U.S. citizen habitually resident in another Convention country (the receiving country); and
- Has been, is being, or is to be moved from the country of origin to the receiving country, either after the adoption or for the purposes of emigration and adoption.[2]

A prospective adoptive parent (PAP)[3] must generally follow the Convention process[4] if the PAP:

- Is a U.S. citizen[5] who is habitually resident[6] in the United States;[7] and
- Seeks to adopt a child who is habitually resident in a Convention country[8] (other than the United States) on or after April 1, 2008, and on or after the date the Convention entered into force for the other country.[9]

B. Background

The United States signed the Hague Adoption Convention in 1994, signaling support for the principles and standards set forth in the Convention. In 2000, Congress consented to the ratification of the Convention and enacted implementing legislation, the Intercountry Adoption Act of 2000 (IAA).[10] In 2006, the Department of State (DOS) published regulations to establish the regulatory framework for accreditation and approval of adoption service providers required under the Convention and the IAA.[11] In 2007, DHS published Hague Adoption Convention regulations to implement the IAA.[12] The United States ratified the Convention in December 2007 and the Convention subsequently entered into force for the United States on April 1, 2008. On the same day, DHS Hague Adoption Convention regulations noted above also took effect.

Although the United States implemented Convention procedures for intercountry adoptions in 2008, the orphan intercountry adoption process and family-based immigration process for adopted children are also available for eligible children, depending on their country of habitual residence.[13]

Key Aspects of Hague Adoption Convention Process

The Convention and U.S. implementing regulations increase accountability and transparency in the intercountry adoption process by generally requiring the accreditation and approval of adoption service providers.[14] The Convention safeguards against the trafficking, abduction, or sale of children and against the unintentional adoption and emigration of a child who is not eligible to be adopted or whose best interests may not be served through intercountry adoption.

U.S. procedures for Convention cases are aimed at identifying any potential eligibility issues under U.S. immigration law before a PAP adopts the child (or obtains legal custody for the purpose of emigration and adoption) in the child's country of origin so that every eligible child adopted through the Convention process can enter and reside permanently in the United States.

Before a PAP adopts (or obtains legal custody of) a child in the country of origin, USCIS determines whether the child appears eligible to be classified as a Convention adoptee under the Immigration and Nationality Act (INA), and DOS determines whether the child appears to meet the criteria for visa eligibility if immigrating to the United States.[15]

After the PAP adopts the child (or obtains legal custody), the child's country of origin certifies that the adoption complied with the Hague Adoption Convention and DOS reviews the documents again for Convention compliance before making a final decision and issuing a Hague Adoption Certificate and immigrant visa.[16]

C. Scope

For the Convention process, the PAP must first file an application to determine the PAP's suitability and eligibility as an adoptive parent[17] and then file a petition to determine the child's eligibility as a Convention adoptee.[18] This Part D addresses the requirements for petitions used to determine children's eligibility as Convention adoptees.

USCIS guidance does not address other adoption-related requirements, such as those of the child's country of origin, state of proposed residence, or other federal agencies, such as DOS, or the U.S. Department of Health and Human Services (HHS).[19]

Additionally, this part does not address the specific requirements for adopted children to obtain U.S. citizenship.[20]

D. Legal Authorities

- The Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (PDF) (Hague Adoption Convention)
- The Intercountry Adoption Act of 2000 (PDF) (IAA)
- INA 101(b)(1)(G) – Definition of child (for Convention adoptee)
- INA 201(b) – Immediate relatives
- INA 204 – Procedure for granting immigrant status
- 8 CFR 204 Subpart C – Intercountry adoption of a Convention adoptee
- 22 CFR Part 96 – Intercountry adoption accreditation and approval standards and process

Footnotes

[^ 1] This Convention (PDF) is referred to in this part as the Hague Adoption Convention or Convention.

[^ 2] See Hague Adoption Convention (PDF), Article 2(1).

[^ 3] USCIS uses the term PAP in this part to refer to the applicant or petitioner and the applicant or petitioner's spouse (if any) as applicable.

[^ 4] For more information on determining the applicability of the Hague Adoption Convention see Part A, Adoptions Overview, Chapter 2, Adoption Processes, Section A, Hague Adoption Convention, Subsection 1, Applicability [5 USCIS-PM A.2(A)(1)].

[^ 5] In the case of a married couple, this applies if either of the PAPs is a U.S. citizen. However, only one PAP must be a U.S. citizen.

[^ 6] For more information on habitual residence determinations, see part A, Adoptions Overview, Chapter 2, Adoption Processes [5 USCIS-PM A.2].

[^ 7] If the PAP is a U.S. citizen residing outside of the United States and seeks to adopt a child residing in a Hague Adoption Convention country, the PAP may be able to use the U.S. Convention process (even if the PAP does not intend to immediately immigrate the child to the United States), provided the country of origin allows the PAP to complete the Convention process from the Convention country and the PAP can obtain the Hague Adoption Certificate or Hague Custody Certificate to complete the process. The PAP may also be required to follow the law and procedures for immigration and adoption in the country where the PAP resides. For information on determining which U.S. immigration process applies, see Part A, Adoptions Overview [5 USCIS-PM A].

[^ 8] For a list of countries that are party to the Hague Adoption Convention, see the U.S. Department of State (DOS)'s Convention Countries webpage.

[^ 9] The Hague Adoption Convention entered into force for the United States on April 1, 2008. For information on the entry into force date for each country, see the Hague Conference on Private International Law's Status Table webpage.

[^ 10] See Pub. L. 106-279 (PDF), 114 Stat. 825 (October 6, 2000).

[^ 11] See 71 FR 8064 (Feb. 15, 2006). See 22 CFR Part 96.

[^ 12] See 72 FR 56832 (Oct. 4, 2007). See 8 CFR 204 Subpart C.

[^ 13] See Part A, Adoptions Overview [5 USCIS-PM A] for information on determining which adoption process (Hague Adoption Convention, orphan, or family-based) applies, depending on the PAP's circumstances.

[^ 14] See Part A, Adoptions Overview, Chapter 5, Authorized Adoption Service Providers [5 USCIS-PM A.5]. See 22 CFR 96.2. See DOS's Convention Adoption Process webpage for additional information.

[^ 15] For information on the role of DOS as the U.S. Central Authority for the Hague Adoption Convention and the role of USCIS, see Part A, Adoptions Overview, Chapter 1, Purpose and Background, Section C, Background, Subsection 2, Federal Agency Roles [5 USCIS-PM A.1(C)(2)].

[^ 16] See Hague Adoption Convention (PDF), Article 23.

[^ 17] See the Application for Determination of Suitability to Adopt a Child from a Convention Country (Form I-800A). For information on suitability applications, see Part B, Adoptive Parent Suitability Determinations [5 USCIS-PM B].

[^ 18] See the Petition to Classify Convention Adoptee as an Immediate Relative (Form I-800).

[^ 19] For general information on other countries' requirements, see DOS's Country Information webpage. For more information on requirements of the state of proposed residence, see HHS' Child Welfare Information Gateway's State Laws Related to Adoption webpage. For DOS guidance, see 9 FAM 502.3, Adoption-based Classifications and Processing.

[^ 20] For more information on citizenship for adopted children, see Part F, Citizenship for Adopted Children [5 USCIS-PM F].

Chapter 2 - Eligibility

A child must qualify as a Convention adoptee to be eligible to immigrate through the Hague Adoption Convention process.[1] The table below lists general eligibility criteria for the Hague Adoption Convention process, with references to where each individual criterion is discussed in further detail.

Summary of Eligibility Criteria

Eligibility Requirement	For More Information

Eligibility Requirement	For More Information
USCIS determines the prospective adoptive parent (PAP) is suitable and eligible to adopt.	See Part B, Adoptive Parent Suitability Determinations [5 USCIS-PM B].
The child meets identity and age requirements.	See Chapter 3, Identity and Age [5 USCIS-PM D.3].
The child meets specific requirements for eligibility as a Convention adoptee.	See Chapter 4, Eligibility Requirements Specific to Convention Adoptees [5 USCIS-PM D.4].
The child has been adopted by a U.S. citizen (and spouse, if married) or is under the legal custody of the U.S. citizen PAP for purposes of emigration and adoption.	See Chapter 5, Qualifying Adoptive or Custodial Relationship [5 USCIS-PM D.5].
The PAP must have identified an accredited or approved primary adoption service provider (unless a limited exception applies).	See Chapter 6, Additional Requirements [5 USCIS-PM D.6].
There must be no evidence of improper inducement, fraud or misrepresentation of material fact, or non-bona fide intent.	See Chapter 6, Additional Requirements [5 USCIS-PM D.6].
The child must match the characteristics that the PAP has been approved to adopt.	See Chapter 6, Additional Requirements [5 USCIS-PM D.6].
The PAP must not have engaged in prohibited contact with the child's birth parent(s), legal custodian(s), or caregiver(s).	See Chapter 6, Additional Requirements [5 USCIS-PM D.6].
The PAP must have met any pre-adoption requirements of the child's jurisdiction of proposed residence.	See Chapter 6, Additional Requirements [5 USCIS-PM D.6].
The PAP completed any required pre-placement preparation and training.	See Chapter 8, Documentation and Evidence [5 USCIS-PM D.8].

Footnotes

[^ 1] See INA 101(b)(1)(G). To meet the definition of a child under INA 101(b)(1), the child must be unmarried and under the age of 21.

Chapter 3 - Identity and Age

The child's identity must be properly documented,[1] and the child must meet applicable age requirements. The prospective adoptive parent (PAP) must file the petition[2] before the child turns 16 unless the child qualifies for the sibling exception or the suitability application[3] exception.[4]

Sibling Exception

A child who is age 16 or older at the time the petition is filed qualifies for the sibling exception if the child is under age 18 at the time the petition is filed, and that child's birth[5] sibling:

- Has been or will be adopted by the same parent or parents; and
- Is or was previously classified as an orphan while under age 16;
- Is or was previously classified as a Convention adoptee while under age 16; or
- Meets the definition of adopted child for a family-based adoption petition and was under age 16 at the time of adoption.[6]

Suitability Application Exception

USCIS deems the suitability application filing date to be the petition filing date if both of the following requirements are met:[7]

- The PAP filed the suitability application after the child's 15th birthday, but before the child's 16th birthday (or, if the sibling exception also applies, after the child's 17th birthday, but before the child's 18th birthday); and
- The PAP files the petition not more than 180 days after the initial approval of the suitability application.

Footnotes

[^ 1] See Chapter 8, Documentation and Evidence, Section B, Required Evidence [5 USCIS-PM D.8(B)].

[^ 2] In this part, the term petition refers to the Petition to Classify Convention Adoptee as an Immediate Relative (Form I-800).

[^ 3] In this part, the term suitability application refers to the Application for Determination of Suitability to Adopt a Child from a Convention Country (Form I-800A).

[^ 4] This chapter describes age-related requirements that a child must meet for their Form I-800 to be approved. This chapter does not discuss age-related requirements for citizenship purposes. For information about the age of child applicants and immigrant visa eligibility, see 9 FAM 502.1-1(D), Child Status Protection Act. For information on age requirements related to citizenship for adopted children, see Part F, Citizenship for Adopted Children [5 USCIS-PM F].

[^ 5] In this volume, USCIS uses birth and natural synonymously. The terms natural siblings and birth siblings are not defined in the public law that provides for the sibling exception. USCIS interprets these terms to include children sharing one or both biological parents. The PAP must show through evidence that the children are birth siblings. The applicant may provide birth certificates, custody, or adoption decrees from the foreign court, death certificates, marriage certificates, and other official documentation to establish the children are birth siblings. USCIS may suggest DNA testing of the siblings if there are any questions regarding the sibling relationship. All expenses incurred to prove relationship must be borne by the PAP.

[^ 6] See INA 101(b)(1)(G)(iii).

[^ 7] See 8 CFR 204.313(b)(3).

Chapter 4 - Eligibility Requirements Specific to Convention Adoptees

To be eligible under the Convention process, the child must be habitually resident in a Convention country and meet the definition of a Convention adoptee.[1] To be eligible as a Convention adoptee, the Central Authority of the child's country of origin must also have determined that the child is eligible and available for intercountry adoption.[2]

A Convention adoptee must meet the eligibility requirements under U.S. immigration law as described below.[3] A child can have:

- Two living parents or legal custodians who release the child for emigration and adoption (if there is a direct relinquishment by the birth parents, the birth parents must be incapable of providing proper care); or
- A sole or surviving parent who releases the child for emigration and adoption and the other parent has died, disappeared, abandoned, or deserted the child.

Definitions

Foreign official documents and laws may use different terms from those used in U.S. immigration law or use the same terms but with different meanings to define eligibility criteria for Convention adoptees. To determine if a definition or requirement under U.S. immigration law is met, USCIS considers the laws of the child's country of origin and the required actions by the foreign Central Authority.

USCIS also considers the facts and circumstances of the particular case given the totality of the record. While some of the terms used in the Convention adoptee definition are the same as those used in the orphan definition, they often have different meanings or requirements.

A. Two Living Birth Parents or Legal Custodians

1. Irrevocable Consent

The child's birth parents or other persons or institutions who retain legal custody of the child must have freely given their written irrevocable consent to the termination of their legal relationship with the child and to the child's emigration and adoption.[4]

2. Incapable of Providing Proper Care

In the case of a child released for adoption by two living birth parents directly to an individual (rather than to an orphanage or institution authorized under the Convention country's child welfare laws to act in such a capacity), the petitioner must demonstrate that the birth parents are incapable of providing proper care.[5] Incapable of providing proper care means that in light of all the relevant circumstances, including economic or financial concerns, extreme poverty, medical, mental, or emotional difficulties, or long term incarceration, the child's two living birth parents are not able to provide for the child's basic needs, consistent with the local standards of the Convention country.[6]

If two living birth parents release a child for adoption to an orphanage or institution that is authorized under the Convention country's child welfare laws to act in such a capacity, the petitioner does not need to establish that the birth parents are incapable of providing proper care. However, irrevocable consent by the birth parents and legal custodian is still required.

B. Sole Parent or Surviving Legal Parent

1. Sole or Surviving Parent

A birth parent may be a sole parent or a surviving parent if:[7]

- The other parent is deceased (for a surviving parent), or the competent authority has determined that the other parent disappeared, abandoned, or deserted the child (for a sole parent); and
- The child has not acquired a new legal parent under the law.[8]

The sole or surviving parent must irrevocably consent to the adoption in writing. However, the petitioner does not have to demonstrate that a sole or surviving parent is incapable of providing proper care for the child.

2. Disappearance

Disappearance means that a child's parent has unaccountably or inexplicably passed out of the child's life so that their whereabouts are unknown, there is no reasonable expectation of their reappearance, and there has been a reasonable effort to locate them, as determined by a competent authority in accordance with the laws of the Convention country.[9]

A stepparent who is deemed to be a child's legal parent may be found to have disappeared if it is established that the stepparent either never knew of the child's existence, or never knew of their legal relationship to the child.

3. Abandonment

Abandonment means that a child's parent:

- Has willfully forsaken all parental rights, obligations, and claims to the child, as well as all custody of the child without intending to transfer, or without transferring, these rights to any specific individual or entity; and
- Surrendered such rights, obligations, claims, control, and possession.

Knowledge that a specific person may adopt a child does not void an abandonment; however, abandonment cannot be conditioned on the child's adoption by that specific person. If the parent entrusted the child to a third party for custodial care in anticipation of, or preparation for, adoption:

- The third party (such as a governmental agency, court of competent jurisdiction, adoption agency, or orphanage) must have been authorized under the Convention country's child welfare laws to act in such a capacity; and
- The transfer must have been permanent and unconditional with the intent to terminate the legal parent-child relationship.

To meet the definition of abandonment, the petitioner must establish by a preponderance of evidence that the child's parent abandoned the child.[10] If a written document is used to help establish this, the document must:

- Specify whether the parent(s) who signed the document were able to read and understand the language in which the document is written; or

- If the parent(s) are not able to read or understand the language in which the document is written, then the document must be accompanied by a declaration by an identified person, establishing that the identified person is competent to translate the language in the document into a language that the parent(s) understand and that the identified person, on the date and at the place specified in the declaration, read and explained the document to the parent(s) in a language that the parent(s) understand. The declaration must also indicate the language used to provide this explanation.

4. Desertion

Desertion means that a child's parent has willfully forsaken the child, refused to carry out their rights and obligations, and that, as a result, the child has become a ward of a competent authority in accordance with the laws of the Convention country.[11]

Desertion does not mean that the parent has disappeared, but rather that they refuse to carry out their parental rights and obligations towards the child. Desertion differs from abandonment in that the parent has not taken steps to divest themselves of parental duties, but the parent's inaction has caused a local authority to step in to assume custody of the child.

C. Other Legal Parents

USCIS considers a parent to include any person who is related to a child in any of the ways specified in the definition under U.S. immigration law.[12] The officer must determine for each parent whether the person has legal rights to the child in accordance with the Convention country's laws. If the officer determines that a person is a legal parent, the officer must determine whether the child still meets the Convention adoptee definition in light of the legal parent.

Stepparents

USCIS must consider the existence of a stepparent in determining whether a child is a Convention adoptee.[13] The officer must determine whether the stepparent has a legal parent-child relationship with the child under the Convention country's laws.[14]

If an officer determines that the child has a stepparent, the officer should request additional evidence from the prospective adoptive parent (PAP), including:

- A copy (with a certified English translation, if applicable) of the relevant statutes, regulations, court judgments, or other legal authority from the country of origin addressing whether a stepparent has a legal parent-child relationship to the stepchild; and
- A statement from the stepparent (with a certified English translation, if applicable) indicating that the stepparent has neither adopted the stepchild nor obtained any other form of legal custody of the stepchild and does not intend to do so.

USCIS considers a stepparent to be a parent for purposes of adjudication of a petition if:

- The stepparent adopted the stepchild as specified in U.S. immigration law;[15]
- Under the Convention country's laws, the marriage between the parent and stepparent creates a legal parent-child relationship between the stepparent and stepchild; or
- The stepparent has obtained legal custody of the stepchild establishing a legal relationship to the stepchild.

In some jurisdictions, a stepparent does not have a legal parent-child relationship to a stepchild and would, therefore, not have any legal standing to perform any action terminating parental rights and duties.

USCIS does not consider a stepparent to be a child's parent for purposes of a petition if the PAP establishes that the stepparent has no legal parent-child relationship to the stepchild under the Convention country's laws. The burden of establishing this rests with the PAP. The PAP cannot simply assert without evidence that the stepparent has no legal parental rights to the child.

If the officer determines the stepparent is a legal parent, the PAP must establish the child still meets the Convention adoptee definition in light of the stepparent and that the stepparent has consented to the adoption, in the same manner that would apply to any other legal parent.

Footnotes

[^ 1] See 8 CFR 204.301 for the definition of a Convention adoptee. For information on habitual residence determinations, see Part A, Adoptions Overview, Chapter 2, Adoption Processes [5 USCIS-PM A.2]. See 8 CFR 204.303.

[^ 2] The Central Authority of the child's country of origin will affirm the child's eligibility and availability for intercountry adoption in accordance with the country of origin's laws when referring the child to the PAP and sending an Article 16 report. An Article 16 report is an official report on the child. For more information on the Article 16 report, see Chapter 8, Documentation and Evidence, Section B, Required Evidence, Subsection 2, Article 16 Report and Accompanying Evidence [5 USCIS-PM D.8(B)(2)].

[^ 3] See INA 101(b)(1)(G). See 8 CFR 204.301.

[^ 4] See INA 101(b)(1)(G)(i)(II). See 8 CFR 204.301. For more information on irrevocable consent requirements, see Chapter 8, Documentation and Evidence, Section B, Required Evidence, Subsection 2, Article 16 Report and Accompanying Evidence [5 USCIS-PM D.8(B)(2)].

[^ 5] See INA 101(b)(1)(G)(i)(III). See 8 CFR 204.301.

[^ 6] See 8 CFR 204.301.

[^ 7] See the definitions of sole parent, surviving parent, abandonment, deserted or desertion, and disappeared or disappearance at 8 CFR 204.301.

[^ 8] See Section C, Other Legal Parents [5 USCIS-PM D.4(C)].

[^ 9] See definition of disappeared or disappearance at 8 CFR 204.301.

[^ 10] See definition of abandonment at 8 CFR 204.301. For information on standards of proof for immigration petitions, see Chapter 9, Adjudication, Section B, Burden and Standards of Proof [5 USCIS-PM D.9(B)].

[^ 11] See 8 CFR 204.301.

[^ 12] See INA 101(b)(2).

[^ 13] Under the law of some jurisdictions, a stepparent may adopt their spouse's child without terminating the legal parent-child relationship between the child and their other parent. The adoptive stepparent may then qualify as a parent through INA 101(b)(1)(E), as well as INA 101(b)(1)(B).

[^ 14] For information on resources on foreign law, see Part A, Adoptions Overview, Chapter 4, Adoption Definition and Order Validity, Section A, Determining the Validity and Effect of an Adoption, Subsection 7, Evidence About the Applicable Adoption Law [5 USCIS-PM A.4(A)(7)].

[^ 15] See INA 101(b)(1)(E).

Chapter 5 - Qualifying Adoptive or Custodial Relationship

A prospective adoptive parent (PAP) must have one of the following for a child to be classified as a Convention adoptee:

- A final adoption in the Convention country; or
- Legal custody of the child under the law of the Convention country for purposes of emigration and adoption in the United States.[1]

A. Final Adoption

A child may qualify as a Convention adoptee based on a final adoption if:

- The adoption meets USCIS requirements for a final adoption (is valid under the law of the country of origin, creates a legal permanent parent-child relationship,[2] and terminates the prior legal parent-child relationship); and
- The petitioner (and spouse, if married) adopted the child.

If these requirements are met, the child may qualify for an IH-3 visa[3] based on a valid final adoption. USCIS considers an adoption that meets these requirements to be a final adoption.

A child does not, however, have a final adoption if only one parent of a married couple adopted the child. USCIS may, however, consider the foreign adoption by one parent in a married couple to have established legal custody for purposes emigration and adoption, and the child may be eligible for an IH-4 visa.[4]

B. Legal Custody for Emigration and Adoption

Not all countries grant what USCIS considers a final adoption abroad for immigration purposes.[5] A child may, however, be eligible based on legal custody for the purpose of emigration and adoption if the following criteria are met:[6]

- The PAP secured legal custody in accordance with the laws of the country of origin;
- The person, organization, or competent authority that has legal custody or control over the child irrevocably released the child for emigration and adoption;[7]
- The PAP has complied with any pre-adoption requirements; and
- If there was an adoption abroad that did not meet the requirements for a final adoption, the child’s proposed jurisdiction of residence allows re-adoption or provides for judicial recognition of the foreign adoption.

If the child meets these requirements, the child may qualify for an IH-4 visa to come to the United States for adoption.[8]

Footnotes

[^ 1] Some countries will not allow a child to emigrate without a final adoption decree. To determine a Convention country’s specific laws, see the U.S. Department of State (DOS)’s Country Information webpage.

[^ 2] For more information on what qualifies as a final adoption for immigration purposes, see Part A, Adoptions Overview, Chapter 4, Adoption Definition and Order Validity [5 USCIS-PM A.4].

[^ 3] Visa category for an immediate relative under INA 201(b) and INA 204(a)(1), as a child from a Convention country adopted abroad by a U.S. citizen.

[^ 4] Visa category for an immediate relative under INA 201(b) and INA 204(a)(1), as a child from a Convention country coming to be adopted in the United States by a U.S. citizen.

[^ 5] For example, guardianships, simple adoptions, or Kafala orders in countries that follow traditional Islamic law generally do not qualify as a final adoption abroad. Such guardianship, Kafala, or other custody orders may, however, be sufficient to establish that the PAP has secured legal custody of the child. If the legal custody is for emigration and adoption and all other requirements are met, such an order could support approval of a petition. See 8 CFR 204.313(h)(1)(ii)(A).

[^ 6] See the definition of custody for purposes of emigration and adoption at 8 CFR 204.301.

[^ 7] The Central Authority of the country of a child's habitual residence must have, by a judicial or administrative act, expressly authorized the petitioner, or an individual or entity acting on the petitioner's behalf, to take the child out of the child's country of habitual residence and bring the child to the United States for adoption in the United States. See 8 CFR 204.301.

[^ 8] See Volume 5, Adoptions, Part F, Citizenship for Adopted Children [5 USCIS-PM F] for information on citizenship for adopted children. A PAP needs to take additional steps to secure U.S. citizenship for a child entering with an IH-4 visa because the adoption of the child has to be finalized in the United States or recognized by operation of law, unlike in cases of children entering with IH-3 visas on the basis of a final adoption.

Chapter 6 - Additional Requirements

In addition to meeting general eligibility requirements, the following requirements must also be met:

- The Department of State (DOS) has determined that the United States can partner with the Convention country and is able to issue Hague Certificates for children from the Convention country;[1]
- There is no improper inducement, fraud, misrepresentation, or non-bona fide intent;

- The child matches the characteristics that the prospective adoptive parent (PAP) has been approved to adopt;
- The PAP met any pre-adoption requirements of the child's jurisdiction of proposed residence;[2]
- The petitioner has identified and uses the services of an accredited or approved primary adoption service provider;[3] and
- There has not been any prohibited contact between the PAP, or any adult member of the household, and the child's birth parents, legal custodians, or caregivers.

A. No Child-Buying, Fraud, Misrepresentation, or Non-Bona Fide Intent

The officer must determine whether there are allegations or indications of improper inducement, fraud, misrepresentation, or non-bona fide intent that would prevent the child from being classified as a Convention adoptee.

1. Improper Inducement

A petition must be denied or revoked if there is improper inducement or a prohibited payment. A prohibited payment is when the PAP or a person or entity working on their behalf paid, gave, offered to pay or offered to give, receive, or accept money or other consideration, either directly or indirectly, to a child's parent, agent, other person, or entity to induce or influence any decision about:

- The child's placement for adoption;
- The consent to adoption;
- Relinquishment of the child for the purpose of adoption; or
- The performance of any act that makes the child a Convention adoptee.[4]

Prohibited payments do not include paying for reasonable costs incurred for permissible services such as administrative, court, legal, translation, or medical services related to the adoption proceedings.[5]

A payment is not reasonable if it is prohibited under the law of the country in which the payment is made or if the amount of the payment is not commensurate with the costs for professional and other services in the country in which any particular service is provided.

Permissible services are:

- The services of an adoption service provider in connection with an adoption;
- Expenses incurred in locating a child for adoption;
- Medical, hospital, nursing, pharmaceutical, travel, or other similar expenses incurred by a mother or her child in connection with the birth or any illness of the child;
- Counseling services for a parent or a child for a reasonable time before and after the child's placement for adoption;
- Expenses, in an amount commensurate with the living standards in the country of the child's habitual residence, for the care of the birth mother while pregnant and immediately following the birth of the child;
- Expenses incurred in obtaining the home study;
- Expenses incurred in obtaining required reports on the child;[6]
- Legal services, court costs, and travel or other administrative expenses connected with an adoption, including any legal services performed for a parent who consents to the adoption of a child or relinquishes the child to an agency; and
- Any other service the payment for which the officer finds, on the basis of the facts of the case, was reasonably necessary.

2. Fraud or Misrepresentation

Fraud is the willful misrepresentation of a material fact. In the adoption context, this typically involves concealment of a material fact to obtain an official document or judgment by a court or authorized entity (for example, an adoption decree). To meet the requirement of materiality, evidence of the misrepresentation must be documented and generally relate to the child's eligibility as a Convention adoptee.

3. Non-Bona Fide Intent

The PAP must establish that the purpose of the adoption (or legal custody for adoption) is for the PAP to form a bona fide parent-child relationship with the child.[7] The intent to create a legal permanent parent-child relationship requires the intent to raise the child as their own child, with the same mutual rights and obligations that exist between a birth parent and birth child.

Intent in this case implies the provision of care, support, and direction to the Convention adoptee, without the intent to profit financially or otherwise from the presence of the child. The PAP must also establish that the parent-child relationship between the child and the birth or other prior legal parent(s) has been terminated. USCIS evaluates the petition to determine if the intent of the adoption is for the PAP to form a genuine parent-child relationship and not solely for immigration purposes.

USCIS generally does not consider PAPs who intend to terminate the adoption or transfer physical or legal custody of the child after the child enters the United States to meet the bona fide relationship requirement.

B. Child Matches Characteristics that Prospective Adoptive Parent is Approved For

During the suitability and eligibility application process, USCIS determined that the evidence submitted established the PAP was a suitable adoptive parent for a child with specific characteristics.[8] The child must match the characteristics that the PAP has been approved to adopt (such as age, sex, nationality, special needs, and number of children).

If the child does not match the characteristics for which USCIS has approved the PAP to adopt, then the officer should issue a Request for Evidence (RFE)[9] for an updated home study, any related documents, and a Form I-800A, Supplement 3, Request for Action on an Approved Form I-800A (Form I-800A, Supplement 3).

1. Special Needs

The officer should review evidence, generally found in the Article 16 report,[10] to verify whether the child has any significant physical or mental impairment, disability, or condition. The officer should:

- Ensure that the suitability application approval does not exclude any such significant or serious medical condition of the child; and

- Verify that the PAP is aware of and accepts any significant medical, physical, or mental condition.

If an officer discovers that the child has a significant medical condition that the PAP is not aware of, the officer must:

- Provide the PAP with all available pertinent details concerning the impairment, disability, or condition; and
- Halt adjudication of the case until the PAP submits a notarized statement indicating awareness of the child's impaired health or disability and a willingness to proceed and an updated home study addressing the PAP's ability to provide proper care for such child.[11]

2. Age

The child must meet the age range listed on the suitability application approval at the time the referral or match was accepted by the PAP, or if the accepted referral or match date cannot be established, the filing date of the petition.[12] If the child does not match the age range for which USCIS has approved the PAP to adopt, then the officer should issue an RFE for an updated home study.

C. Primary Provider

The PAP must use an authorized adoption service provider for the provision of adoption services and identify on the petition which accredited or approved adoption service provider is the primary provider if using multiple accredited or approved adoption service providers.[13] If the officer determines that the PAP has not sufficiently identified a primary adoption service provider on the petition, the officer may issue an RFE.[14]

If an officer learns that the PAP's primary adoption service provider has withdrawn from the PAP's case, is no longer providing any remaining adoption services, or has lost accreditation or approval, the officer should issue an RFE requesting evidence that either the current primary adoption service provider remains as such, or the PAP has identified a new primary adoption service provider.[15]

Reporting Adoption Service Provider Concerns to Department of State

If the officer uncovers information that suggests the primary provider is failing to comply with DOS accreditation regulations, the officer can report the adoption service provider through the DOS complaint registry or to DOS.[16] If an officer suspects adoption service provider misconduct, the officer should consult with their supervisor before making a report.

D. No Prohibited Contact

The PAP, and any adult member of the household, must not have had any prior contact with a child's birth parent, legal custodian, or caregiver (including an entity) unless contact is permitted because: [17]

- The first contact occurred after USCIS approved the suitability application, and after the Central Authority of the child's country of origin determined that the child is eligible for intercountry adoption and that the required consents to the adoption were given;
- The Central Authority of the child's country of origin permitted earlier contact, either in the particular instance or through laws or rules of general application, and the contact occurred in compliance with the authorization or generally applicable laws or rules;[18] or
- The PAP was related to the child before the adoption through certain familial relationships.[19]

Footnotes

[^ 1] If DOS has determined the United States cannot process Convention cases from a certain country, USCIS publishes this information on the USCIS Country-Specific Processing webpage.

[^ 2] See INA 101(b)(1)(G)(i)(V)(bb).

[^ 3] See 22 CFR 96.2 and 22 CFR 96.14.

[^ 4] See 8 CFR 204.304.

[^ 5] DOS works closely with foreign governments to identify all costs related to intercountry adoption in particular countries. DOS posts general information about adoption-related costs on DOS's Country Information webpage.

[^ 6] See the reports described in 8 CFR 204.313(d)(3) and 8 CFR 204.313(d)(4).

[^ 7] See INA 101(b)(1)(G)(i)IV).

[^ 8] See Part B, Adoptive Parent Suitability Determinations [5 USCIS-PM B].

[^ 9] For more information on RFEs, see Chapter 9, Adjudication, Section D, Decisions and Actions [5 USCIS-PM D.9(D)].

[^ 10] An Article 16 report is an official report on the child. For more information on the Article 16 report, see Chapter 8, Documentation and Evidence, Section B, Required Evidence, Subsection 2, Article 16 Report and Accompanying Evidence [5 USCIS-PM D.8(B)(2)].

[^ 11] See Part B, Adoptive Parent Suitability Determinations, Chapter 5, Action on Pending or Approved Suitability Determinations [5 USCIS-PM B.5].

[^ 12] For example, if a suitability determination states that the PAP is approved to adopt a child aged 0-4 years old, then a child who is 4 years old but not yet 5 would meet this age range. This is true even if the child has turned 5 by the time the officer is adjudicating the application.

[^ 13] See Part A, Adoptions Overview, Chapter 5, Authorized Adoption Service Providers [5 USCIS-PM A.5]. See 22 CFR 96.2 definition of adoption services.

[^ 14] For more information on RFEs, see Chapter 9, Adjudication, Section D, Decisions and Actions [5 USCIS-PM D.9(D)].

[^ 15] An adoption service provider is not allowed to act as a primary provider if it loses its accreditation or approval or allows its accreditation or approval to lapse. For more information, see the If Your Adoption Service Provider is No Longer Accredited or Approved webpage.

[^ 16] See DOS's Complaint Registry webpage.

[^ 17] See 8 CFR 204.309(b)(2).

[^ 18] If the PAP first adopted the child without complying with the Hague Adoption Convention, the competent authority's decision to permit the adoption to be vacated, and to allow the petitioner to adopt the child again after complying with the Hague Adoption Convention, also constitutes approval of any prior contact. See 8 CFR 204.309(b)(2)(ii).

[^ 19] For information on qualifying relationships, see 8 CFR 204.309(b)(2)(iii).

Chapter 7 - Required Order of Immigration and Adoption Steps

A. General

The prospective adoptive parent (PAP) must follow the adoption and U.S. immigration process in a specific order.[1] Specifically, a PAP should not adopt or obtain legal custody of a child for purposes of emigration and adoption before completing certain steps in the Hague Adoption Convention process.[2] The list below highlights the key steps and the order in which they must generally be completed.[3]

Summary of Hague Adoption Convention Process Steps

Step	Description
Step 1	The PAP chooses a U.S. accredited or approved adoption service provider.
Step 2	The PAP obtains a home study from a home study preparer authorized to complete an intercountry adoption home study.[4]
Step 3	The PAP files a suitability application with USCIS to be found suitable and eligible to adopt a child from a Convention country.[5]
Step 4	The PAP obtains a proposed adoptive placement for a child who is eligible for intercountry adoption with the Central Authority of the child's country of origin.
Step 5	The Central Authority of the child's country of origin matches the child with the PAP, issues an Article 16 letter,[6] and the PAP accepts the match.
Step 6	The PAP files a petition[7] with USCIS to have the child found provisionally eligible to be classified as a Convention adoptee under U.S. immigration law.[8]
Step 7	After USCIS provisionally approves the petition, the PAP applies to the U.S. Department of State (DOS) for an immigrant visa for the child.
Step 8	DOS reviews the petition and visa application to determine whether there appear to be any visa ineligibilities and whether the placement took place in compliance with the Intercountry Adoption Act of 2000 and with the Hague Adoption Convention.
Step 9	DOS notifies the Central Authority of the child's country of origin of the Step 8 determination by issuing an Article 5/17 letter, indicating that the adoption may be proceed and the child appears authorized to enter and reside permanently in the United States.[9]
Step 10	After DOS issues the Article 5/17 letter, the PAP completes the adoption or obtains legal custody of the child for the purposes of emigration and adoption.
Step 11	The Central Authority of the child's country of origin certifies that the adoption or grant of custody occurred in accordance with the Convention.[10]
Step 12	After the PAP completes the adoption or obtains legal custody of the child, DOS reviews and issues a Hague Adoption Certificate or a Hague Custody Certificate and issues final approval of the petition if it is clearly approvable. If DOS cannot issue final approval, the DOS consular officer returns the case to USCIS as not clearly approvable.
Step 13	If the PAP resides in the United States, the PAP obtains a U.S. immigrant visa and brings the child to the United States.[11]

B. Out-of-Order Adoption or Legal Custody Order

1. Obtaining Legal Custody or Adoption Out of Order

If the PAP adopts or obtains legal custody of the child out of order, before the required immigration processing steps take place, USCIS considers the adoption or custody order to be premature. If the PAP obtained an adoption or custody order prematurely, USCIS generally must deny the petition.[12] USCIS considers an adoption or custody order to be premature when the PAP adopted the child, or obtained custody for purposes of emigration and adoption, before USCIS provisionally approved the petition or before DOS issues the Article 5/17 letter.

The PAP must show that an order obtained prematurely was voided, vacated, annulled, or otherwise terminated, for USCIS to provisionally approve a petition.[13] USCIS may provisionally approve the petition if the PAP can establish that an order obtained prematurely was terminated[14] (no longer in effect) at the time of filing the petition or that laws of the jurisdiction where they obtained the order prevent an adoptive family from terminating a previously finalized adoption.

2. Additional Evidence

If the PAP obtained an order prematurely, the officer should send a Request for Evidence (RFE) or a Notice of Intent to Deny (NOID) asking the PAP to submit:

- A copy of the applicable law governing the termination of adoption and custody orders, as well as a certified English translation of that law; and
- Evidence showing the following:
  - The order is no longer in effect, as demonstrated by an order from a competent authority terminating the adoption or custody order; or
  - Why the order cannot be terminated (order is still in effect) and why the PAP did not follow the proper sequence.

The PAP may demonstrate the order cannot be terminated by providing both:

- A statement from the Central Authority of the child's country of origin indicating that, under the law of that country, the petitioner is not able to obtain an order terminating the adoption or custody order; and
- A statement from the PAP, signed under penalty of perjury under U.S. law, explaining why, despite the clearly stated requirements[15] and the warnings on the form instructions,[16] the PAP obtained the adoption or custody order before receiving provisional approval of the (immigration) petition.

If the PAP submits evidence that the order obtained prematurely was terminated, the officer may provisionally approve[17] the petition, if it is otherwise approvable.

Some countries may not have readily available legal mechanisms for terminating adoption or custody orders. If the PAP's response establishes that the PAP is not able to obtain an order terminating the adoption or custody order obtained prematurely, USCIS adjudicates the petition in light of the fact that the adoption or custody order appears to have been obtained without compliance with the Hague Adoption Convention requirements and related U.S. laws[18] and regulations.

The officer must deny the petition if the evidence of record establishes that the PAP knowingly obtained the adoption or custody order before filing the petition with the specific intent to circumvent the Convention's requirements, U.S. immigration laws, and the implementing regulations.[19]

Footnotes

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[1] If the child is in the United States and will apply for adjustment of status instead of consular processing, also see Volume 7, Adjustment of Status [7 USCIS-PM].

[2] See Articles 4, 5, 16, 17, and 23 of the Hague Adoption Convention (PDF).

[3] For more information, see DOS's Convention Adoption Process webpage.

[4] See Part A, Adoptions Overview, Chapter 5, Authorized Adoption Service Providers [5 USCIS-PM A.5].

[5] See the Application for Determination of Suitability to Adopt a Child from a Convention Country (Form I-800A)

[6] See Article 16 of the Hague Adoption Convention (PDF).

[7] See the Petition to Classify Convention Adoptee as an Immediate Relative (Form I-800).

[8] The PAP must have an approved Form I-800A before they can file a Form I-800.

[9] See Articles 5 and 17 of the Hague Adoption Convention (PDF).

[10] See Article 23 of the Hague Adoption Convention (PDF).

[11] However, if the child is in the United States and will apply for adjustment of status instead of consular processing, see Volume 7, Adjustment of Status [7 USCIS-PM].

[12] See 8 CFR 204.309(b)(1).

[13] See 8 CFR 204.309(b)(1).

[14] For purposes of this section, the terms terminated, terminating, and termination all refer to adoption or custody orders that are voided, vacated, annulled, or otherwise terminated under the Convention country's laws.

[15] See 8 CFR 204.309(b)(2).

[16] See instructions for Application for Determination of Suitability to Adopt a Child from a Convention Country (Form I-800A) and Petition to Classify Convention Adoptee as an Immediate Relative (Form I-800).

[17] USCIS may only deem the premature order voiding requirement at 8 CFR 204.309(b)(1) to be met for purposes of provisional approval.

[18] See Section 301(b) of the Intercountry Adoption Act, Pub. L. 106-279 (PDF), 114 Stat. 825, 837 (October 6, 2000).

[19] See 8 CFR 204.309(b)(1).

Chapter 8 - Documentation and Evidence

A. Filing

To request a determination of a child's eligibility for classification as a Convention adoptee, a prospective adoptive parent (PAP) files a Petition to Classify Convention Adoptee as an Immediate Relative (Form I-800), and any required fee, supplements, or supporting forms in accordance with form instructions.[1]

Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act)[2]

A petitioner who has been convicted of a specified offense against a minor is prohibited from filing a family-based petition,[3] including adoption petitions, on behalf of any family-based beneficiary.[4]

B. Required Evidence

The PAP must submit required evidence in accordance with form instructions.[5] The table below summarizes what evidence is required for petitions and what additional evidence is required for certain cases.

Summary of Required Evidence

Evidence the PAP Submits	When Applicable
Evidence of valid Application for Determination of Suitability to Adopt a Child from a Convention Country (Form I-800A) approval (or of a Form I-800A, Supplement 3, suitability approval extension)	All Form I-800 petitions
The report required under Article 16 of the Hague Adoption Convention (and all accompanying evidence) regarding the child's identity, adoptability, background, family history, medical history, and any special needs	All Form I-800 petitions
A statement from the primary provider certifying the Article 16 report	All Form I-800 petitions
A statement from the primary adoption service provider that the PAP meets training requirements	All Form I-800 petitions

Evidence the PAP Submits	When Applicable
Application for Waiver of Grounds of Inadmissibility (Form I-601)	If the child is inadmissible to the United States
Additional evidence and supporting forms for children coming to the United States for adoption, such as a post-placement service plan provided by the adoption service provider and evidence of compliance with any state pre-adoption requirements	If the child will not have an adoption abroad that USCIS considers final
Certified copy of the adoption or legal custody order or decree	To obtain final approval from the U.S. Department of State (DOS) of a provisionally approved Form I-800[6]

If the Central Authority matches the PAP with a child more than 6 months after the child's 15th birthday, but before the child's 16th birthday (or for a qualifying sibling, 6 months after the child's 17th birthday, but before the child's 18th birthday), the PAP may file the petition without all of the applicable supporting evidence. The PAP must submit a statement from the primary provider, under penalty of perjury, confirming that the Central Authority made the adoption placement on the date specified in the statement.[7]

1. PAP is Suitable and Eligible to Adopt

To show that USCIS found the PAP suitable and eligible to adopt, the PAP must submit a copy of a valid unexpired Form I-800A or Form I-800A, Supplement 3 approval notice.[8] The approval notice must be valid at the time the PAP files Form I-800.

The Form I-800A or Form I-800A, Supplement 3 approval does not need to remain valid while the Form I-800 is pending, but the PAP's duty of disclosure remains ongoing.[9] The PAP cannot request an updated suitability determination or make any additional petition filings without a valid suitability approval.

2. Article 16 Report and Accompanying Evidence

An Article 16 report is an official report from the Central Authority on the child's identity, adoptability, background, family history, medical history, and any special needs. The PAP must submit an Article 16 report that meets all the requirements of the Hague Adoption Convention.[10]

The report may consist of more than one document, as long as the documents address all of the required elements. The report must specify the child's name and date of birth, indicate the reasons for making the adoption placement, and establish that the Central Authority:

- Determined that the child is eligible for intercountry adoption;
- Considered placing the child for adoption within the child's country of origin, and determined that intercountry adoption is in the child's best interests;
- Ensured that any identifiable birth parent or legal custodian freely consented to the child's adoption in writing after appropriate counseling;
- Ensured the child has freely consented in writing to the adoption after appropriate counseling (if the child is of an age that the Convention country's laws require the child's consent) and considered the child's wishes and opinion; and
- Ensured that no payment or inducement of any kind has been given to obtain the necessary consents.

The following evidence must accompany the Article 16 report:[11]

- A copy of the child's birth certificate that includes the name of the child's birth parent or parents, or secondary evidence of the child's age and identity (if a birth certificate is not available);
- A copy of any needed irrevocable consents;[12]
- A statement from the primary provider certifying the report is a true, correct, and complete copy of the report from the Central Authority; and
- A summary of the information provided to the PAP concerning the child's medical and social history.[13]

This summary, or a separate document, must include:

- A statement as to whether there is reason to believe the child has any medical condition that makes the child inadmissible.[14] If the medical information available at the provisional approval stage is not sufficient to assess whether the child may be inadmissible, the PAP may submit the information to DOS before seeking final approval of the petition.
- The factual basis for being unable to provide proper care (if both of the child's birth parents were the child's legal custodians and signed the irrevocable consent).
- Information about the parent's or legal custodian's death and a copy of the death certificate (if applicable).
- The circumstances leading to the determination that a parent or legal custodian is a sole parent (if applicable).
- The circumstances leading to the custodian's acquisition of custody of the child and the legal basis of that custody (if the legal custodian was any individual or entity other than the child's birth parent or parents).

Delayed Birth Certificates

Generally, USCIS does not give the same weight to delayed birth certificates as birth certificates issued at the time of birth due to the potential for fraud.[15] Certain jurisdictions, however, may not issue birth certificates to children until they become involved in an intercountry adoption.

An officer must determine the reliability of the facts contained in the delayed certificate in light of the other evidence in the record and should not reject the delayed certificate's evidentiary value simply because it was not issued at the time of the child's birth.

Officers should check the DOS's U.S. Visa: Reciprocity and Civil Documents by Country Schedule[16] to determine a document's availability and reliability. If the officer determines that reliability is a concern, the officer should request additional evidence.

Written Irrevocable Consent

The irrevocable consent must meet the following requirements:[17]

- Establish that the legal custodian freely consents to the termination of the legal custodian's legal relationship with the child;
- Indicate the place and date the document was signed by a child's legal custodian;
- If signed by the child's birth mother or any legal custodian other than the birth father,[18] have been signed after the child's birth;
- Specify whether the legal custodian is able to read and understand the language in which the consent is written;

- If the legal custodian is not able to read or understand the language in which the document is written, then the document does not qualify as an irrevocable consent unless the document is accompanied by a declaration signed by an identified person who meets the following requirements:
  - Establish that the identified person is competent to translate the irrevocable consent into a language that the legal custodian understands;
  - Establish that the person, on the date and at the place specified in the declaration, read and explained the consent to the legal custodian in a language that the legal custodian understands and indicates the language used to provide this explanation; and
  - Certify the truth of the facts stated in the declaration, if the person who signed the declaration is an officer or employee of the Central Authority (but not of an agency or entity authorized to perform a Central Authority function by delegation) or any other governmental agency. Any other person who signs a declaration must sign the declaration under penalty of perjury under U.S. law.

3. Pre-Placement Training Statement

The PAP must submit a statement from the primary adoption service provider verifying that the PAP met required pre-placement preparation and training requirements provided for under federal regulations.[19]

4. Application for Waiver of Grounds of Inadmissibility (Form I-601)

If a PAP knows that the child is inadmissible for an inadmissibility ground for which a waiver is available (such as for certain medical conditions), the PAP must submit an Application for Waiver of Grounds of Inadmissibility (Form I-601).[20] The PAP must submit the application in accordance with form instructions.[21]

5. Additional Evidence for Children Coming to the United States for Adoption

USCIS considers a Convention adoptee to be coming to the United States for adoption if the PAP does not complete a final adoption abroad, or if only one parent of a married couple completes the adoption abroad.[22] If a child is coming to the United States for adoption, the PAP must submit the following in addition to the evidence outlined above:

- Affidavit of Support Under Section 213A of the INA (Form I-864);
- Evidence that the PAP met any pre-adoption requirements; and
- A statement on post-placement services.

Affidavit of Support

If the child is coming to the United States for adoption, the PAP must include a completed and signed Affidavit of Support Under Section 213A of the INA (Form I-864) with their petition unless the child is otherwise exempt.[23]

Evidence the PAP Met the Pre-Adoption Requirements

If the child is coming to the United States for adoption, the PAP must meet any pre-adoption requirements of the jurisdiction where they will reside. Pre-adoption requirements vary by jurisdiction and the PAP must describe them on the petition.[24] The PAP must describe:

- Which pre-adoption requirements have been met;
- When and how the PAP intends to complete the child's adoption; and
- When and how the PAP intends to satisfy any requirements that can be satisfied only after the child arrives in the United States.[25]

Post-Placement Services Statement

If the child is coming to the United States for adoption, the PAP must submit a written report from the primary provider, signed under penalty of perjury by the primary provider (or an authorized representative of the primary adoption service provider) detailing the primary adoption service provider's plan for post-placement services.[26]

C. Primary and Secondary Evidence

A PAP should submit primary evidence when available.[27] Primary evidence is evidence that, on its face, proves a fact. For example, primary evidence of death is a death certificate issued by the appropriate authority.

Not all countries, however, have the same kind of documentary practices as the United States. If primary evidence is not available, a PAP must demonstrate its unavailability and should submit secondary evidence.[28]

If both primary and secondary evidence are unavailable, the PAP must demonstrate the unavailability of the primary and secondary evidence and submit two or more affidavits that are sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances.[29]

Footnotes

[^ 1] See instructions for Form I-800. For more information on filing timeframes, see Volume 1, General Policies and Procedures, Part B, Submission of Benefit Requests, Chapter 6, Submitting Requests, Section D, Filing Periods Ending on Weekends or Federal Holidays [1 USCIS-PM B.6(D)]. See Fee Schedule (Form G-1055) to determine if a fee is needed for Form I-800 and its supplements.

[^ 2] See Pub. L. 109-248 (PDF) (July 27, 2006). For more information, see Volume 6, Immigrants, Part C, Adam Walsh Act [6 USCIS-PM C].

[^ 3] This includes Form I-800.

[^ 4] See INA 204(a)(1)(A)(i), INA 204(a)(1)(B)(i), and INA 101(a)(15)(K).

[^ 5] See instructions for Form I-800. See 8 CFR 103.2(b).

[^ 6] The PAP does not submit the adoption or custody order with the Form I-800 petition, but rather as part of the final approval process. For more information, see Chapter 9, Adjudications, Section D, Decisions and Actions, Subsection 2, Approvals [5 USCIS-PM D.9(D)(2)].

[^ 7] See 8 CFR 204.313(c)(2).

[^ 8] See 8 CFR 204.313(d)(1). For information on extensions of approval periods, see 8 CFR 204.312(e).

[^ 9] See Part B, Adoptive Parent Suitability Determinations, Chapter 4, Home Studies, Section P, Duty of Disclosure [5 USCIS-PM B.4(P)].

[^ 10] See 8 CFR 204.313(d)(3). See the Hague Adoption Convention (PDF).

[^ 11] See 8 CFR 204.313(d)(4).

[^ 12] For information on when irrevocable consent is required, see Chapter 4, Eligibility Requirements Specific to Convention Adoptees [5 USCIS-PM D.4]. If the laws of the country prohibit providing the identity of the parent or legal custodian, then they do not need to provide the consent documentation. However, the Central Authority must certify in its report that the documents exist, and that they establish the child's age and availability for intercountry adoption.

[^ 13] See 22 CFR 96.49 and 8 CFR 204.313(d)(4).

[^ 14] See INA 212(a).

[^ 15] See *Matter of Bueno-Almonte* (PDF), 21 I&N Dec. 1029, 1032-33 (BIA 1997). See *Matter of Ma* (PDF), 20 I&N Dec. 394 (BIA 1991). See *Matter of Serna* (PDF), 16 I&N Dec. 643 (BIA 1978).

[^ 16] See DOS's U.S. Visa: Reciprocity and Civil Documents by Country webpage.

[^ 17] See 8 CFR 204.301.

[^ 18] The birth father may sign an irrevocable consent before the child's birth if permitted by the law of the country of the child's habitual residence. See 8 CFR 204.301.

[^ 19] See 22 CFR 96.48 and 8 CFR 204.313(d)(2).

[^ 20] See 8 CFR 204.313(d)(5). For information on inadmissibility provisions, see INA 212(a).

[^ 21] See instructions for Petition to Classify Convention Adoptee as an Immediate Relative (Form I-800). See instructions for Form I-601. For more information on inadmissibility waivers, see Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM].

[^ 22] For more information on what qualifies as a final adoption for immigration purposes, see Part A, Adoptions Overview, Chapter 4, Adoption Definition and Order Validity [5 USCIS-PM A.4].

[^ 23] See 8 CFR 204.313(d)(6). See Volume 8, Admissibility, Part G, Public Charge Ground of Inadmissibility, Chapter 6, Affidavit of Support Under Section 213A of the INA [8 USCIS-PM G.6].

[^ 24] The home study must also provide details about any required pre-adoption requirements. See Part B, Adoptive Parent Suitability Determinations, Chapter 4, Home Studies, Section M, State-Specific Requirements [5 USCIS-PM B.4(M)].

[^ 25] See 8 CFR 204.313(h)(1)(ii)(C).

[^ 26] See 8 CFR 204.313(d)(6). For information on post-placement duties, see 22 CFR 96.5.

[^ 27] Officers should check DOS's U.S. Visa: Reciprocity and Civil Documents by Country webpage to determine a document's availability and reliability.

[^ 28] See 8 CFR 103.2(b)(2)(i). See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section B, Primary and Secondary Evidence [1 USCIS-PM E.6(B)].

[^ 29] See 8 CFR 103.2(b)(2)(i)-(ii).

Chapter 9 - Adjudication

Both USCIS and the U.S. Department of State (DOS) have roles in the adjudication of the Petition to Classify Convention Adoptee as an Immediate Relative (Form I-800), but their roles and authorities differ.[1] USCIS may issue:

- A provisional approval;
- A Request for Evidence (RFE) or Notice of Intent to Deny (NOID);
- A final denial;
- A Notice of Intent to Revoke (NOIR); or
- A final revocation.

DOS may issue a final petition approval, but cannot issue an RFE, NOID, NOIR, final revocation, or denial. In the case of a child who will apply for adjustment of status, the USCIS officer with jurisdiction over the adjustment application has authority to grant this final approval upon receiving the Secretary of State's certificate.[2]

A. General Guidelines for Adjudication

The following table outlines the main steps a USCIS officer uses to make a provisional decision on whether a child will qualify as a Convention adoptee.

General Guidelines for Adjudication of Form I-800 Petitions
Ensure the petition was properly filed.[3]
Verify the petitioner has identified an accredited or approved primary adoption service provider.[4]
Ensure the prospective adoptive parent (PAP) meets suitability determination and eligibility requirements.[5]

General Guidelines for Adjudication of Form I-800 Petitions
Ensure security checks are current.[6]
Verify the child's identity.[7]
Determine if the child meets age requirements.[8]
Confirm the child matches the characteristics that the PAP has been approved to adopt.[9]
Determine if it appears the child likely meets specific requirements for eligibility as a Hague Convention adoptee.[10]
Determine if there is evidence of a final adoption or legal custody for emigration and adoption in the United States.[11]
Verify there is no material evidence of fraud, improper inducement, other misrepresentation, or non-bona fide intent that impacts eligibility.[12]
Ensure the petition does not meet any grounds for denial, such as the PAP not meeting order of adoption and immigration steps requirements.[13]
Provisionally approve the petition, issue an RFE, issue a NOID, deny the petition, or refer for investigation.[14]
Notify DOS if USCIS provisionally approves the petition, so DOS can determine if final approval is appropriate following the final adoption or grant of legal custody.

B. Burden and Standards of Proof

In matters involving immigration benefits, the petitioner always has the burden of proving eligibility for the immigration benefit sought.[15] This determination may include questions of foreign law. When a PAP relies on foreign law to establish eligibility for the child, the application of the foreign law is a question of fact, which must be proved by the PAP. The burden of proof is on the PAP to establish that the child is eligible as a Convention adoptee.[16]

The standard of proof relates to the persuasiveness of the evidence necessary to meet the eligibility requirements for a particular benefit.[17] The standard of proof for establishing eligibility for petitions is that of a preponderance of the evidence.[18] The PAP meets this standard if the evidence permits a reasonable person to conclude that the claim that the child is eligible as a Convention adoptee is probably true.[19] The standard of proof for Form I-800 petitions is that of a preponderance of the evidence.[20] The PAP meets this standard if the evidence permits a reasonable person to conclude that the claim that the child is eligible as a Convention adoptee is probably true.[21]

C. Weight and Reliability of Evidence

1. Weight of Evidence

In applying the preponderance of the evidence standard (to determine whether it is more likely than not that the child is eligible as a Convention adoptee), an officer must consider all the evidence and determine eligibility based on the totality of the evidence in the record.

If there are inconsistencies in the record, the officer should request more information[22] to resolve any inconsistencies and give appropriate weight to the evidence in question. The officer must determine whether:

- The court or local authority was aware of any potentially derogatory information;[23]
- Gaps or inconsistencies in the record are material; and
- The inconsistencies are overcome by other evidence in the record indicating the child appears to meet requirements as a Convention adoptee.

Inconsistencies in the Record

If the inconsistencies or omissions are…	Then they…
Minor and not material to the determination of eligibility	Generally do not support a denial or make an otherwise approvable petition not clearly approvable.
Not minor (such as multiple inconsistences or omissions) and are material to the determination of eligibility	May lead to a denial or a not clearly approvable[24] finding.

If additional investigative steps do not reasonably explain a material inconsistency or omission or no plausible explanation exists, then the officer should issue an RFE or a NOID, as appropriate.[25]

Officers should carefully weigh the evidence and may assign differing weight to evidence in the record, depending on the reliability of that evidence.

An officer should consider all evidence regarding the circumstances of the child's eligibility, including documents from the Central Authority in the child's country of origin. For example, an officer should consider secondary evidence, such as police reports or administrative or lower court documents that led to the foreign government's decision to terminate parental or custodial rights.

Although USCIS would generally not see a foreign adoption decree at the provisional approval stage, USCIS generally accepts foreign decrees or orders on their face as primary evidence of a determination by a foreign court. Absent specific material information that a court decree is legally invalid[26] or was obtained by fraud, an officer may generally rely on such authentic decrees as evidence of a determination by a foreign government. An officer may, however, question the validity of a decree or order for various reasons, such as:

- Lack of jurisdiction by the foreign court authority;
- Lack of parental or custodial consent to the adoption or legal custody decree;
- No or improper notice of termination of parental or custodial rights;
- Evidence of corruption, fraud, or material misrepresentation;
- Lack of due process or appropriate safeguards in the country or jurisdiction issuing the order; or
- Other credible and probative evidence to question the reliability of the documentation.

If there is reason to doubt the validity of the decree or order, USCIS may request additional evidence.

D. Decisions and Actions

1. Federal Agency Roles

The adjudication of Form I-800 petitions is the exercise of the DHS Secretary's authority, delegated to USCIS.[27] DHS further delegated authority to DOS consular officers to approve petitions.[28] However, consular officers cannot deny or revoke petitions. In addition, a consular officer is not authorized to issue an RFE, a NOID, or a NOIR. If the consular officer believes that a petition is not clearly approvable or recommends revocation, the consular officer must refer the petition to USCIS.[29]

2. Approvals

Provisional Approval

USCIS may provisionally approve a petition if:[30]

- The petition was properly filed;
- The PAP meets suitability determination and eligibility requirements;[31]
- All security checks are current at the time of approval and there is no unresolved derogatory information;[32] and
- The PAP has met the burden of proving by a preponderance of the evidence that the child qualifies as a Convention adoptee.[33]

If the officer provisionally approves the petition, the officer sends a Provisional Approval of Form I-800 notice to:

- The PAP;
- The PAP's legal representative, if any; and
- The adoption service provider, if the PAP authorized disclosure in the Form I-800, Supplement 1, Consent to Disclose Information (Form I-800, Supplement 1).[34]

The officer forwards the notice of provisional approval and all supporting evidence to DOS.[35]

Final Approval

If USCIS provisionally approves the petition, the PAP may continue on with the next steps in the Hague Adoption Convention process, which include DOS issuance of the Article 5/17 letter,[36] final adoption or custody of the child, and applying for an immigrant visa for the child.[37]

The PAP must submit a legible, certified copy of the adoption decree or legal custody for purposes of emigration and adoption order to obtain final approval of a provisionally approved petition.[38] The PAP submits the order to DOS as part of the visa application process, or to the USCIS officer who has jurisdiction of the child's adjustment of status application.

As part of the final approval process, DOS issues the Hague Adoption Certificate or Hague Custody Certificate.[39] This certification establishes that the final adoption of the child, or the grant of custody of the child for the purpose of emigration and adoption, was done in accordance with the Hague Adoption Convention and the Intercountry Adoption Act of 2000. Such a certified final adoption is entitled to recognition in the United States as a valid adoption order. DOS may then grant final approval of the petition.[40]

If DOS cannot issue final approval, the consular officer returns the case to USCIS as not clearly approvable.

3. Request for Evidence, Notice of Intent to Deny, and Referral

If USCIS is adjudicating the Convention adoption petition and any of the required evidence to determine the child's eligibility is missing, deficient, or adverse, or the eligibility requirements have otherwise not been demonstrated, the officer issues an RFE or NOID, as appropriate.[41]

USCIS is required to issue a NOID before denying a Form I-800 petition based on any mandatory denial grounds in 8 CFR 204.309(b).[42]

Referrals for Investigation

If USCIS determines, on the basis of specific facts, that completing an investigation will aid in the provisional or final adjudication of the Form I-800, USCIS can refer a case to DOS for investigation before Form I-800 adjudication.[43]

If the officer suspects fraud beyond the scope of the review conducted by DOS concerning the child's status as a Convention adoptee, or that national security or public safety concerns exist, the officer should refer the case to the Fraud Detection and National Security Directorate (FDNS).

4. Not Clearly Approvable Cases

For provisionally approved petitions, if derogatory information is subsequently discovered by DOS, DOS returns the petition to USCIS as not clearly approvable. DOS may return a petition as not clearly approvable for various reasons, including:

- The child does not meet the definition of a Convention adoptee;
- The child is not eligible to immigrate to the United States;
- The child does not meet the characteristics that USCIS and the home study preparer approved;
- The child was adopted or a grant of legal custody occurred before the Article 5/17 letter was issued; or
- There is evidence that prohibited payments were made by or on behalf of the applicant or petitioner to directly or indirectly influence decisions related to any stage of the Hague Adoption Convention process.

After USCIS receives the petition, the officer should review all of the information and determine the appropriate next step. The officer may then:

- Issue an RFE;
- Issue a NOID;
- Deny the petition;[44] or
- Affirm the original provisional approval.

If USCIS issues a RFE and either the PAP does not respond or the information is insufficient, the officer may deny the petition or issue a NOID. If the officer issues a NOID, and the PAP does not overcome the reasons for denial, the officer denies the petition. If the officer issues an RFE or NOID and the PAP overcomes the reasons for ineligibility, the provisional approval

stands, and the officer returns the petition to DOS for continued processing.

5. Denials

USCIS must deny a petition that does not meet the requirements for a provisional approval.[45] This includes denial if any of the below conditions apply.

- The petitioner completed the adoption of the child or acquired legal custody of the child for purposes of emigration and adoption before the provisional approval of the petition (unless the petitioner meets requirements for this restriction to not apply).[46]
- The petitioner, or any additional adult member of the household, met with, or had any other form of contact with, the child's parents, legal custodian, or other individual or entity who was responsible for the child's care when the contact occurred (unless the contact qualifies as a permitted contact).[47]
- The petitioner, or any individual or entity acting on behalf of the petitioner, engaged in any conduct related to the adoption or immigration of the child that is prohibited as an improper inducement, or that the petitioner has concealed or misrepresented any material facts concerning payments made in relation to the adoption.[48]
- The child is already present in the United States (unless the petitioner meets requirements for this restriction to not apply).[49]
- The petitioner files the petition before the approval of a suitability application, after the denial of a suitability application; or after the expiration of the approval of a suitability application.[50]
- The petitioner is currently barred from filing a petition.[51]

If the officer cannot provisionally approve the petition, the officer must explain in writing the specific reasons for denial.[52] The denial notice must include information about appeal rights and the opportunity to file a motion to reopen or reconsider.

6. Appeals, Revocation, and Withdrawals

Appeals

A PAP may appeal the denial of a petition unless:[53]

- The petitioner filed the petition before USCIS approved a suitability application or after the expiration of the approval of a suitability application; or
- The petition was filed during any period in which the petitioner is barred from filing a petition.[54]

A PAP may choose to file a motion to reopen or reconsider rather than an appeal.[55]

Revocation

USCIS may revoke the provisional or final approval of a petition if there is good and sufficient cause for revocation. Good and sufficient cause exists where information is discovered concerning the child’s status as a Convention adoptee that would have warranted the denial of the petition had it been known at the time of adjudication.[56]

Withdrawals

A PAP (or their attorney or accredited representative of record) may withdraw their petition at any point up until the child is admitted to the United States by submitting a written request to USCIS.

7. Communication and Correspondence

USCIS sends communication of its actions and decisions directly to the PAP for all case-related matters. If a Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28) or Notice of Entry of Appearance as Attorney in Matters Outside the Geographical Confines of the United States (Form G-28I) is completed by an attorney or by an accredited representative,[57] the officer also sends a copy of USCIS decision notices to such authorized attorney or accredited representative.[58]

A person representing an organization such as a non-profit or charitable organization must first be accredited by the Board of Immigration Appeals. In general, individuals who work for adoption agencies do not qualify as accredited representatives.

Information about the particulars of any case can only be given to the PAP, or to an attorney or accredited representative with a Form G-28 or Form G-28I on file. The Privacy Act forbids disclosing information about the case to anyone else unless the PAP has signed a written consent[59] to the disclosure or such disclosure is not prohibited by law.[60]

Footnotes

[^ 1] See INA 103(a) and INA 204(b).

[^ 2] See INA 204(d)(2). See 8 CFR 204.313(h)(2).

[^ 3] See Chapter 8, Documentation and Evidence [5 USCIS-PM D.8].

[^ 4] See Chapter 6, Additional Requirements, Section C, Primary Provider [5 USCIS-PM D.6(C)].

[^ 5] See Part B, Adoptive Parent Suitability Determinations [5 USCIS-PM B].

[^ 6] See Part B, Adoptive Parent Suitability Determinations, Chapter 3, Eligibility, Documentation, and Evidence (Hague Process), Section C, Documentation and Evidence, Subsection 5, Biometrics [5 USCIS-PM B.3(C)(5)].

[^ 7] See Chapter 3, Identity and Age [5 USCIS-PM D.3].

[^ 8] See Chapter 3, Identity and Age [5 USCIS-PM D.3].

[^ 9] See Chapter 6, Additional Requirements, Section B, Child Matches Characteristics that Prospective Adoptive Parent is Approved For [5 USCIS-PM D.6(B)].

[^ 10] See Chapter 4, Eligibility Requirements Specific to Convention Adoptees [5 USCIS-PM D.4].

[^ 11] See Chapter 5, Qualifying Adoptive or Custodial Relationship [5 USCIS-PM D.5].

[^ 12] See Chapter 6, Additional Requirements, Section A, No Child-Buying, Fraud, Misrepresentation, or Non-Bona Fide Intent [5 USCIS-PM D.6(A)].

[^ 13] See Chapter 7, Required Order of Immigration and Adoption Steps [5 USCIS-PM D.7)].

[^ 14] See Section D, Decisions and Actions [5 USCIS-PM D.9(D)].

[^ 15] See INA 291. See *Matter of Brantigan* (PDF), 11 I&N Dec. 493 (BIA 1966). See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 4, Burden and Standards of Proof [1 USCIS-PM E.4].

[^ 16] See *Matter of Kodwo* (PDF), 24 I&N Dec. 479, 482 (BIA 2008) (citing *Matter of Fakalata* (PDF), 18 I&N Dec. 213 (BIA 1982) and *Matter of Annang* (PDF), 14 I&N Dec. 502 (BIA 1973)).

[^ 17] See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 4, Burden and Standards of Proof [1 USCIS-PM E.4].

[^ 18] See *Matter of Chawathe* (PDF), 25 I&N Dec. 369, 375 (AAO 2010).

[^ 19] See *Matter of Chawathe* (PDF), 25 I&N Dec. 369, 376 (AAO 2010). See *Matter of E-M-* (PDF), 20 I&N Dec. 77, 80 (Comm. 1989).

[^ 20] See *Matter of Chawathe* (PDF), 25 I&N Dec. 369, 375 (AAO 2010).

[^ 21] See *Matter of Chawathe* (PDF), 25 I&N Dec. 369, 376 (AAO 2010). See *Matter of E-M-* (PDF), 20 I&N Dec. 77, 80 (Comm. 1989).

[^ 22] If USCIS is adjudicating the case, see Section D, Decisions and Actions, Subsection 3, Request for Evidence, Notice of Intent to Deny, and Referral [5 USCIS-PM D.9(D)(3)]. If a consular officer is adjudicating the case, see Section D, Decisions and Actions, Subsection 4, Not Clearly Approvable Cases [5 USCIS-PM D.9(D)(4)].

[^ 23] If there are any indicators of fraud, see Chapter 6, Additional Requirements, Section A, No Child-Buying, Fraud, Misrepresentation, or Non-Bona Fide Intent [5 USCIS-PM D.6(A)].

[^ 24] See Section D, Decisions and Actions, Subsection 4, Not Clearly Approvable Cases [5 USCIS-PM D.9(D)(4)].

[^ 25] For a full discussion on RFEs and NOIDs, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 26] An order may be legally invalid if the order was issued by an entity without proper authority to issue such orders or if the court invalidated its order.

[^ 27] See INA 103(a) and INA 204(b).

[^ 28] For information on DOS processing of Form I-800 petitions, see 9 FAM 502.3, Adoption-based Classifications and Processing.

[^ 29] See 8 CFR 204.3(k)(2).

[^ 30] See 8 CFR 204.313(g).

[^ 31] See Part B, Adoptive Parent Suitability Determinations [5 USCIS-PM B].

[^ 32] See Part B, Adoptive Parent Suitability Determinations [5 USCIS-PM B].

[^ 33] USCIS cannot approve a petition if it meets grounds for denial under 8 CFR 204.309(b). For more information, see Subsection 5, Denials [5 USCIS-PM D.9(D)(5)].

[^ 34] For more information on approvals, see Volume 1, General Policies and Procedures [1 USCIS-PM].

[^ 35] If the child will apply for adjustment of status, USCIS retains the record of proceeding. For information on adjustment of status, see Volume 7, Adjustment of Status [7 USCIS-PM].

[^ 36] If DOS determines that the child appears eligible to immigrate to the United States and that the information provided indicates that the adoption process thus far has complied with the Hague Adoption Convention and the Intercountry Adoption Act, DOS notifies the Central Authority of the child's country of origin by issuing an Article 5/17 letter. The Article 5/17 letter informs the Central Authority that U.S. competent authorities have determined the PAP is eligible and suitable to adopt, that the child may enter and reside permanently in the United States, and that the U.S. Central Authority agrees that the adoption may proceed.

[^ 37] See 22 CFR 42.24.

[^ 38] See 8 CFR 204.313(h)(1).

[^ 39] See INA 204(d)(2).

[^ 40] See 22 CFR 42.24.

[^ 41] See 8 CFR 204.309(c). For more information, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 42] See Subsection 5, Denials [5 USCIS-PM D.9(D)(5)].

[^ 43] See 8 CFR 204.313(f).

[^ 44] See Subsection 5, Denials [5 USCIS-PM D.9(D)(5)].

[^ 45] See Subsection 2, Approvals [5 USCIS-PM D.9(D)(2)].

[^ 46] See Chapter 7, Required Order of Immigration and Adoption Steps [5 USCIS-PM D.7].

[^ 47] For information on permitted contacts, see 8 CFR 204.309(b)(2)(i)-(iii).

[^ 48] See 8 CFR 204.304.

[^ 49] See 8 CFR 204.309(b)(4).

[^ 50] See 8 CFR 204.309(b)(5).

[^ 51] There is a 1-year bar for from filing a subsequent adoption petition in certain circumstances. For more information, see 8 CFR 204.307(c). A petitioner who has been convicted of a specified offense against a minor is prohibited from filing a family-based petition on behalf of any family-based beneficiary. See Adam Walsh Act, Pub. L. 109-248 (PDF) (July 27, 2006).

[^ 52] A DOS consular officer does not have the authority to deny a Form I-800 petition. For more information on denials, see Volume 1, General Policies and Procedures [1 USCIS-PM].

[^ 53] See 8 CFR 204.314.

[^ 54] See 8 CFR 204.307(c).

[^ 55] See Notice of Appeal or Motion (Form I-290B). For more information, see Volume 1, General Policies and Procedures, Part F, Motions and Appeals [1 USCIS-PM F].

[^ 56] See 8 CFR 204.313(f). For more information, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 10, Post-Decision Actions, Section D, Revocation, Rescission, or Termination [1 USCIS-PM E.10(D)].

[^ 57] See 8 CFR 292.2.

[^ 58] See 8 CFR 103.2(b)(19).

[^ 59] See Consent to Disclose Information (Form I-800, Supplement 1).

[^ 60] See Privacy Act of 1974, Pub. L. 93-579 (PDF), 88 Stat. 1896 (December 31, 1974) (codified at 5 U.S.C. 552a).

Part E - Family-Based Adoption Petitions

Chapter 1 - Purpose and Background

A. Purpose

The family-based petition process is one of the three processes for a beneficiary to immigrate to the United States based on adoption.[1] Unlike the Hague Adoption Convention[2] or orphan processes, eligibility for the family-based process generally requires the adoptee beneficiary to have been in the legal custody of and jointly resided with the adoptive parent for at least 2 years (amongst other requirements),[3] and it does not require a USCIS determination of the adoptive parent's suitability.

There are certain restrictions for U.S. citizens on using the family-based petition process for an adoptee beneficiary from a Hague Adoption Convention country. USCIS can only approve a family-based petition filed by a U.S. citizen for an adoptee beneficiary from a Hague Adoption Convention country under limited circumstances.[4]

B. Background

The family-based petition process describes the process by which a U.S. citizen or lawful permanent resident (LPR) petitions for an adopted child, son, or daughter. The petition process establishes the petitioner's[5] relationship to an adopted child, son, or daughter so that the adoptee beneficiary can apply to become an LPR.[6]

Filing a family-based petition[7] is the first step for an adopted child, son, or daughter to become an LPR. The filing or approval of the petition does not give the adoptee beneficiary any immigration status or benefit. Generally, if the petition is approved, the adoptee beneficiary will need to take additional steps to become an LPR.

C. Scope

This Part discusses the requirements for a qualifying family member to file a Petition for Alien Relative (Form I-130) on behalf of an adoptee beneficiary.

This Policy Manual does not address other adoption-related requirements, such as those of the adoptee beneficiary's country of origin,[8] state of proposed residence,[9] or other federal agencies, such as the U.S. Department of State.[10]

Additionally, this Part does not discuss how to obtain U.S. citizenship for an adoptee beneficiary.[11]

D. Legal Authorities

- INA 101(b)(1)(E) – Definition of an adopted child
- 8 CFR 204.1 – General information about immediate relative and family-sponsored petitions
- 8 CFR 204.2 – Petitions for relatives, widows and widowers, and abused spouses and children
- 8 CFR 204.303 – Determination of habitual residence

Footnotes

[^ 1] See Part A, Adoptions Overview [5 USCIS-PM A] for information on determining which adoption process (Hague Adoption Convention, orphan, or family-based) applies.

[^ 2] The Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (PDF) is referred to as the Hague Adoption Convention.

[^ 3] See INA 101(b)(1)(E).

[^ 4] For general information on when a U.S. citizen can file a family-based petition for a child from a Hague Adoption Convention country, see Part A, Overview and Guiding Principles [5 USCIS-PM A]. For information on how restrictions apply if the child is physically present in the United States, see Chapter 3, Hague Restrictions on Family-Based Petitions [5 USCIS-PM E.3].

[^ 5] Petitioner refers to the petitioning adoptive parent in this Part.

[^ 6] A person can apply for lawful permanent residence through either consular processing outside of the United States or adjustment of status within the United States. See Volume 7, Adjustment of Status [7 USCIS-PM]. Additional eligibility requirements apply to applicants seeking adjustment as opposed to consular processing.

[^ 7] See Petition for Alien Relative (Form I-130).

[^ 8] For general information on other countries' requirements, see the U.S. Department of State (DOS)'s Country Information webpage.

[^ 9] See the Child Welfare Information Gateway's State Laws Related to Adoption webpage.

[^ 10] For DOS guidance, see their Foreign Affairs Manual.

[^ 11] For information on acquisition of citizenship for the adopted children of a U.S. citizen, see Part F, Citizenship for Adopted Children [5 USCIS-PM F]. For more information, see Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens [12 USCIS-PM H]. For information on naturalization, see Volume 12, Citizenship and Naturalization [12 USCIS-PM].

Chapter 2 - Eligibility

The following table outlines the main eligibility factors USCIS considers when adjudicating a family-based adoption petition.[1]

Eligibility for Family-Based Adoption Petition

Eligibility Requirements	For More Information
The adoptee beneficiary must meet requirements for age and marital status and the petitioner[2] must be a U.S. citizen or lawful permanent resident (LPR).	See Section A, Age, Marital Status, and Immigration Status Requirements [5 USCIS-PM E.2(A)].
The petitioner must establish that the petitioner has a qualifying adoptive relationship with the adoptee beneficiary.	See Section B, Qualifying Relationship [5 USCIS-PM E.2(B)].
The petition is compliant with the Hague Adoption Convention, if applicable.	See Part A, Adoptions Overview, Chapter 2, Adoption Processes [5 USCIS-PM A.2]; and See Chapter 3, Hague Restrictions on Family-Based Petitions [5 USCIS-PM E.3].

Derivatives

The children and spouse of certain adoptee beneficiaries can accompany or follow to join the adoptee beneficiary.[3]

A. Age, Marital Status, and Immigration Status Requirements

The adoptee beneficiary must meet requirements for age[4] and marital status[5] and the petitioner must meet immigration status requirements.

1. Adoptee Beneficiary Age and Marital Status

Child Beneficiary (Unmarried and Under 21)

To qualify under the definition of an adopted child under immigration law, the adoptee beneficiary must be unmarried and under 21 years of age.[6] A U.S. citizen or LPR may file a petition on behalf of an adoptee beneficiary who meets the definition of a child under immigration law.[7]

Son or Daughter Beneficiary (Married or Age 21 or Over)

An adoptee beneficiary who no longer meets the definition of an adopted child (because the beneficiary is currently married or age 21 or over) may still be eligible as a son or daughter, if the beneficiary previously met the definition of adopted child as set forth in immigration law.[8]

2. Immigration Status of Petitioner

The following persons are eligible to file a petition on behalf of an adoptee beneficiary:

- A U.S. citizen; or
- An LPR of the United States (unless the adoptee beneficiary is married).[9]

U.S. Citizen Petitioner

A U.S. citizen may file a petition on behalf of an adopted son or daughter who is now 21 years of age or over, or who is currently married, if the adoptee beneficiary previously met the definition of adopted child as set forth in immigration law.[10]

Lawful Permanent Resident Petitioner

An LPR may file a petition for an adopted son or daughter who is 21 years of age or older, if the adoptee beneficiary previously met the definition of child as set forth in immigration law.[11] However, USCIS must deny a petition filed by an LPR if the adoptee beneficiary is married at the time of filing or adjudication (unless the beneficiary can demonstrate the marriage

was terminated).[12]

B. Qualifying Relationship

The petitioner must establish that the petitioner has a qualifying adoptive relationship with the adoptee beneficiary. To satisfy the requirements for a qualifying relationship, the petitioner must establish the:

- Adoptee beneficiary's age at time of adoption; and
- Validity of relationship between the petitioner and the adoptee beneficiary.

1. Age at Time of Adoption

The petitioner must have adopted the adoptee beneficiary while the beneficiary was under the age of 16, unless the sibling exception applies.[13] This means that the court or other entity must have entered the adoption order before the adoptee beneficiary's 16th birthday.

Sibling Exception

An adoptee beneficiary who was adopted on or after the beneficiary's 16th birthday, but before the beneficiary's 18th birthday, meets the age at time of adoption requirement if the beneficiary is the birth sibling of another child who:

- Was adopted by the same petitioning parent(s) before the beneficiary's 16th birthday; and
- Immigrated, or is immigrating, as an adopted child or orphan based on an adoption by the same petitioning parent(s).[14]

Retroactive Adoption Orders

A retroactive adoption order (known as a nunc pro tunc order) entered on or after the adoptee beneficiary's 16th birthday (or 18th birthday if the sibling exception applies) does not meet the age at time of adoption requirement unless the petitioner establishes that:

- The petitioner initiated the adoption proceeding before the adoptee beneficiary's 16th birthday (or 18th birthday if the sibling exception applies);[15]
- The law of the jurisdiction where the order was issued expressly permits an adoption decree to be dated retroactively; and
- The court's order grants the adoption with an effective date before the adoptee beneficiary's 16th birthday (or 18th birthday if the sibling exception applies).[16]

Amended Orders

An order entered to correct an error in an order that actually was entered before the adoptee beneficiary's 16th birthday (or 18th birthday if the sibling exception applies) may also establish eligibility. For example, if a court intended to enter an adoption order but mistakenly entered a guardianship order, an amended order correcting the earlier order would support approval of the petition.[17] In these circumstances, the petitioner should submit both the original order and the later order correcting the original order.

2. Validity of the Relationship

Bona fide Adoption

USCIS assesses whether the adoptive relationship is bona fide. USCIS evaluates the petition to determine if the intent of the adoption was to form a genuine parent-child relationship and not solely for immigration purposes.[18]

Legal Custody and Joint Residence

In order to establish the validity of the relationship, the petitioner must establish that the adoptee beneficiary has been in the legal custody of and jointly resided[19] with the adoptive parent(s) for at least 2 years.[20] The legal custody and joint residence requirement may be met by custody and residence before or after the final adoption, but any pre-adoption custody must be based on a formal grant of custody from a court or authorized governmental entity according to the law of the country where it was obtained.

The 2-year time period does not need to be continuous and multiple periods of time can be added together to accrue the 2 years. The legal custody and joint residence requirements are reviewed independently. If the adoptive parents are a married couple who jointly adopted, the 2 years of legal custody and joint residence cannot be split between the parents. However, only one adoptive parent needs to establish 2 years of legal custody and joint residence. The two years the child was in the legal custody of the adoptive parent do not have to be the same two years the child jointly resided with the adoptive parent.

In order to establish that the adoptee beneficiary jointly resided with the adoptive parent(s) in a familial relationship, the petitioner must establish that the adoptive parent(s) exercised parental control over the adoptee beneficiary.[21] Specifically, if an adopted child continues to reside in the same household as the birth parent(s) during the period in which the adoptive parent petitioner seeks to establish compliance with this requirement, the petitioner must establish that an adoptive parent exercised primary parental control during that period of residence despite joint residence with the birth parents.

Once the petitioner submits evidence to establish compliance with parental control requirements, USCIS generally presumes the relationship is bona fide,[22] absent any evidence indicating otherwise.

A petitioner who is a stepparent who adopted the petitioner's stepchild also has to meet the 2-year legal custody and 2-year joint residence requirements and obtain a final adoption before the child's 16th birthday (or 18th birthday if the sibling exception applies) before the petitioner can be considered an adoptive parent under immigration law.[23]

Final Adoption Requirements

In order for an adoption to meet USCIS requirements for a final adoption, the adoption must:

- Be valid under the law of the jurisdiction where it was issued;
- Create a permanent legal parent-child relationship; and
- Terminate the prior legal parent-child relationship.[24]

Footnotes

[^ 1] See Petition for Alien Relative (Form I-130).

[^ 2] Petitioner refers to the adoptive parent.

[^ 3] See INA 203(d). For more information, see Volume 6, Immigrants, Part B, Family-Based Immigrants [6 USCIS-PM B].

[^ 4] There are also requirements related to the age of the adoptee beneficiary at the time of the adoption. See Section B, Qualifying Relationship, Subsection 1, Age at Time of Adoption [5 USCIS-PM E.2(B)(1)].

[^ 5] Unmarried means never been married or has terminated any and all prior marriages.

[^ 6] See INA 101(b)(1)(E). For information on how a beneficiary's age at the time of filing the petition impacts eligibility for an immigrant visa, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 7, Child Status Protection Act [7 USCIS-PM A.7].

[^ 7] See INA 101(b)(1)(E).

[^ 8] See INA 101(b)(1)(E).

[^ 9] See INA 101(b)(1)(E). See INA 203(a)(2)(A). See 8 CFR 204.2(d).

[^ 10] See INA 101(b)(1)(E).

[^ 11] See INA 101(b)(1)(E).

[^ 12] See INA 203(a)(2)(A). See 8 CFR 204.2(d).

[^ 13] See INA 101(b)(1)(E).

[^ 14] See INA 101(b)(1)(E)(ii). See INA 101(b)(1)(F). Note that the sibling exception does not apply to someone whose sibling immigrated as a Hague Convention adoptee.

[^ 15] The petitioner must submit evidence that the adoptive parent filed a formal petition or application to adopt the child with the court or other competent authority to grant the adoption before the beneficiary's 16th (or 18th) birthday.

[^ 16] Overruling *Matter of Drigo* and *Matter of Cariaga* in part, the Board of Immigration Appeals held in *Matter of Huang*, 26 I&N Dec. 627 (BIA 2015), that a nunc pro tunc adoption can support approval of a Form I-130 if the petitioner establishes that the adoptive parent initiated the adoption proceeding before the adoptee's 16th birthday; and the law of the forum "expressly" permits the court to give retroactive effect to an adoption decree. In the Fourth Circuit, in *Ojo v. Lynch*, 813 F.3d 533 (4th Cir. 2016), the court concluded that *Matter of Huang* is not sufficiently deferential to a court's authority to determine the scope of its own jurisdiction. The court held that the term "adopted" while under the age of 16 for purposes of INA 101(b)(1)(E) is the date the state court rules the adoption is effective, without regard to the date on which the act of adoption occurred. Therefore, in the Fourth Circuit, *Ojo* imposes no requirement that the adoption proceeding have been initiated prior to the beneficiary's 16th or 18th birthday and defers to a state court's facially valid nunc pro tunc order.

[^ 17] See *Allen v. Brown*, 953 F. Supp. 199 (N.D. Ohio 1997).

[^ 18] See *Matter of Marquez* (PDF), 20 I&N Dec. 160 (BIA 1990). *Matter of Marquez* rejects a strict statutory interpretation of INA 101(b)(1)(E) and relies instead upon the legislative history of the statute which indicates that Congress did not intend to recognize ad hoc adoptions designed to circumvent the immigration laws. This decision found that an adoptive relationship to be more akin to marital relationships than to step-relationships, and therefore, USCIS may evaluate the bona fides of adoptions.

[^ 19] The legal custody must have been the result of a formal grant of custody from a court or other governmental entity. The regulations incorporate the definitions for both legal custody and joint residence in paragraphs (vii)(A), (vii)(B), and (vii)(C) of 8 CFR 204.2(d)(2).

[^ 20] Exceptions may apply for certain battered children. See INA 101(b)(1)(E)(ii). For more information, see Volume 3, Protection and Parole, Part D, Violence Against Women Act [3 USCIS-PM D].

[^ 21] See 8 CFR 204.2(d)(2)(vii)(B) for types of evidence of that may be submitted to establish such parental control.

[^ 22] USCIS may further evaluate the bona fides of the relationship. See *Matter of Marquez* (PDF), 20 I&N Dec. 160 (BIA 1990).

[^ 23] See INA 101(b)(1)(E). Note that 2 years of legal custody and joint residence is not required to establish a qualifying step-relationship under INA 101(b)(1)(B). For information on (non-adoptions based) family-based petitions, see Volume 6, Immigrants, Part B, Family-Based Immigrants [6 USCIS-PM B].

[^ 24] For more information on what qualifies as a final adoption for immigration purposes, see Part A, Adoptions Overview, Chapter 4, Adoption Definition and Order Validity [5 USCIS-PM A.4].

Chapter 3 - Hague Restrictions on Family-Based Petitions

There are restrictions on approving a family-based adoption petition if the petitioner is a U.S. citizen and the adoptee beneficiary is from a Hague Adoption Convention country.[1] USCIS cannot approve a family-based adoption petition[2] filed by a U.S. citizen who is habitually resident in the United States on behalf of an adoptee beneficiary who is habitually resident in a Hague Adoption Convention country[3] unless the petitioner establishes that the Hague Adoption Convention does not apply because either:

- The U.S. citizen adoptive parent is not habitually resident in the United States;[4] or
- The child is not habitually resident in the other Hague Adoption Convention country.[5]

A. Adoptee Beneficiary in the United States

U.S. regulations state that if a child is a citizen of a Hague Adoption Convention country (other than the United States) and is present in the United States based on an adoption, the child should generally be deemed to be habitually resident in the child's country of citizenship, even though the child is already in the United States.[6] Therefore, a U.S. citizen petitioner

generally must adopt such child by following the Hague Adoption Convention process for the child to acquire lawful permanent residence based on the adoption.[7]

A child is generally deemed to be habitually resident in a Hague Adoption Convention country if they are a citizen of that Convention country. A child's country of citizenship is usually the child's country of origin. However, a child living outside the country of the child's citizenship may be deemed habitually resident in the child's country of actual residence based on a determination by the Central Authority[8] or another competent authority[9] of the country where the child actually physically resides.[10]

USCIS is a competent authority that can make a factual determination of habitual residence when a child is present in the United States. Accordingly, USCIS may determine that a child living in the United States is habitually resident in the United States. If USCIS makes such a determination, the Hague Adoption Convention would not apply to the adoption of the child.[11]

Language in the adoption order alone is not sufficient to establish that the Hague Adoption Convention does not apply to a particular case. Although an adoption order issued by a court in the United States may contain language indicating that the adoptee beneficiary was not habitually resident in the adoptee beneficiary's country of origin or that the adoption is not governed by the Hague Adoption Convention, such language is not determinative. Only USCIS can determine whether the Hague Adoption Convention applies when adjudicating the family-based petition.

USCIS must generally know whether the Central Authority of the child's country of origin still considers the child habitually resident in that country before USCIS can determine if a child is habitually resident in the United States. USCIS denies any family-based petition filed for an adoptee beneficiary in the United States if the Central Authority of the adoptee beneficiary's country of origin advises the U.S. government, the petitioner, or the U.S. court with jurisdiction over the adoption that it considers an adoptee beneficiary to remain habitually resident in the adoptee beneficiary's country of origin, despite the adoptee beneficiary's presence in the United States.

If the Central Authority of the adoptee beneficiary's country of origin states that it considers the adoptee beneficiary to be habitually resident in that country, the petitioner(s) must follow the Hague Adoption Convention process.[12]

If the child is present in the United States, the petitioner may establish the child is not habitually resident in the Hague Adoption Convention country by providing either:

- A written statement from the child's country of origin indicating the child is no longer deemed habitually resident in that country;[13] or
- If the petitioner cannot obtain such written statement, evidence that the petitioner meets intent, actual residence, and notice criteria.[14]

B. Written Statement for Adoptee Beneficiary Physically Present in United States

In order to establish that the child is not habitually resident in the Hague Adoption Convention country, the petitioner may submit:

- An adoption order or an amended adoption[15] order that expressly states that the Central Authority of the other Hague Adoption Convention country advised the adoption court in the United States in a written statement that the Central Authority is aware of the adoptee beneficiary's presence in the United States, and of the proposed adoption, and that the Central Authority has determined that the adoptee beneficiary is not habitually resident in that country; and
- A copy of the written statement from the Central Authority.[16]

C. No Written Statement for Adoptee Beneficiary Physically Present in United States

A petitioner may be unable to obtain a written statement regarding the adoptee beneficiary's habitual residence because the Central Authority of the adoptee beneficiary's country of origin:

- Does not issue statements concerning habitual residence, as confirmed by the U.S. Department of State;[17]
- Has informed the petitioner in writing that it will not make a determination on habitual residence upon the petitioner's request; or
- Has not issued a statement of habitual residence for at least 120 days following the petitioner's request to obtain such a statement.

In these situations, USCIS may approve a family-based petition if:[18]

- At the time the adoptee beneficiary entered the United States, the purpose(s) of the entry was (or were) for reasons other than adoption (see intent criteria below);
- Before the U.S. domestic adoption, the adoptee beneficiary actually resided in the United States for a substantial period of time, establishing compelling ties in the United States (see actual residence criteria below); and
- For any adoption decrees issued after February 3, 2014,[19] the decree confirms that the Central Authority of the adoptee beneficiary's country of origin was notified of the adoption or amended adoption proceedings in a manner satisfactory to the court and that the Central Authority did not object to the proceeding with the court within 120 days after receiving notice or within a longer period of time determined by the court (see notice criteria below).

1. Intent Criteria

USCIS reviews the petition to determine whether the adoptee beneficiary entered the United States for adoption purposes.[20]

Evidence

USCIS considers the following evidence regarding intent:

- An affidavit, made under penalty of perjury, from the petitioning adoptive parent(s), which should include a:
  - Description of the adoptee beneficiary's circumstances before entering the United States (such as where the adoptee beneficiary lived or went to school, who cared for the adoptee beneficiary, what events led to the adoptee beneficiary's travel to the United States, and the reason for the adoptee beneficiary's travel to the United States);
  - List of people who have cared for the adoptee beneficiary since the beneficiary entered the United States and their relationships to the beneficiary;
  - Description of any contact the petitioning adoptive parent(s) had with the adoptee beneficiary, the birth parents, or any adoption or child welfare agency or nongovernmental organization (in the United States or abroad) related to the adoptee beneficiary that took place either before the adoptee beneficiary came to the United States or after the adoptee beneficiary's arrival but before a court placed the adoptee beneficiary with the petitioning adoptive parent(s); and
  - Petitioning adoptive parent(s)'s declaration that on the date the adoptee beneficiary entered the United States, the petitioner did not intend to adopt the adoptee beneficiary or circumvent the Hague Adoption Convention procedures.

- Evidence establishing the timeline and course of events that led to the adoptee beneficiary's availability for adoption by the petitioner, which may include one or more of the following:
  - An order from a court with jurisdiction over the adoptee beneficiary that includes express findings related to the adoptee beneficiary's purpose for entering the United States, such as a finding that the adoptee beneficiary did not enter the United States for the purpose of adoption. (However, this information in a court order is not, by itself, determinative.);
  - Addresses where the birth parents have resided since the adoptee beneficiary's date of birth (if known), and any time periods the birth parents resided with the adoptee beneficiary;
- Any other evidence to support the statements made in the affidavit (such as informal consent documentation) or to document that the petitioner did not intend to adopt the adoptee beneficiary when the beneficiary entered the United States;
- Method of arrival, as indicated in visa records or other government system checks; specifically, any records related to the adoptee beneficiary's stated purpose of travel to the United States or whether the adoptee beneficiary had any intent to immigrate;
- Evidence that the adoptee beneficiary was a ward of a U.S. state or state court before the adoption. In such cases, the evidence should establish that the adoptee beneficiary was in state care due to the adoptee beneficiary's bona fide need for state managed care and was not abandoned in order for the petitioner to adopt the adoptee beneficiary;
- Evidence of the birth parents' inability to provide proper care for the adoptee beneficiary;
- Evidence to establish one or both birth parents are deceased;
- Evidence to establish any living birth parents freely consented to the proposed adoption or the birth parents' parental rights were fully and properly terminated; or
- Any other evidence to establish that entry into the United States was for purposes other than adoption.

Adverse Factors

USCIS considers the following adverse factors in determining if the adoptee beneficiary entered the United States for the purpose of adoption:

- A prior adoption of the adoptee beneficiary in the country of origin by the adoptive parent(s) in the United States. (This is a significant adverse factor.)
- Prior contact between the adoptive parent(s) and the adoptee beneficiary. (This could be an adverse factor if the contact was related to the adoption.) USCIS considers present and prior family relationships when reviewing the intent criteria. Prior contact between the adoptive parent(s) and the adoptee beneficiary may not be an adverse factor if the adoptee beneficiary is a relative, but USCIS reviews the case based on the totality of the evidence.
- Any evidence that suggests that the entry was for the purpose of adoption.

2. Actual Residence Criteria

If the adoptee beneficiary was physically present in the United States for 2 years or more before the adoption, USCIS presumes that the adoptee beneficiary has actually and physically resided in the United States for a substantial period of time, establishing compelling ties in the United States prior to the U.S. domestic adoption (and that the adoptee beneficiary meets actual residence criteria). However, if the adoptee beneficiary has been present in the United States for less than 2 years, the officer considers the length of time that the adoptee beneficiary has spent in the United States before the adoption and supporting evidence establishing the adoptee beneficiary's actual residence and compelling ties in the United States before the adoption.

Evidence

Documentation from the time period before the adoption may include, but is not limited to, the following:

- Evidence of ongoing medical care in the United States;
- Statement from the petitioners explaining the adoptee beneficiary's social interactions, including family and peer relationships;
- School records;
- Registration for extra-curricular activities;
- Affidavits from knowledgeable people (such as the adoptee beneficiary's doctor or teacher, day care provider, landlord, or neighbors) attesting to the adoptee beneficiary's actual residence in the United States;
- Evidence that the adoptee beneficiary's birth parent(s), guardian, or caretaker resided in the United States;
- An order from a court with jurisdiction over the adoptee beneficiary if that order includes express findings that the adoptee beneficiary actually resided in the United States for a substantial period of time or had compelling ties in the United States before the adoption (The information in a court order does not in itself guarantee that USCIS will determine that the adoptee beneficiary is no longer habitually resident in the country of origin.); or
- Evidence that the adoptee beneficiary was a ward of the state or court before the adoption.

Adverse Factors

If there is evidence that the adoptee beneficiary lived outside of the United States shortly before the adoption, USCIS may consider it as an adverse factor.

3. Notice Criteria

The notice criteria is required in any case where the adoption took place on or after February 3, 2014.

If the petitioner cannot obtain a written statement addressing an adoptee beneficiary's habitual residence from the Central Authority of the adoptee beneficiary's country of origin in 120 days, the petitioner still must notify the Central Authority of the adoption in a manner satisfactory to the court. The Central Authority then has an additional 120 days to object to the adoption.

Notification Process

When notifying the Central Authority in the adoptee beneficiary's country of origin of the adoption proceedings, the petitioner must follow the court's rules of procedure or the instructions in a specific order from the court. If permitted by the court, the petitioner can send both the request for a habitual residence statement and the notice of the court proceeding to the Central Authority at the same time. The notification can take the form of a court order or another document authorized by the court. Notice by email or fax is generally not sufficient unless the court rules clearly allow for email or fax notifications.

The notice must include a copy of the adoption petition or the motion for amended adoption order and must clearly specify:

- The name of the adoptee beneficiary, together with the place and date of birth of the adoptee beneficiary, and the name(s) of the birth parent(s), if known;

- The country of the adoptee beneficiary's nationality;
- The name of the agency or person who is the Central Authority in the adoptee beneficiary's country of origin;
- The names of the adopting parents;
- The date of the adoptee beneficiary's departure from the adoptee beneficiary's country of origin, if known;
- The date of the adoptee beneficiary's arrival in the United States, if known;
- The court name and the date, time, and place of the court's hearing on the adoption petition or motion for amended adoption order; and
- An indication that the Central Authority should notify the court if the Central Authority does not intend to object or requires additional time beyond 120 days.

Both the request for a statement addressing the adoptee beneficiary's habitual residence (if applicable) and the notice of the court proceeding must be provided directly to the Central Authority. Notice to another competent authority or an embassy or consulate of the country of origin in the United States is generally insufficient. If a country has a different Central Authority for different parts of the country (such as a regional or state Central Authority), the petitioner must provide the request for a statement addressing the adoptee beneficiary's habitual residence and the notice of the court proceeding to the Central Authority for the place where the adoptee beneficiary last resided in that country.

The petitioner does not need to give 120-day notice of the court hearing on the adoption proceeding more than once. If the Central Authority does not respond to the notice of the court hearing on the adoption proceeding within the 120-day period, there is no need to give additional notice, even if the court grants a continuance in the adoption proceeding and the adoption hearing takes place at a later date than what was stated in the notice provided to the Central Authority.

Evidence

USCIS considers the following evidence regarding notice:

- Copy of the notice provided to the Central Authority of the adoptee beneficiary's country of origin informing it of the pending adoption and providing the Central Authority with 120 days to object;
- Any and all responses received from the Central Authority;
- If the Central Authority of the adoptee beneficiary's country of origin does not reply to the notice, an adoption order (or amended adoption order) containing language regarding the:
  - Petitioner's request for a statement of habitual residence (if applicable);
  - Indication the Central Authority did not respond to the court notice; and
  - The court's confirmation that the court required the petitioner(s) and their representatives (if any) to provide all correspondence from the Central Authority to the court, even responses stating the adoptee beneficiary is considered habitually resident in the country of origin; and
- Copies of the request for a statement of habitual residence (if applicable) and court notice in the language used for official proceedings in the adoptee beneficiary's country of origin and a certified English translation of each document and proof of service in the manner specified by the court.

Central Authority Response

If the Central Authority informs the court in writing that it does not consider the adoptee beneficiary to be habitually resident in that country before the expiration of the 120-day period, there is no need to delay the hearing for the 120-day period. USCIS does not apply the intent, residence, and notice criteria when adjudicating a family-based petition if requirements are met for a written statement from the adoptee beneficiary's country of origin.

D. Amended Orders

If the petitioner does not obtain a written statement from the Central Authority in the adoptee beneficiary's country of origin until after the adoption is finalized, the petitioner must submit an amended order that contains the required language and the Central Authority's written statement.

For purposes of the age, custody, and joint residence requirements,[21] the date of the adoption is the date of the original order, not the amended order.

If a court amends an order after February 3, 2014 to meet the notice criteria, USCIS considers the amended order not as the adoption order itself, but as a confirmation that the state court had jurisdiction to make the original order when the court did so. The notice and amended order may therefore be issued after an adoptee beneficiary's 16th birthday as long as the original adoption order took place before the adoptee beneficiary's 16th birthday (or 18th birthday in the case of a qualifying sibling).

If the petitioner(s) cannot obtain an amended order within the standard Request for Evidence (RFE) response period, the petitioner must:

- Submit all other requested evidence by the RFE response date, including a copy of the written notice provided to the Central Authority of the country of origin; and
- Request in writing that USCIS administratively close the family-based petition for up to 1 year.

USCIS may or may not grant the petitioner's request, depending on the circumstances of the case and the evidence provided.

If the petition is administratively closed, once the petitioner obtains the amended order, the petitioner may ask USCIS to reopen the case administratively without being required to file a Notice of Appeal or Motion (Form I-290B). If the petitioner does not request to reopen the case within 1 year, USCIS denies the petition.

Footnotes

[^ 1] For a list of countries that are party to the Hague Adoption Convention, see the U.S. Department of State (DOS)'s Convention Countries webpage. For general information about determining if the Hague Adoption Convention applies, see Part A, Adoptions Overview, Chapter 2, Adoption Processes [5 USCIS-PM A.2]. For information about determining if the Hague Adoption Convention applies specifically when the adoptee beneficiary is from a Hague Adoption Convention country and is present in the United States based on an adoption, see Section A, Adoptee Beneficiary in the United States [5 USCIS-PM E.3(A)].

[^ 2] See Petition for Alien Relative (Form I-130).

[^ 3] For information on determinations of habitual residence, see 8 CFR 204.303.

[^ 4] For information on habitual residence determinations for U.S. citizens who reside outside of the United States, see Part A, Adoptions Overview, Chapter 2, Adoption Processes [5 USCIS-PM A.2].

[^ 5] For information on how and when the petitioner may establish that the Hague Adoption Convention does not apply, see Part A, Adoptions Overview, Chapter 2, Adoption Processes [5 USCIS-PM A.2].

[^ 6] See 8 CFR 204.2(d)(2)(vii)(F) and 8 CFR 204.303(b).

[^ 7] See 8 CFR 204.309(b)(4), which specifically provides that a Petition to Classify Convention Adoptee as an Immediate Relative (Form I-800) can be filed, even if the child is in the United States, if the other Hague Adoption Convention country is willing to complete the Hague Adoption Convention process with respect to the child.

[^ 8] Central Authority means the entity designated as such under Article 6(1) of the Hague Adoption Convention by any Convention country, or, in the case of the United States, DOS. See 22 CFR 96.2.

[^ 9] Competent authority means a court of governmental authority of a foreign country that has jurisdiction and authority to make decisions in matters of child welfare, including adoption. See 22 CFR 96.2.

[^ 10] See 8 CFR 204.303.

[^ 11] If there is a sufficient basis for saying that the Hague Adoption Convention and the implementing regulations no longer apply to a child who came to the United States from another Hague Adoption Convention country, then USCIS can conclude that 8 CFR 204.2(d)(2)(vii)(F) does not preclude approval of the Form I-130.

[^ 12] See Part D, Child Eligibility Determinations (Hague) [5 USCIS-PM D].

[^ 13] See Section B, Written Statement for Adoptee Beneficiary [5 USCIS-PM E.3(B)].

[^ 14] See Criteria for Determining Habitual Residence in the United States for Children from Hague Convention Countries, PM-602-0095, issued November 20, 2017. See Section C, No Written Statement for Adoptee Beneficiary Physically Present in United States [5 USCIS-PM E.3(C)].

[^ 15] If the petitioner did not obtain a written statement from the Central Authority of the adoptee beneficiary's country of origin until after the adoption was finalized, the petitioner must submit an amended order that contains the required language.

[^ 16] See 8 CFR 204.303.

[^ 17] Currently, Mexico is the only country DOS has confirmed does not issue such statements. For more information, see DOS's Mexico webpage.

[^ 18] USCIS denies the petition if these criteria are not met.

[^ 19] The notice criteria applies to adoptions issued on or after February 3, 2014.

[^ 20] Restrictions on approving a Form I-130 for a child from a Hague Adoption Convention country do not apply to children admitted as refugees or in asylee status because the child did not travel to the United States in connection with an adoption, and because children admitted as refugees or granted asylum as they are no longer considered habitually resident in their country of citizenship or residence.

[^ 21] See INA 101(b)(1)(E).

Chapter 4 - Documentation and Evidence

A. Filing

The petitioner must file the Petition for Alien Relative (Form I-130) with the proper fee, in accordance with the applicable form instructions.[1]

Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act)

A petitioner who has been convicted of a specified offense against a minor is prohibited from filing a family-based petition[2] on behalf of any family-based beneficiary.[3]

B. Required Evidence

The petitioner must submit all required evidence[4] in accordance with the form instructions.[5]

The officer must carefully evaluate the evidence and adoption order to determine eligibility. The officer should be aware that evidence regarding an adopted child's birth and parentage may vary with the circumstances and the jurisdiction. For example, some jurisdictions annotate birth certificates issued for adopted children to indicate the adoption, while others do not. Officers should consult on questions of foreign and state laws through appropriate USCIS channels, including with USCIS counsel.

Footnotes

[^ 1] For current information about filing locations, fees, and other information about how to file, see instructions for Petition for Alien Relative (Form I-130). See 8 CFR 103.2. See Fee Schedule (Form G-1055).

[^ 2] This includes the Petition for Alien Relative (Form I-130).

[^ 3] See Adam Walsh Act, Pub. L. 109-248 (PDF) (July 27, 2006). See INA 204(a)(1)(A)(i). See INA 204(a)(1)(B)(i). See INA 101(a)(15)(K). See Volume 6, Immigrants, Part C, Adam Walsh Act [6 USCIS-PM C].

[^ 4] See 8 CFR 103.2. See 8 CFR 204.2(d)(2)(vii) for information regarding primary evidence for an adopted child or son or daughter. See *Matter of Cuello* (PDF), 20 I&N Dec. 94 (BIA 1989) and *Matter of Marquez* (PDF), 20 I&N Dec. 160 (BIA 1990). See 8 CFR 204.1(g) for evidence to establish the petitioner's status as a U.S. citizen or lawful permanent resident.

[^ 5] See form instructions for Petition for Alien Relative (Form I-130).

Chapter 5 - Adjudication

A. Evidentiary Standards

In matters involving immigration benefits, the burden of proof in establishing eligibility rests with the petitioner.[1]

The standard of proof for establishing eligibility for an adoption petition is that of a preponderance of the evidence.[2] USCIS reviews petitions on a case-by-case basis and based on the totality of the evidence.

However, if the petitioner failed to disclose a relationship to the adoptee beneficiary in a previous immigration application or petition, USCIS applies the higher standard of proof of clear and convincing evidence.[3]

B. Requests for Evidence

USCIS generally issues a Request for Evidence or Notice of Intent to Deny, as appropriate, if any of the requirements or required evidence are missing or deficient.[4]

C. Approval

An officer approves a family-based adoption petition[5] if:

- The petition was properly filed;
- The petitioner has met the petitioner's burden of proving by a preponderance of the evidence that the beneficiary is eligible; and
- Any adverse information is resolved.

If the officer approves the petition, USCIS notifies the petitioner and the petitioner's legal representative, if any, of the approval.[6]

The approval of the petition only means that USCIS recognizes the relationship for immigration purposes; the approval does not provide any immigration status by itself. If the petition is approved, the adoptee beneficiary can generally go on to apply to become a lawful permanent resident based on the recognized relationship. The adoptee beneficiary still, however, needs to meet the requirements for lawful permanent residence.[7]

D. Denial

If the petitioner fails to establish eligibility, the officer denies the petition and notifies the petitioner in writing of the reasons for the denial. The denial notice must include information about appeal rights and the opportunity to file a motion to reopen or reconsider.[8]

The petitioner may appeal the denial of a family-based petition to the Board of Immigration Appeals.[9]

Footnotes

[^ 1] See INA 291. See *Matter of Brantigan* (PDF), 11 I&N Dec. 493 (BIA 1966). See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 4, Burden and Standards of Proof, Section A, Burden of Proof [1 USCIS-PM E.4(A)].

[^ 2] The person who bears the burden of proof must submit evidence to satisfy the applicable standard of proof. For more information on standards of proof, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 4, Burden and Standards of Proof, Section B, Standards of Proof [1 USCIS-PM E.4(B)].

[^ 3] See *Matter of Ma* (PDF), 20 I&N Dec. 394 (BIA 1991).

[^ 4] For more information, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 5] See Petition for Alien Relative (Form I-130).

[^ 6] See 8 CFR 103.2(b)(19). For additional information on approvals, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 9, Rendering a Decision [1 USCIS-PM E.9].

[^ 7] See Volume 7, Adjustment of Status [7 USCIS-PM].

[^ 8] See 8 CFR 103.3. For additional information on denials, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 9, Rendering a Decision [1 USCIS-PM E.9].

[^ 9] See 8 CFR 1003.1(b)(5).

Chapter 6 - Post-Adjudication Actions

Revocation

USCIS may revoke an approved family-based petition[1] automatically or upon notice.[2]

The petitioner may appeal the revocation of a family-based petition to the Board of Immigration Appeals.[3]

Footnotes

[^ 1] See Petition for Alien Relative (Form I-130).

[^ 2] See 8 CFR 205.1 (automatic revocation). See 8 CFR 205.2 (revocation upon notice).

[^ 3] See 8 CFR 1003.1(b)(5).

Part F - Citizenship for Adopted Children

Chapter 1 - Purpose and Background

A. Purpose

Under U.S. laws, children may obtain U.S. citizenship other than through birth in the United States.[1] Persons born outside of the United States, including adopted children, may obtain U.S. citizenship after birth, before the age of 18, through a U.S. citizen adoptive parent.[2] Some children immigrating based on adoption automatically acquire U.S. citizenship upon their admission to the United States as lawful permanent residents. Others do not, and their adoptive parents need to take additional steps before the adopted child turns 18 years of age for the child to obtain U.S. citizenship through the adoptive parent(s).

Adopted children who do not obtain citizenship through their adoptive parents before turning 18 may be eligible to apply for naturalization as an adult.[3]

B. Background

The law under which an adopted child may have obtained citizenship is the law in effect while the adopted child was under the age of 18.[4] Citizenship laws for children have changed over time with the most recent major change taking effect in 2001.

1. The Child Citizenship Act of 2000

The Child Citizenship Act of 2000 (CCA) took effect on February 27, 2001, and was not retroactive.[5] The CCA amended INA 320 and removed INA 321 to create only one method for children in the United States to automatically acquire citizenship after birth.

Children, including adopted children, who were under the age of 18 on February 27, 2001 (that is, born on or after February 28, 1983), may automatically acquire U.S. citizenship from a U.S. citizen parent if the statutory requirements are satisfied before the child's 18th birthday. The CCA also amended INA 322 to provide for applications for naturalization on behalf of foreign-born children who did not automatically acquire citizenship under INA 320 and who generally reside outside the United States with a U.S. citizen parent.

2. Before the Child Citizenship Act of 2000

Although adoptees do not qualify under the CCA if they were 18 years of age or older on February 27, 2001 (that is, were born on or before February 27, 1983), they may have obtained citizenship under a different law.[6]

C. Scope

This Part F clarifies how current citizenship provisions apply to adopted children. Volume 12, Citizenship and Naturalization, contains detailed guidance on the requirements for citizenship and naturalization, including for adopted children.[7]

D. Legal Authorities

- INA 101(c) – Definition of child for citizenship and naturalization
- INA 320; 8 CFR 320 – Children residing permanently in the United States
- INA 322; 8 CFR 322 – Children residing outside the United States

Footnotes

[^ 1] See INA 301, INA 309, INA 320, and INA 322. See Volume 12, Citizenship and Naturalization [12 USCIS-PM].

[^ 2] See INA 320 and INA 322.

[^ 3] See Volume 12, Citizenship and Naturalization, Part D, General Naturalization Requirements [12 USCIS-PM-D].

[^ 4] Adoptees who need more information about determining their immigration status may see the Adult Adoptees and U.S. Citizenship webpage.

[^ 5] See the Child Citizenship Act of 2000, Pub. L. 106-395 (PDF) (October 30, 2000).

[^ 6] For information on prior provisions, see Appendix: How Previous Citizenship Provisions Apply to Adopted Children [5 USCIS-PM F, Appendices Tab].

[^ 7] See Volume 12, Citizenship and Naturalization [12 USCIS-PM].

Chapter 2 - Definitions

A. Child

The Immigration and Nationality Act (INA) provides two different definitions of "child."[1] One definition of child applies to immigrant petitions and applications for lawful permanent residence.[2] The other definition of child applies to citizenship and naturalization.[3]

The definition of child for purposes of immigrant petitions and applications for lawful permanent residence includes certain children who have not yet been adopted or whose adoption is not considered final.[4] However, an adopted child for citizenship and naturalization purposes is a child who has met the applicable adoption-based immigration requirements[5] and has been adopted through a full, final, and complete adoption.[6]

B. Adoption

To meet the definition of adoption for immigration purposes, an adoption must create a legal status comparable to that of a natural legitimate child between the adopted child and the adoptive parent.[7]

For an adoption to be considered full, final, and complete for citizenship and naturalization purposes,[8] the adoption must meet the additional requirements described below if the child is qualifying under the orphan[9] or Hague Adoption Convention[10] provisions.[11]

Orphan and Hague Adoption Convention Provisions

For the foreign adoption of an orphan to be considered full, final, and complete for citizenship and naturalization purposes:

- The child must have been adopted by a U.S. citizen and spouse jointly (if married), or by an unmarried U.S. citizen who is at least 25 years of age; and
- At least one of the adoptive parents must have personally seen and observed the child before or during the foreign adoption proceedings.[12]

For the foreign adoption of a Hague Convention adoptee to be considered full, final, and complete for citizenship and naturalization purposes, the child must have been adopted by a U.S. citizen and their spouse jointly (if married) or by an unmarried U.S. citizen who is at least 25 years of age.[13]

For children residing in the United States, if the foreign adoption is not considered full and final, or the child immigrated with a custody order for purposes of emigration and adoption, the child must be readopted or adopted in the United States to meet the definition of adopted.[14] However, USCIS may waive readoption requirements if the adoptive parent(s)' U.S. jurisdiction of residence recognizes (judicially or by operation of law) the foreign adoption as full and final under that state's adoption laws before the child is age 18.[15]

For children residing outside of the United States, if the foreign adoption in the child's country of origin is not considered full and final, or the child was issued a custody order for purposes of emigration and adoption, the child must be readopted or adopted through a full, final, and complete adoption before age 18 to naturalize under INA 322.[16]

The table below outlines the different immigrant visa classifications[17] issued to a child depending on whether the parents completed a final adoption or obtained legal custody for emigration and adoption.

Hague and Orphan Visa Classification Codes

Code	Classification Name	Application Process
IR-3	Orphan – "full and final" adoption abroad	Consular processing
IR-4	Orphan – coming to the United States to be adopted	Consular processing
IR-8	Orphan – "full and final" adoption abroad	Adjustment of status
IR-9	Orphan – coming to the United States to be adopted	Adjustment of status
IH-3	Hague adoptee – final adoption abroad	Consular processing
IH-4	Hague adoptee – coming to the United States to be adopted	Consular processing
IH-8	Hague adoptee – final adoption abroad	Adjustment of status
IH-9	Hague adoptee – coming to the United States to be adopted	Adjustment of status

Footnotes

[^ 1] See INA 101(b) and INA 101(c).

[^ 2] See INA 101(b).

[^ 3] See INA 101(c). See Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens, Chapter 2, Definition of Child and Residence for Citizenship and Naturalization [12 USCIS-PM-H.2].

[^ 4] See INA 101(b)(1)(F) and INA 101(b)(1)(G).

[^ 5] The child must meet the requirements for family-based adoption at INA 101(b)(1)(E), orphans at INA 101(b)(1)((F), or Hague Convention adoptees at INA 101(b)(1)(G). See Part E, Family-Based Adoption Petitions [5 USCIS-PM E]. See Part C, Child Eligibility Determinations (Orphan) [5 USCIS-PM C]. See Part D, Child Eligibility Determinations (Hague) [5 USCIS-PM D].

[^ 6] See 8 CFR 320.1 and 8 CFR 322.1. For information on requirements for an adoption to be considered valid for immigration purposes see Part A, Adoptions Overview, Chapter 4, Adoption Definition and Order Validity [5 USCIS-PM A.4].

[^ 7] See *Matter of Mozeb (PDF)*, 15 I&N Dec. 430 (BIA 1975). For the definition of adoption, see Part A, Adoptions Overview, Chapter 4, Adoption Definition and Order Validity [5 USCIS-PM A.4].

[^ 8] See 8 CFR 320.1 and 8 CFR 322.1.

[^ 9] For information on the orphan provision, see INA 101(b)(1)(F). See Part C, Child Eligibility Determinations (Orphan) [5 USCIS-PM C].

[^ 10] For information on the Hague Adoption Convention provision, see INA 101(b)(1)(G). See Part D, Child Eligibility Determinations (Hague) [5 USCIS-PM D].

[^ 11] The additional requirements described in the "Orphan and Hague Adoption Convention Provisions" section for an adoption to be considered full, final, and complete for citizenship and naturalization purposes do not apply if a child meets the requirements of the family-based adoption provision at INA 101(b)(1)(E).

[^ 12] See INA 101(b)(1)(F).

[^ 13] See INA 101(b)(1)(G).

[^ 14] The child must be adopted and meet all eligibility requirements before the age of 18 to acquire citizenship under INA 320. See the definition of adopted at 8 CFR 320.1.

[^ 15] See 8 CFR 320.1. For additional information on state readoption and recognition, see the Child Welfare Information Gateway's State Laws Related to Adoption webpage.

[^ 16] See 8 CFR 322.1.

[^ 17] Children who reside abroad who naturalize through the Application for Citizenship and Issuance of Certificate Under Section 322 (Form N-600K) process are only required to be temporarily lawfully present, and typically are not issued immigrant visas.

Chapter 3 - Eligibility, Documentation, and Evidence

A. General Eligibility

Current provisions under INA 320 or INA 322 apply if the child was born on or after February 28, 1983, and meets the required conditions on or after February 27, 2001. The following table outlines the applicability of current citizenship and naturalization provisions to adopted children.

Current Citizenship and Naturalization Provisions Applicability to Adopted Children

Where the Child Resides	Provision	Adoption Requirements for U.S. Citizenship	Additional Requirements[1]
In the United States (INA 320 may also apply to certain children of U.S. military members, U.S. government employees, and their U.S. citizen spouses, who are residing outside of the United States)	INA 320	Must satisfy INA 101(b)(1)(E), INA 101(b)(1)(F), or INA 101(b)(1)(G) requirements.	A child born outside of the United States automatically becomes a U.S. citizen when all the following requirements have been met on or after February 27, 2001: • The child has at least one adoptive parent who is a U.S. citizen by birth or through naturalization; • The child is under 18 years of age; • The child is a lawful permanent resident (LPR); and • The child is residing in the United States in the legal and physical custody of the U.S. citizen parent.[2]
Outside the United States	INA 322	Must satisfy INA 101(b)(1)(E), INA 101(b)(1)(F), or INA 101 (b)(1)(G) requirements.	Applies to certain children under 18 years of age residing outside of the United States in the legal and physical custody of the U.S. citizen parent.[3] The child generally must be temporarily present in the United States after being lawfully admitted and be maintaining their status, amongst other requirements.[4] The child must have an application filed on their behalf and take the Oath of Allegiance, unless waived.

B. Child Residing in the United States

1. Eligibility

An adopted child born outside of the United States becomes a U.S. citizen by operation of law at the time the adopted child satisfies all requirements on or after February 27, 2001, and before turning 18 years of age.[5] These requirements include that the adopted child:[6]

- Satisfies the requirements applicable to adopted children;[7]
- Has at least one adoptive parent who is a U.S. citizen (by birth or naturalization);
- Is an LPR;[8] and
- Resides in the United States in the legal and physical custody of the U.S. citizen adoptive parent (or parents).[9]

Adopted children of U.S. armed forces members or U.S. government employees (or their spouses) who are residing outside the United States may also acquire citizenship under INA 320 upon meeting the eligibility criteria.[10]

Children who meet all requirements of INA 320 (including having a final adoption)[11] at the time of their admission as LPRs automatically acquire citizenship upon their admission as LPRs. Children who do not meet all requirements of INA 320 upon their admission as LPRs do not acquire citizenship upon their admission, but may automatically acquire citizenship at a later point (provided they satisfy all conditions before they turn 18). This includes children who do not have an adoption considered final under U.S. immigration law and children who do not otherwise meet the requirements of INA 320 upon their admission. Their adoptive parents may need to take additional steps, such as obtaining a final adoption, before the child turns 18 years of age for the child to obtain U.S. citizenship through an adoptive parent.

2. Certificate of Citizenship

A person who automatically acquires U.S. citizenship is not required to file an Application for Certificate of Citizenship (Form N-600).

Certain adopted children automatically receive a Certificate of Citizenship without filing Form N-600. Other children immigrating based on adoption do not, and must submit Form N-600 if they seek to obtain a Certificate of Citizenship from USCIS. A person may also apply for a U.S. passport with the U.S. Department of State to serve as evidence of U.S. citizenship.

Certificate of Citizenship Issued without an Application

Generally, USCIS automatically issues a Certificate of Citizenship to adopted children who are admitted to the United States with an IR-3 visa[12] or IH-3 visa,[13] if the child meets all INA 320 requirements.[14] In order to be issued a Certificate of Citizenship, if the child is over the age of 14, the child must take the Oath of Allegiance, unless otherwise waived.[15]

Thus, children over 14 at the time of their admission who are eligible for automatic issuance of a Certificate of Citizenship generally collect their Certificate of Citizenship at a USCIS field office after taking the oath. Children under 14 years of age who are eligible for automatic issuance of a Certificate of Citizenship generally receive their certificate by mail.[16]

Certificate of Citizenship with Application

USCIS does not automatically issue Certificates of Citizenship to adopted children who are admitted to the United States with a different visa classification (such as IR-2 visas) or who do not acquire citizenship upon their admission as LPRs (such as IR-4s[17] and IH-4s[18]).

If an adoptee did not automatically receive a Certificate of Citizenship and would like to obtain documentation of their citizenship status from USCIS, they (or their parent or legal guardian if the adoptee is under age 18) must submit Form N-600.[19] A person may also apply for a U.S. passport with the U.S. Department of State to serve as evidence of U.S. citizenship.[20]

An applicant (person seeking the Certificate of Citizenship) must submit, with their application, all required documentation and evidence in accordance with form instructions,[21] including a copy of the full, final adoption decree or order.[22] If the child did not have a foreign adoption that is considered full, final, and complete, the applicant must submit:

- Evidence of the final adoption decree or order; or
- If the U.S. jurisdiction of the adoptive parent's or parents' residence recognizes the foreign adoption decree or order as full and final, evidence establishing this under state law together with the foreign adoption order.[23]

To determine if the adopted child meets the requirements applicable to adopted children, USCIS reviews the file, including any evidence indicating that the child was admitted to the United States as an LPR through an adoption-based petition.[24]

In order to be issued a Certificate of Citizenship, if the child is over the age of 14, the child must take the Oath of Allegiance, unless otherwise waived.[25]

C. Child Residing Outside of the United States

1. Eligibility

An adopted child who regularly resides outside of the United States[26] is eligible for naturalization under INA 322 if all of the following conditions have been met before the child turns 18 years of age:[27]

- The child satisfies the requirements applicable to adopted children;[28]
- The child has at least one adoptive parent who is a U.S. citizen by birth or through naturalization;
- The child's U.S. citizen adoptive parent or U.S. citizen grandparent has been physically present in the United States or an outlying possession for 5 years, at least 2 of which were after reaching the age of 14;[29]
- The child is residing outside of the United States in the legal and physical custody of the U.S. citizen parent, or of a person who does not object to the application if the U.S. citizen parent is deceased; and
- The child is lawfully admitted, physically present, and maintaining a lawful status in the United States at the time the application is approved and the time of naturalization.

Children of U.S. Armed Forces Members or U.S. Government Employees (or their Spouses)

Children are not eligible to naturalize under INA 322 if they already acquired citizenship. Adopted children of U.S. armed forces members or U.S. government employees (or their spouses) who are residing outside the United States may acquire citizenship under INA 320 upon meeting the eligibility criteria.[30]

2. Application for Citizenship and Issuance of Certificate

To apply for a child to become a U.S. citizen and obtain a Certificate of Citizenship, the U.S. citizen parent, or if the citizen parent has died during the preceding 5 years, a citizen grandparent or citizen legal guardian, files an Application for Citizenship and Issuance of Certificate Under Section 322 (Form N-600K) on behalf of the child.[31]

An applicant (person seeking a Certificate of Citizenship) must submit with their application all required documentation and evidence in accordance with form instructions.[32] The adoption-specific required evidence that applicants must submit depends on the type of case. The table below describes the adoption-specific evidence that is required by case type.

Adoption-Specific Required Evidence by Case Type

Type of Case	Adoption-Specific Required Evidence
Hague Convention Adoption Case	A copy of the full, final adoption decree or order; and a copy of the notice of approval of the Petition to Classify Convention Adoptee as an Immediate Relative (Form I-800), and supporting documentation for the petition, or evidence the child has been admitted for lawful permanent residence on an IH-3 or IH-4 visa.[33]
Orphan Case	A copy of the full, final adoption decree or order; and a copy of the notice of approval of the Petition to Classify Orphan as an Immediate Relative (Form I-600), and supporting documentation for the petition (except the home study), or evidence the child has been admitted for lawful permanent residence on an IR-3 or IR-4 visa.[34]
Family-based Adoption Petitions	A copy of the full, final adoption decree or order; and evidence that the child meets the requirements of INA 101(b)(1)(E), including adoption before age 16 (or age 18 if the sibling exception applies) and 2 years of legal custody and joint residence with the adoptive parent.[35]

To determine if the adopted child meets the requirements applicable to adopted children, USCIS reviews the file, including any evidence indicating that an adoption-based petition was approved for the child, and has not been revoked.[36]

If an adoption-based petition was not approved for the child, the applicant must submit the following to show that they meet the requirements of a family-based adoption:[37]

- A full, final adoption decree or order showing that the child was adopted before the child's 16th birthday (or before the child's 18th birthday if the sibling exception applies);[38]
- Documentation that the child has been in the legal custody of the adoptive U.S. citizen parent for at least 2 years (at the time of filing); and
- Documentation that the child has been jointly residing with the adoptive parent(s) for at least 2 years (at the time of filing).

In order to be issued a Certificate of Citizenship, if the child is over the age of 14, the child must take the Oath of Allegiance, unless otherwise waived, before the age of 18.[39]

Footnotes

[^ 1] Adopted children who did not acquire citizenship through their adoptive parent(s) or naturalize before the age of 18 may also apply for naturalization when eligible. See Volume 12, Citizenship and Naturalization, Part D, General Naturalization Requirements [12 USCIS-PM D].

[^ 2] For more information, see Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens, Chapter 4, Automatic Acquisition of Citizenship after Birth (INA 320) [12 USCIS-PM H.4].

[^ 3] If the parent is deceased, the child may be residing in the legal and physical custody of a person who does not object to the application.

[^ 4] For information on requirements, see Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens, Chapter 5, Child Residing Outside the United States (INA 322) [12 USCIS-PM H.5].

[^ 5] These provisions were created by the Child Citizenship Act of 2000 (CCA), Pub. L. 106-395 (PDF) (October 30, 2000), which amended earlier provisions of the Immigration and Nationality Act (INA) regarding acquisition of citizenship after birth for foreign-born children who have U.S. citizen parent(s). These CCA amendments became effective on February 27, 2001.

[^ 6] See INA 320. See 8 CFR 320.2. For more information on requirements, see Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens, Chapter 4, Automatic Acquisition of Citizenship After Birth (INA 320) [12 USCIS-PM H.4].

[^ 7] The child must meet the requirements for family-based adoption at INA 101(b)(1)(E), orphans at INA 101(b)(1)(F), or Hague Convention adoptees at INA 101(b)(1)(G).

[^ 8] A person is generally considered to be a LPR once USCIS approves the adjustment application or once the person is admitted to the United States with an immigrant visa. See INA 245(b).

[^ 9] See INA 101(a)(33). For the definition of residence, see Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens, Chapter 2, Definition of Child and Residence for Citizenship and Naturalization, Section E, Definitions of U.S. Residence and Physical Presence [12 USCIS-PM H.2(E)]. For the definition of legal and physical custody, see Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens, Chapter 4, Automatic Acquisition of Citizenship after Birth (INA 320), Section B, Child in Legal and Physical Custody of U.S Citizen Parent [12 USCIS-PM H.4(B)].

[^ 10] See INA 320(c), which applies to children who were under 18 on March 26, 2020. For more information, see Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens, Chapter 4, Automatic Acquisition of Citizenship after Birth (INA 320), Section C, Children of Armed Forces Members or U.S. Government Employees (or their Spouses) [12 USCIS-PM H.4(C)].

[^ 11] For information on final adoption requirements, see Chapter 2, Definitions [5 USCIS-PM F.2].

[^ 12] Visa category for an immediate relative under INA 201(b) and INA 204(a)(1), as a child adopted abroad by a U.S. citizen.

[^ 13] Visa category for an immediate relative under INA 201(b) and INA 204(a)(1), as the adopted child from a Hague Adoption Convention country adopted outside the United States by a U.S. citizen.

[^ 14] Before January 1, 2004, USCIS did not automatically issue a Certificate of Citizenship to adopted children who came to the United States. If a child met all the INA 320 requirements but did not automatically receive a Certificate of Citizenship, they can still submit an Application for Certificate of Citizenship (Form N-600) to obtain a Certificate of Citizenship.

[^ 15] See Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens, Chapter 4, Automatic Acquisition of Citizenship after Birth (INA 320), Section G, Decision and Oath of Allegiance [12 USCIS-PM H.4(G)]. See Volume 12, Citizenship and Naturalization, Part J, Oath of Allegiance, Chapter 2, The Oath of Allegiance [12 USCIS-PM J.2].

[^ 16] For information on contacting USCIS if your child was admitted to the United States on an IR-3 or IH-3 visa and did not receive a Certificate of Citizenship within 60 days, see the Certificate of Citizenship for Your Internationally Adopted Child webpage.

[^ 17] Visa category for an immediate relative under INA 201(b) and INA 204(a)(1), as a child coming to be adopted in the United States by a U.S. citizen.

[^ 18] Visa category for an immediate relative under INA 201(b) and INA 204(a)(1), as the adopted child from a Hague Adoption Convention country adopted in the United States by a U.S. citizen.

[^ 19] See Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens, Chapter 4, Automatic Acquisition of Citizenship after Birth (INA 320) [12 USCIS-PM H.4]. See Volume 12, Citizenship and Naturalization, Part K, Certificates of Citizenship and Naturalization, Chapter 2, Certificate of Citizenship [12 USCIS-PM K.2].

[^ 20] See U.S. Department of State's U.S. Passports webpage.

[^ 21] For a full list of required evidence, see instructions for Form N-600.

[^ 22] For more information on required evidence, see 8 CFR 320.3(b). See Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens, Chapter 4, Automatic Acquisition of Citizenship after Birth (INA 320), Section E, Documentation and Evidence [12 USCIS-PM H.4(E)].

[^ 23] For example, a certificate of recognition of adoption from the state court, or a copy of the state statute indicating that the state recognizes all foreign adoptions.

[^ 24] See Part C, Child Eligibility Determinations (Orphan) [5 USCIS-PM C]. See Part D, Child Eligibility Determinations (Hague) [5 USCIS-PM D]. See Part E, Family-Based Adoption Petitions [5 USCIS-PM E].

[^ 25] See Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens, Chapter 4, Automatic Acquisition of Citizenship after Birth (INA 320), Section G, Decision and Oath of Allegiance [12 USCIS-PM H.4(G)]. See Volume 12, Citizenship and Naturalization, Part J, Oath of Allegiance, Chapter 2, The Oath of Allegiance [12 USCIS-PM J.2].

[^ 26] See Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens, Chapter 2, Definition of Child and Residence for Citizenship and Naturalization, Section E, Definition of U.S. Residence [12 USCIS-PM H.2(E)].

[^ 27] See INA 322. For more information on requirements, see Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens, Chapter 5, Child Residing Outside the United States (INA 322) [12 USCIS-PM H.5].

[^ 28] The child must meet the requirements for family-based adoption at INA 101(b)(1)(E), orphans at INA 101(b)(1)((F), or Hague Convention adoptees at INA 101(b)(1)(G).

[^ 29] See Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens, Chapter 5, Child Residing Outside the United States (INA 322), Section C, Physical Presence of U.S. Citizen Parent or Grandparent [12 USCIS-PM H.5(C)].

[^ 30] See INA 320(c). For more information, see USCIS Policy Manual Volume 12, Part H, Children of U.S. Citizens, Chapter 4, Automatic Acquisition of Citizenship after Birth (INA 320), Section C, Children of Armed Forces Members or U.S. Government Employees (or their Spouses) [12 USCIS-PM H.4(C)]. Such children may submit Form N-600. See Section B, Child Residing in the United States [5 USCIS-PM F.3(B)].

[^ 31] See Form N-600K. See Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens, Chapter 5, Child Residing Outside the United States (INA 322) [12 USCIS-PM H.5] and Part K, Certificates of Citizenship and Naturalization, Chapter 3, Certificate of Naturalization [12 USCIS-PM K.3].

[^ 32] See instructions for Form N-600K. For more information on required evidence, see 8 CFR 322.3(b) and Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens, Chapter 5, Child Residing Outside the United States (INA 322), Section G, Documentation and Evidence [12 USCIS-PM H.5(G)].

[^ 33] See INA 101(b)(1)(G). See 8 CFR 322.3(b). See Part D, Child Eligibility Determinations (Hague) [5 USCIS-PM D].

[^ 34] See INA 101(b)(1)(F). See 8 CFR 322.3(b). See Part C, Child Eligibility Determinations (Orphan) [5 USCIS-PM C].

[^ 35] See INA 101(b)(1)(E). See 8 CFR 322.3(b). See Part E, Family-Based Adoptions [5 USCIS-PM E].

[^ 36] See Part C, Child Eligibility Determinations (Orphan) [5 USCIS-PM C]. See Part D, Child Eligibility Determinations (Hague) [5 USCIS-PM D]. See Part E, Family-Based Adoptions [5 USCIS-PM E].

[^ 37] See INA 101(b)(1)(E). See Part E, Family-Based Adoptions [5 USCIS-PM E].

[^ 38] See INA 101(b)(1)(E)(ii).

[^ 39] See Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens, Chapter 5, Child Residing Outside the United States (INA 322), Section I, Decision and Oath of Allegiance [12 USCIS-PM H.5(I)].

Chapter 4 - Citizenship Following a Disrupted or Dissolved Adoption

A. Disruption of Adoption

A disruption means an adoption process that ends after the prospective adoptive parents obtain legal custody and before the adoption is legally finalized, which may result in the child's return to (or entry into) foster care or placement with new adoptive parents.[1]

A child who has not acquired U.S. citizenship[2] before such a disruption may be eligible to obtain citizenship and documentation if later adopted by different U.S. citizen parent(s). The child must meet all requirements of INA 320 or INA 322 through the new U.S. citizen parent, including the requirements applicable to adopted children under INA 101(b)(1).

However, the adopted child does not have to establish eligibility under the same specific statutory provision as under the original petitioning parents. For example, an adopted child who immigrated as an orphan under INA 101(b)(1)(F) with the original adoptive parent(s), may be able to meet the requirements with the new adoptive parents for a family-based petition under INA 101(b)(1)(E), if eligible.[3]

The child may also seek naturalization when eligible.[4]

B. Dissolution of Adoption

A dissolution means an adoption in which the legal relationship between the adoptive parent(s) and adopted child is severed, either voluntarily or involuntarily, after the adoption is legally finalized.[5]

In the event of a dissolution, an adopted child who has already obtained U.S. citizenship through the original petitioning adoptive parent(s),[6] does not lose their U.S. citizenship as a result of the dissolution.[7] If the U.S. citizen adopted child does not have documentation demonstrating their U.S. citizenship,[8] a Certificate of Citizenship based on the original adoption may be requested.[9] A person may also apply for a U.S. passport with the Department of State to serve as evidence of U.S. citizenship.

The new adoptive parents may also make a Freedom of Information Act (FOIA) request on behalf of the child to determine if the child was previously issued a Certificate of Citizenship.[10]

Footnotes

[^ 1] See the U.S. Citizenship for an Adopted Child webpage for more information on citizenship of a foreign-born child following a disrupted or dissolved adoption. See also 22 CFR 96.2.

[^ 2] For example, a child whose adoption disrupts before the adoptee fulfills all requirements for citizenship (including having an adoption that is considered full, final, and complete).

[^ 3] For information on INA 101(b)(1)(E) requirements, see Part E, Family-Based Adoption Petitions [5 USCIS-PM E]. To petition for an adopted child under INA 101(b)(1)(E), see Petition for Alien Relative (Form I-130).

[^ 4] See Volume 12, Citizenship and Naturalization [12 USCIS-PM].

[^ 5] See the Child Welfare Information Gateway's Adoption Disruption and Dissolution (PDF) webpage.

[^ 6] See INA 320 and INA 322.

[^ 7] A dissolution in and of itself does not generally impact an adoptee's U.S. citizenship status.

[^ 8] For example, a Certificate of Citizenship (USCIS Form N-560A) or a valid, unexpired U.S. passport.

[^ 9] See instructions for the Application for Certificate of Citizenship (Form N-600). See instructions for the Application for Replacement Naturalization/Citizenship Document (Form N-565).

[^ 10] See the Request Records through the Freedom of Information Act or Privacy Act webpage.

Volume 6 - Immigrants

Part A - Immigrant Policies and Procedures

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures.

See more

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures. We are working quickly to update and incorporate all of the AFM content into the USCIS Policy Manual, the agency's centralized online repository for immigration policies. Until then, we have moved any remaining AFM content to its corresponding Policy Manual Part. To the extent that a provision in the Policy Manual conflicts with remaining AFM content or Policy Memoranda, the updated information in the Policy Manual prevails. If you have questions or concerns about any discrepancies among these resources, contact PolicyFeedback@uscis.dhs.gov.

AFM Chapter 20 - Immigrants in General (External)

Part B - Family-Based Immigrants

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AFM Chapter 21 - Family-based Petitions and Applications (External)

Chapter 1 - Purpose and Background

A. Purpose

The Immigration and Nationality Act (INA) allows U.S. citizens, U.S. nationals,[1] and lawful permanent residents (LPRs) to petition for certain alien relatives to immigrate to the United States.[2] These alien relatives include immediate relatives[3] of U.S. citizens and relatives who fall within a family-based preference immigrant visa category.[4]

Family-based immigration accounts for most new LPRs with immediate relatives alone making up approximately 40 percent of all new LPRs annually.[5]

Fraudulent, frivolous, or otherwise non-meritorious family-based immigrant visa petitions erode confidence in family-based pathways to LPR status and undermine family unity in the United States. Therefore, USCIS must ensure that qualifying marriages and family relationships are genuine, verifiable, and compliant with all applicable laws.

B. Background

Legislative History

U.S. immigration law and policy has included family relationships as a basis for admitting immigrants as early as 1924. The Immigration Act of 1924 established a country-specific quota system for immigration to the United States and was the first to establish guidance around family-based immigration by excluding certain spouses and children of U.S. citizens from numerical limitations.[6]

Congress enacted legislation in 1952 and 1965 to further refine existing categories of family members and specifically promote family-based immigration and continued to provide for family-based immigration reform.[7] These laws created the basis for the immediate relative and family-based preference categories that are used today for family-based immigration.[8]

Visa Availability for Immediate Relatives and Family-Based Preference Immigrants

If the petitioners and the alien beneficiaries of family-based immigrant visa petitions meet the eligibility requirements and USCIS approves their petitions, alien beneficiaries may then pursue LPR status by applying for an immigrant visa at a U.S. embassy or consulate (otherwise known as consular processing), or if already in the United States, by applying for adjustment of status.[9]

Immigrant visas are always immediately available for immediate relative beneficiaries as they are not subject to the numerical limitations.[10] Alien beneficiaries in a family-based preference category are subject to annual numerical limitations set by Congress and can immigrate only when an immigrant visa is available.[11]

In part, the availability of an immigrant visa is based on the number of visas designated by Congress on an annual basis for each family-based preference category.[12] The annual limit for family-based preference categories depends on the previous year's immigration levels and is set at a minimum of 226,000.[13]

After a petitioner files an immigrant visa petition for his or her qualifying relative in a preference category, USCIS or the U.S. Department of State (DOS) assigns a priority date, which establishes the alien beneficiary's place on a waiting list maintained by DOS for issuance of an immigrant visa.[14]

In most instances, the priority date is the date the petitioner properly filed[15] the immigrant visa petition with USCIS or, in cases where the petition is filed with DOS, the date the petition is received at a U.S. embassy or consulate outside the United States.[16]

To immigrate based on the qualifying family relationship, the alien must be the beneficiary of an approved immigrant visa petition demonstrating that he or she is an immediate relative or falls into a preference category. An approved petition and available immigrant visa are the basis for a beneficiary to apply for adjustment of status (if in the United States) or for an immigrant visa (if outside the United States).

C. Legal Authorities

- INA 101 – Definitions
- INA 201 – Worldwide level of immigration
- INA 202 – Numerical limitations on individual foreign states
- INA 203 – Allocation of immigrant visas
- INA 204; 8 CFR 204 – Procedure for granting immigrant status
- INA 205; 8 CFR 205 – Revocation of approval of petitions
- 8 CFR 103 – Immigration benefit requests; USCIS filing requirements; biometric requirements; availability of records
- 22 CFR 42.31 – Family-sponsored immigrants

Footnotes

[^ 1] U.S. nationals, as defined in INA 308, are afforded the same rights as lawful permanent residents (LPRs) to file a family-based immigration petition for certain alien relatives. See *Matter of Ah San* (PDF), 15 I&N Dec. 315 (BIA 1975) (holding that nationals, but not citizens, of the United States may also file petitions under INA 203(a)(2)). A person who, though not a citizen of the United States, owes permanent allegiance to the United States (for example, persons born in American Samoa or Swains Island). See definition in Glossary.

[^ 2] In addition, Congress provided that certain relatives may self-petition in limited circumstances, including self-petitioners seeking to immigrate as an abused spouse, child, or parent; as an Amerasian; or as a widow or widower of a U.S. citizen. See Volume 3, Humanitarian Protection and Parole, Part D, Violence Against Women Act [3 USCIS-PM D]. See Volume 7, Adjustment of Status, Part P, Other Adjustment Programs, Chapter 9, Amerasian Immigrants [7 USCIS-PM P.9]. See the Green Card for Widow(er) of a U.S. Citizen webpage.

[^ 3] See INA 201(b)(2)(A)(i).

[^ 4] See INA 203(a). The term preference is used in immigration law to refer to numerically limited family-based and employment-based categories for immigration and LPR status.

[^ 5] See U.S. Department of Homeland Security, Office of Homeland Security Statistics (OHSS), Annual Flow Reports on Lawful Permanent Residents.

[^ 6] See the Immigration Act of 1924, also known as the National Origins Act or the Johnson–Reed Act, Pub. L. 68-139 (PDF) (May 26, 1924).

[^ 7] See the McCarran-Walter Act, also known as the Immigration and Nationality Act of 1952, Pub. L. 82-414 (PDF) (June 27, 1952). See the Immigration and Nationality Act of 1965, Pub. L. 89-236 (PDF) (October 3, 1965). The 1965 Act replaced quota limitations based on nationality in favor of family reunification and skills-based immigration. Family-based immigration reform has continued to evolve since 1965 with the Refugee Act of 1980, Pub. L. 96-212 (PDF) (March 17, 1980); the Immigration Reform and Control Act of 1986, Pub. L. 99-603 (PDF) (November 6, 1986); the Immigration Act of 1990, Pub. L. 101-649 (PDF) (November 29, 1990); and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208 (PDF) (September 30, 1996).

[^ 8] See Chapter 2, General Eligibility Requirements, Section B, Qualifying Relationship, Subsection 1, Immediate Relatives of a U.S. Citizen [6 USCIS-PM B.2(B)(1)] and Subsection 2, Family-Based Preference Relatives [6 USCIS-PM B.2(B)(2)].

[^ 9] For more information, see Volume 7, Adjustment of Status [7 USCIS-PM].

[^ 10] See INA 201(b)(2)(A)(i).

[^ 11] See INA 201(a)(1) and INA 203(a). See 8 CFR 204.1. For more information on the numerical limits system, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].

[^ 12] See INA 201, INA 202(a), and INA 203(a).

[^ 13] See INA 201(c)(1)(B)(ii).

[^ 14] See INA 203(e). For information on determining priority dates, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability, Subsection 3, Priority Dates [7 USCIS-PM A.6(C)(3)].

[^ 15] See 8 CFR 204.1(b). USCIS considers a petition properly filed if it is filed in accordance with the form instructions and 8 CFR 103.2. The filing date of the petition is generally the date USCIS receives a properly filed petition and constitutes the priority date.

[^ 16] The priority date is listed on a Notice of Action (Form I-797). See Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability, Subsection 3, Priority Dates [7 USCIS-PM A.6(C)(3)].

Chapter 2 - General Eligibility Requirements

A. Family-Based Immigrant Visa Petitions

A U.S. citizen, U.S. national,[1] or lawful permanent resident (LPR) may file a Petition for Alien Relative (Form I-130) on behalf of certain relatives who seek to immigrate based on a qualifying family relationship.[2]

This chapter addresses general eligibility requirements for family-based immigrant visa petitions, including the qualifying relationship between the petitioner and the principal beneficiary and requirements for family members of the principal beneficiary to qualify as derivative beneficiaries.

B. Qualifying Relationship

A qualifying relationship between the petitioner and the alien beneficiary must exist at the time the immigrant visa petition is filed and continue through adjudication.[3] USCIS determines if the alien beneficiary of a petition is eligible for the family-based classification sought.

U.S. citizen petitioners may file a Form I-130 on behalf of the following relatives:

- Spouse;[4]
- Child (unmarried and under 21 years old);[5]
- Parent (if the U.S. citizen petitioner is at least 21 years old);[6]
- Unmarried son or daughter, age 21 or older;[7]
- Married son or daughter of any age;[8] or
- Sibling (if the U.S. citizen petitioner is at least 21 years old).[9]

LPR and U.S. national (who are not citizen) petitioners may file a Form 1-130 on behalf of the following relatives:

- Spouse;[10]
- Child (unmarried and under 21 years old);[11] or
- Unmarried son or daughter, age 21 or older.[12]

1. Immediate Relatives of a U.S. Citizen

Immediate relatives include spouses, certain children[13] and parents of U.S. citizens.[14] The following table summarizes general principles applicable to each immediate relative category.

Summary of Family-Based Immediate Relative Categories

Family-Based Immediate Relative Category	General Principles
Spouse of U.S. citizen	An immediate relative spouse includes someone who is recognized as married to a U.S. citizen under the laws of the place of celebration.[15] Upon the death of the U.S. citizen, the alien spouse may still qualify as an immediate relative as a widow or widower if certain conditions are met.[16]
Child of U.S. citizen	An immediate relative child includes someone unmarried and under the age of 21 whose relationship to a U.S. citizen is covered under INA 101(b)(1).[17]
Parent of a U.S. citizen	An immediate relative parent includes someone whose relationship to a U.S. citizen is covered under INA 101(b)(1).[18] The U.S. citizen petitioning for the parent must be 21 years of age or older.[19]

2. Family-Based Preference Relatives

Certain family members of U.S. citizens, U.S. nationals, and LPRs, who are not immediate relatives, may be eligible to immigrate as a family member through the preference system.[20]

The following table summarizes the general principles applicable to each family-based preference category.

Summary of Family-Based Preference Categories

Family-Based Preference Category	General Principles
Unmarried sons and daughters of U.S. citizens[21] (1st preference)	A family preference unmarried son or daughter includes someone who is unmarried and 21 years or older who once qualified as a child of the U.S. citizen.[22] Unmarried generally means not married at the time of filing through admission or adjustment of status, whether or not previously married.[23]
Family members of LPRs (2nd preference)[24]	Certain family members of an LPR may be eligible for family preference based immigration and include someone who is the spouse, child (under 21 and unmarried), or unmarried son and daughter (21 years old or older) of the LPR.
Married sons and daughters of U.S. citizens[25] (3rd preference)	A family preference married son or daughter includes someone who is married and once qualified as a child of the U.S. citizen.[26] Married generally means a person who is recognized as married under the laws of the place of celebration.[27]
Brothers and sisters of U.S. citizens[28]	A family preference sibling includes someone who has at least one parent in common with a U.S. citizen.[29]

Family-Based Preference Category	General Principles
(4th preference)	The U.S. citizen petitioning for the brother or sister must be 21 years or older.[30]

3. Impact of Life Events and Material Changes in Circumstances

Certain life events, such as the petitioner's naturalization, a change in the beneficiary's marital status, or the beneficiary turning 21 years old, may impact a pending or approved immigrant visa petition. These material changes in circumstances may result in:

- Automatic conversion of the petition to a new immigrant visa category without the petitioner filing a new petition;[31]
- Denial of a pending petition; or
- Automatic revocation of an approved petition.

Automatic Conversion

USCIS converts the classification of an alien beneficiary's petition to a different immigrant visa category if a change in circumstances occurs that would allow the alien beneficiary to be classified under a different visa category. In such cases, the alien beneficiary retains the original priority date.[32] Examples where a material change in circumstance may lead to a converted classification include:

- A U.S. citizen's unmarried son or daughter, age 21 or older (beneficiary of a 1st preference petition) marries, and the classification converts to a married son or daughter of a U.S. citizen (3rd preference petition);[33]
- A U.S. citizen's married son or daughter, age 21 or older (beneficiary of a 3rd preference petition) divorces, and the classification converts to an unmarried son or daughter of a U.S. citizen (1st preference petition);[34]
- An LPR petitioner of a spouse or child (2nd preference petition) naturalizes, and the classification converts to an immediate relative;[35] or
- A child beneficiary reaches the age of 21 years.[36]

If an event occurs while the petition is pending or the alien beneficiary is waiting for an immigrant visa to become available, the alien beneficiary's visa classification changes accordingly as of the date of the event.[37]

Opting Out of Automatic Conversion

Sometimes the wait for one family preference immigrant visa category is shorter than the wait for another family preference immigrant visa category. Certain alien beneficiaries may opt out of the automatic conversion to stay in a preference category with a shorter wait. For example, an alien beneficiary whose immigrant visa category automatically converts to the first preference immigrant visa category upon the petitioner's naturalization may opt out of the automatic conversion to remain in the second preference immigrant visa category as the son or daughter of an LPR.[38]

Conversion of Classification for Derivative Beneficiaries[39]

Generally, a child who turns 21 and does not benefit from the Child Status Protection Act (CSPA)[40] is no longer eligible as a derivative beneficiary and requires a new petition.[41] However, if the CSPA allows the beneficiary to automatically convert to a new category as a principal beneficiary based on their relationship to the same petitioner, USCIS does not require a new petition since there is a corresponding immigrant visa category for the child when they turn 21.[42]

For example, the derivative child of a spouse of an LPR who ages out automatically converts to a principal beneficiary as the unmarried son or daughter of an LPR. No new petition is needed, and the child retains the priority date from the original petition.[43]

In most cases, a derivative beneficiary who changes marital status can no longer qualify as a derivative beneficiary. For example, a child who marries no longer qualifies as a derivative beneficiary because he or she does not meet the definition of a child.[44] In addition, a spouse who divorces the principal beneficiary no longer has the required family relationship to the principal beneficiary to qualify as a derivative beneficiary.[45] A spouse whose marriage ends because the principal beneficiary dies, however, may be eligible to request the immigrant petition be reinstated, remain approved, or adjudicated, if pending, as if the principal had not died.[46]

Denial

If an event occurs while the petition is pending that places the alien beneficiary in a relationship for which there is no visa classification, USCIS denies the petition. For example, if an unmarried son or daughter of an LPR marries while the petition is pending, USCIS denies the petition because there is no visa classification for the married son or daughter of an LPR.

Automatic Revocation

If an event occurs after the petition has been approved and before the alien beneficiary adjusts status or is admitted as a lawful permanent resident, that places the beneficiary in a relationship for which there is no visa classification the petition is generally automatically revoked.[47] For example, if an unmarried son or daughter of an LPR marries after the petition is approved and before the alien beneficiary adjusts status or commences his or her journey to the United States the petition is automatically revoked because there is no visa classification for the married son or daughter of an LPR.[48]

C. Family Members of the Principal Beneficiary

1. Family Members of Immediate Relative Beneficiaries

Generally, family members of an immediate relative beneficiary are not eligible to accompany or follow to join the immediate relative as derivative beneficiaries.[49] However, these family members may independently qualify for an immigration classification if the U.S. citizen petitioner can demonstrate a qualifying relationship to the family member.

For example, a U.S. citizen petitioning for an immediate relative spouse may file a separate petition for the child of that spouse, as the child's stepparent. The U.S. citizen petitioner must file a separate petition for each individual family member who qualifies as an immediate relative.

2. Members of Family-Based Preference Principal Beneficiaries

Spouses and children of a family-based preference beneficiary may be eligible to accompany or follow to join the principal beneficiary as derivative beneficiaries. The petitioner is not required to file a separate petition for derivative beneficiaries.[50]

A derivative beneficiary may seek the same immigrant status and is assigned the same priority date for visa availability as the principal beneficiary if accompanying or following to join the principal beneficiary.[51] The relationship between the derivative beneficiary and the principal beneficiary must continue to exist at the time of adjustment of status or admission for the derivative beneficiary to remain eligible for adjustment or admission.[52]

Dependent Child of an LPR

In some cases, the child of an LPR may qualify either as a principal beneficiary based on a petition filed on behalf of the child, or as a derivative beneficiary through a petition filed by the LPR on behalf of the child's alien parent. The child can only qualify as the principal beneficiary of a petition filed by the LPR if the child has the requisite child-parent relationship to the LPR petitioner.[53]

For example, a stepchild of an LPR, who was age 18 or older at the time the LPR married the stepchild's alien parent, would only qualify for an immigrant visa as a derivative beneficiary of a petition filed on behalf of the alien parent. In this situation, the stepchild would not qualify as a principal beneficiary because the marriage creating the step-relationship did not occur before the child turned 18.[54]

An LPR petitioner may decide to file one petition (for the spouse as the principal beneficiary and the spouse's children as derivative beneficiaries) or separate petitions for each qualifying family member (one for the spouse and one for each of the spouse's children). A child accompanying or following to join a principal beneficiary under INA 203(a)(2) of the Act may be included in the principal beneficiary's second preference visa petition.[55] If the principal beneficiary dies, the remaining derivative beneficiaries may be eligible for relief under INA 204(l) without the need for new petitions. However, the petitioner may file new petitions if a qualifying relationship still exists with the derivative beneficiaries.

If the petitioner chooses to file separate petitions, each alien beneficiary can immigrate independently. For example, if one child needs to immigrate before the others are ready to travel, that child may do so as the principal beneficiary of a petition.

Additionally, if a petition is filed separately on behalf of the child, the child may independently adjust status based on the child's relationship to the LPR parent, whereas a derivative beneficiary's eligibility to adjust status is tied to the principal beneficiary parent's eligibility. If the LPR parent naturalizes after filing an immigrant visa petition for the principal beneficiary, the petition converts to an immediate relative petition and the child is no longer eligible as a derivative beneficiary. In this situation, the petitioner must file a new petition on behalf of the child as an immediate relative.[56]

Footnotes

[^ 1] A person who, though not a citizen of the United States, owes permanent allegiance to the United States (for example, persons born in American Samoa or Swains Island). See definition in Glossary.

[^ 2] Some alien relatives of U.S. citizens may self-petition by filing a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360). An alien may file Form I-360 when seeking to immigrate as an abused spouse, child, or parent under the Violence Against Women Act; as an Amerasian under the Amerasian Act; or as a widow or widower of a U.S. citizen. See Volume 3, Humanitarian Protection and Parole, Part D, Violence Against Women Act [3 USCIS-PM D]. See Volume 7, Adjustment of Status, Part P, Special Adjustment Programs, Chapter 9, Amerasian Immigrants [7 USCIS-PM P.9]. For widows and widowers of U.S. citizens, USCIS automatically converts a pending or approved spousal Form I-130 to a Form I-360 when the U.S. citizen petitioner dies. See the Green Card for Widow(er) of a U.S. Citizen webpage.

[^ 3] See 8 CFR 103.2(b)(1).

[^ 4] See INA 201(b)(2)(A)(i).

[^ 5] See INA 201(b)(2)(A)(i). Under the Child Status Protection Act (CSPA), certain children may have their age frozen at the time of petition filing to preserve their eligibility for an immigrant visa. For more information on CSPA age calculation, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 7, Child Status Protection Act [7 USCIS-PM A.7].

[^ 6] See INA 201(b)(2)(A)(i).

[^ 7] See INA 203(a)(1).

[^ 8] See INA 203(a)(3).

[^ 9] See INA 203(a)(4).

[^ 10] See INA 203(a)(2).

[^ 11] See INA 203(a)(2). Under the CSPA, certain applicants in family-based categories who are not immediate relatives may have their age determined based on a calculation that considers the time the visa petition was pending and the beneficiary's age on the date a visa becomes available to preserve their eligibility for an immigrant visa. See INA 203(h)(1). For more information on the CSPA age calculation, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 7, Child Status Protection Act [7 USCIS-PM A.7].

[^ 12] See INA 203(a)(2).

[^ 13] See INA 101(b)(1).

[^ 14] See INA 201(b)(2)(A)(i).

[^ 15] See INA 101(a)(35). See *Matter of P-*, 4 I&N Dec. 610, 613 (A.G. 1952).

[^ 16] See INA 201(b)(2)(A)(i).

[^ 17] See INA 101(b)(1)(A)-(G). See Chapter 8, Children, Sons, and Daughters [6 USCIS-PM B.8].

[^ 18] See INA 101(b)(1) and INA 101(b)(2).

[^ 19] See INA 201(b)(2)(A)(i).

[^ 20] See INA 203(a).

[^ 21] See INA 203(a)(1).

[^ 22] See *Matter of Bullen* (PDF), 16 I&N Dec. 378 (BIA 1977) (In order to qualify as a “daughter” for preference purposes under INA 203(a)(2), the beneficiary must once have qualified as the child of the petitioner under INA 101(b)(1).).

[^ 23] See 8 CFR 103.2(b)(1), 8 CFR 205.1(a)(3)(i)(H), and 8 CFR 204.2(i).

[^ 24] See INA 203(a)(2).

[^ 25] See INA 203(a)(3).

[^ 26] See *Matter of Bullen* (PDF), 16 I&N Dec. 378 (BIA 1977) (In order to qualify as a “daughter” for preference purposes under INA 203(a)(2), the beneficiary must once have qualified as the child of the petitioner under INA 101(b)(1).).

[^ 27] See INA 101(a)(35). See *Matter of P-*, 4 I&N Dec. 610, 613 (A.G. 1952).

[^ 28] See INA 203(a)(4).

[^ 29] See INA 101(b)(1) and INA 101(b)(2). See *Matter of Garner* (PDF), 15 I&N Dec. 215 (BIA 1975) (To support a claimed brother-sister relationship under INA 203(a)(5), petitioner and beneficiary must have once qualified as children of a common parent as provided in INA 101(b)(1) and INA 101(b)(2).).

[^ 30] See INA 203(a)(4).

[^ 31] See 8 CFR 204.2(i). Petitioners should inform USCIS of life events that may impact the immigrant category of their beneficiary. If an adjustment application or immigrant visa petition is still pending with USCIS, the alien (beneficiary applying to adjust status) or petitioner should notify the USCIS office that issued the receipt notice or most recent correspondence in writing. If the approved petition is with the U.S. Department of State’s National Visa Center, the petitioner or applicant should write to the National Visa Center directly.

[^ 32] See 8 CFR 204.2(i). The priority date of the newly converted petition is generally the date on which that petition was originally filed (albeit for another classification).

[^ 33] See 8 CFR 204.2(i)(1)(i).

[^ 34] See 8 CFR 204.2(i)(1)(iii).

[^ 35] See INA 201(f)(2). See 8 CFR 204.2(i)(3).

[^ 36] See 8 CFR 204.2(i)(2). However, if an alien beneficiary (principal or derivative) is a child under the age of 21 when the immigrant petition is filed but turns 21 years old before it is approved or before the alien beneficiary seeks an immigrant visa, the alien beneficiary may be eligible to remain a child for immigration purposes. See the Child Status Protection Act (CSPA), Pub. L. 107-208 (PDF) (August 6, 2002). For information on how a beneficiary’s age at the time of filing the petition impacts eligibility for an immigrant visa, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 7, Child Status Protection Act [7 USCIS-PM A.7].

[^ 37] See 8 CFR 204.2(i)(1).

[^ 38] See INA 204(k)(2). A beneficiary may opt out by submitting a written request and contacting the USCIS office that approved the petition (printed on the approval or receipt notice) or the USCIS Contact Center and requesting to opt out of automatic conversion. For additional information on opting out of automatic conversion see the Child Status Protection Act (CSPA) webpage.

[^ 39] For information about family-based derivative beneficiaries, see Section C, Family Members of the Principal Beneficiary [6 USCIS-PM B.2(C)].

[^ 40] See Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 7, Child Status Protection Act [7 USCIS-PM A.7].

[^ 41] See 8 CFR 204.2(a)(4).

[^ 42] See INA 203(h)(3). See *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014), upholding *Matter of Wang* (PDF), 25 I&N Dec. 28 (2009).

[^ 43] See INA 203(h)(3). See *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2212 n.16 (2014) (observing that INA 203(h)(3) superseded the requirement in 8 CFR 204.2(a)(4) that a subsequent petition be filed by the same petitioner for an aged-out derivative beneficiary). For more information on priority dates, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6].

[^ 44] See INA 203(d) and INA 101(b)(1).

[^ 45] See INA 203(d).

[^ 46] See INA 204(l). For more information, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 9, Death of Petitioner or Principal Beneficiary, Section B, Effect on Adjustment Application [7 USCIS-PM A.9(B)]. This scenario only applies to derivative beneficiaries in the family-based third preference (F3) and family-based fourth preference (F4) categories.

[^ 47] See 8 CFR 205.1(a)(3). However, USCIS may not revoke the petition if converted to a new classification. See 8 CFR 205.1(a)(3)(G) and 8 CFR 205.1(a)(3)(H).

[^ 48] See 8 CFR 205.1(a)(3)(i)(I).

[^ 49] See 8 CFR 204.2(a)(4). A widow or widower, however, is permitted to have an immediate relative classified as derivative beneficiaries to accompany or follow to join. See 8 CFR 204.2(b)(4).

[^ 50] See INA 203(d). In general, a petitioner should list all known derivative beneficiaries on the Form I-130. Note that a principal beneficiary's natural born child born after the principal's LPR admission or adjustment may still be eligible as a derivative if born of a marriage that existed at the time of the principal's admission or adjustment to LPR status. See 8 CFR 204.2(a)(4), 8 CFR 204.2(d)(4), and 8 CFR 204.2(g)(4).

[^ 51] See INA 203(d). For more information on derivative status by accompanying or following to join a principal, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability, Subsection 6, Derivatives [7 USCIS-PM A.6(C)(6)]. Accompanying refers to a derivative who is immigrating concurrently with the principal beneficiary or who has an immigrant visa issued within 6 months of the principal beneficiary's admission or adjustment. Following to join refers to a derivative who is immigrating more than 6 months after the principal beneficiary, based on a relationship that existed at the time of the principal's immigration, so long as the relationship still exists at the time of the derivative's admission.

[^ 52] See 8 CFR 103.2(b)(1).

[^ 53] See INA 101(b)(1).

[^ 54] See INA 101(b)(1)(B).

[^ 55] See 8 CFR 204.2(a)(4).

[^ 56] See 8 CFR 204.2(a)(4).

Chapter 3 - Filing

A U.S. citizen, U.S. national,[1] or lawful permanent resident (LPR) may file a petition on behalf of a qualifying relative using the Petition for Alien Relative (Form I-130), in accordance with the regulations and form instructions.[2] Petitioners must file a Form I-130 petition for certain alien beneficiaries within a specific period to ensure the alien beneficiary qualifies for the classification sought, such as filing before the age of 21 for certain children.[3]

A beneficiary of a family-based immigrant petition may concurrently file to adjust status in certain circumstances.[4] For example, since immediate relatives are not subject to numerical limitations on visa availability, an immediate relative beneficiary who is in the United States may file an Application to Register Permanent Residence or Adjust Status (Form I-485) concurrently with the immigrant petition or after it is approved.[5]

Generally, family-based petitions must be filed with USCIS.[6] However, there are limited circumstances where the U.S. Department of State (DOS) may accept and adjudicate Form I-130. USCIS no longer accepts and adjudicates routine Form I-130 petitions at its international field offices.

A. When the U.S. Department of State is Authorized to Accept and Adjudicate Form I-130

USCIS has delegated[7] authority to DOS to accept and adjudicate a clearly approvable Form I-130 filed abroad by a U.S. citizen petitioner for an immediate relative[8] if the petitioner establishes exceptional circumstances or falls under blanket authorization criteria defined by USCIS.[9] A clearly approvable petition is generally one that includes sufficient primary evidence to establish the status of the petitioner and the qualifying relationship.[10] This policy applies even in countries with a USCIS presence. Without such delegation, DOS has no authority to permit a U.S. embassy or consulate to accept a local Form I-130 filing abroad.

If a consular officer in a U.S. embassy or consulate encounters an individual case that the officer believes needs immediate processing of a Form I-130 filed by a U.S. citizen petitioner for an immediate relative, the consular officer may, but is not required to, accept the local filing in exceptional circumstances, in accordance with the guidance below. If DOS accepts a petition, USCIS must receive notice of the filing and information about the basis for local acceptance.

1. Exceptional Circumstances

Examples of exceptional circumstances include, but are not limited to:

- Military emergencies – A U.S. citizen military service member petitioner, who is abroad but who does not fall under the blanket authorization for U.S. citizen service members stationed abroad on military bases, becomes aware of a new deployment or transfer with little notice. This exception generally applies in cases where the U.S. citizen service member is provided with exceptionally less notice than normally expected.
- Medical emergencies – A petitioner or alien beneficiary is facing an urgent medical emergency that requires immediate travel.
- Threats to personal safety – A petitioner or alien beneficiary is facing an imminent threat to personal safety. For example, a petitioner and alien beneficiary may have been forced to flee their country of residence due to civil strife or natural disaster and are in precarious circumstances in a different country outside of the United States.
- Close to aging out – An alien beneficiary is within a few months of aging out of eligibility.
- Petitioner has recently naturalized – A petitioner and alien beneficiary has traveled for the immigrant visa interview, but the petitioner has naturalized and the beneficiary requires a new petition based on the petitioner's citizenship.
- Adoption of a child – A U.S. citizen petitioner has adopted a child abroad and has an imminent need to depart the country. This type of case should only be considered if the adoptive parent petitioner(s) has a final adoption decree on behalf of the child and has had legal custody of and jointly resided with the child for at least 2 years.[11]
- Short notice of position relocation – A U.S. citizen petitioner, living and working abroad, has received a job offer in or reassignment to the United States with little notice for the required start date.

Discretion

The list of examples provided above is not exhaustive. DOS may exercise its discretion to accept clearly approvable local Form I-130 filings for other exceptional circumstances, unless specifically noted below. However, such filings must be truly urgent and otherwise limited to situations when filing with USCIS online or domestically with an expedite request would likely not be sufficient to address the time-sensitive and exigent nature of the situation.

DOS may consider a petitioner's residency within the consular district when determining whether to accept a filing, but it is not required.[12]

2. Blanket Filing Authorizations

USCIS may issue a blanket authorization for DOS to exercise its discretion to accept locally-filed clearly approvable Form I-130 immediate relative petitions in certain situations. Petitioners in these situations do not need to reside in the country of the U.S. embassy or consulate, but they must meet the blanket authorization criteria described below in order to file a Form I-130 with DOS.

Temporary Blanket Authorizations for Large Scale Disrupting Events

In certain events, such as prolonged or severe civil strife or a natural disaster, USCIS may authorize a blanket authorization for DOS to accept and adjudicate clearly approvable Form I-130 immediate relative petitions from petitioners directly affected by such events. If DOS accepts a petition under a temporary blanket authorization, USCIS must receive notice of the filing and information about the basis for local acceptance.

Temporary blanket authorizations do not require DOS to accept a filing, but rather allow DOS to exercise its discretion to accept a Form I-130 filed at a U.S. embassy or consulate where a petitioner and alien beneficiary are physically present in the consular district where filed. Although DOS may accept a local filing by a petitioner who does not reside within the post's jurisdiction, the temporary blanket authorization is intended to assist those directly affected by the disruptive event and may be limited to event-specific dates and circumstances. Such blanket authorization is not for the purpose of expediting the process for those who are not directly affected.

Petitioners who are not eligible to locally file Form I-130 under a temporary blanket authorization may still be eligible to file locally if they are otherwise eligible and establish exceptional circumstances.

U.S. Military and Certain U.S. Government Personnel Stationed or Assigned Abroad

USCIS has granted DOS blanket authorization to accept and adjudicate clearly approvable Form I-130 immediate relative petitions filed by:

- U.S. citizen military service members stationed at U.S. military bases abroad on official orders; and
- U.S. citizens who are U.S. government (USG) employees assigned to a U.S. mission abroad under Chief of Mission authority or at an office of the American Institute of Taiwan.

If DOS accepts a petition under this blanket authorization, USCIS must receive notice of the filing and information about the basis for local acceptance. This blanket authorization does not apply to U.S. service members or USG employees stationed or assigned to non-executive branch agencies or exceptions or exclusions to Chief of Missions Authority[13] or non-military bases, such as international organizations or civilian institutions. It also does not apply to service members who are on temporary duty orders or assignments, USG employees who are personal service contractors, or their eligible family members.

The petitioner and beneficiary do not both have to be physically present in the consular jurisdiction where the petition is filed. Qualifying petitioners do not need to establish exceptional circumstances. This blanket authorization is not time-limited, but USCIS may revoke the authorization if warranted.

B. When the U.S. Department of State is Not Authorized to Accept and Adjudicate Form I-130

DOS may not exercise discretion to accept local filings in certain scenarios. USCIS does not authorize DOS to accept a local filing abroad when a petitioner based in the United States seeks to travel and file abroad in order to expedite processing. DOS acceptance of Form I-130s abroad is intended to assist petitioners living abroad who demonstrate exceptional circumstances as described above.

In addition, USCIS does not authorize DOS to accept a local filing abroad if the petitioner has already filed a Form I-130 domestically for the same beneficiary. If exigent circumstances exist, the petitioner should request expedited processing for an electronic or domestically-filed petition. Local consular or USCIS staff should inform the petitioner of the process to request expedited adjudication.[14]

C. Procedures for Local Filings

DOS may accept and adjudicate a clearly approvable local Form I-130 filed by a U.S. citizen petitioner outside the United States for an immediate relative if the U.S. citizen petitioner establishes exceptional circumstances or meets blanket authorization criteria defined by USCIS.

If DOS declines to accept a local filing, DOS informs the petitioner of its decision and of the process for filing the Form I-130 at a USCIS lockbox or online in accordance with the USCIS filing instructions.

The petitioner does not have the right to appeal, motion, or otherwise request reconsideration of a USCIS or DOS decision to decline acceptance of a local filing. Although this local filing process is designed to facilitate expedited processing of cases abroad in exceptional circumstances, it is not the only way to file a petition or seek expedited adjudication. If not permitted to file locally abroad, a petitioner may still file a Form I-130 petition with a USCIS lockbox or online and may request expedited processing for that petition in accordance with the published USCIS expedite process and criteria.[15]

DOS may approve only those Form I-130 petitions that are clearly approvable.[16]

If DOS accepts a petition and determines the petition is not clearly approvable, DOS forwards the petition to the USCIS office designated to adjudicate such petitions.[17]

If DOS approves a Form I-130 petition but that U.S. embassy or consulate does not issue immigrant visas, the Consular Section coordinates with the appropriate embassy or consulate with jurisdiction to issue a visa in accordance with DOS guidelines.

Although USCIS has delegated authority to DOS to accept Form I-130 petitions in all locations abroad in the limited instances described above, USCIS retains authority to accept and adjudicate a local Form I-130 filing abroad or conduct an in-person interview abroad as warranted, regardless of where or how the petition was filed.

D. Multiple Petitions

Multiple Form I-130 Petitions for the Same Beneficiary and Classification

In some cases, the petitioner may file more than one petition on behalf of the same beneficiary for the same immigrant classification.[18] If a Form I-130 petition and subsequent Form I-130 petition filed by the same petitioner for the same beneficiary and for the same classification are approved, USCIS regards the subsequent petition approval as a reaffirmation or reinstatement of the validity of the first petition. Prior to approving, reaffirming, or reinstating a subsequent petition filed by the same petitioner for the same beneficiary in the same immigrant visa classification, USCIS must first address any fraud or ineligibility if a prior petition was returned to USCIS by DOS for good and sufficient cause for revocation.[19] The

original priority date is retained unless the original petition was terminated by the DOS,[20] had its approval revoked,[21] or a visa has been issued based on the original petition.[22] In these situations, USCIS assigns a new priority date based on the date of the subsequent filing.

Petition Submitted Concurrently for Other Relatives

If the petitioner indicates on the Form I-130 that he or she is filing petitions for additional alien relatives at the same time, the officer considers all the petitions simultaneously, if possible.[23] However, all petitions stand alone, and officers must adjudicate each petition on its own merits.

Where multiple petitions are filed together, the adjudicating officer may consider evidence provided in support of one petition to adjudicate the related petitions. However, the file must contain a copy of the evidence the officer relied upon in making the determination for each petition.

An officer should not hold a clearly approvable petition pending the adjudication of another alien relative's petition but should make every attempt to keep the family cases together.

Footnotes

[^ 1] A person who, though not a citizen of the United States, owes permanent allegiance to the United States (for example, persons born in American Samoa or Swains Island). See definition in Glossary.

[^ 2] In certain cases, alien relatives may self-petition by filing the Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360). For example, the widow or widower of a U.S. citizen may file a self-petition and include derivative child(ren). Additionally, an abused spouse, child, or parent may file a self-petition under the Violence Against Women's Act. See Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162 (PDF) (January 5, 2006). Amerasians may either self-petition or have a petition filed on their behalf under the Amerasian Act, as amended by subsequent legislation. See Pub. L. 97-359 (PDF), 96 Stat. 1716 (October 22, 1982). See Volume 3, Humanitarian Protection and Parole, Part D, Violence Against Women Act [3 USCIS-PM D] and Volume 7, Adjustment of Status, Part P, Special Adjustment Programs, Chapter 9, Amerasian Immigrants [7 USCIS-PM P.9]. For more information on self-petitioner categories, see the instructions for the Form I-360. Form I-360 is also used for a number of other (non-relative) special immigrant classifications, which are discussed in other Policy Manual parts.

[^ 3] For more information on filing timeframes, see Volume 1, General Policies and Procedures, Part B, Submission of Benefit Requests, Chapter 6, Submitting Requests, Section D, Filing Periods Ending on Weekends or Federal Holidays [1 USCIS-PM B.6(D)].

[^ 4] See 8 CFR 245.2(a)(2)(B).

[^ 5] See INA 201(b)(2).

[^ 6] See instructions to the Petition for Alien Relative (Form I-130).

[^ 7] See INA 103(a)(6) and 8 CFR 2.1.

[^ 8] Immediate relative refers to a U.S. citizen's spouse, unmarried child under the age of 21, or parent (if the U.S. citizen is over the age of 21). See INA 201(b)(2)(A)(i). Other Form I-130 filing categories, which may be filed by either U.S. citizens or LPRs and are also referred to as preference category petitions, must be filed with a domestic USCIS lockbox or online in accordance with the filing instructions. See 8 CFR 103.2(a)(1).

[^ 9] USCIS' Refugee, Asylum and International Operations Directorate (RAIO) serves as the liaison with DOS regarding its delegated authority to accept and adjudicate clearly approvable Form I-130 petitions abroad. RAIO receives, reviews, and responds to DOS requests for blanket authorizations on behalf of USCIS. USCIS has also delegated authority to DOS to accept and adjudicate certain clearly approvable family-based petitions under certain circumstances, as outlined in guidance on petitions filed at consular offices abroad in 9 FAM 504.2, including a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) when filed by a widow or widower and a Petition to Classify Orphan as an Immediate Relative (Form I-600) when accompanied by an approved Application for Advance Processing of an Orphan Petition (Form I-600A).

[^ 10] Additional criteria may be considered by consular officers to determine whether a petition is clearly approvable, including when the record indicates possible concerns related to the Adam Walsh Act. See Petitions Filed at Consular Offices Abroad, 9 FAM 504.2-4.

[^ 11] This applies to adopted beneficiaries of Form I-130. For more information on local filing processes for beneficiaries of a Form I-600 or Petition to Classify Convention Adoptee as an Immediate Relative (Form I-800), see 9 FAM 504.2 and 9 FAM 504.2-4(B).

[^ 12] For information on adjudicating exceptional circumstances I-130 cases, see 9 FAM 504.2.

[^ 13] For more information on Chief of Missions exclusions, see 2 Foreign Affairs Handbook (FAH)-2 H-112.

[^ 14] See Volume 1, General Policies and Procedures, Part A, Public Services, Chapter 5, Expedite Requests [1 USCIS-PM A.5]. See the Expedite Requests webpage.

[^ 15] For more information, see Volume 1, General Policies and Procedures, Part A, Public Services, Chapter 5, Expedite Requests [1 USCIS-PM A.5]. See the Expedite Requests webpage.

[^ 16] For more information, see Volume 1, General Policies and Procedures, Part A, Public Services, Chapter 5, Expedite Requests [1 USCIS-PM A.5]. See the Expedite Requests webpage.

[^ 17] See 9 Foreign Affairs Manual (FAM) 504.2-4(B)(1)(b), Adjudicating Exceptional Circumstance I-130 Cases.

[^ 18] See 8 CFR 204.2(h)(2).

[^ 19] See INA 205.

[^ 20] See INA 203(g).

[^ 21] See INA 205.

[^ 22] See 8 CFR 204.2(h)(2).

[^ 23] If an adoption-based Form I-130 is filed along with any Form I-130 for additional relative beneficiaries, the adoption-based Form I-130 is adjudicated apart from the other family-based Form I-130s.

Chapter 4 - Documentation and Evidence

A. Burden and Standard of Proof

Generally, the petitioner must establish eligibility for a family-based immigrant visa petition by a preponderance of the evidence.[1] If the petitioner submits relevant, probative, and credible evidence that leads USCIS to believe that the claim is more likely than not true, the petitioner has satisfied the preponderance of the evidence standard.

If the initial filing does not contain sufficient evidence to demonstrate eligibility by the appropriate standard of proof, USCIS either issues a Request for Evidence (RFE), issues a Notice of Intent to Deny (NOID), schedules an interview, or denies the petition depending on the facts and law. For instance, USCIS has discretion to deny a petition without issuing an RFE or NOID if there is no statutory basis for approval or for failure to submit initial required evidence.[2] However, USCIS must provide the petitioner with sufficient detail of any derogatory information that is unknown to the petitioner when USCIS intends to take adverse action on a family-based petition (through a NOID, RFE, or interview).

USCIS adjudicates the Petition for Alien Relative (Form I-130) based on the information contained in the form, submitted documentation, other information in the record, and testimony provided at the interview (if applicable).

B. Evidence

A petitioner seeking to bring an alien beneficiary to the United States as an immediate relative or a family-based preference relative must submit the following initial evidence[3] in accordance with the Form I-130 instructions:

- Documentation establishing the existence of a qualifying relationship with the alien beneficiary, such as copies of birth certificates, marriage certificates, and evidence of termination of any prior marriages, if applicable;[4]
- Documentation establishing the petitioner's status as a U.S. citizen, U.S. national,[5] or lawful permanent resident (LPR);[6] and
- Documentation of any legal name changes (if applicable) and any other documentation requested in the instructions.[7]

Documentation of Petitioner's Citizenship or Immigration Status

Documentation of a petitioner's citizenship or immigration status includes, but is not limited to:

- A copy of the petitioner's birth certificate issued by a civil registrar, vital statistics office, or other U.S. civil authority;
- A copy of the petitioner's Certificate of Naturalization or Certificate of Citizenship issued by USCIS;
- A copy of the petitioner's Consular Report of Birth Abroad issued by the U.S. Department of State (DOS);
- A copy of the petitioner's current, unexpired U.S. passport or passport card; or
- A copy of the petitioner's Permanent Resident Card (Form I-551) or other valid unexpired evidence of status.[8]

Types of Evidence for Family-Based Immigrant Visa Petitions[9]

Generally, a petitioner of a family-based petition must submit primary evidence in support of a claim of U.S. citizenship, LPR status, or U.S. national status and a claim of a qualifying relationship to the alien beneficiary.[10]

If a petitioner does not provide primary evidence in support of a family-based petition, USCIS generally only considers other records as secondary evidence if primary evidence is determined to be unavailable or unreliable (according to the DOS's Foreign Affairs Manual Reciprocity and Civil Documents webpage).[11]

Petitioners may also submit two or more sworn written statements (affidavits) from third parties who had personal knowledge of the event and circumstances establishing a claimed relationship, such as the date and place of birth, marriage, or death, if both primary and secondary evidence are unavailable.[12]

Footnotes

[^ 1] See INA 291. See *Matter of Brantigan (PDF),* 11 I&N Dec. 453 (BIA 1966). See *Matter of Phillis (PDF)*, 15 I&N Dec. 385 (BIA 1975) (burden of proof to establish eligibility for the benefit sought lies with the petitioner). See *Matter of Chawathe (PDF)*, 25 I&N Dec. 369 (AAO 2010). The preponderance of the evidence standard of proof, however, does not apply where a higher standard is specified by law (such as, the "clear and convincing evidence" standard). For more information on the burden or standard of proof, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 4, Burden and Standards of Proof [1 USCIS-PM E.4].

[^ 2] For additional information on RFEs and NOIDs, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 3] Documents that are not in English must be accompanied by a full, certified English translation. See 8 CFR 103.2(b)(3). Applicants should submit only photocopies of original documents unless USCIS specifically requests an original document.

[^ 4] See 8 CFR 103.2 and 8 CFR 204.2.

[^ 5] A person who, though not a citizen of the United States, owes permanent allegiance to the United States (for example, persons born in American Samoa or Swains Island). See definition in Glossary.

[^ 6] See 8 CFR 204.1(g)(1)(i-vi).

[^ 7] Many of the documents required as initial evidence may also be used to establish the petitioner's and the beneficiary's identity. Identity is material to a request for benefits. See *Matter of B- and P-*, 2 I & N Dec. 638 (BIA 1946). For additional information on identify verification for USCIS benefit requests, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 5, Verification of Identifying Information [1 USCIS-PM E.5]. Any substantial variation in the name of the petitioner or beneficiary, when compared with other records, must be satisfactorily explained by the submission of additional documents, affidavits, or other appropriate means.

[^ 8] See 8 CFR 204.1(g)(1)(vii). In the case of an LPR who has not yet received a Permanent Resident Card (Form I-551), a temporary U.S. Customs and Border Protection-issued or USCIS-issued stamp in a passport or on an Arrival/Departure Record (Form I-94) reflecting LPR status is acceptable evidence of lawful permanent residence. In the absence of such evidence, the petitioner may submit any other documents issued or endorsed by USCIS relevant to the claim to LPR status. If the LPR status cannot be verified through systems checks or the petitioner's file, or if needed to resolve any discrepancies, USCIS may also refer a petitioner for an interview.

[^ 9] For additional information on primary and secondary evidence for USCIS benefit requests, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence [1 USCIS-PM E.6].

[^ 10] See 8 CFR 204.1(f) and 8 CFR 204.1(g)(1) for primary evidence to demonstrate U.S. citizenship or LPR status. See 8 CFR 204.2 for primary evidence to establish a qualifying relationship. See 8 CFR 103.2(b).

[^ 11] See 8 CFR 204.1(f)(1). For additional information on primary and secondary evidence, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section B, Primary and Secondary Evidence [1 PM-USCIS E.6(B)].

[^ 12] See 8 CFR 103.2(b)(2)(i). For additional information on affidavits, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section B, Primary and Secondary Evidence [1 PM-USCIS E.6(B)].

Chapter 5 - Adjudication of Family-Based Petitions

A. Petition Review [Reserved]

B. Interviews

USCIS has the authority to interview any petitioner or alien beneficiary.[1] USCIS may interview the petitioner, beneficiary, or both parties, either together or separately at any stage in the adjudication.[2] The U.S. Department of State (DOS) generally conducts in-person interviews when the alien applies for an immigrant visa.

While USCIS may interview any applicant, petitioner, or beneficiary, USCIS requires an interview in connection with a Petition for Alien Relative (Form I-130) as indicated in the table below.

When USCIS Requires an Interview for Standalone Family-Based Immigrant Visa Petitions[3]
Evidence is insufficient to determine the marital bona fides or the record indicates that a marriage is not bona fide.[4]
There are any material inconsistencies or derogatory information.
Petitions for a spouse where either spouse or both spouses were under the age of 16 at the time of the marriage celebration.
Petitions for a spouse where one spouse was 16 or 17 years of age and the other spouse was at least 10 years older than the younger spouse at the time of the marriage celebration.
Petitions that lack reliable documentary evidence to demonstrate the existence of a qualifying relationship after an officer has issued a Request for Evidence (RFE) or Notice of Intent to Deny (NOID).
Petitions where testimony is needed to resolve discrepancies in the record or to address concerns regarding the reliability or credibility of evidence following an RFE or NOID.
Petitions for a spouse where the petitioner previously filed a spousal petition for a different beneficiary.
Petitions for a spouse where either the petitioner or beneficiary was party to a prior denied, revoked, terminated, or withdrawn spousal petition.
Petitions for a spouse where the LPR petitioner acquired permanent resident status through marriage less than 5 years prior to filing for the current beneficiary.[5]
Petitions for a spouse where the marriage occurred while the beneficiary was in removal proceedings.[6]
Petitions for a spouse that are adjudicated where, following an initial interview, it is determined that the bona fides of the marriage are in question.

USCIS Field Operations Directorate (FOD) conducts most family-based immigrant visa petition interviews. When a family-based immigrant visa petition is submitted to a USCIS Service Center after intake and the case requires an interview, the Service Center refers the case, with an explanation of the reason for the interview, to the local FOD office with jurisdiction over the case. The FOD office schedules the interview according to its availability and completes adjudication of the case.

C. Decision

1. Approvals

If the petitioner properly files the petition in accordance with regulations and the form instructions and demonstrates they meet eligibility requirements, then USCIS must approve the petition.[7] Generally, there is no discretionary analysis as part of the adjudication of a family-based immigrant petition, and USCIS cannot deny these petitions as a matter of discretion.[8]

The alien's history or character is usually not relevant to the adjudication.[9] However, if during the adjudication the officer encounters grounds of inadmissibility that are relevant for adjustment of status or consular processing, the officer should document the specific grounds or factors for USCIS or the U.S. Department of State (DOS) to review during the alien's application for adjustment of status or an immigrant visa.

USCIS approves a Petition for Alien Relative (Form I-130)[10] if the petitioner establishes that they are a U.S. citizen, U.S. national or lawful permanent resident (LPR) and a qualifying relationship exists between the petitioner and the alien beneficiary.

An alien beneficiary may apply to immigrate to the United States and become an LPR if there is an available visa[11] and they are the beneficiary of an approved Form I-130 or an approved Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360).[12]

Notice of Approval

USCIS notifies the petitioner of the approval on a Notice of Action (Form I-797).[13] The approval notice generally acknowledges the petitioner's declaration regarding the alien beneficiary's intent to immigrate to the United States through consular processing with DOS or to adjust status to lawful permanent residence in the United States, if eligible.

When approving the petition, the USCIS officer ensures that the notice accurately reflects the correct priority date, the proper section of law with the alien beneficiary's designated immigration classification, and whether USCIS will forward the petition to the DOS National Visa Center (NVC) for consular processing or retain the petition for the alien beneficiary to seek adjustment of status if eligible.

Correcting Errors in a Notice of Approval

The petitioner may request a corrected notice from USCIS if the approval notice is missing information, such as the correct priority date or the proper section of law with the beneficiary's designated immigration classification, or has a mistake because of USCIS error.[14]

If a mistake is related to the alien beneficiary's classification or the priority date, the consular officer who is adjudicating the visa application may return the petition for corrective action. Similarly, the USCIS officer adjudicating the adjustment of status application may review the petition for corrective action. This may delay the alien beneficiary's immigrant visa processing or adjustment of status.

To prevent these errors and delays, the petitioner should ensure they provide the correct information in the petition and notify USCIS of any changes or corrections needed.

Consular Processing or Adjustment of Status

Generally, if the petitioner indicates the alien beneficiary intends to adjust status in the United States, and the alien beneficiary is in the United States and eligible to adjust, USCIS retains the petition for adjustment of status processing.[15] If the petitioner indicates that the alien beneficiary intends to consular process or if the file indicates the alien beneficiary is ineligible to adjust status,[16] USCIS sends the approved petition to the NVC.[17] When an immigrant visa becomes available, the NVC forwards the approved petition to the appropriate consulate.[18]

It is important for the petitioner to answer the questions completely and accurately on the petition about the alien beneficiary's location and whether the alien beneficiary intends to adjust status in the United States or consular process with DOS outside of the United States. If applicable, it is also important that the petitioner identify the embassy or consulate where the alien beneficiary intends to consular process. If the petitioner does not provide this information on the petition or does not contact USCIS to update this information prior to final adjudication, further action on the approved petition may be delayed and there may be additional fees.[19]

If the petitioner leaves the relevant questions on the petition blank or the petitioner selects both the option to consular process and the option to adjust status in the United States on Form I-130,[20] USCIS exercises discretion to determine whether to send the approved petition to the NVC or retain the petition for adjustment of status processing by reviewing evidence of the alien beneficiary's most recent location, including the alien beneficiary's physical address on the petition, and whether the file indicates the alien beneficiary is eligible to adjust status.

USCIS generally retains the approved Form I-130 when:

- The petitioner indicates on the Form I-130 that the alien beneficiary is in the United States and will apply for adjustment of status in the United States;
- The alien beneficiary's physical address on the petition is in the United States and the petitioner indicates both adjustment of status and consular processing on the Form I-130;
- The alien beneficiary's physical address on the petition is in the United States and the petitioner indicates neither adjustment of status nor consular processing on the Form I-130; or
- The alien beneficiary filed an Application to Register Permanent Residence or Adjust Status (Form I-485) and the beneficiary's physical address on the petition is in the United States.

USCIS generally sends the approved Form I-130 to the NVC when:

- The petitioner indicates on the Form I-130 that the alien beneficiary will not apply for adjustment of status and will apply for an immigrant visa through consular processing on the Form I-130;[21]
- The alien beneficiary's physical address on the petition is outside the United States and the petitioner indicates both adjustment of status and consular processing on the Form I-130;
- The alien beneficiary's physical address on the petition is outside the United States and the petitioner indicates neither adjustment of status nor consular processing on the Form I-130; or
- The alien beneficiary's physical address on the petition is in the United States, but the record indicates the alien beneficiary is ineligible to adjust status.

Prior to final adjudication of the petition, the petitioner may provide updates on the petition, including whether the beneficiary intends to adjust status or consular process, the preferred embassy or consulate for visa processing, and the beneficiary's address. To provide updated information on a pending petition, petitioners should contact the office indicated on the Form I-130 receipt notice.[22]

If USCIS has approved the petition, a petitioner must file an Application for Action on an Approved Application or Petition (Form I-824) with a fee, if applicable,[23] to change from adjustment of status to consular processing, or update the preferred embassy or consulate.[24] If the petitioner seeks to change from consular processing to adjustment of status, USCIS works with the NVC to return the petition for adjustment of status processing.

2. Denials

Generally, USCIS may only deny a family-based immigrant visa petition if the petitioner fails to establish status as a U.S. citizen, U.S. national, or LPR, or the petitioner fails to establish a qualifying relationship to the alien beneficiary.[25]

USCIS may deny without first issuing a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) if there is no legal basis for approval and no additional information could establish a legal basis for approval (for example, a petition submitted on behalf of an alien relative who does not fall under a category provided for in the Immigration and Nationality Act, such as a grandparent).[26]

If USCIS denies a petition, USCIS explains in writing the specific reasons for the denial, and the right to appeal if applicable.

3. Removable Aliens

If USCIS determines the alien beneficiary is removeable and amenable to removal from the United States USCIS may issue a Notice to Appear (NTA) placing the beneficiary in removal proceedings. Petitioners and alien beneficiaries should be aware that a family-based petition accords no immigration status nor does it bar removal.

D. Post Decision Actions

A petitioner may withdraw an approved family-based immigrant petition up until the beneficiary is admitted or granted adjustment of status based on the approved immigrant petition.[27]

An approved petition may be automatically revoked before the alien beneficiary's journey to the United States commences or, if the alien beneficiary or self-petitioner is an applicant for adjustment of status, before the decision on the beneficiary's adjustment application becomes final.[28] An approved petition may also be revoked upon written notice to the petitioner if certain conditions occur or are discovered.[29]

Unless denied for abandonment or withdrawal,[30] the petitioner may appeal a family-based immigrant petition that was denied or revoked upon notice to the Board of Immigration Appeals (BIA), or USCIS may review the denied or revoked petition following a motion to reopen or reconsider.

1. Withdrawal of Petition

A petitioner may voluntarily withdraw a family-based petition before USCIS issues a decision or after USCIS has approved the petition if the beneficiary has not yet adjusted status or been admitted as an LPR.[31] The alien beneficiary of a family-based petition may not withdraw the petition.[32] A withdrawal may not be retracted.

Withdrawal is a voluntary action, and officers should not coerce petitioners into withdrawing a petition. However, an officer may suggest withdrawal as an alternative to a formal denial if the officer has not yet denied the petition.[33] Whenever an officer receives a withdrawal request,[34] the officer should acknowledge the request in writing. USCIS may not refuse a withdrawal request.[35]

Although a withdrawal by a petitioner is not necessarily an indication of fraud, officers must consider the facts surrounding any prior withdrawal in the event the same petitioner files a subsequent petition.[36] Once USCIS accepts and acknowledges a withdrawal request, the petitioner may not appeal since USCIS no longer has authority to render a decision on the petition.[37]

2. Automatic Revocation

An approved family-based immigrant petition may be automatically revoked under certain circumstances if the alien beneficiary has not yet adjusted status or commenced his or her journey to the United States.[38] The following circumstances generally trigger automatic revocation of a family-based immigrant petition:[39]

- Termination of an alien beneficiary's registration for an available visa by DOS;[40]
- Written notice of withdrawal by the petitioner (or self-petitioner);[41]
- Death of the alien beneficiary or self-petitioner;[42]
- Death of the petitioner;[43]
- Legal termination of a marriage that is the basis of the petition;
- Marriage of the son or daughter of a lawful permanent resident (LPR);[44] or
- Legal termination of a petitioner's LPR status, other than through naturalization.

Effective Date of Automatic Revocation

Under each of these grounds, the revocation is automatically triggered by the circumstance's occurrence regardless of whether USCIS is aware of the circumstance. Although the circumstance triggers the revocation, the revocation is effective as of the date of the petition's approval, not when USCIS issues notice of the revocation or when the circumstance occurred.[45]

For example, if a beneficiary of an approved petition as the unmarried son or daughter of an LPR marries before immigrating or adjusting status, the event of the marriage triggers the automatic revocation. Since the petition's approval is automatically revoked as of the date of approval, it does not become valid again if the marriage of the beneficiary is terminated through divorce or death of the beneficiary's spouse. Generally, if the marriage is annulled, the legal effect is that the marriage never occurred and, therefore, neither did the revocation.[46]

Notice of Automatic Revocation

When USCIS becomes aware of a circumstance triggering automatic revocation in an approved family-based immigrant petition, USCIS sends a revocation notice to the petitioner's last known address and the petitioner's legal representative (if any).[47] If the alien beneficiary is outside the United States and intends to consular process, USCIS must also notify DOS[48] of the revocation.[49]

There is no right to appeal an automatically revoked petition,[50] but petitioners may file a motion to reopen or reconsider a decision made by USCIS.

3. Revocation Upon Notice

In addition to the grounds for automatic revocation, at any time USCIS may revoke an approved petition upon notice[51] for good and sufficient cause.[52] USCIS must give the petitioner the opportunity to offer evidence in support of the petition and to rebut the grounds supporting USCIS' initiation of revocation proceedings.[53]

Effective Date of Revocation Upon Notice

Unlike automatic revocation, when USCIS revokes a petition upon notice, the revocation is effective as of the date on which the revocation decision becomes final, including any decision on appeal.[54]

Good and Sufficient Cause

The INA permits the revocation at any time of approved family-based petitions for good and sufficient cause.[55] The BIA has held that there is good and sufficient cause for revoking an approved petition upon notice when the evidence in the record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial based on the petitioner's failure to meet the burden of proof.[56] This discretion is provided by statute and is not subject to judicial review.[57]

At any time, USCIS may initiate revocation proceedings on an immigrant visa petition when USCIS becomes aware of the necessity of the revocation.[58] While this necessity may be the result of a particular triggering event, USCIS may also initiate revocation proceedings upon notice without a specific triggering event. There may be a series of events leading up to a

determination to revoke an approved petition upon notice, and the events could have occurred either before or after the original approval.

Notice of Intent to Revoke

When it appears that revocation upon notice is appropriate, USCIS sends the petitioner a Notice of Intent to Revoke (NOIR).[59] An NOIR must include all the reasons for which USCIS intends to revoke the approval of the petition. The petitioner is only required to respond to, and the ultimate decision can only be based on, reasons that were specified in the notice.

In addition to a specific statement of the facts and evidence underlying the proposed revocation, the notice must advise the petitioner of the right to review and rebut the evidence.[60] A decision to revoke the approval of a visa petition is not valid if USCIS did not properly issue the NOIR.[61]

Generally, the petitioner has 30 days to respond to the NOIR (33 days if USCIS mails the notice).[62] If the petitioner requests additional time to respond, USCIS may grant the petitioner additional time to respond to the notice.

If the petitioner does not respond within the allotted time, or if the response is inadequate to meet the petitioner's burden of proof, the officer revokes the approval and notifies the petitioner[63] of revocation and the opportunity to file an appeal.[64] The petitioner may appeal the decision to revoke the approval within 15 calendar days after service of the notice of the revocation.[65]

If the petitioner responds and sufficiently rebuts all grounds for revocation, USCIS reaffirms the petition and sends notice of the reaffirmation to the petitioner. If the decision to reaffirm the petition followed a consular return, USCIS returns the petition to DOS with copies of the NOIR, the petitioner's response, and the letter of reaffirmation.

4. Appeals and Motions

If USCIS denies a family-based immigrant visa petition, a petitioner has the right to appeal the decision within 30 calendar days from the date of the decision.[66] However, if USCIS revokes upon notice the approval of a family-based immigrant visa petition, a petitioner has the right to appeal the decision within 15 days after service of the notice of the revocation.[67]

Petitioners of family-based immigrant visa petitions may file an appeal using a Notice of Appeal to the Board of Immigration Appeals (BIA) from a Decision of a DHS Officer (Form EOIR-29). The BIA has jurisdiction over most appeals of decisions on a Petition for Alien Relative (Form I-130) and on a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) for a widow or widower.[68]

Once the petitioner has properly filed a Form EOIR-29 in accordance with regulations and the form instructions, a USCIS officer reviews the appeal. If the USCIS officer determines that the underlying petition is approvable, USCIS may reopen the petition on a service motion and approve the petition.[69] USCIS may only reopen the petition if the case is going to be approved. Some examples of reasons USCIS may reopen and approve a petition include:

- USCIS overlooked evidence that was provided before final adjudication and the petition is approvable after reviewing the evidence;
- The petitioner provided new facts[70] that are supported by affidavits or other documentary evidence, and the petition is approvable[71] after reviewing the new facts; or
- USCIS made another error[72] (for example, USCIS sent a request for evidence to the incorrect address).

If USCIS does not reopen and approve the underlying petition, USCIS creates a record of proceedings (ROP), USCIS counsel prepares a brief, and the ROP and brief are forwarded to the BIA.

A petitioner may also submit a Notice of Appeal or Motion (Form I-290B) to file only a motion to reopen or reconsider a USCIS decision.[73] The petitioner must file either motion within 30 days of the denial, or 33 days if the denial was sent by mail.[74] Petitioners should not submit a Form I-290B in lieu of the EOIR-29 if they want to appeal USCIS' decision. Failure to file the EOIR-29 within 30 days will result in a loss of appellate rights.

Footnotes

[^ 1] See 8 CFR 103.2(b)(9).

[^ 2] See 8 CFR 103.2(b)(7) and 8 CFR 103.2(b)(9).

[^ 3] USCIS may still require an interview with the petitioner or alien beneficiary even beyond these enumerated circumstances. Additionally, USCIS may conduct an interview in Form I-130 petitions filed concurrently with the Form I-485.

[^ 4] See *Stokes v. INS*, 393 F. Supp. 24 (S.D.N.Y. 1975). See *Stokes v. INS*, 74-cv-1022 (S.D.N.Y., Nov. 10, 1976).

[^ 5] See INA 204(a)(2).

[^ 6] See INA 204(g).

[^ 7] In this section, petition refers to the Petition for Alien Relative (Form I-130) and the Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360), where an alien filed Form I-360 as a self-petitioner seeking to immigrate as an abused spouse, child, or parent; as an Amerasian; or as a widow or widower of a U.S. citizen. See Volume 3, Humanitarian Protection and Parole, Part D, Violence Against Women Act [3 USCIS-PM D]. See Volume 7, Adjustment of Status, Part P, Other Adjustment Programs, Chapter 9, Amerasian Immigrants [7 USCIS-PM P.9]. See the USCIS Green Card for Widow(er) of a U.S. Citizen webpage. As used in this section, the term beneficiary may also refer to these Form I-360 self-petitioners.

[^ 8] See INA 204(b). If the petitioner establishes the claimed relationship with the alien beneficiary, USCIS does not have discretion to deny the petition, unless the petition is subject to the Adam Walsh Act or is subject to relief under INA 204(l).

[^ 9] See *Matter of O*– (PDF), 8 I&N Dec. 295 (BIA 1959) (admissibility of beneficiary is not relevant to decision of visa petition). However, if the alien beneficiary previously entered into a marriage for the purpose of evading immigration laws, such conduct would be relevant to the adjudication of the petition. See INA 204(c).

[^ 10] For information on Form I-360 approvals where the applicant filed Form I-360 as a self-petitioner seeking to immigrate as an abused spouse, child, or parent; as an Amerasian; or as a widow or widower of a U.S. citizen, see Volume 3, Humanitarian Protection and Parole, Part D, Violence Against Women Act, Chapter 5, Adjudication, Section C, Decision, Subsection 2, Approvals [3 USCIS-PM D.5(C)(2)]. See Volume 7, Adjustment of Status, Part P, Other Adjustment Programs, Chapter 9, Amerasian Immigrants, Section D, Petition for Amerasian, Subsection 3, Decision [7 USCIS-PM P.9(D)(3)]. See the USCIS Green Card for Widow(er) of a U.S. Citizen webpage.

[^ 11] See the USCIS Visa Availability and Priority Dates webpage.

[^ 12] For information on additional requirements following the approval of a family-based immigrant visa petition, see the USCIS Consular Processing webpage and USCIS Adjustment of Status webpage.

[^ 13] See 8 CFR 103.2(b)(19) and 8 CFR 204.2.

[^ 14] For additional information, see the Form I-130 webpage.

[^ 15] See 8 CFR 204.2(a)(3), 8 CFR 204.2(b)(3), 8 CFR 204.2(c)(3), 8 CFR 204.2(e)(3), 8 CFR 204.2(f)(3), and 8 CFR 204.2(g)(3).

[^ 16] Officers should not affirmatively review a Form I-130 petition for admissibility issues when adjudicating a family-based immigrant petition. However, if an officer becomes aware of an alien's ineligibility to adjust status during the adjudication, and the officer approves the petition, the officer should route the petition to the NVC.

[^ 17] See 8 CFR 204.2(a)(3), 8 CFR 204.2(b)(3), 8 CFR 204.2(c)(3), 8 CFR 204.2(e)(3), 8 CFR 204.2(f)(3), and 8 CFR 204.2(g)(3).

[^ 18] For additional information on NVC visa processing, see step two of the DOS's Immigrant Visa Process webpage.

[^ 19] For additional information about requesting action on an approved petition, see the USCIS Form I-824 webpage.

[^ 20] Form I-360 does not contain the option to select either consular processing or to adjust status in the United States. However, the form does ask for information about the U.S. consulate at which the self-petitioner prefers to apply for an immigrant visa if they are outside the United States, ineligible to adjust status in the United States, or they do not wish to adjust status. If the self-petitioner provides the U.S. consulate information, or fails to provide the information but provides an address outside the United States, USCIS forwards the Form I-360 to the NVC. Otherwise, USCIS retains the Form I-360.

[^ 21] See the DOS's Visa Issuing Posts webpage. If the consulate designated on the petition does not issue immigrant visas, officers may use the beneficiary's country of birth as indicated on the petition. If the beneficiary is unable to return to the country of birth or if a U.S. consulate is not present in the beneficiary's country of birth, the petitioner may request another U.S. consulate through the first designated consulate. If the new consulate accepts jurisdiction, officers annotate the petition accordingly before forwarding the petition to the NVC.

[^ 22] See the Form I-130 webpage for additional instructions on how to contact USCIS to provide updated information on a pending petition.

[^ 23] Certain individuals may be eligible for a fee exemption. For information on fees, see the Fee Schedule (Form G-1055).

[^ 24] See 8 CFR 103.9. See Form I-824.

[^ 25] See INA 204(b). See 8 CFR 204.2.

[^ 26] See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 27] See 8 CFR 103.2(b)(6). This pertains to any information provided to USCIS as part of a benefit request or related application, including interview notes. See 8 CFR 205.1(a)(3).

[^ 28] See 8 CFR 205.1(a)(3).

[^ 29] See INA 205. See 8 CFR 205.2.

[^ 30] See 8 CFR 103.2(b)(15).

[^ 31] See 8 CFR 103.2(b)(6).

[^ 32] See 8 CFR 103.2(b)(6).

[^ 33] A withdrawn petition cannot be denied. See *Matter of Cintron* (PDF), 16 I&N Dec. 9 (BIA 1976).

[^ 34] A petitioner's request for a withdrawal should be received through a written statement.

[^ 35] See *Matter of Cintron* (PDF), 16 I&N Dec. 9 (BIA 1976).

[^ 36] See *Matter of Isber*, (PDF) 20 I&N Dec. 676 (BIA 1993).

[^ 37] See 8 CFR 103.2(b)(15). See *Matter of Cintron* (PDF), 16 I&N Dec. 9 (BIA 1976).

[^ 38] See 8 CFR 205.1(a).

[^ 39] See 8 CFR 205.1(a).

[^ 40] See INA 203(g). However, if the beneficiary files a Form I-485 prior to the termination by DOS, then automatic revocation does not occur.

[^ 41] See 8 CFR 205.1(a).

[^ 42] In some cases where the principal beneficiary or self-petitioner dies before USCIS makes a decision on the adjustment of status application, the derivative beneficiaries may still be eligible to adjust status. For more information, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 9, Death of Petitioner or Principal Beneficiary [7 USCIS-PM A.9].

[^ 43] In some cases where the petitioner dies before USCIS makes a decision on the adjustment of status application, the principal beneficiary and any derivative beneficiaries of the immigrant petition may still be eligible to adjust status. For more information see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 9, Death of Petitioner or Principal Beneficiary [7 USCIS-PM A.9].

[^ 44] This includes the marriage of children of LPRs (under 21 years of age) in the F2A category as well as the marriage of sons and daughters of LPRs (21 years of age or older) in the F2B category.

[^ 45] See 8 CFR 205.1(a). This is different in revocation upon notice under 8 CFR 205.2.

[^ 46] However, USCIS does not have to recognize annulments where there was fraud or manipulation of immigration laws. See *Matter of Magana* (PDF), 17 I&N Dec. 111 (BIA 1979) and *Matter of Wong* (PDF), 16 I&N Dec. 87 (BIA 1977).

[^ 47] See 8 CFR 205.1(b).

[^ 48] USCIS generally forwards approved petitions for beneficiaries outside of the United States to DOS at the National Visa Center, or where otherwise designated by DOS.

[^ 49] See 8 CFR 205.1(b).

[^ 50] The Board of Immigration Appeals (BIA) does not have jurisdiction over automatic revocations of visa petitions. See *Matter of Zaidan* (PDF), 19 I&N Dec. 297 (BIA 1985). See the BIA Practice Manual, Chapter 9.4(a), Jurisdiction.

[^ 51] See 8 CFR 205.2(a).

[^ 52] See INA 205.

[^ 53] See 8 CFR 205.2(b).

[^ 54] See 8 CFR 205.2(a).

[^ 55] See INA 205.

[^ 56] See *Matter of Estime* (PDF), 19 I&N Dec. 450 (BIA 1987).

[^ 57] See INA 205. See *Bouarfa v. Mayorkas*, 604 U.S. 6 (Dec. 10, 2024). The statute states that the “Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him” under section INA 204.

[^ 58] See 8 CFR 205.2(a).

[^ 59] See 8 CFR 205.2(b).

[^ 60] See 8 CFR 103.2(b)(16). A petitioner must be permitted to inspect the record of proceeding and be advised of derogatory evidence, with exceptions related to classified materials and as outlined in this Policy Manual part. See *Matter of Estime* (PDF), 19 I&N Dec. 450 (BIA 1987).

[^ 61] See *Matter of Estime* (PDF), 19 I&N Dec. 450 (BIA 1987).

[^ 62] See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 10, Post-Decision Actions [1 USCIS-PM E.10]. See 8 CFR 103.8.

[^ 63] If applicable, USCIS must also notify DOS of the revocation of an approval. See 8 CFR 205.2(c).

[^ 64] See 8 CFR 205.2(d). The petitioner has the same appeal rights from a decision to revoke upon notice as a decision to deny the petition. If a denial of the petition would be appealable, so is the revocation. The petitioner also has a right to file a motion to reopen or reconsider the decision revoking the petition approval.

[^ 65] See 8 CFR 1003.3(a)(2). The notice of revocation must include information about appeal rights. The petitioner has the same appeal rights from a decision to revoke upon notice as they would have from a decision to deny the petition. The petitioner also has a right to file a motion to reopen or reconsider the decision revoking the petition approval.

[^ 66] See 8 CFR 1003.3(a)(2).

[^ 67] See 8 CFR 205.2 and 8 CFR 1205.2(d). Although the regulations provide for 15 days for the appeal of a revocation on notice, the BIA applies 30-days for appeal denials and revocations on notice, pursuant to 8 CFR 1003.3(a)(2).

[^ 68] See 8 CFR 1003.5(b). For additional information on BIA actions and procedures, see the BIA Practice Manual webpage.

[^ 69] See 8 CFR 1003.5(b).

[^ 70] New facts are facts that demonstrate eligibility at the time of filing, are relevant to the issues raised on motion, and have not been previously submitted in the proceeding. New facts are not facts that present new or changed eligibility. See 8 CFR 103.5(a)(2) and USCIS Questions and Answers: Appeals and Motions for additional information on motion to reopen requirements.

[^ 71] The evidence must establish eligibility at the time of filing the benefit request. See 8 CFR 103.2(b)(1) and (12). See *Matter of Bardouille* (PDF), 18 I&N Dec. 114 (BIA 1981); *Matter of Drigo* (PDF), 18 I&N Dec. 223 (BIA 1982). If the petitioner was not already eligible when the petition was filed, subsequent developments cannot retroactively establish eligibility as of the filing date. See *Matter of Katigbak* (PDF), 14 I&N Dec. 45, 49 (Reg. Comm’r 1971).

[^ 72] See 8 CFR 103.5(a)(2).

[^ 73] See 8 CFR 103.5.

[^ 74] See 8 CFR 103.8.

Chapter 6 - Spouses

The Immigration and Nationality Act (INA) permits U.S. citizens, U.S. nationals,[1] and lawful permanent residents (LPRs) to petition for qualifying spouses to immigrate to the United States.[2]

In its adjudication of immigrant visa spousal petitions, USCIS must ensure that marriages are between two people who are legally willing and able to marry and that marriages are legally valid, bona fide, and consistent with the laws and public policy of the United States.

A. Definition of Spouse and Types of Marriages for Family-Based Immigration Purposes

A qualifying spousal relationship for immigration purposes includes marriages that:

- Are legally valid in the place of celebration;
- Are consistent with the public policy of the United States;
- Are bona fide or entered into in good faith;[3] and
- Demonstrate the parties to the marriage were legally free and able to marry.

1. Definition of Spouse

The term spouse generally refers to one of two persons who are recognized as married to each other under the laws of the location where the marriage took place, commonly called the place-of-celebration rule.[4] In addition to the qualifying relationship requirements listed above, under the INA, a person only qualifies as a spouse if both parties to the marriage were present during the marriage ceremony, or the parties consummated the marriage following the ceremony if they were not present together.[5]

2. Types of Marriage

USCIS recognizes several types of marriages, which are discussed below, for immigration purposes if valid under the laws of the place of celebration.

Civil Marriage

A civil marriage refers to a marriage that is observed as a civil contract.[6] Although the ceremony may include religious or traditional aspects, a civil marriage requires that a civil authority formally recognized the marriage. A civil authority generally issues evidence of the marriage in the form of a marriage certificate.

Common Law Marriage

A common law marriage refers to a marriage that takes effect in certain jurisdictions without a license or ceremony, when two people who are free and able to marry live together as spouses, intend to be married, and hold themselves out to others as a married couple.[7]

A common law marriage may be valid for immigration purposes if it is valid where it was celebrated. Common law marriages generally do not require any civil action to formalize the marriage. Each jurisdiction which recognizes common law marriages may have different requirements for its recognition of such a marriage. For example, a jurisdiction may recognize a common law marriage if the parties:

- Live together;
- Present themselves to others as married, for example, by sharing a last name, referring to each other as husband and wife, or filing a joint tax return; and
- Intend to be married.

If the parties live in a jurisdiction which recognizes common law marriage, and the parties meet the qualifications for common law marriage for that jurisdiction, then their common law marriage may be valid for immigration purposes.[8] Even if a common law marriage is otherwise valid for immigration purposes, the state in which the petitioner and alien beneficiary currently reside or intend to reside may not recognize a common law marriage which was entered into in another jurisdiction.[9]

The validity of a common law marriage is generally a fact specific determination. Some examples of evidence that the parties may submit to show they have met the requirements to be in a common law marriage in a specific jurisdiction may include, but are not limited to:

- An affidavit[10] of marriage or affidavits from third parties confirming the marriage;
- Documents demonstrating a marital partnership, such as income tax returns, mortgages, joint utility bills, or leases; or
- A religious marriage certificate.

Customary Marriage

A customary marriage refers to a marriage made in accordance with customary law or traditional practice rather than under civil authority.

Some countries recognize customary or traditional law as having jurisdiction over certain domestic issues including marriage and divorce.[11] Where customary law exists, civil authorities in that country may have a role in affirming a customary marriage. In these cases, the petitioner should provide a civil court decree or other evidence of the civil authority's agreement.[12] However, civil authorities in the place of celebration may consider these marriages to be valid even if the marriages are not certified by the civil authority.

In addition to reviewing whether there is evidence of the civil authority's agreement, USCIS may look at cultural norms, traditional practices, religious belief systems, and whether local communities recognize these marriages to help determine whether a customary marriage is valid in the place of celebration.[13]

Same Sex Marriages

Same-sex marriage is a lawful basis for all family-based immigration benefits.[14] In order to be valid for immigration purposes, a same-sex marriage must meet the same requirements as an opposite-sex marriage.[15] If a same-sex marriage is not recognized as a valid marriage in the place of celebration, it is not a valid marriage for immigration purposes. A same-sex marriage that is legally valid in the jurisdiction where it was celebrated is valid for immigration purposes, even if the jurisdiction in which the parties reside does not recognize same-sex marriage, unless the marriage falls within an exception.[16]

B. Eligibility for Spouses

The petitioner has the burden to establish that the marriage to the alien beneficiary meets the requisite criteria for immigration purposes.

1. Legal Validity of Marriage

Generally, USCIS recognizes a marriage as valid for immigration purposes if it is legally valid in the place where the marriage is celebrated.[17] Although states and foreign countries may have specific laws governing jurisdiction over a marriage, the place of celebration is generally where the ceremony takes place or where the marriage certificate is issued.[18] Even if valid in the place of celebration, there are circumstances where USCIS may still not recognize a marriage as valid for immigration purposes.

Examples of the types of relationships that USCIS generally does not recognize as marriages for immigration purposes include:

- Civil unions, domestic partnerships, or other relationships not recognized as marriages in the place of celebration;
- Marriages that are not consistent with public policy in the United States, which includes polygamous marriages and may include marriages involving certain minors or close relatives;
- Marriages where one party is not present during the marriage ceremony (proxy marriages) unless the parties later consummate the marriage;
- Marriages where one or both parties to the marriage are not legally free to marry or have not given consent to the marriage; or
- Marriages entered into for the purpose of evading immigration laws of the United States.

2. Marriages Not Consistent with Public Policy

Even if a marriage is considered valid in the place of celebration, a marriage may not be consistent with the public policy of the United States or the state in which the couple resides and, therefore, may not be valid for U.S. immigration purposes.[19] For example, if a marriage was lawfully entered into in the place where it was celebrated but the couple now lives or will live in a different place, USCIS must determine whether the marriage is or will be recognized as valid in the petitioner's current or identified intended state of residence.[20] If the alien beneficiary resides abroad, unless otherwise indicated, USCIS presumes that the couple will reside in the petitioner's state of residence.[21]

In such cases, officers must issue a Request for Evidence (RFE) for the petitioner to establish whether the marriage is or will be recognized as valid in the petitioner's current or presumed state of residence.[22]

Officers must look at the state's criminal and civil statutes to determine whether the marriage is consistent with the state's public policy. The assessment as to whether a marriage violates state public policy is a case-by-case determination and involves the facts surrounding the parties, the marriage, and U.S. state law.

Examples of marriages that may violate public policy are discussed below.

Polygamy

Polygamy is the practice of having more than one spouse at the same time. The United States does not consider polygamous marriages as valid.[23] Therefore, USCIS does not recognize polygamous marriage for immigration purposes even if valid in the place of celebration.

The first legally valid marriage in a polygamous marriage situation is the only relationship that USCIS recognizes as valid for immigration purposes.[24]

Marriage Between Close Relatives

Some foreign countries and some states in the United States permit marriages between close relatives under certain circumstances.[25] USCIS recognizes these marriages for immigration purposes, generally, if they are consistent with the laws or public policy of the state where the parties reside or intend to reside. The fact that the couple could not have married in the state of residence does not necessarily mean that the marriage is contrary to public policy of the state.

In determining whether a marriage between close relatives is contrary to the public policy of the state of residence, USCIS assesses whether the state of residence would refuse to recognize the marriage or would prosecute conduct related to the marriage.[26]

Marriage Involving Minors

While there are no statutory minimum age requirements for the petitioner or alien beneficiary of a spousal immigration petition, marriages involving a minor warrant special consideration because of the minor's possible vulnerabilities. At minimum, USCIS evaluates whether the ages of the parties at the time of marriage violate the law of the place of celebration or violate the law or public policy of the state where the couple reside or intend to reside. While marriages involving a minor are not allowed in some states, some states and some foreign countries permit marriage involving one or more minors.[27]

Some circumstances where certain states or foreign countries permit marriages involving minors include marriages where:

- There is parental consent;
- There is a judicial order;
- The minor or minors are emancipated; or
- The minor is pregnant.[28]

The existence of one of these factors does not equate to a finding that a marriage involving a minor is valid for immigration purposes. USCIS evaluates each marriage on a case-by-case basis considering the law of the place of celebration and place of residence of the parties.

If the place of celebration does not allow minors to marry unless certain circumstances apply, USCIS issues an RFE and requests evidence of those circumstances and that the couple has met the requirements under relevant state or foreign laws, if applicable.[29] Evidence that the couple meets an exception under state or foreign law that permits them to legally marry may include, but is not limited to:

- A court order demonstrating legal emancipation of the minor;
- A written statement of a licensed physician, licensed physician's assistant, or nurse practitioner confirming a pregnancy;
- Documented parental consent, as required by state or foreign law;
- A judicial decree; and
- Any other evidence the state or foreign country requires.

If a jurisdiction recognizes a marriage involving a minor as valid, USCIS further evaluates the marriage for evidence that:

- The marriage was lawful in the place of celebration on the date it was celebrated;[30]
- The marriage is consistent with the public policy of the United States or the state where the couple resides, or will reside, and that the state would recognize the marriage;
- The marriage is bona fide; and
- The minors provided full, free, and informed consent to enter into the marriage.

As with marriages between close relatives, the fact that the couple could not have married in the state of residence does not necessarily mean that the marriage is contrary to public policy of the state. Even though a particular state may prohibit a marriage involving minors, that state might still choose to recognize the marriage if it took place in another jurisdiction.[31]

In determining whether a marriage involving one or more minors is contrary to the public policy of the state of residence, USCIS assesses whether the state of residence would refuse to recognize the marriage or would prosecute conduct related to the marriage.[32]

As with any marriage, USCIS also considers whether the marriage is bona fide and not entered into for the primary purpose of evading immigration law.[33] Marriages involving minors may raise questions as to the consent of the parties. Generally, an officer may rely upon a marriage certificate, court decree, or parental consent as probative evidence of a minor's consent. However, if the case presents questions as to the full, free consent of both parties, the officer should consult with supervisors and local USCIS counsel to help determine whether there is a disclosure of forced marriage.[34]

USCIS has the authority to interview any petitioner or alien beneficiary, including a minor.[35] To better examine the eligibility of the marriage for immigration purposes, officers must refer the following Petition for Alien Relative (Form I-130) spousal petitions for interview:

- All Form I-130 spousal petitions in which the petitioner or the alien beneficiary is less than 16 years of age when the marriage took place; or
- All Form I-130 spousal petitions in which the petitioner or the alien beneficiary is 16 or 17 years of age and there were at least 10 years difference between the ages of the spouses when the marriage took place.

Generally, officers should ask the same types of questions they would in any other spousal petition case to evaluate the relationship for immigration purposes, while remaining aware of the unique nature of interviewing minors.

While there is no minimum age requirement to file or be a beneficiary to a Form I-130 spousal petition, any sponsor executing an Affidavit of Support Under Section 213A of the INA (Form I-864) (including the Form I-130 petitioner, any joint sponsor, or a substitute sponsor) must be at least 18 years of age at the time the sponsor signs Form I-864. The Form I-864 must generally be submitted with the alien beneficiary's Form I-485.[36] Therefore, if a petitioner is under the age of 18 and submits a Form I-864, USCIS must deny the alien beneficiary's adjustment of status application.

3. Bona Fide Marriages

In addition to demonstrating that the marriage is legally valid, a petitioner must also show that the marriage with the alien beneficiary was bona fide at the beginning of the marriage, which means the petitioner must show that the marriage was entered into in good faith and not for the purpose of evading immigration laws, and that the spouses intended to build a life together at the time they were married.[37]

A marriage that complies with all the formal requirements of the law, but where the parties entered into the marriage with no good faith intent to live together as spouses and intended to circumvent immigrations laws, is not a bona fide marriage.[38] USCIS does not recognize marriages that do not meet the requirements of being bona fide as valid for immigration purposes.[39]

Good Faith Intent

Apart from whether the marriage was entered into for immigration purposes, USCIS generally does not evaluate specific motives for entering into a marital relationship.[40] In determining whether a marriage is bona fide, USCIS looks to the subjective good faith intent of the couple to establish a lasting relationship at the inception of the marriage. When determining whether a marriage is bona fide, the viability of the marriage or the probability of the parties remaining married for a long time is not relevant.[41] Even if the petitioner and the alien beneficiary appear to not have a viable marriage, USCIS may approve the petition if the marriage was valid at the beginning and the parties did not enter into it primarily for immigration purposes.

Withdrawal and Subsequent Re-Filing of Spousal Petition by Same Petitioner and Beneficiary

Failure to demonstrate a bona fide marriage does not, by itself, mean that the marriage is fraudulent. However, if the petitioner withdraws a spousal petition based on an admission by one party that he or she entered the marriage primarily for immigration purposes, any subsequent spousal petition involving the same petitioner and alien beneficiary must include at the time of filing:[42]

- An explanation of the prior withdrawal; and
- Evidence supporting the bona fides of the parties' relationship.

The petitioner has a heavy burden to establish the bona fides of the marital relationship in these cases.[43]

4. Legally Free to Marry

The petitioner must establish that both the petitioner and the alien beneficiary were legally free to marry one another.[44] A bona fide intent to enter into a valid marital relationship is not enough if one or both parties were not legally free or able to marry.

If either party was previously married, the petitioner must demonstrate that the prior marriage was legally terminated, leaving both parties free to marry. If there is evidence that either the petitioner or the alien beneficiary was not free to marry based on a prior marriage to another party, but the petitioner did not submit any evidence of marriage termination, USCIS issues a Notice of Intent to Deny (NOID) to inform the petitioner of this deficiency.

In some jurisdictions, a marriage that is void because one party is still married may become valid once the party terminates the prior marriage.[45] If a marriage occurred before the final date of termination of a prior marriage, USCIS looks to the laws of the place where the parties celebrated the subsequent marriage. If there is no evidence that the applicable law would allow the subsequent marriage to become valid once the party terminates the prior marriage, USCIS issues a NOID for the petitioner to establish that the marriage is valid.

Divorce

The effect of a judicial divorce is to terminate a marriage. The court with jurisdiction over divorce proceedings issues the final divorce decree which typically is final as of the date the court enters the decree. If a divorce decree requires a waiting or revocable period, the decree is not final until that period ends. Some jurisdictions may issue interlocutory divorce decrees or decrees nisi which require a specified period to pass or condition to be met prior to becoming final. These orders are not acceptable evidence of final dissolution or termination of

marriage. Both only become final after the specified waiting period or condition is met, such as no new evidence or new petitions related to the case being introduced within the specific time.[46]

In all cases, the divorce must be final to terminate the marriage. If the divorce is not final under the law in the jurisdiction where the divorce decree was issued, a subsequent marriage is not valid for immigration purposes.[47]

USCIS determines the validity of a divorce by first examining whether the state or country that granted the divorce had jurisdiction over the divorce proceeding.[48] USCIS also determines whether the parties followed the proper legal formalities required by the state or country where the parties obtained the divorce.[49] USCIS generally recognizes a foreign divorce when the country granting the divorce has jurisdiction to grant the divorce on the basis of comity, if both parties had notice of the divorce proceeding and an opportunity to be heard within the proceedings, and the proceedings complied with basic due process guarantees.[50]

When a foreign divorce occurs before a later marriage in the United States, USCIS must verify that the foreign divorce is recognized in the jurisdiction of the later marriage.[51] Foreign divorce laws may allow for jurisdiction even when the parties are not residing in the country. However, some states may not recognize the validity of a foreign divorce unless at least one of the parties to the divorce was domiciled in the jurisdiction granting the divorce.[52]

When there was no later marriage in the United States and the parties were not physically present together or domiciled in the jurisdiction granting the divorce, USCIS may deem a foreign proxy divorce (where one of the parties to the divorce was not physically present during the proceedings) to be valid if both parties were citizens of the country granting the divorce, were married and lived as spouses in the jurisdiction where divorced, had notice of the proceeding, and either one of the parties appeared in court or consented to personal jurisdiction.[53]

If an alien beneficiary or petitioner is divorced but carries on an appearance of a marital relationship with the former spouse, the divorce may not be sufficient to establish that the alien beneficiary or petitioner is free to marry.[54] When determining whether a divorce was not bona fide and done primarily for the purpose of obtaining immigration benefits, factors that USCIS considers may include, but are not limited to, the party and former spouse:

- Continuing to reside together;
- Owning joint property;
- Sharing assets or personal funds, such as through a joint bank account; or
- Filing joint tax returns.

If a lawful permanent resident petitioner and alien beneficiary residing in the United States were previously married, divorced, and then remarried shortly after the petitioner entered the United States on an immigrant visa or adjusted status, officers should review the case thoroughly to determine whether the parties intended to enter into a bona fide marriage and conduct an interview as appropriate.

Customary Divorce

USCIS may recognize a customary divorce if it complies with the marriage and divorce laws of the jurisdiction in which it takes place. However, if the customary divorce is initiated in a jurisdiction other than where the custom is practiced, that jurisdiction may not recognize the foreign customary divorce.[55]

Primary evidence of customary divorce is a court order. However, if the foreign jurisdiction does not require that a court grant or confirm a customary divorce, the petitioner may prove the validity of a customary divorce by establishing: the tribe or group to which the parties belong; the customary divorce law of that tribe or group; and the fact that the required ceremonial procedures were actually followed.[56]

To establish the relevant customary law, the petitioner may submit evidence from reported cases, legal treatises and commentaries, depositions from legal scholars, or advisory opinions from organizations traditionally recognized as possessing knowledge of customary law. If proceeding by way of affidavit, any such affidavits asserting that the pertinent ceremonial procedures were actually followed should be specific and include:

- The full names and birth dates of the parties;
- The date of the customary marriage;
- The date of, and grounds for, the dissolution of marriage;
- The names, birth dates of, and custody agreement for any children born of the marriage; and
- A description of the tribal formalities that were observed, including the names of the tribal leaders, the name of the tribe, the place, the type of divorce, and any other relevant information.[57]

Under current regulation, if submitting affidavits the petitioner must submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition and who have direct personal knowledge of the event and circumstances.[58]

Annulment

The result of annulment is to declare a marriage null and void from its inception.[59] As with divorces, the state or country issuing an annulment must have had jurisdiction over the proceeding. A court's jurisdiction to grant an annulment is usually set forth in the various divorce statutes and generally requires residence or domicile of the parties in that jurisdiction. Court orders or decree documents are issued when a marriage has been annulled by a court with appropriate jurisdiction.

If a marriage was annulled, and therefore invalid from its inception, USCIS may consider the annulment to be retroactive for immigration purposes, even if the marriage was legal in the place of celebration. However, if a prior marriage was annulled, the annulment does not have a retroactive effect to make the subsequent marriage valid in cases where the person sought an immigration benefit through concealment of the prior marriage.[60]

Legal Separation

A legal separation is a formal process by which a judicial decree alters the rights of a married couple without terminating the marital relationship.[61]

The jurisdiction where the legal separation occurs may issue a judicial order of legal separation. However, an order of legal separation is not sufficient evidence that the marriage was fully or legally dissolved. Spouses may also separate without obtaining a judicial order altering the marital relationship or formalizing the separation. Informally separated spouses are similarly also not free to remarry.

5. Additional Considerations for a Qualifying Marriage for Immigration Purposes

In addition to the requirements discussed above for a qualifying marriage for immigration purposes, USCIS considers other issues that may be relevant to the qualifying spousal relationship.

Proxy Marriages

A proxy marriage occurs where the contracting parties are not physically in the presence of each other at the marriage ceremony.[62] These marriages are only valid for immigration purposes if the parties consummate the marriage after the ceremony.[63] Acceptable evidence that the parties consummated a proxy marriage includes but is not limited to:

- The birth certificate of a child born to the couple, and listing both parents on the certificate, after the ceremony took place;
- Passport or airline tickets showing that the petitioner and alien beneficiary were in the same place at the same time subsequent to the marriage ceremony; or
- Evidence of residence together after the ceremony took place such as a joint lease or signed witness affidavits.

Virtual Marriages

A virtual marriage is one that takes place remotely, usually through electronic media technology.[64] The parties to the marriage may or may not be physically present together and are generally physically located in a place other than where the officiant to the ceremony is located.

The laws of the place of celebration govern the validity of the marriage.[65] Each jurisdiction's civil authorities set their own requirements for authorizing a marriage, including any requirements regarding the location of the parties and the officiant. A virtual marriage is valid for immigration purposes if it is valid in the state or country that issued the marriage certificate, and it does not violate the public policy of the United States or a state where the petitioner resides, or where the couple will reside. For the marriage to be valid for immigration purposes, the parties also must consummate the marriage after the ceremony if the parties were not physically together for the ceremony.[66]

Forced Marriage

USCIS considers a forced marriage to mean a marriage to which one or both parties do not or cannot consent, and in which one or more elements of force, fraud, or coercion is present. USCIS does not consider a marriage in which one or both parties did not consent to the marriage to be valid for immigration purposes. Forced marriages are distinct from arranged marriages, which allow for consent of the parties involved.[67]

Legal Separation of Petitioners and Beneficiaries Before Petition Approval

USCIS denies a spousal petition in instances where the parties enter into a valid marriage but obtain a legal separation before the final adjudication of the petition.[68] If the parties enter into a valid marriage, reside separately, but have not obtained a legal separation, USCIS may not deny the petition merely because the parties live separately since USCIS does not consider the viability of a marriage.[69] However, when determining the intent of the parties at the time of the marriage,[70] the factors USCIS considers if the parties are not living together include:

- The timing of the separation;
- The length of separation; and
- Whether the parties continue to support each other and their children (if any) during the separation.

C. Evidence for Spousal Petitions

1. Required Documentation

As with other relative petitions, petitioners must submit documentation along with their petition to establish that the petitioner is either a U.S. citizen, U.S. national, or LPR, and that the claimed relationship is valid.[71] For spousal petitions, the petitioner must generally demonstrate that the marriage is legally valid, bona fide, and that the petitioner and alien beneficiary were free to marry each other.

In addition, spousal petitions filed after April 28, 2017, require a completed and signed Supplemental Information for Spousal Beneficiary (Form I-130A). USCIS does not require the alien beneficiary's signature if the beneficiary resides overseas. If the alien beneficiary resides in the United States and the Form I-130A does not contain a signature, USCIS issues an RFE.

For petitions filed before April 28, 2017, the petitioner and alien beneficiary must have completed a Biographic Information (Form G-325A). If Form G-325 was erroneously submitted instead of Form G-325A, USCIS may adjudicate the form without issuing an RFE only if there were no prior marriages.

Evidence to support a claimed relationship for spousal petitions includes:

- A marriage certificate;[72]
- Evidence showing that the marriage is bona fide, including but not limited to:
  - Documentation showing joint ownership of property;[73]
  - A lease showing joint tenancy of a common residence;[74]
  - Documentation of commingling of financial resources;[75]
  - Birth certificates of children born to the couple;[76]
  - Affidavits of third parties with personal knowledge of the relationship;[77] and
  - Any other documentation relevant to establishing that the parties did not enter the marriage for the purpose of evading immigration law;[78]
- Evidence of legal termination of all prior marriages[79] (if applicable) including:
  - A final decree of divorce;[80]
  - A final decree of annulment; or
  - A death certificate; and
- Documentation of legal name changes (if applicable).[81]

Additional evidence that the petitioner may be required to submit to support a claimed relationship includes, but is not limited to:

- Evidence that a proxy marriage was consummated after the ceremony, when required;
- Evidence that the marriage is consistent with the public policy of the United States or the state where the couple will reside, when required; and
- Evidence that the parties to the marriage mutually agreed to enter into a marriage relationship.

Marriage Certificate

A valid marriage certificate, timely registered in accordance with the requisite jurisdiction's requirements, from the appropriate civil authority, such as a justice of the peace, judge, or city clerk, is prima facie evidence of the validity of a marriage. A license to marry is insufficient evidence of a marital relationship.

A marriage certificate should include the full names of the parties, include the date the marriage actually occurred, and be timely registered with the appropriate civil authority after the ceremony, or show that it conforms to the legal requirements of the place of celebration. USCIS may require additional evidence to demonstrate the validity of the marriage, that the parties to the marriage were legally free to marry, and that marriage was bona fide, if additional evidence was not already submitted and the initial evidence submitted fails to meet the appropriate burden.

Affidavits in Support of Bona Fides

Third party affidavits that the petitioner submits when primary or secondary evidence does not exist or is unavailable[82] as evidence of a bona fide marriage must contain:[83]

- The full name and address of the person making the affidavit;
- Date and place of birth of the person making the affidavit; and
- Details explaining how the person acquired knowledge of the marriage.

Evidence of Legal Termination of Prior Marriages

The civil authority in the jurisdiction where a marriage is terminated issues documents, such divorce certificates, as evidence of legal termination of the marriage. The petitioner must provide documentation of the termination of each prior marriage.

2. Standard of Proof for Spousal Petitions

Generally, the petitioner must meet the preponderance of the evidence standard of proof for spousal petitions. There are instances, discussed below, where USCIS applies a heightened evidentiary standard based on immigration law and regulation.[84]

D. Adjudication of Spousal Petitions

USCIS generally approves the petition when the petitioner submits sufficient evidence in support of a Form I-130 to establish a legally valid and bona fide marriage.[85] If the petitioner has submitted some evidence with the initial filing, but it is insufficient to establish a legally valid and bona fide marriage, or concerns exist regarding the reliability or credibility of the evidence, USCIS may issue either an RFE or a NOID or conduct an interview.

1. Interviews

USCIS has the authority to interview any petitioner or beneficiary.[86] If the facts of an individual case present a need for an interview, for example, if the facts presented are inconsistent or raise doubt about the bona fides of the marriage,[87] or if the documentary evidence submitted to establish that the marriage is legally valid is insufficient,[88] USCIS will conduct in person interviews with the petitioner, and in some cases the alien beneficiary. In certain cases where USCIS determines that the petitioner and alien beneficiary will both be interviewed, USCIS may interview the petitioner and alien beneficiary separately or together.

In addition to instances where the individual facts of the case warrant an interview, USCIS will also conduct an interview in the following spousal cases:

- One or both spouses were under the age of 15 at the time of the marriage;
- One spouse was 16 or 17 and the other spouse was at least 10 years older at the time of the marriage;
- A heightened evidentiary standard is applied as discussed below;
- The petitioner previously filed a spousal petition for a different beneficiary; or
- An adverse decision or withdrawal request was made on a prior spousal petition involving either the petitioner or alien beneficiary.

2. Heightened Evidentiary Standard for Certain Petitions[89]

The INA generally prohibits USCIS from approving a spousal petition filed[90] by an LPR within 5 years of the date on which the petitioner became an LPR through a prior marriage to a U.S. citizen or LPR.[91] The LPR petitioner can overcome this prohibition if the petitioner:

- Waits 5 years from the date of obtaining status to file the petition;
- Establishes by clear and convincing evidence that the prior marriage was not entered into with the purpose of evading immigration laws; or
- Establishes that the prior marriage ended through death.

The clear and convincing standard is higher than the usual preponderance of the evidence standard for family-based visa petitions. The clear and convincing evidence standard is "that degree of proof, though not necessarily conclusive, which will produce in the mind of the court [or other trier of fact] a firm belief or conviction, or as that degree of proof which is more than a preponderance but less than beyond a reasonable doubt."[92]

If the petitioner falls within this prohibition and has not submitted sufficient evidence, USCIS notifies the petitioner of the deficiency and requests additional evidence. If, after an RFE or a NOID, the petitioner has still not met the clear and convincing evidence burden, USCIS denies the family-based visa petition.

3. Marriage During Removal Proceedings (INA 204(g))

The INA prohibits USCIS from approving a visa petition filed on behalf of an alien spouse if the marriage occurred on or after November 10, 1986, and while the alien beneficiary was in exclusion, deportation, or removal proceedings.[93] The petitioner can overcome this prohibition if eligible for an exemption.[94]

The petitioner has the burden to establish eligibility for an exemption[95] and may do so if the petitioner can establish one of the following:

- An immigration judge determined that the alien beneficiary is not inadmissible or deportable from the United States;
- DHS cancelled the charging document, such as a Notice to Appear (Form I-862) or similar document;
- The proceedings have been terminated by the immigration judge or the Board of Immigration Appeals;
- A federal court has granted a petition for review or an action for habeas corpus;
- At the time of filing, the alien beneficiary has resided outside the United States for 2 or more years following the marriage;[96] or
- There is clear and convincing evidence that the petitioner and alien beneficiary entered into a bona fide marriage in good faith and in accordance with the laws of the place of celebration, and no fee or other consideration was given (other than to an attorney for assistance in preparation of a lawful petition) for the filing of a petition.

To establish eligibility for a bona fide marriage exemption, the petitioner must submit a written request for an exemption along with the Form I-130 for that alien beneficiary.[97] USCIS may also issue an RFE or NOID to request evidence for the exemption if the petitioner does not submit a request as initial evidence. The purpose of the exemption is to establish that the marriage is bona fide and that the petitioner and alien beneficiary entered into the marriage in good faith and not for the purpose of evading immigration law. The request for an exemption must state the reason for seeking the exemption and must be supported by clear and convincing evidence establishing the bona fides of the marriage.

4. INA 204(c) Denials

USCIS must deny any petition filed after November 10, 1986 if the alien beneficiary previously entered into, or attempted or conspired to enter into, a marriage for the purpose of evading immigration laws.[98] When denying based on INA 204(c), USCIS must demonstrate that the record contains substantial and probative evidence of marriage fraud.[99]

The BIA has defined the substantial and probative evidence standard as “more than a preponderance of the evidence, but less than clear and convincing evidence.”[100] USCIS may consider “any relevant evidence” in determining whether there is substantial and probative evidence of marriage fraud, including both direct evidence and circumstantial evidence.[101] USCIS also may consider evidence originating in prior immigration proceedings or court proceedings.[102] However, USCIS ordinarily should reach an independent conclusion based on the evidence which must be documented in the alien beneficiary’s file.[103]

If there is substantial and probative evidence that the alien beneficiary’s prior marriage was fraudulent and the petitioner and alien beneficiary entered into the marriage for the purpose of evading immigration laws, USCIS gives the petitioner an opportunity to overcome the finding.[104]

USCIS considers all evidence in the record, including from any previous petition,[105] to determine whether there is substantial and probative evidence of prior marriage fraud on the part of the alien beneficiary.[106] However, when applying INA 204(c), in general, USCIS only discloses the information that USCIS directly relied upon to find that the alien beneficiary entered into, or attempted or conspired to enter into, a prior marriage for the purposes of evading immigration laws.

For example, if an alien’s A-file contains a previous spousal petition filed by a different petitioner and that petitioner admitted to marriage fraud in the previous spousal petition relating to the alien beneficiary, after a full re-evaluation of all evidence in the record of the current petition, USCIS may conclude that the current petition should be denied or revoked under INA 204(c) since the record includes substantial and probative evidence of the alien beneficiary’s prior marriage fraud. In such a case, USCIS discloses the prior petitioner’s statements to the current petitioner as well as other evidence directly relied on in making the adverse decision, where permissible.

If the petitioner cannot overcome the finding, then USCIS denies the visa petition under INA 204(c). An officer may deny a visa petition filed on the alien beneficiary’s behalf under INA 204 even if a prior visa petition was denied for reasons other than fraud.[107]

The INA 204(c) bar does not apply when the petitioner has filed a subsequent petition for the same beneficiary,[108] but USCIS may use the original evidence in subsequent petitions filed on the alien beneficiary’s behalf.

5. Ineligibility for Alien Petition

An alien who knowingly made a frivolous application for asylum on or after April 1, 1997, and has a final order by an immigration judge or the Board of Immigration Appeals specifically finding the alien knowingly filed a frivolous asylum application, is permanently ineligible for any benefits under the INA,[109] including as the beneficiary of a family-based immigrant visa petition.[110] Generally, an asylum claim is frivolous if the alien knowingly fabricated any material element of the claim, and was unable to rebut such determination following sufficient notice and opportunity to do so.[111] A frivolous finding on an asylum claim may be made even if the asylum application is untimely filed or withdrawn.[112]

Footnotes

[^ 1] U.S. nationals, as defined in INA 308, are not U.S. citizens. U.S. nationals are afforded the same rights as lawful permanent residents (LPRs) to file a family-based immigration petition for certain alien relatives. See *Matter of Ah San* (PDF), 15 I&N Dec. 315 (BIA 1975) (holding that nationals, but not citizens, of the United States may also file petitions under INA 203(a)(2)). A U.S. national is a person who, though not a citizen of the United States, owes permanent allegiance to the United States (for example, persons born in American Samoa or Swains Island). See definition in Glossary.

[^ 2] In addition, Congress provided that certain spouses may self-petition in limited circumstances, including self-petitioners seeking to immigrate as an abused spouse or as a widow or widower of a U.S. citizen. See Volume 3, Humanitarian Protection and Parole, Part D, Violence Against Women Act [3 USCIS-PM D]. See the Green Card for Widow(er) of a U.S Citizen webpage.

[^ 3] For more information on how USCIS determines whether there is a bona fide marriage, see Part I, Family-Based Conditional Permanent Residents (CPRs), Chapter 3, Petition to Remove Conditions on Residence, Section A, Establishing a Bona Fide Marriage [6 USCIS-PM I.3(A)]. USCIS applies the same general principles regarding bona fide marriages for Form I-130 immigrant visa spousal petitions as it does for CPRs seeking to remove conditions on permanent resident status.

[^ 4] See *Matter of P-*, 4 I&N Dec. 610 (A.G. 1952).

[^ 5] See INA 101(a)(35).

[^ 6] See Black’s Law Dictionary (12th ed. 2024).

[^ 7] See Black’s Law Dictionary (12th ed. 2024).

[^ 8] See *Matter of Garcia* (PDF), 16 I&N Dec. 623 (BIA 1978).

[^ 9] See *Matter of C--*, 1 I&N Dec. 301 (BIA 1942).

[^ 10] For guidance on affidavits, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 4, Documentation, Section B, Unavailability of Records and the Use of Affidavits, Subsection 3, Affidavits [7 USCIS-PM A.4(B)(3)].

[^ 11] See *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973).

[^ 12] See *Matter of Kumah* (PDF), 19 I&N Dec. 290 (BIA 1985) (A Ghanaian court decree of divorce is accepted as evidence that a customary divorce was validly obtained, but it may not be conclusive proof because of the potential for fraud or error in the issuance.).

[^ 13] USCIS should review the Department of State's U.S. Visa: Reciprocity and Civil Documents by Country webpage to determine a document's availability and reliability to help verify the validity of civil marriage or divorce records. See 8 CFR 103.2(b). See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence [1 USCIS-PM E.6].

[^ 14] See 1 U.S.C. 7, as amended by the Respect of Marriage Act, Pub. L. 117-228 (PDF) (December 13, 2022). See *United States v. Windsor*, 133 U.S. 2675 (2013) (holding that Section 3 of the Defense of Marriage Act (DOMA), which previously had barred recognition of same-sex marriages for federal purposes, is unconstitutional and a violation of the Fifth Amendment Due Process Clause). See *Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding that the Due Process Clause of the Fourteenth Amendment guarantees the right to marry as one of the fundamental liberties it protects and applies to same-sex couples in the same manner as it does to opposite-sex couples).

[^ 15] This includes marriages between parties where one individual identifies as a member of the sex other than the sex indicated on their birth certificate or similar evidence at birth. See *Matter of Lovo-Lara*, 23 I&N Dec. 746 (BIA 2005).

[^ 16] See *Matter of Zeleniak*, 26 I&N Dec. 158 (BIA 2013). For information on exceptions for marriages USCIS does not consider valid for immigration purposes, see Section B, Eligibility for Spouses [6 USCIS-PM B.6(B)].

[^ 17] See *Matter of P-*, 4 I&N Dec. 610, 613 (A.G. 1952) (stating that as the immigration statutes do not affirmatively define marriage, "the generally accepted rule is that the validity of a marriage is governed by the law of the place of celebration").

[^ 18] See 8 CFR 204.2(a)(2) (requiring certificate of marriage issued by civil authorities as primary evidence of a marriage).

[^ 19] See *Matter of H–,* 9 I&N Dec. 640 (BIA 1962) (A polygamous marriage, though valid where contracted, is not recognized for immigration purposes.).

[^ 20] See *Matter of Zappia* (PDF), 12 I&N Dec. 439 (BIA 1967). See *Matter of Da Silva* (PDF), 15 I&N Dec. 778, 779 (BIA 1976).

[^ 21] See *Matter of Manjoukis* (PDF), 13 I&N Dec. 705 (BIA 1971).

[^ 22] See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 23] See *Matter of H–,* 9 I&N Dec. 640 (BIA 1962).

[^ 24] If polygamy is valid in the place where a child was born, USCIS may consider that child to be legitimate if the laws of the child's birth country or the father's country of domicile consider the child to be legitimate. See *Matter of Mahal* (PDF), 12 I&N Dec. 409 (BIA 1967).

[^ 25] See *Matter of M-*, 3 I&N Dec. 25 (BIA 1947) (The foreign marriage was valid in Romania when a niece married her uncle, and they could have lawfully cohabited in New York, according to the view of the New York State Attorney General.). See *Matter of T* (PDF), 8 I&N Dec. 529 (BIA 1960) (holding that a marriage between an uncle and niece that was valid under the law of Czechoslovakia where the ceremony was performed and not subject to criminal sanctions under the law of Pennsylvania where the parties cohabit is lawful for immigration purposes).

[^ 26] See *Matter of Hirabayashi* (PDF), 10 I&N Dec. 722 (BIA 1964) (A marriage entered into in Colorado between first cousins, residents of Illinois, is a valid marriage in Illinois since the evidence establishes the parties did not go to Colorado with the primary intention of evading the Illinois statutes prohibiting the marriage of first cousins and there is no evidence of a strong public policy in the State of Illinois against these marriages which are valid in the place where contracted, since cohabitation between first cousins is no longer a crime under Illinois statutes). See *Matter of Zappia* (PDF), 12 I&N Dec. 439 (BIA 1967) (A marriage contracted in South Carolina in 1966 between first cousins, residents of Wisconsin, for the purpose of evading the statutory prohibition against these marriages in the State of Wisconsin, to which they immediately returned to live and in which these marriages are void and criminally incestuous, is not a valid marriage for the purpose of conferring immediate relative status on the wife). See *Matter of Da Silva* (PDF), 15 I&N Dec. 778, 779 (BIA 1976) (Marriage between an uncle and his niece under the laws of Georgia was valid for immigration purposes even though the marriage would have been void as incestuous if solemnized in New York, because the Georgia marriage would be recognized as valid in New York and therefore did not violate New York public policy.).

[^ 27] Although the INA defines a child for immigration purposes as an unmarried person under 21 years of age, domestic law determines the definition of a minor in the context of marriage. Most U.S. states consider a minor, in the context of marriage, to generally be defined as an individual under 18 years of age.

[^ 28] U.S. state laws vary in setting minimum age requirements to marry and exceptions that may permit minors to marry. Some U.S. states do not have an age floor below which a minor cannot marry if an exception applies. However, there may still be public policy considerations that would cause the state where the parties live to refuse to recognize an out of state marriage involving a minor.

[^ 29] Officers should review the most recent information on specific state and foreign laws.

[^ 30] See *Matter of P*, 4 I&N Dec. 610 (A.G. 1952). (Regardless of the age of the petitioner and beneficiary at the time USCIS adjudicates the petition, officers must ensure that any marriage that involved a minor was lawful at inception).

[^ 31] See *Matter of Hirabayashi* (PDF), 10 I&N Dec. 722 (BIA 1964).

[^ 32] See *Matter of Zappia* (PDF), 12 I&N Dec. 439 (BIA 1967).

[^ 33] See *Lutwak v. United States*, 344 U.S. 604 (1953). See *Matter of McKee* (PDF), 17 I&N Dec. 332 (BIA 1980).

[^ 34] See the Forced Marriage webpage. See Section B, Eligibility for Spouses, Subsection 5, Additional Considerations for a Qualifying Marriage for Immigration Purpose [6 USCIS-PM B.6(B)(5)].

[^ 35] See 8 CFR 103.2(b)(7) and 8 CFR 103.2(b)(9).

[^ 36] For more information about affidavit of support considerations, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section D, Determine Admissibility, Subsection 2, Affidavit of Support Under Section 213A of the Act (Form I-864) [7 USCIS-PM A.6(D)(2)].

[^ 37] See *Lutwak v. United States*, 344 U.S. 604 (1953). See *Matter of Laureano* (PDF), 19 I&N Dec. 1, 2 (BIA 1983) (When considering whether a marriage was a sham, "[t]he central question is whether the bride and groom intended to establish a life together at the time they were married"). See *Matter of Phillis*, 15 I&N Dec. 385 (BIA 1975).

[^ 38] See *Matter of M–*, 8 I&N Dec. 217 (BIA 1958) (Where parties did not intend to enter a bona fide marriage, the marriage was deemed invalid for immigration purposes regardless of whether it would be considered valid under the domestic law of the jurisdiction where it was performed.).

[^ 39] See *Matter of Patel* (PDF), 19 I&N Dec. 774 (BIA 1988). See *Matter of Laureano* (PDF), 19 I&N Dec. 1 (BIA 1983).

[^ 40] See *Matter of Peterson* (PDF), 12 I&N Dec. 665 (BIA 1968).

[^ 41] See *Matter of McKee* (PDF), 17 I&N Dec. 332 (BIA 1980).

[^ 42] See *Matter of Laureano* (PDF), 19 I&N Dec. 1 (BIA 1983).

[^ 43] See *Matter of Laureano* (PDF), 19 I&N Dec. 1 (BIA 1983). See *Matter of Isber* (PDF), 20 I&N Dec. 676 (BIA 1993).

[^ 44] See *Matter of Ceballos*, 16 I&N Dec. 765 (BIA 1979). See *Matter of Hann*, 18 I&N Dec 196 (BIA 1982).

[^ 45] See *Matter of Arenas* (PDF), 15 I&N Dec. 174 (BIA 1975) (In determining the validity of a marriage for immigration, the law of the place of celebration of the marriage generally governs. Under Section 2.22 of the Texas Family Code, a marriage is void if either party was married and the prior marriage was not dissolved. However, the marriage becomes valid when the prior marriage is dissolved and the parties continue to reside together as husband and wife and present themselves to others as being married.).

[^ 46] See *Matter of S-*, 9 I&N Dec. 296 (BIA 1961). See *Matter of Souza*, 14 I&N Dec. 1 (BIA 1972).

[^ 47] See *Matter of P-*, 4 I&N Dec. 610 (A.G. 1952). See *Matter of Darwish*, 14 I&N Dec. 307 (BIA 1973).

[^ 48] See *Matter of Luna*, 18 I&N Dec. 385, 386 (BIA 1983) ("A foreign court must have jurisdiction to render a valid decree, and the applicable tests of jurisdiction are ordinarily those of the United States, rather than of the divorcing country").

[^ 49] See *Matter of Karim*, 14 I&N Dec. 417 (BIA 1973) (finding that the alien had not legally terminated his prior marriage in Pakistan because he may not have complied with divorce procedures under Pakistani law).

[^ 50] See *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) ("Every foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered by a court having jurisdiction of the cause, and upon regular proceedings, and due notice."). See *Animal Science Products, INC v. Hebei Welcome Pharmaceutical Company*, Petition for Writ of Certiorari, 16-1220 (2018) ("Courts in the United States have declined to recognize foreign judgments in instances where the proceedings failed to provide basic due process or otherwise violated public policy."). See *Matter of Hussein* (PDF), 15 I&N Dec. 736 (BIA 1976).

[^ 51] See *Matter of P-*, 4 I&N Dec. 610 (A.G. 1952). See *Matter of W–* (PDF), 8 I&N Dec. 16 (BIA 1958) (California courts did not ordinarily recognize Mexican mail order divorces, and so divorce was not valid for immigration purposes as the applicant was not legally free to marry.). See *Matter of Hosseinian* (PDF), 19 I&N Dec. 453 (BIA 1987).

[^ 52] See *Matter of Revelo* (PDF), 16 I&N Dec. 685 (BIA 1979). For cases in the Ninth Circuit, a person admitted who overstays a B nonimmigrant visa does not establish domicile in California. See *Park v. Barr*, 946 F.3d 1096 (9th Cir. 2020) (holding the beneficiary's Korean divorce and subsequent marriage in California were valid).

[^ 53] See *Matter of Ma* (PDF), 15 I&N Dec. 70 (BIA 1974).

[^ 54] See *Matter of Aldecoaotalora* (PDF), 18 I&N Dec. 430 (BIA 1983).

[^ 55] For example, a talaq divorce that is pronounced over the phone from the United States to a spouse in a country which practices Islamic law and would recognize a talaq divorce as valid, may not be valid for immigration purposes if it is not valid in the U.S. jurisdiction in which the divorce is pronounced. See *Matter of Awadalla*, 10 I&N Dec. 556, 586 (BIA 1957) (citing *Matter of M-*, 7 I&N Dec. 470 (BIA 1954)). See *Shikoh v. Murff*, 257 F.2d 306 (C.A. 2, 1958) ("A Moslem divorce pronounced in a jurisdiction which does not ordinarily apply Moslem law raises a serious question of its validity.").

[^ 56] See *Matter of Kodwo*, 24 I&N Dec. 479 (BIA 2008).

[^ 57] See *Matter of Kodwo*, 24 I&N Dec. 479 (BIA 2008).

[^ 58] See 8 CFR 103.2(b)(2)(i).

[^ 59] See *Matter of Astorga*, 17 I&N Dec. 1 (BIA 1979).

[^ 60] See *Matter of Magana* (PDF), 17 I&N Dec. 111 (BIA 1979) (Where the beneficiary entered the United States as the spouse of a U.S. citizen and concealed a prior marriage in Mexico, a decree from a Washington state court declaring the Mexican marriage invalid from its inception was not given retroactive effect for immigration purposes). See *Matter of B--*, 3 I&N Dec. 102 (BIA 1947).

[^ 61] See, for example, *Nehme v. INS*, 252 F.3d 415, 422-27 (5th Cir. 2001) (discussing legal separation for purposes of derivation of citizenship). See *Matter of Miraldo*, 14 I&N Dec. 704 (BIA 1974).

[^ 62] See INA 101(a)(35). See *Matter of B,* 5 I&N Dec. 698 (BIA 1954).

[^ 63] Determining whether a marriage was consummated is not the same as determining whether a marriage is bona fide for immigration purposes. See *Matter of Peterson* (PDF), 12 I&N Dec. 663 (BIA 1968) (the BIA affirmed that consummation of a marriage is not a requirement for proving that the marriage is bona fide.). See *Matter of M*, 7 I&N, Dec. 601 (BIA 1957) (A beneficiary in deportation proceedings was found to not have committed marriage fraud even though the marriage was never consummated because he had tried to consummate the marriage and his wife refused because she was interested in another man).

[^ 64] For example, marriage ceremonies conducted using applications like ZOOM and Facetime. While a marriage certificate is generally prima facie evidence of a valid marriage, the officer may request further evidence if it's unclear that the petitioner has met the burden of proving that a virtual marriage is valid and that the parties complied with all legal requirements of the state or country that issued the marriage certificate.

[^ 65] See *Matter of P-*, 4 I&N Dec. 610 (A.G. 1952). See 8 CFR 204.2(a)(2) (requiring certificate of marriage issued by civil authorities).

[^ 66] See INA 101(a)(35).

[^ 67] For additional information about forced marriages, see the Forced Marriage webpage.

[^ 68] See *Matter of Lenning* (PDF), 17 I&N Dec. 476 (BIA 1980).

[^ 69] See *Matter of McKee* (PDF), 17 I&N Dec. 332 (BIA 1980).

[^ 70] See Section B, Eligibility for Spouses, Subsection 4, Legally Free to Marry [6 USCIS-PM B.6(D)(4)].

[^ 71] See 8 CFR 103.2(b)(1), 8 CFR 204.1(f), 8 CFR 204.1(g), and 8 CFR 204.2(a)(2).

[^ 72] See 8 CFR 204.2(a)(2).

[^ 73] See 8 CFR 216.4(a)(5)(i). This guidance is applicable for conditional permanent residents to establish their marriage is bona fide per statutory requirements and is similarly applicable for all spousal immigrant visa petitions. See 8 CFR 204.2(a)(1)(i)(B)(1).

[^ 74] See 8 CFR 216.4(a)(5)(ii) and 8 CFR 204.2(a)(1)(i)(B)(2).

[^ 75] See 8 CFR 216.4(a)(5)(iii) and 8 CFR 204.2(a)(1)(i)(B)(3).

[^ 76] See 8 CFR 216.4(a)(5)(iv) and 8 CFR 204.2(a)(1)(i)(B)(4).

[^ 77] See 8 CFR 216.4(a)(5)(v) and 8 CFR 204.2(a)(1)(i)(B)(5).

[^ 78] See 8 CFR 216.4(a)(5)(vi) and 8 CFR 204.2(a)(1)(i)(B)(6).

[^ 79] See 8 CFR 204.2(a)(2).

[^ 80] See *Matter of Pearson* (PDF), 13 I&N Dec. 152 (BIA 1969) (The marriage following a divorce can only be considered valid if the divorce is considered valid under the laws of the place where the marriage was contracted.).

[^ 81] See 8 CFR 204.1(f). See the instructions for the Petition for Alien Relative (Form I-130).

[^ 82] See 8 CFR 103.2(b)(2)(i).

[^ 83] See 8 CFR 204.2(a)(1)(i)(B)(5).

[^ 84] See Section D, Adjudication of Spousal Petitions [6 USCIS-PM B.6(D)].

[^ 85] In some instances, the petitioner or alien beneficiary may be ineligible from petition approval even if the qualifying relationship is established. For example, if the Attorney General has found that an alien made a frivolous application for asylum and the alien received notice, the alien is permanently ineligible for any immigration benefits under the INA. See INA 208(d)(6).

[^ 86] See 8 CFR 103.2(b)(9).

[^ 87] If an interview, following an initial interview, is required to verify the bona fides in the New York District Office, USCIS provides the following to the petitioner: a written notice describing the rights of the parties involved, a separate attachment of the list of rights with the appointment letter, and a list of documents to submit at the time of the interview. See *Stokes v. INS*, No. 74 Civ. 1022 (S.D.N.Y. Nov. 10, 1976).

[^ 88] In addition to other reasons for insufficient documentary evidence, there may be potential integrity issues with civil records from certain countries. In these cases, officers should check the U.S. Department of State's U.S. Visa: Reciprocity and Civil Documents by Country webpage to determine a document's availability and reliability, and proceed to interview the petitioner and alien beneficiary as needed.

[^ 89] See INA 204(a)(2)(A).

[^ 90] See 8 CFR 103.2(b)(1), 8 CFR 204.2(a)(1)(i)(A), and 8 CFR 204.2(a)(1)(i)(C). 8 CFR 204.2(a)(1)(i)(A) was amended in 1992, superseding the BIA decision in *Matter of Pazandeh*, 19 I&N Dec. 884 (BIA 1989).

[^ 91] See INA 204(a)(2)(A). If the LPR petitioner naturalizes before or after the petition is filed and the alien beneficiary's status changes to the spouse of a U.S. citizen, USCIS does not apply this approval bar in its adjudication.

[^ 92] See *Matter of Patel* (PDF), 19 I&N Dec. 774, 783 (BIA 1988). See *Matter of Carrubba* (PDF), 11 I&N Dec. 914, 917 (BIA 1966).

[^ 93] See INA 204(g) and INA 245(e). See 8 CFR 245.1(c)(8), which defines when an alien has been placed into proceedings and when proceedings are terminated.

[^ 94] See 8 CFR 204.2(a)(1)(iii)(C).

[^ 95] See *Matter of Brantigan* (PDF), 11 I&N Dec. 493 (BIA 1966). See 8 CFR 245.1(c)(8)(iii) and 8 CFR 204.2(a)(1)(iii).

[^ 96] See 8 CFR 103.2(b)(1), 8 CFR 204.2(a)(1)(iii)(C), and 8 CFR 204.2(a)(1)(iii)(D).

[^ 97] See 8 CFR 245.1(c)(8)(iv).

[^ 98] See INA 204(c). See 8 CFR 204.2(a)(1)(ii). INA 204(c) prohibits USCIS from approving any immigrant visa petition, not just a Form I-130 petition. Accordingly, if an alien is a beneficiary of an Immigrant Petition for Alien Workers (Form I-140) or a Petition for Amerasian, Widow(er) or Special Immigrant (Form I-360), and the beneficiary has attempted or conspired to enter into a fraudulent marriage, USCIS is also be barred from approving the Form I-140 petition.

[^ 99] See *Matter of Pak*, 28 I&N Dec. 113 (BIA 2020) (the record must contain substantial and probative evidence of prior marriage fraud). See *Matter of Tawfik* (PDF), 20 I&N Dec. 166 (BIA 1990).

[^ 100] See *Matter of P. Singh*, 27 I&N Dec. 598 (BIA 2019).

[^ 101] See *Matter of P. Singh*, 27 I&N Dec. 598, 607-08 (BIA 2019).

[^ 102] See *Matter of Tawfik* (PDF), 20 I&N Dec. 166 (BIA 1990).

[^ 103] See *Matter of Tawfik* (PDF), 20 I&N Dec. 166 (BIA 1990). See *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978) (a final order of deportation based on a marriage fraud finding provides a clear and substantial basis for applying the INA 204(c) bar).

[^ 104] Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section G. Derogatory Information [1 USCIS-PM E.6(G)].

[^ 105] INA 204(c) does not require the filing of a previous spousal petition or the existence of a prior marriage. Evidence of an attempt or conspiracy to engage in a marriage through fraud is sufficient to trigger INA 204(c).

[^ 106] The substantial and probative evidence standard requires the examination of all relevant evidence and a determination as to whether such evidence, when viewed in its totality, establishes, with sufficient probability, that the marriage is fraudulent. Both direct and circumstantial evidence may be considered in determining whether there is substantial and probative evidence of marriage fraud under INA 204(c), and circumstantial evidence alone may be sufficient to constitute substantial and probative evidence. See *Matter of Singh*, 27 I&N Dec. 598 (BIA 2019). See *Matter of Pak*, 28 I&N Dec. 113 (BIA 2020) ("Where there is substantial and probative evidence that a beneficiary's prior marriage was fraudulent and entered into for the purpose of evading the immigration laws, a subsequent visa petition filed on the beneficiary's behalf is properly denied pursuant to section 204(c) of the Immigration and Nationality Act… even if the first visa petition was denied because of insufficient evidence of a bona fide marital relationship.").

[^ 107] See *Matter of Tawfik* (PDF), 20 I&N Dec. 168 (BIA 1990) and *Matter of Pak*, 28 I&N Dec. 113 (BIA 2020).

[^ 108] See *Matter of Isber* (PDF), 20 I&N Dec. 676 (BIA 1993).

[^ 109] See 8 CFR 208.20. The provisions of 8 CFR 208.20 that are currently applicable existed prior to changes made by the rule titled Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 80274 (Dec. 11, 2020) (final rule amending 8 CFR parts 208, 235, 1003, 1208, 1235, also called the "Global Asylum Rule"). The Global Asylum Rule was to go into effect on January 11, 2021. However, it was enjoined on January 8, 2021, in *Pangea Legal Services v. Department of Homeland Security*, 512 F. Supp. 3d 966 (N.D. Cal. 2021) (order granting preliminary injunction). The previous version of 8 CFR 208.20 remains in effect. An alien is not precluded from seeking withholding of removal under section 241(b)(3) of the Act or protection under the regulations issued to implement the Convention Against Torture.

[^ 110] See INA 208(d)(6). Depending on advice of another to make a frivolous claim does not exempt an alien from the permanent bar; see instructions for Application for Asylum and for Withholding of Removal (Form I-589).

[^ 111] See *Matter of Y-L-* (PDF), 24 I&N Dec. 151, 153-63 (BIA 2007).

[^ 112] See *Matter of M-S-B-*, 26 I&N Dec. 872 (BIA 2016).

Chapter 7 - Children, Sons, and Daughters

A. Definition of a Child[1]

In general, a child for immigration purposes is an unmarried person under 21 years of age who is:

- A child born in wedlock[2] to a U.S. citizen or lawful permanent resident (LPR) parent;
- The legitimated[3] child of a U.S. citizen or LPR parent who is under 18 and in the legal custody of the legitimating parent or parents at the time of legitimation;
- The stepchild of a U.S. citizen or LPR parent who is under 18 at the time of the marriage, creating the step-relationship;
- A child adopted while under age 16 (or 18 if the sibling exception applies) who has jointly resided with and been in the legal custody of the adopting U.S. citizen or LPR parent for at least 2 years;[4]
- An orphan who has been adopted abroad by a U.S. citizen or who is coming to the United States for adoption by a U.S. citizen;[5]
- A Hague Convention adoptee who has been adopted abroad by a U.S. citizen or who is coming to the United States for adoption by a U.S. citizen;[6] or
- A child born out of wedlock to a natural[7] U.S. citizen or LPR parent. If the petitioning parent is the natural father and the child has not been legitimated, the natural father and child must have had a bona-fide parent-child relationship before the child reached the age of 21 or married.

1. Child Born In or Out of Wedlock

USCIS considers a child to be born in wedlock when the child's legal parents are married to one another at the time of the child's birth and at least one of the legal parents has a genetic or gestational relationship to the child.[8] Therefore, a child born in wedlock may be:

- A genetic child of a married U.S. citizen or LPR parent if both married parents are recognized by the relevant jurisdiction as the child's legal parents;
- The child of a married non-genetic gestational U.S. citizen or LPR parent (person who carried and gave birth to the child) if both married parents are recognized by the relevant jurisdiction as the child's legal parents; or
- A child of a U.S. citizen or LPR who is married to the child's genetic or gestational parent at the time of the child's birth, if both married parents are recognized by the relevant jurisdiction as the child's legal parents.[9]

If a child does not meet this definition of born "in wedlock," USCIS considers the child to have been born out of wedlock. While the petitioning U.S. citizen or LPR parent may be the natural mother or natural father, if the petitioning parent is the natural father and the child has not been legitimated, the natural father and child must have had a bona-fide parent-child

relationship before the child reached the age of 21 or married. A “natural” parent may be a genetic or a gestational parent (who carries and gives birth to the child) who is recognized by the relevant jurisdiction as the child’s legal parent.

2. Legitimated Child [Reserved]

[Reserved]

3. Assisted Reproductive Technology (ART)[10]

The child of a gestational parent who is also the child’s legal parent may be considered a “child” for immigration purposes. A person who is the gestational and legal parent of a child under the law of the relevant jurisdiction at the time of the child’s birth may file a Petition for Alien Relative (Form I-130) for the child if all other eligibility requirements are met.

In addition, a non-genetic, non-gestational legal parent may file a Form I-130 on behalf of the child if the parent is married to the child’s genetic or gestational parent at the time of the child’s birth and both parents are recognized by the relevant jurisdiction as the child’s legal parents. Under those circumstances, the child is considered born in wedlock.[11]

Legal parentage is generally determined under the laws of the jurisdiction in which the child was born, but there may be circumstances in which the law of the jurisdiction of residence applies, such as when a post-partum act of legitimation occurs in the jurisdiction of residence.

4. Stepchild [Reserved]

[Reserved]

B. Eligibility Requirements for Child Petitions [Reserved]

[Reserved]

C. Documentation and Evidence [Reserved]

[Reserved]

D. Adjudication [Reserved]

[Reserved]

Footnotes

[^ 1] See INA 101(b). The Immigration and Nationality Act (INA) provides different definitions of “child” for immigrant visa petitions and for citizenship and naturalization. One significant difference is that a stepchild is not included in the definition relating to citizenship and naturalization. For more information, see Chapter 2, Definition of Child and Residence for Citizenship and Naturalization [12 USCIS-PM H.2].

[^ 2] See Subsection 1, Child Born in or Out of Wedlock [6 USCIS-PM B.8(A)(1)].

[^ 3] A child can be legitimated under the laws of the child’s residence or domicile or under the laws of the father’s residence or domicile. See INA 101(b)(1)(C). A person’s “residence” is the person’s place of general abode, that is, the principal, actual dwelling place without regard to intent. See INA 101(a)(33). A person’s “domicile” refers to a “person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere.” See Black’s Law Dictionary (11th ed. 2019). In most cases, a person’s residence is the same as a person’s domicile. Legitimated child includes a child of a U.S. citizen or LPR who is the child’s genetic or gestational parent at the time of the child’s birth, if the parent(s) are recognized by the relevant jurisdiction as the child’s legal parents.

[^ 4] See INA 101(b)(1)(E).

[^ 5] See INA 101(b)(1)(F).

[^ 6] See INA 101(b)(1)(G).

[^ 7] A “natural” parent may be a genetic or a gestational parent (who carries and gives birth to the child) who is recognized by the relevant jurisdiction as the child’s legal parent.

[^ 8] The term “genetic child” refers to a child who shares genetic material with the parent. The term “gestational parent” refers to the person who carriers and gives birth to the child.

[^ 9] The law of the relevant jurisdiction governs whether the non-genetic parent is the legal parent for purposes of U.S. immigration law. A non-genetic U.S. citizen parent, who is not a legally recognized parent of the child, may not be considered a parent for immigration purposes. USCIS follows any applicable court judgment of the relevant jurisdiction if parentage is disputed. In addition, USCIS does not adjudicate cases involving children whose legal parentage remains in dispute unless there has been a determination by a proper authority.

[^ 10] For additional background and eligibility criteria for Assisted Reproductive Technology see Volume 12, Part H, Children of U.S. Citizens, Chapter 2, Definition of Child and Residence for Citizenship and Naturalization, Section D, Assisted Reproductive Technology [12 USCIS-PM-H.2(D)].

[^ 11] See INA 101(b)(1)(A).

Chapter 8 - Parents of U.S. Citizens [Reserved]

Chapter 9 - Siblings of U.S. Citizens [Reserved]

Part C - Adam Walsh Act

In May 2020, USCIS retired its Adjudicator’s Field Manual (AFM), a collection of our immigration policies and procedures.

See more

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures. We are working quickly to update and incorporate all of the AFM content into the USCIS Policy Manual, the agency's centralized online repository for immigration policies. Until then, we have moved any remaining AFM content to its corresponding Policy Manual Part. To the extent that a provision in the Policy Manual conflicts with remaining AFM content or Policy Memoranda, the updated information in the Policy Manual prevails. If you have questions or concerns about any discrepancies among these resources, contact PolicyFeedback@uscis.dhs.gov.

AFM Chapter 21 - Family-based Petitions and Applications (External)

Part D - Surviving Relatives

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AFM Chapter 10 - An Overview of the Adjudication Process (External)

AFM Chapter 21 - Family-based Petitions and Applications (External)

Part E - Employment-Based Immigration

Chapter 1 - Purpose and Background

A. Purpose

Congress provided several classifications for employment-based immigration to allow a limited number of aliens to become lawful permanent residents (LPRs) based on certain skillsets.

B. Background

For a person to immigrate on an employment basis, his or her employer or intending employer must file a petition for an employment-based immigrant classification using a Petition for Alien Workers (Form I-140). The petitioning employer must demonstrate to USCIS that the beneficiary is qualified for the immigrant classification sought.[1]

If the petition is based on an underlying approved permanent labor certification application, then the immigrant petition must be filed during the validity period of the permanent labor certification established by the U.S. Department of Labor (DOL). The petitioner must demonstrate that the beneficiary is qualified for the position certified by DOL. Not all employment-based immigrant classifications require the petitioner to first obtain permanent labor certification. In addition, in certain classifications, the beneficiary can self-petition for the classification sought.

This Part E provides general information relating to employment-based immigrant petitions. Part F provides a more detailed discussion of the specific immigrant classifications.[2]

Visa Classifications

The following table lists the categories of employment-based immigrant visa classifications, the corresponding codes of admission, and where to find additional guidance about the classifications.

Employment-Based Visa Classifications

Employment-Based Immigrant	Code of Admission	For More Information
Person of Extraordinary Ability	E11	Part F, Employment-Based Classifications, Chapter 2, Extraordinary Ability [6 USCIS-PM F.2]
Outstanding Professor Outstanding Researcher	E12	See Part F, Employment-Based Classifications, Chapter 3, Outstanding Professor or Researcher [6 USCIS-PM F.3]
Multinational Executive Multinational Manager	E13	See Part F, Employment-Based Classifications, Chapter 4, Multinational Executive or Manager [6 USCIS-PM F.4]
Professional Holding Advanced Degree Person of Exceptional Ability	E21	See Part F, Employment-Based Classifications, Chapter 5, Advanced Degree or Exceptional Ability [6 USCIS-PM F.5] and Chapter 6, Physician [6 USCIS-PM F.6]
Skilled Worker	E31	See Part F, Employment-Based Classifications, Chapter 7, Skilled Worker, Professional, or Other Worker [6 USCIS-PM F.7]
Professional Holding Baccalaureate Degree	E32	See Part F, Employment-Based Classifications, Chapter 7, Skilled Worker, Professional, or Other Worker [6 USCIS-PM F.7]
Other Worker	EW3	See Part F, Employment-Based Classifications, Chapter 7, Skilled Worker, Professional, or Other Worker [6 USCIS-PM F.7]

C. Legal Authorities

- INA 203(b)(1), (2), (3) – Preference allocation for employment-based immigrants

- 8 CFR 204.5 – Petitions for employment-based immigrants
- 20 CFR 656 – Labor certification process for permanent employment of aliens in the United States

Footnotes

[^ 1] This Part generally uses the simplified terms petition, petitioner, and beneficiary. The term petition refers to the Immigrant Petition for Alien Workers (Form I-140). The term petitioner generally refers to the petitioning employer, though in some circumstances the petitioner may be a self-petitioning alien. The term beneficiary refers to the alien who is the beneficiary of the petition, who in some cases may also be a self-petitioner.

[^ 2] See Part F, Employment-Based Classifications [6 USCIS-PM F].

Chapter 2 - Eligibility Requirements

The employment-based immigrant classifications are comprised of the following categories of workers:

- First preference workers, including persons of extraordinary ability, outstanding professors or researchers, and multinational executives or managers (EB-1);[1]
- Second preference workers, including members of the professions holding advanced degrees and persons of exceptional ability (EB-2);[2] and
- Third preference workers, including skilled workers, professionals, and other workers (EB-3).[3]

The following table outlines the eligibility requirements that must be met in order for an alien to obtain permanent residence in the United States based on employment.

General Eligibility Requirements for Employment-Based Immigration
If a job offer is required, the petitioning employer meets the classification-specific requirements and has the ability to pay the proffered wage.[4]
The beneficiary qualifies under one of the employment-based immigrant classifications.[5]
Where applicable, the beneficiary has an individual permanent labor certification application approved by the U.S. Department of Labor or seeks a Schedule A blanket labor certification.[6]

Footnotes

[^ 1] See INA 203(b)(1).

[^ 2] See INA 203(b)(2).

[^ 3] See INA 203(b)(3).

[^ 4] For more information about employer requirements, see Part F, Employment-Based Classifications [6 USCIS-PM F]. For information about employers that are successors to the entity that filed the labor certification application, see Chapter 3, Successor-in-Interest in Permanent Labor Certification Cases [6 USCIS-PM E.3]. For information on ability to pay, see Chapter 4, Ability to Pay [6 USCIS-PM E.4]. Finally, see Business Structures.

[^ 5] See Part F, Employment-Based Classifications [6 USCIS-PM F].

[^ 6] See INA 212(a)(5). This requirement only applies to EB-2 and EB-3 classifications. See INA 212(a)(5)(D). For individual applications, see Chapter 6, Labor Certification [6 USCIS-PM E.6]. For Schedule A blanket certification, see Chapter 7, Schedule A Designation Petitions [6 USCIS-PM.E.7].

Chapter 3 - Successor-in-Interest in Permanent Labor Certification Cases

A. Successor Requests to Use a Predecessor's Approved Permanent Labor Certification

When a company is bought, merged, changes corporate structure, or significantly changes owners, the new or reorganized company may demonstrate to USCIS that it can be considered a successor in interest (successor) of the original company to assume the predecessor's prior immigrant benefits requests.

If such a successor company acquires all or some of a business from a predecessor company, it may file a petition that requests to use the approved permanent labor certifications that the predecessor filed with the U.S. Department of Labor (DOL). Such successor may also file a new or amended petition if the predecessor has already filed a petition.

The employer must file such petitions within the validity period of the permanent labor certification and must submit the following evidence:

- Documentation to establish the qualifying transfer of the ownership of the predecessor to the successor;
- Documentation from an authorized official of the successor that evidences the transfer of ownership of the predecessor; the organizational structure of the predecessor prior to the transfer; the current organizational structure of the successor; and the job title, job location, rate of pay, job description, and job requirements for the permanent job opportunity for the beneficiary;
- Documentation to demonstrate that the beneficiary possesses the requisite minimum education, licensure, and work experience requirements specified on the permanent labor certification;
- The original approved permanent labor certification; and
- Documentation to establish the ability to pay the proffered wage by the predecessor and the successor.

B. Situations Not Requiring a New or Amended Petition

Not every change to the petitioner's name or, in certain cases, the location where the beneficiary is to be employed requires a new or amended petition. Specifically, the petitioner does not need to file a new or amended Immigrant Petition for Alien Workers (Form I-140) due to:

- A legal change in the name of the petitioner, including a petitioner's "doing business as" (DBA) name, if the ownership and legal business structure of the petitioner remains the same; or
- A new job location, if the new business location and job are within the same metropolitan statistical area of intended employment stated on the permanent labor certification.

When the beneficiary files an Application to Register Permanent Residence or Adjust Status (Form I-485) with USCIS or applies for an immigrant visa with the U.S. Department of State, the beneficiary may need to document that the petitioner is the same petitioner that filed the petition or that the job opportunity is still located in the area of intended employment specified on the permanent labor certification.[1]

C. Change in Employer Due to Transfer of Ownership to a Successor

Successor-in-interest entities that wish to rely on the approval of a petition and the permanent labor certification filed by a predecessor entity must file an amended petition that demonstrates that a qualifying successor-in-interest relationship exists in accordance with the three successor-in-interest factors.[2]

The petitioner must submit the following evidence with each amended petition:

- Documentation, such as a copy of the Form I-797 approval or receipt notice, that provides the previously filed petition's receipt number and the petitioner's name and address;
- Documentation to establish the ability to pay the proffered wage by the predecessor and the successor;
- Documentation to establish the qualifying transfer of ownership of the predecessor to the successor; and
- Documentation from an authorized official of the successor evidencing the transfer of ownership of the predecessor, the organizational structure of the predecessor before the transfer; the current organizational structure of the successor; and the job title, job location, rate of pay, job description, and job requirements for the permanent job opportunity for the beneficiary.

D. Consolidated Processing of Multiple Successor-In-Interest Petitions

Each successor-in-interest petition must be evaluated according to the three factors and is adjudicated on its own merits with regard to eligibility for the visa preference classification requested in the petition.[3] However, multiple filings based on the same transfer and assumption of the ownership of the predecessor by the successor may have duplicative evidence provided in each case to establish the transfer and assumption of the ownership of the predecessor by the successor.

In the interest of efficiency and consistency, USCIS may elect to accept consolidated evidence (for example, one copy of the U.S. Securities and Exchange Commission Form 10-K for 20 petitions instead of 20 copies of the SEC Form 10-K). Additionally, USCIS may coordinate the adjudication of multiple pending successor petitions so that the petitions are adjudicated at a single USCIS office or at the same time or both, to the extent that other pressing work priorities permit.

Petitioners can initiate a request for the consolidated processing of multiple successor-in-interest cases affected by the same transfer of ownership through the USCIS Contact Center or, if applicable, the appropriate Premium Processing mailbox.[4] USCIS reviews the submitted request and any related documentation when determining whether USCIS may accept the consolidated evidence.

The decision to grant a request for consolidated case processing rests solely with USCIS.

E. Successor-In-Interest Determinations

Interpretation of Matter of Dial Auto Repair Shop, Inc.

The legacy Immigration and Naturalization Service (legacy INS) Commissioner in *Matter of Dial Auto Repair Shop, Inc. (PDF)*, examined a petitioner (the successor) who had taken over some functions of the employer who filed the permanent labor certification (the predecessor).[5] The Commissioner found that the petitioner failed to adequately describe how it had acquired its predecessor, Elvira Auto Body's, business. As a result, Dial Auto Repair Shop failed to meet its burden and was not eligible to claim continued validity of the original permanent labor certification.

The Commissioner stated that if Dial Auto Repair Shop's "claim of having assumed all of Elvira Auto's rights, duties, obligations, etc., is found to be untrue, then grounds would exist for invalidation of the labor certification . . . . Conversely, if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown . . . ." [6] Notably, the Commissioner did not state that a valid successor relationship could only be established through the assumption of all the predecessor entity's rights, duties, and obligations.

The definition of a successor is "someone who succeeds to the office, rights, responsibilities, or place of another; one who replaces or follows a predecessor."[7] Similarly, the term "successor" with reference to corporations is defined as "a corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an earlier corporation."[8]

These definitions are consistent with the determinations made in *Matter of Dial Auto Repair Shop, Inc.*, which highlight three factors that should be considered when determining if a previously approved or pending permanent labor certification remains valid for successor-in-interest petition adjudications.

F. Factors for Successorship Determinations

The three successor-in-interest factors are:

- The job opportunity offered by the successor must be the same as the job opportunity originally offered on the permanent labor certification;
- The successor bears the burden of proof to establish all elements of eligibility as of the priority date, including the provision of required evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage; and
- For a valid successor-in-interest relationship to exist between the successor and the predecessor that filed the permanent labor certification, the petition must fully describe and document the transfer and assumption of the ownership of the predecessor by the successor.

If a business can establish these three factors, an officer may find a valid successor-in-interest relationship even in situations where a successor does not wholly assume a predecessor entity's rights, duties, and obligations.

1. Same Job Opportunity

The job opportunity offered by the successor must be the same as the job opportunity originally offered on the permanent labor certification.

The job offered in the successor-in-interest petition by the successor must remain unchanged with respect to the rate of pay, metropolitan statistical area, job description, and job requirements specified on the permanent labor certification. USCIS denies successor-in-interest claims where the position with the successor is changed such that the rate of pay, job description, or requirements specified on the permanent labor certification no longer relate to the labor market test.[9]

In other words, officers should deny any successor claim where the changes to the rate of pay, job description, or job requirements, as stated on permanent labor certification, if made at the time that the permanent labor certification was filed with DOL, could have affected the number or type of available U.S. workers who applied for the job opportunity. However, an increase in the rate of pay due to the passage of time does not affect the successor-in-interest claim.

The job opportunity must also remain valid and available from the time of the filing of the permanent labor certification with DOL until the issuance of an immigrant visa abroad or the beneficiary's adjustment of status to lawful permanent resident while in the United States.[10] Otherwise, a new test of the labor market and new permanent labor certification application by the successor employer is required.

The original job opportunity ceases to exist if, at any time before the transfer of ownership, the predecessor ceases business operations entirely or even partially so that the beneficiary's services are no longer required or the business operation in which the job opportunity was originally offered has a substantial lapse in business operations after the transfer of ownership.

Example

A predecessor was involved in the operation of a restaurant, and the job opportunity specified on the permanent labor certification is for a specialty cook. The successor acquires the business and closes the restaurant for extensive renovations. The restaurant reopens 6 months later. In this case, the original job opportunity is no longer valid, as there was a substantial lapse in business operations after the transfer of ownership.

The successor would have to conduct a new test of the labor market for the job opportunity through the filing of a permanent labor certification application with DOL. Conversely, if, in the example described above, the restaurant did not close during the renovations to the property but continued business operations in a manner that would require the beneficiary's services as a specialty cook, then the job offer would remain valid during the business transition and no new permanent labor certification would be required.

2. Successor's Burden of Proof

The successor bears the burden of proof to establish all elements of eligibility as of the priority date, including the provision of required evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage.

In order to establish its eligibility as a successor-in-interest petitioner and the beneficiary's eligibility for the visa classification, the successor must demonstrate that the beneficiary met all the criteria for the visa classification. This includes the predecessor's ability to pay the proffered wage from the date of the filing of the permanent labor certification with DOL until the date of the transfer of the ownership of the predecessor to the successor.

The successor must meet the definition of "employer" and demonstrate the ability to pay the proffered wage as of the date of the transfer of ownership of the predecessor to the successor, continuing until the time of immigrant visa issuance or the beneficiary's adjustment of status in the United States.[11] In cases of sales of discrete operational divisions or units of the predecessor,[12] the predecessor's ability to pay the proffered wage should be analyzed by considering the financial data relating to the predecessor entity, not just the business unit.

The evidence in the petition must also show that the beneficiary possessed the minimum education and work experience requirements specified on the permanent labor certification, as of the filing date of the permanent labor certification with DOL.

Example

A petitioner files and obtains a DOL-approved permanent labor certification for an architect. The petitioner then becomes insolvent in the following year and is unable to meet its existing financial obligations. The firm is ultimately acquired by another architectural firm, which files a successor petition on the beneficiary's behalf.

In this case the second factor is not met because the predecessor entity did not possess the ability to pay the beneficiary's wage from the time of filing of the permanent labor certification until the acquisition of the predecessor by the successor.

The successor would have to conduct a new test of the labor market for the job opportunity through the filing of a permanent labor certification application with DOL. Conversely, if the predecessor had remained solvent until the time that it was acquired by the successor, then the second factor may be met if all other areas of eligibility are established.

3. Transfer and Assumption of Ownership

For a valid successor-in-interest relationship to exist between the successor and the predecessor that filed the permanent labor certification, the petition must fully describe and document the transfer and assumption of the ownership of the predecessor by the successor.

For successor-in-interest purposes, the transfer of ownership may occur at any time after the filing or approval of the original permanent labor certification with DOL.[13]

Evidence of business transactions resulting in the transfer of ownership may include, but is not limited to:

- Legal agreements evidencing the merger, acquisition, or other reorganization of the predecessor;
- Mortgage closing statements;
- An SEC Form 10-K, Form 10-Q, Form 8-K or other relevant filing;
- Audited financial statements of the predecessor and successor for the year in which the transfer occurred;

- Documentation of the transfer or other assumption of real property, business licenses and other assets and interests from the predecessor to the successor;
- Copies of the financial or other legal instruments used to execute the transfer of ownership; and
- Newspaper articles or other media reports announcing the merger, acquisition, or other reorganization effecting the change between the predecessor and the successor.

The evidence provided must show that the successor not only acquired the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the way the business is controlled and carried on by the successor must remain substantially the same as it was before the ownership transfer.

However, a valid successor-in-interest relationship may still be established in certain instances where liabilities unrelated to the original job opportunity are not assumed by the successor (for example, where the successor does not assume the liability of pending or potential sexual harassment litigation or other tort obligations unrelated to the job opportunity in the permanent labor certification).

Contractual agreements or other arrangements in which two or more business entities agree to conduct business together or agree to provide services to each other without the transfer of the ownership of the predecessor to the successor do not create a valid successor-in-interest relationship.

Example

Company A filed a permanent labor certification application with DOL for a computer systems analyst, which is ultimately approved. Company A subsequently signs a contract with Company B for the provision of computer systems analyst services to Company A by Company B, effectively outsourcing the computer systems analyst duties that were to be performed by the beneficiary to Company B.

A valid successor-in-interest relationship between Company A and Company B does not exist in this instance. The contractual agreement between the companies did not result in the transfer of the ownership of Company A to Company B in a manner so that its business interests are carried on and controlled in the same manner by Company B.

Conversely, in the example above, Company A sells its computer software development unit to Company B and the computer systems analyst position specified within the approved permanent labor certification is located within that business unit. A valid successor-in-interest relationship may exist between Company A and Company B if the sale of the business unit results in the transfer of the ownership of relevant assets and other interests of the business unit of Company A to Company B in a manner so that its business interests are carried on and controlled in the same manner by Company B.

Transfers in Whole or Part

The transfer of the ownership of the predecessor to the successor may occur through a merger, acquisition, or reorganization. These business transactions may involve business entities with differing organizational structures, such as:

- General partnerships;
- Limited partnerships;
- Limited liability partnerships (LLPs);
- Limited liability companies (LLCs); or
- Corporations (including subchapter C and S corporations).

The structure of business transactions resulting in the transfer of ownership of the predecessor to the successor varies from case to case. Frequently, the acquiring entity (successor) purchases a discrete operational division or unit, resulting in the sale of only a part of the predecessor (often structured to only transfer ownership of the assets or other interests comprising the division or unit to the successor without transferring ownership of the predecessor entity itself).

For successor-in-interest petition purposes, the operational division or unit of the business entity that is being transferred to the successor must be a clearly defined unit within the predecessor entity, and that unit must be transferred as a whole to the successor, with the exception of certain unrelated liabilities such as those previously outlined.

The job offered to the beneficiary in the successor petition must have been, and must continue to be, located within the operational division or unit that is transferred from the predecessor to the successor. The three successor-in-interest factors must also be met.

Example

The manufacturing division of a chemical wholesale corporation, which uses plant facilities and equipment, management, accounting, and operational structures that are readily divisible from the general structure of the predecessor entity might qualify if the manufacturing division (including all relevant divisible assets) is transferred to another business entity that continues to engage in chemical manufacturing.

Example

Another example might involve the sale of a branch office of a bank to another entity engaged in the provision of banking services as a member organization in the banking industry.

Conversely, the sale of a patented chemical formula by Company A to Company B, which allows Company B to manufacture a product using the chemical formula, does not create a successor-in-interest relationship between the two companies, even if Company A ceases to manufacture the product and starts to purchase the product from Company B.

This transaction did not result in the transfer of a clearly defined business unit. Rather, Company A merely sold the manufacturing rights for a given product to Company B without the transfer of the other related assets located within its business unit.

Requests for Evidence

USCIS may issue a Request for Evidence (RFE) to the petitioner if the petitioner has failed to demonstrate a qualified successor-in-interest relationship. The RFE explains why the permanent labor certification that was originally provided in support of the petition is not valid for the proffered position, based on one or more of the reasons outlined above, and other reasons, if any. If the petitioner does not provide a new original permanent labor certification that was valid at the time of filing of the petition or sufficient evidence to overcome the concerns outlined in the RFE, then USCIS denies the petition.

G. Portability on Successor-In-Interest Filing Requirements

The American Competitiveness in the 21st Century Act (AC21)[14] allows for certain petitions to remain valid even if the beneficiary is no longer seeking to adjust status based on employment with the petitioner that originally filed the petition on that beneficiary's behalf.

In cases where a beneficiary is eligible for portability based on AC21, a successor entity need not file a new petition on the beneficiary's behalf, provided that all the AC21 requirements have been met.[15] For instance, the beneficiary would have to show for purposes of adjustment that the successor job opportunity is the "same or similar" as the job opportunity on the permanent labor certification, according to applicable guidance on AC21.[16]

H. Relevance to Permanent Labor Certification Application

Successor-in-interest determinations are principally relevant to the continuing validity of a permanent labor certification. Successor-in-interest petitions are not required to reaffirm the validity of the initial petition requesting visa preference categories that do not require a permanent labor certification, such as the employment-based 1st preference persons of extraordinary ability and certain employment-based 2nd preference national interest waiver cases.

A new or successor employer seeking to classify the beneficiary as an employment-based 1st preference multi-national executive or manager or employment-based 1st preference outstanding professor or researcher must file a new petition and establish the beneficiary's eligibility under the requested category's specific eligibility requirements.

Footnotes

[^ 1] In situations where the beneficiary eligible for portability based on the American Competitiveness in the 21st Century Act (AC21), the area of intended employment is not relevant at the adjustment stage. See Volume 7, Adjustment of Status, Part E, Employment-Based Adjustment, Chapter 5, Job Portability after Adjustment Filing and Other AC21 Provisions [7 USCIS-PM E.5] and the Form I-485 Supplement J webpage.

[^ 2] See Section F, Factors for Successorship Determinations [6 USCIS-PM E.3(F)].

[^ 3] See Section F, Factors for Successorship Determinations [6 USCIS-PM E.3(F)].

[^ 4] See the Direct Filing Addresses for Form I-140, Immigrant Petition for Alien Worker webpage.

[^ 5] See *Matter of Dial Auto Repair Shop, Inc. (PDF)*, 19 I&N Dec. 481 (Comm. 1986).

[^ 6] See *Matter of Dial Auto Repair Shop, Inc. (PDF)*, 19 I&N Dec. 481, 482 (Comm. 1986).

[^ 7] See Black's Law Dictionary (11th ed. 2019).

[^ 8] See Black's Law Dictionary (11th ed. 2019).

[^ 9] An exception to this general rule is if a beneficiary is eligible for portability based on AC21. See Pub. L. 106-313 (PDF) (October 17, 2000). See INA 204(j). For more information, see Volume 7, Adjustment of Status, Part E, Employment-Based Adjustment, Chapter 5, Job Portability after Adjustment Filing and Other AC21 Provisions [7 USCIS-PM E.5]

[^ 10] In situations where the beneficiary eligible for portability based on AC21, the area of intended employment is not relevant at the adjustment stage. See Volume 7, Adjustment of Status, Part E, Employment-Based Adjustment, Chapter 5, Job Portability after Adjustment Filing and Other AC21 Provisions [7 USCIS-PM E.5] and the Form I-485 Supplement J webpage.

[^ 11] See *Matter of Dial Auto Repair Shop, Inc. (PDF)*, 19 I&N Dec. 481, 482 (Comm. 1986).

[^ 12] For more information on transfers in whole or in part, see Subsection 3, Transfer and Assumption of Ownership [6 USCIS-PM E.3(F)(3)].

[^ 13] Where the succession occurred during the pendency of the labor certification application before DOL, including during the pre-filing recruitment phase, prior to filing the permanent labor certification application with DOL, DOL would have the jurisdiction to review the successor claim. See DOL FAQs Round 10 (PDF). In this instance, USCIS will consider tax returns or other documentation pertaining to ability to pay that relate to the predecessor(s).

[^ 14] See Pub. L. 106-313 (PDF) (October 17, 2000). See INA 204(j).

[^ 15] See INA 204(j).

[^ 16] See Volume 7, Adjustment of Status, Part E, Employment-Based Adjustment, Chapter 5, Job Portability after Adjustment Filing and Other AC21 Provisions [7 USCIS-PM E.5] and the Form I-485 Supplement J webpage.

Chapter 4 - Ability to Pay

An employer filing an Immigrant Petition for Alien Workers (Form I-140) must establish that the job offered to the beneficiary is realistic.[1] The petitioner's ability to pay the proffered wage indicated on Form I-140 is one of the essential elements in evaluating whether the job offer is realistic.[2]

Accordingly, for immigrant petitions that require an offer of employment,[3] the employer must demonstrate its continuing ability to pay the required wage as of the priority date through the time the beneficiary becomes a permanent resident.[4]

Many employers satisfy the ability to pay requirement by submitting the initial required evidence described below together with payroll records demonstrating that, during the relevant time period, they have been paying the employee at least the proffered wage.

A. Initial Required Evidence

In order to establish ability to pay, the petition must include copies of the petitioner's annual reports, federal tax returns, or audited financial statements for each available year from the priority date.[5] The only exception to this requirement is if a U.S. employer employs 100 or more workers, it may instead include a financial officer statement.[6]

1. Annual Reports

Publicly traded companies of a certain size are required to submit annual reports to the U.S. Securities and Exchange Commission (SEC) on Form 10-K. The SEC Form 10-K provides an overview of the company's business and includes its audited financial statements. These companies must also issue an annual report to shareholders, which contains the company's audited financial data and is often a simplified version of the SEC Form 10-K. Either the SEC Form 10-K or the annual report to shareholders constitute an annual report under 8 CFR 204.5(g)(2). Annual reports of private companies are also acceptable but are most persuasive to establish a petitioner's ability to pay when they contain audited financial data.

2. Federal Tax Returns

The petitioner's business structure or entity classification election determines the applicable Internal Revenue Service (IRS) tax return form and filing deadline. Submitted tax returns should be complete, including all required schedules. At times, USCIS may request schedules, statements, attachments, and other supporting documentation when the submitted evidence does not establish the petitioner's ability to pay. In addition, USCIS may request the submission of IRS-issued certified copies or transcripts of tax returns in certain circumstances, such as when the petitioner has amended its tax returns in the middle of USCIS' adjudication of the petition or when there is a question about the information contained on the returns.

The Business Structures overview provides more information on the most common business forms or structures and the tax forms they file with the IRS.

3. Audited Financial Statements

If the petitioner relies on financial statements to demonstrate ability to pay as initial evidence, the financial statements must be audited. Audited financial statements are financial statements that have been examined under an acceptable standard by an accountant authorized by the jurisdiction to perform the audit; for example, by a certified public accountant in accordance with generally accepted accounting principles (GAAP).[7] Audited financial statements must be accompanied by an auditor's report that states that the financial statements have been audited.[8]

Audited financial statements are distinct from compiled or reviewed financial statements. Compiled and reviewed financial statements are less rigorous reviews of a client's financial statements and therefore the petitioner may only use them to establish ability to pay when accompanied by the other initial required forms of evidence required by the regulation. The auditor's report accompanying the financial statements states whether the financial statements have been audited, compiled, or reviewed.

There are four types of auditor's reports that accompany audited financial statements: unqualified opinion, qualified opinion, adverse opinion, and disclaimer of opinion. Reports including an unqualified opinion are generally the most credible, reliable, and probative.

- An unqualified opinion states that, in the opinion of the auditor, the financial statements are free of material misstatements and are presented fairly in accordance with GAAP.
- A qualified opinion report states that, in the opinion of the auditor, the financial statements are presented fairly in accordance with GAAP, except for a specified qualification. A qualified opinion is generally issued when the auditor identifies a departure from GAAP or when the auditor could not audit one or more areas of the financial statements. Audited financial statements with a qualified opinion report may be credible, reliable, and probative to establish ability to pay, especially if the qualification does not relate to the net income or net current assets figures on the financial statements.[9]
- An adverse opinion report states that, in the opinion of the auditor, the financial statements are materially misstated and do not conform with GAAP. A disclaimer of opinion report states that the accountant is unable to form an opinion on the financial statements. Officers should review financial statements with adverse or disclaimer of opinion reports along with other ability to pay evidence to determine whether all of the evidence submitted establishes a petitioner's ability to pay.

The mere submission of annual reports, federal tax returns, or audited financial statements does not establish ability to pay. USCIS must analyze the financial information contained in these documents to determine whether they present persuasive information demonstrating that the petitioner possessed the ability to pay the proffered wage on the priority date and continuing until the beneficiary obtains lawful permanent residence.

4. Financial Officer Statement

If the petitioner employs 100 or more workers, a statement from a financial officer of the organization may serve to establish ability to pay the proffered wage.[10] The financial officer statement may be submitted in place of annual reports, federal tax returns, or audited financial statements.[11] Detailed letters that explain the basis of the financial officer's conclusion in terms of the company's finances are the most probative. USCIS has the discretion to determine whether the statement is, by itself, sufficient to establish ability to pay.

Examples of when a statement from a financial officer alone might not be sufficient to establish ability to pay include, but are not limited to:

- The petitioner has filed petitions on behalf of multiple beneficiaries to the extent that the ability to pay all of the salary obligations may be in question;[12]
- Evidence in the record reflects that the petitioner may have fewer than 100 employees;
- The document is a copy of a letter dated several years before the filing date and has been submitted in support of other previously-filed petitions;
- The letter is inconsistent with other evidence in the record or publicly available information, such as when the petition (or financial documentation if submitted) shows large losses or the petitioner is in bankruptcy proceedings;
- The petition is filed by a successor-in-interest to the company that obtained the labor certification and the only evidence is a letter from a financial officer of the predecessor company to establish the successor's ability to pay; and
- The statement does not indicate that the signatory is a financial officer of the petitioner.

B. Examples of Other Evidence of Ability to Pay

The petitioner has the burden of establishing its continuing ability to pay the proffered wage. Ultimately, USCIS considers all evidence relevant to the petitioner's financial strength and the significance of its business activities, whether listed in the regulation or related to other metrics.[13]

In certain circumstances, the petitioner may submit or USCIS may request additional evidence, such as profit and loss statements, bank account records, or personnel records. For example, in a case involving a general partnership where the general partners are personally liable for the partnership's obligations, additional evidence relating to the general partners, such as the partners' personal tax returns, may be relevant.

The following subsections describe examples of evidence commonly submitted by petitioners to establish ability to pay.

Bank Account Statements

Bank statements show the amount in an account on a given date and do not identify if any funds may already be obligated for other purposes. Bank statements often reflect funds that were included on the tax return, annual report, or audited financial statements, such as taxable income or cash used in determining net current assets. If the petitioner submits all monthly statements since the priority date, the petitioner must establish that the amounts reported on the bank statements have not already been considered elsewhere, such as in a calculation of the petitioner's net current assets, and must establish that such amounts reported on the bank statements reflect sufficient cash to establish ability to pay under the totality of the circumstances.

In the limited cases where USCIS may consider the personal assets and liabilities of an owner of the petitioner (for example, petitions filed by sole proprietors, general partners, or other natural persons), bank account statements may be probative of the petitioner's ability to pay the proffered wage.

Personnel Records

Although not required initial evidence, USCIS may accept personnel records as corroborating evidence of an employee's dates of employment and salary, and the petitioner's number of employees and overall payroll. Personnel records may include, but are not limited to, employment contracts, salary and payroll documents, and attendance records. USCIS does not, however, consider wages paid to other employees as available to pay the proffered wage unless the beneficiary is replacing a former employee.

Income and Assets of Others

A legal entity generally has a separate existence from its shareholders, members, managers, officers, or owners. Generally, USCIS does not consider the financial resources of persons or entities that have no explicit legal obligation to pay the proffered wage, including a parent company, shareholders and officers of a corporation, members or managers of a limited liability company (LLC) (even if the LLC is taxed as a partnership or disregarded entity), and limited partners.[14] An annual report, audited financial statement, or tax return of a parent company is more probative of a subsidiary's ability to pay the proffered wage where the subsidiary's financial data is presented separately within the document.

For sole proprietors and individual employers of domestic workers, there is no separate legal entity.[15] Therefore, USCIS considers the employer's adjusted gross income, minus their personal expenses, when determining net income; and their personal liquid assets, minus any financial encumbrances on those assets, when determining net current assets.

In addition, although certain partnerships have a separate legal entity from their partners, general partners (as opposed to limited partners) are personally liable for the debts of the business. Therefore, if a petitioning partnership does not have sufficient net income or net current assets to establish ability to pay the proffered wage, USCIS may also consider whether a general partner of the partnership is individually willing and able to pay the proffered wage using the same analysis of income and assets for sole proprietors and individual employers detailed above.

The Business Structures overview provides more information on the most common business forms or structures, including information on how they are formed, their fundamental characteristics, and the tax forms they file with the IRS.

Credit Limits, Bank Lines, or Lines of Credit

Lines of credit and other forms of debt are an integral part of any business operation. Documentation demonstrating a petitioner's access to credit may establish a baseline of creditworthiness, and under the totality of circumstances, may be considered as one piece of evidence in consideration of whether the petitioner has the ability to pay the proffered wage. In instances where a petitioner is relying upon credit limits, bank lines, or lines of credit to establish ability to pay, USCIS must evaluate the overall financial position of the petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage.[16]

Comparable to the limit on a credit card, a line of credit that has not been drawn upon cannot be treated as cash or as a cash asset and would not be added to the petitioner's net income or net current asset calculations. Any cash drawn upon from a line of credit or any other credit used should be reflected in the balance sheet provided in the tax return or audited financial statement (if available) and would be fully considered in the evaluation of the petitioner's net current assets. If the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner should submit evidence that demonstrates the amount of the line of credit available and that the line of credit augments rather than weakens its overall financial position. Relevant evidence could include monthly statements.

C. Analysis

USCIS considers all evidence relevant to the petitioner's financial strength and the significance of its business activities, whether listed in the regulation or related to other metrics.[17]

1. Employment of the Beneficiary

If the petitioner establishes by documentary evidence that it has paid the beneficiary a salary equal to or greater than the proffered wage for each year from the priority date, the evidence may establish the petitioner's ability to pay.

The wage paid to the beneficiary is generally established with:

- Wage and Tax Statement (IRS Forms W-2);
- Miscellaneous Income (IRS Forms 1099-MISC); or
- State wage and withholding reports that list the individual employee.

Even if the petitioner establishes that it has paid the beneficiary a salary that meets or exceeds the proffered wage, the petition must still contain an annual report, federal tax return, or audited financial statements for each year from the priority date or, for petitioners who employ 100 or more workers, a financial officer statement.[18] Payments that do not compensate the beneficiary through wages, such as those made to health insurers for benefits or housing allowances (unless on the labor certification and advertised), are not part of the wages paid to the beneficiary.

2. Net Income and Net Current Assets

Net income (also called net profit or ordinary income, depending on the corporate structure) consists of revenues less all expenses[19] over a period of time. Where the petitioner's net income over the relevant period is equal to or exceeds the proffered wage, the petitioner generally demonstrates its ability to pay that wage. USCIS does not add back depreciation.[20]

As a separate consideration, net current assets are the difference between the petitioner's current assets and current liabilities. Current assets consist of items having (in most cases) a life of 1 year or less, such as cash, marketable securities, inventory and prepaid expenses.[21] Current liabilities are obligations payable (in most cases) within 1 year, such as accounts payable, short-term notes payable, and accrued expenses.[22] Where the petitioner shows net current assets during the relevant period that are equal to or exceed the proffered wage,

the petitioner has generally demonstrated its ability to pay that wage. USCIS generally does not consider total assets because total assets must be balanced by the petitioner's liabilities and total assets may include assets that are not easily converted into cash in order to pay the proffered wage.

USCIS does not add net income to net current assets in determining a petitioner's ability to pay since net income represents the sum of income remaining after all expenses were paid over a period of time, such as a fiscal year, whereas net current assets denote a specific moment in time. Therefore, the two metrics cannot be combined to establish a petitioner's ability to pay the proffered wage.

If the petitioner has paid the beneficiary an amount that is less than the proffered wage, then the petitioner need only demonstrate that its net income or net current assets are equal to or greater than the difference between the proffered wage and the actual wage paid.

Net income and net current assets are generally calculated using a petitioner's federal income tax returns. The Business Structures overview provides more information on the most common business forms or structures and the tax forms they file with the IRS.

Example

The priority date is January 1, 2009. The proffered wage is $50,000. In addition to the petitioner's federal tax returns, the record contains IRS Forms W-2 demonstrating that the petitioner paid the beneficiary a $40,000 salary in 2009 and 2010. The petitioner can establish its ability to pay for 2009 and 2010 if its federal tax returns show either net income or net current assets equal to or greater than $10,000 for each year.

3. Other Factors

The ability to pay analysis is more nuanced than simply reviewing wages paid, net income, and net current assets. The petitioner may submit, or USCIS may request, additional evidence of the petitioner's ability to pay the proffered wage, including, but not limited to, profit or loss statements, bank account records, or personnel records.[23] Any additional evidence submitted must establish, when considered with the required initial evidence, the petitioner's ability to pay. Additional evidence of the petitioner's ability to pay the proffered wage must be credible and relevant.

Sometimes companies operate at a loss for a period to improve their business position in the long run. For example, a company may not expect research and development costs on a product line to generate revenue for several years. In those instances, the documentation should fully explain the sources of funding for the entity (or unit) and the expected profit potential. Whether the petitioner can demonstrate it has the ability to pay the beneficiary the wages described in the petition depends on the specific facts presented and consideration of all of the circumstances.

The following factors are among the others USCIS may consider in its totality of the circumstances analysis:

- The petitioner's gross sales and gross revenues;
- The total wages paid to the petitioner's current employees during the most recent fiscal years;
- Media accounts about the petitioner's business;
- The number of years the petitioner has been doing business;
- The historical growth of the petitioner's business;
- Any recent changes that may have disrupted or interrupted its business (for example, reorganization, merger, bankruptcy);
- The petitioner's number of employees;
- The occurrence of any uncharacteristic business expenditures or losses from which the petitioner has since recovered (for example, extensive fire or flood damage); and
- The petitioner's overall reputation within its industry.

In some cases, such as when a petitioner has one unprofitable year despite a history of profitability, these factors may establish a petitioner's ability to pay the proffered wage despite a shortfall in net income or net current assets. As another example, USCIS may also take into account that the beneficiary is replacing a former employee or outsourced service or that an officer of the petitioning employer is willing and able to forego compensation specifically to cover the wage.

D. Additional Ability to Pay Issues

1. Prorating the Proffered Wage in the Priority Date Year

The petitioner may request that the proffered wage be prorated for the applicable portion of the priority date year. In addressing such a request, USCIS does not consider 12 months of net income towards its ability to pay the proffered wage for a period of less than 12 months. In this scenario, USCIS may prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date, or both. USCIS may also consider the petitioner's net current assets at the end of the priority date year towards the prorated wage.[24]

Example

The priority date is July 1, 2021. The annual proffered wage is $100,000. The petitioner established that it paid the beneficiary wages between July 1, 2021 and December 31, 2021 in the amount of $15,000. The petitioner also documented that its net income between July 1, 2021 and December 31, 2021 is $25,000. The net current assets shown on balance sheet of the petitioner's 2021 federal tax return is $40,000.

Based on the above facts, the prorated wage is $50,000. If the petitioner requests that USCIS consider the prorated wage, it would have to show its ability to pay the prorated wage deficiency of $35,000, which is the difference between the prorated wage and the wages paid by the petitioner to the beneficiary during the prorated period from July 1, 2021 to December 31, 2021. Its net income of $25,000 during the prorated period is insufficient to pay the wage deficiency. USCIS does not combine prorated net income with net current assets. However, on December 31, 2021, the petitioner had sufficient net current assets to pay the prorated wage deficiency. USCIS does not prorate net current assets. Therefore, the petitioner in this example could establish its ability to pay the prorated wage deficiency of $35,000 for the priority date year based on its net current assets of $40,000.

2. Multiple Beneficiaries

If the petitioner has filed Form I-140 petitions on behalf of other beneficiaries, there may be a question as to whether the petitioner can meet the ability to pay obligation on all petitions. However, this analysis may not be necessary if the petitioner has paid the beneficiary of the petition a salary equal to or greater than the proffered wage since the priority date, and submitted the required regulatory evidence.[25] Conversely, if the petitioner cannot demonstrate an ability to pay the beneficiary of the petition under review, the officer does not need to consider the issue of an ability to pay multiple beneficiaries.

In cases with multiple Form I-140 beneficiaries, where a petitioner with 100 or more employees provides a letter from a financial officer,[26] the officer balances the evidence in the record to determine whether to use discretion to accept the letter as evidence of a petitioner's ability to pay the proffered wages.

In cases necessitating analysis of the ability to pay multiple beneficiaries, the petitioner must demonstrate its ability to pay the proffered wages for each beneficiary for each year starting from the priority date of the petition under review. However, USCIS does not consider the petitioner's ability to pay the proffered wage of another Form I-140 beneficiary:

- After the other beneficiary obtains lawful permanent residence;
- If the employer withdrew the Form I-140 petition filed on behalf of the other beneficiary;
- If USCIS denied or revoked the approval of the Form I-140 petition filed on behalf of the other beneficiary without a pending appeal or motion; or
- Before the priority date of the Form I-140 petition filed on behalf of the other beneficiary.

The analysis to determine the ability to pay the combined wages is the same as that for a single beneficiary, including taking into account wages paid to any of the beneficiaries.

Evidence to support a petitioner's ability to pay the proffered wage for multiple beneficiaries may include, but is not limited to, the following:

- A list of all receipt numbers for the Form I-140 petitions that were pending, or approved as of, or filed after, the priority date of the current petition;
- The name of each beneficiary;
- The proffered wage for each beneficiary;
- The priority date of each petition;
- The status of each petition and the date of any status change (that is, pending, approved, denied, withdrawn, revoked, on appeal or motion, beneficiary obtained lawful permanent residence); and
- Documentary evidence of any wages paid to each beneficiary for each year starting from the priority date of the current Form I-140 petition or the priority date of the Form I-140 petition filed on behalf the other beneficiary, whichever is later. Such evidence may include:
  - Wage and Tax Statement (IRS Form W-2);
  - Miscellaneous Income (IRS Form 1099-MISC);
  - State wage and withholding reports; and
  - Pay vouchers or payroll records that specify the length of the pay periods and show gross or net pay, year-to-date income, income tax deductions, and tax withheld.

Officers should also conduct a totality of the circumstances analysis in each case where ability to pay involves multiple beneficiaries.[27]

3. Successors-in-Interest

A petition filed by a successor-in-interest must establish, among other things, that the predecessor entity possessed the ability to pay the proffered wage from the priority date until the transfer of ownership to the successor, and the successor has possessed the ability to pay the proffered wage from the date of the transfer of ownership onwards.[28]

4. Nonprofit Organizations

Certain nonprofit organizations are exempt from income taxation under the Internal Revenue Code. Nonetheless, tax-exempt nonprofit organizations are generally required to file annual returns of their income and expenses on a Return of Organization Exempt from Income Tax (IRS Form 990 or IRS Form 990EZ). Churches and certain church-related organizations may be exempt from filing IRS Form 990. If a nonprofit organization does not have tax returns, it must still provide annual reports, audited financial statements, or, for organizations with 100 or more employees, a financial officer statement, to establish its ability to pay the proffered wage.

The Business Structures overview provides more information on nonprofit organizations.

5. Establishing Ability to Pay When the Beneficiary Ports to a New Job Under AC21

The American Competitiveness in the Twenty-First Century Act of 2000 (AC21)[29] allows certain employment-based adjustment of status applicants to change jobs or employers without the filing of a new Form I-140 petition. Specifically, if an Application to Register Permanent Residence or Adjust Status (Form I-485) is based on a Form I-140 petition, and the application has been pending for 180 days or more, the petition may remain valid after the individual transfers (or ports) to a new job that is in the same or a similar occupational classification as the original job offer.[30]

When a beneficiary ports to a new employer under AC21 while the Form I-140 is pending, USCIS still examines whether the petitioner meets the ability to pay requirement. Under AC21, when the beneficiary has ported to a new employer, USCIS only considers the facts existing at the time of filing when making the ability to pay determination.[31] Therefore, USCIS reviews any initial evidence of ability to pay submitted with the petition (and any responses to Requests for Evidence, Notices of Intent to Deny, or any other requests for more information that may have been issued) to determine whether the petitioner established its ability to pay the proffered wage from the priority date until the filing date of the petition.[32]

Footnotes

[^ 1] See *Matter of Great Wall (PDF)*, 16 I&N Dec. 142, 144 (Acting Reg. Comm. 1977).

[^ 2] See *Matter of Great Wall (PDF)*, 16 I&N Dec. 142, 144-45 (Acting Reg. Comm. 1977).

[^ 3] Immigrant petitions that require an offer of employment include outstanding professor or researcher, multinational executive or manager, advanced degree professional or person of exceptional ability (except when seeking a national interest waiver of the job offer and, thus, the labor certification), skilled worker, professional, and other worker. For additional information on these classifications, see Part F, Employment-Based Classifications [6 USCIS-PM F].

[^ 4] See 8 CFR 204.5(g)(2). The petitioner's ability to pay is separate from the statutory affidavit of support requirements in family-based petitions. See INA 213A. Therefore, any executed Affidavit of Support Under Section 213A of the INA (Form I-864 or Form I-864EZ), is not required as supporting evidence for a Form I-140, and does not document the petitioner's ability to pay the proffered wage.

[^ 5] See 8 CFR 204.5(g)(2). USCIS reviews ability to pay as part of the Form I-140 petition adjudication, but can reexamine ability to pay in post-adjudication proceedings, given the employer's obligation to maintain their ability to pay until the beneficiary obtains lawful permanent residence. In the event that a tax return, annual report, or audited financial statement is not available for the priority date year at the time of filing, USCIS may consider one of these three documents for the year before the priority date as part of the totality analysis discussed in Section C, Analysis [6 USCIS-PM E.4(C)].

[^ 6] See Subsection 4, Financial Officer Statement [6 USCIS-PM E.4(A)(4)].

[^ 7] See the Federal Accounting Standards Advisory Board Standards & Guidance webpage.

[^ 8] The Financial Accounting Standards Board and the Governmental Accounting Standards Board are responsible for ensuring that GAAP is a high-quality benchmark of financial reporting. See the Financial Accounting Foundation's About GAAP webpage.

[^ 9] See the Financial Accounting Foundation's About GAAP webpage.

[^ 10] See 8 CFR 204.5(g)(2).

[^ 11] Any employee authorized to manage and oversee the financial actions of an organization, or delegate if within the financial hierarchy of the organization, may be a financial officer. The formal title of such financial officer depends on the organization. Common names that identify a company's financial officer include, but are not limited to, chief financial officer, principal financial officer, vice president of finance, chief accounting officer, treasurer, comptroller, or financial director.

[^ 12] For more information as to how officers balance all of the evidence, including relevant factors, see Section D, Additional Ability to Pay Issues, Subsection 2, Multiple Beneficiaries [6 USCIS-PM E.4(D)(2)].

[^ 13] See *Matter of Sonegawa (PDF)*, 12 I&N Dec. 612 (Reg. Comm. 1967). For information on how USCIS analyzes additional evidence, see Section C, Analysis [6 USCIS-PM E.4(C)].

[^ 14] See *Matter of Aphrodite Investments Limited (PDF)*, 17 I&N Dec. 530 (Comm. 1980) (finding that a corporation is a separate and distinct legal entity from its owners or stockholders). In addition, see *Sitar Restaurant v. Ashcroft*, No. CIV.A.02-30197-MAP (D. Mass. Sept. 18, 2003) (finding that nothing in the governing regulation requires USCIS to consider the financial resources of persons or entities who have no legal obligation to pay the wage).

[^ 15] An LLC with only one member is generally not considered separate from its owner for income tax purposes. See IRS's Single Member Limited Liability Companies webpage. However, since the single member of the LLC is not personally liable for for the debts of the business, they do not have a legal obligation to pay the proffered wage. For this reason, USCIS does not consider the personal assets and liabilities of the member of a single-member LLC.

[^ 16] See *Matter of Great Wall (PDF)*, 16 I&N 142, 144-45 (Acting Reg. Comm. 1977).

[^ 17] See *Matter of Sonegawa (PDF)*, 12 I&N Dec. 612 (Reg. Comm. 1967).

[^ 18] See 8 CFR 204.5(g)(2).

[^ 19] See Joel G. Siegel and Jae K. Shim, *Barron's Dictionary of Accounting Terms* (Barron's Educational Series, Inc. 2000), p. 293.

[^ 20] See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009) (holding that USCIS did not abuse its discretion in excluding employer's depreciation deductions from its net income in determining that it did not have financial ability to employ a foreign skilled worker).

[^ 21] See Joel G. Siegel and Jae K. Shim, *Barron's Dictionary of Accounting Terms* (Barron's Educational Series, Inc. 2000), p. 117.

[^ 22] See Joel G. Siegel and Jae K. Shim, *Barron's Dictionary of Accounting Terms* (Barron's Educational Series, Inc. 2000), p. 118.

[^ 23] See 8 CFR 204.5(g)(2).

[^ 24] USCIS does not prorate net current assets. Net current assets on a balance sheet are a snapshot of a business' current assets and current liabilities on a specific date. This amount represents what a petitioner could liquidate on that date to pay the prorated proffered wage. In contrast, net income covers a specific period of time and therefore must be prorated for the same period as the prorated proffered wage. As an example, when prorating net income, USCIS may consider monthly income statements. Stated another way, unlike with income statements, the accounts on the balance sheet (for example, assets and liabilities) are not closed out at the end of the accounting period. Instead, they are carried forward and become the starting balances at the beginning of the next period.

[^ 25] A substantially increased total labor expense of multiple beneficiaries may potentially impact the petitioner's ability to continue to pay existing employees.

[^ 26] See 8 CFR 204.5(g)(2). See Section A, Initial Required Evidence, Subsection 4, Financial Officer Statement [6 USCIS-PM E.4(A)(4)].

[^ 27] See *Matter of Sonegawa (PDF)*, 12 I&N Dec. 612 (Reg. Comm. 1967).

[^ 28] For more information, see Chapter 3, Successor-in-Interest in Permanent Labor Certification Cases [6 USCIS-PM E.3].

[^ 29] See AC21, Pub. L. 106-313 (PDF), 114 Stat. 1251, 1254 (October 17, 2000). In 2002, AC21 was amended by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107-273 (PDF) (November 2, 2002). See INA 204(j).

[^ 30] See Section 106(c) of AC21, Pub. L. 106-313 (PDF), 114 Stat. 1251, 1254 (October 17, 2000). See INA 204(j). See 8 CFR 245.25. For more information about AC21 portability, see Volume 7, Adjustment of Status, Part E, Employment-Based Adjustment, Chapter 5, Job Portability after Adjustment Filing and Other AC21 Provisions [7 USCIS-PM E.5].

[^ 31] See 8 CFR 204.5(g)(2). See 8 CFR 245.25(a)(2)(ii)(B)(1). See 81 FR 82398, 82420 (PDF) (Nov. 11, 2016) (final rule).

[^ 32] For Form I-140 petitions accompanied by a labor certification from the Department of Labor (DOL), the priority date is the date that the labor certification was accepted for processing by the DOL. For immigrant petitions that do not require a labor certification certified by DOL (such as first preference petitions, second preference national interest waivers, and Schedule A, Group I occupations), the priority date is the same as the filing date of the petition. See 8 CFR 204.5(d).

Chapter 5 - Reserved

Chapter 6 - Permanent Labor Certification

A. Employer Requirements

A significant percentage of Immigrant Petitions for Alien Workers (Forms I-140) are based on permanent labor certification applications approved by the U.S. Department of Labor (DOL). When adjudicating a permanent labor certification application, DOL does not generally review the beneficiary's qualifications for the position; this authority and responsibility rests with

USCIS. Therefore, officers must assess these petitions to ensure that the position offered is the same or similar to the position that the DOL certified and that the beneficiary meets the qualifications for the position.

1. Applicability

Employment-based 1st preference (EB-1)[1] beneficiaries are not required to be the beneficiaries of approved permanent labor certifications issued by the DOL. Beneficiaries seeking employment-based 2nd preference (EB-2)[2] or 3rd preference (EB-3)[3] immigrant visas, however, generally must be the beneficiaries of approved permanent labor certifications.

2. Individual Permanent Labor Certifications

In general, petitioners filing EB-2 and EB-3 petitions must first obtain an approved permanent labor certification application from DOL on behalf of the beneficiary. An approved permanent labor certification application demonstrates that:

- The petitioner tested the labor market in the geographic area where the permanent job offer is located to establish that there are no able, qualified, and available U.S. workers who are willing to accept the permanent job offer; and
- The employment of the beneficiary will not adversely affect the wages and working conditions of similarly employed U.S. workers.

Transition to the PERM Labor Certification System

DOL implemented the permanent labor certification system (PERM) on March 28, 2005, effectively eliminating the previous permanent labor certification system, whereby petitioners had an option to file permanent labor certification applications under supervised recruitment or reduction in recruitment rules.

The DOL PERM final rule, published on December 27, 2004 and effective on March 28, 2005, amended the procedures for obtaining permanent labor certification.[4] DOL approves and issues permanent labor certification applications only after the petitioner has complied with DOL advertising and recruiting requirements and has established that there are no able, qualified, and available U.S. workers for the position and has rejected any U.S. job applicants for valid job-related reasons.

Permanent Labor Certifications filed with DOL on or after March 28, 2005[5]

The Application for Permanent Employment Certification (ETA Form 9089 (PDF)) replaced the Application for Alien Employment Certification (ETA Form 750) in most cases, effective March 28, 2005.[6] ETA Form 9089 details the specifics of the job offer and the beneficiary that were contained in the ETA Form 750 Part A and Part B. The ETA Form 9089 can be filed electronically or by mail.[7]

For the application to be valid, the petitioner, the beneficiary, and the form preparer (if any) must sign the ETA Form 9089. It must also contain the DOL certification stamp and bear the DOL certifying officer's signature and the certification date.

An approved permanent labor certification is not evidence that DOL has certified that the beneficiary named on the permanent labor certification qualifies for the position. Only USCIS has the authority to determine qualifications for nonimmigrant and immigrant classifications.[8] An approved permanent labor certification means that the petitioner made a good faith effort to test the labor market and demonstrated to DOL that there were no qualified, able, and available U.S. workers for the position.

USCIS determines whether the beneficiary met the minimum education, training, and experience requirements of the permanent labor certification at the time the petitioner filed the application for permanent labor certification with DOL. An immigrant petition for a preference classification is not approvable if the beneficiary was not fully qualified for the classification by the filing date of the permanent labor certification (the petition's priority date).[9]

B. Validity of Approved Permanent Labor Certifications

1. Validity Period

The validity period for individual permanent labor certifications approved on or after July 16, 2007, is 180 days.[10] Petitioners have 180 calendar days after the date of the approval of the permanent labor certification application by DOL within which to submit the permanent labor certification in support of a petition with USCIS.[11]

USCIS rejects petitions that require an approved permanent labor certification if the permanent labor certification has expired or if the petition is filed without the approved permanent labor certification. USCIS denies a petition that was inadvertently accepted without a required, valid permanent labor certification.

2. Exceptions

USCIS continues to accept amended or duplicate petitions that are filed with a copy of a permanent labor certification that is expired at the time the amended or duplicate petition is filed, if the original permanent labor certification was submitted in support of a previously filed petition during the permanent labor certification's validity period. These filings may occur when:

- There is a successor-in-interest employer change, which requires a new or amended petition;
- The petitioner wishes to file a new petition subsequent to the denial, revocation, or abandonment of the previously filed petition, and the permanent labor certification was not invalidated due to material misrepresentation or fraud relating to the labor certification application;
- The petitioner files an amended petition to request a different immigrant visa classification than the classification requested in the previously filed petition; or
- USCIS or U.S. Department of State (DOS) determines that the previously filed petition has been lost.

Petitioners may not appeal a USCIS decision to deny a petition that is filed with an expired permanent labor certification issued by DOL.[12]

3. Validity Periods Ending on Weekends or Federal Holidays

The petitioner must file a petition supported by an approved permanent labor certification during the certification's validity period as established by DOL. Where the last day of a validity period falls on a Saturday, Sunday, or federal holiday, USCIS considers the petition to be timely if USCIS receives it by the end of the next business day.[13] As such, when the last day of the filing period falls on a Saturday, Sunday, or federal holiday, the deadline is extended until the end of the next business day that is not a Saturday, Sunday, or federal holiday.

USCIS considers electronically-filed petitions to be received immediately upon submission; therefore, these filings are not affected by USCIS mailroom closures.

C. Original and Duplicate Permanent Labor Certification Requirements

While photocopies of other initial supporting documents are generally acceptable, the petitioner must submit the original permanent labor certification unless it has already been filed with another petition.[14]

Issuance of a Duplicate Permanent Labor Certification

If the original permanent labor certification has been lost, DOL does not issue a duplicate permanent labor certification to the petitioner but issues a duplicate directly to DOS or USCIS for ETA Form 9089 permanent labor certifications.[15] DOL only issues these duplicates for permanent labor certifications filed on or after March 28, 2005[16] and only at the request of DOS or USCIS.

A beneficiary, petitioner, or a beneficiary's or petitioner's attorney or agent must therefore explain the need for a duplicate to USCIS and USCIS may then request that DOL issue a duplicate. DOL retains permanent labor certification information for 5 years and can only issue duplicates during that time frame. The USCIS request must include documentary evidence that a visa application or petition has been filed and must include the U.S. embassy or consulate or USCIS case tracking number that is associated with the visa application or petition.

DOL only sends the duplicate permanent labor certification to DOS or USCIS, regardless of who makes the request.[17] An officer should only make the request to DOL if it is in conjunction with a petition filed with USCIS where the original permanent labor certification has been irretrievably lost or destroyed. The duplicate permanent labor certification must be retained as part of the record of the petition after it is received from DOL and should not be forwarded to the petitioner or the petitioner's representative.

An officer should not make such a request to DOL if the petitioner's attorney requested a duplicate permanent labor certification in general correspondence to USCIS, merely because he or she would like a copy for his or her records.

If another beneficiary has used or been substituted on a permanent labor certification that the petitioner claims has been lost or denied, the officer should deny the request for a duplicate permanent labor certification.

D. New Approval of Permanent Labor Certification Required

1. In General

The list of conditions that require the submission of a new original permanent labor certification in support of the petition includes, but is not limited to:

- The successor entity (petitioner) has not established that a successor-in-interest relationship exists between the successor and the predecessor in accordance with the three successor-in-interest factors;[18]
- The permanent labor certification is not valid for the new geographic area of the beneficiary's proposed employment; or
- There has been any other material change in the job opportunity covered by the original permanent labor certification.

2. Permanent Labor Certification Substitution Changes

As of July 16, 2007, DOL regulations prohibit the alteration of any information contained in the permanent labor certification after the permanent labor certification application is filed with DOL, including the substitution of beneficiaries on permanent labor certification applications and resulting certifications.[19]

E. Revocation of a Permanent Labor Certification

DOL may take steps to revoke the approval of a permanent labor certification if a subsequent finding is made that the certification was not justified.[20] In such instances, DOL provides notice to the employer in the form of a Notice of Intent to Revoke (NOIR) that contains a detailed statement of the grounds for the revocation of the approved permanent labor certification and the time period allowed for the petitioner's rebuttal.[21]

The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. If rebuttal evidence is not filed by the petitioner, the NOIR becomes the final decision of DOL.

If the petitioner files rebuttal evidence and DOL determines the certification should nonetheless be revoked, the petitioner may file an appeal within 30 days of the date of the adverse determination.[22] If the permanent labor certification is revoked, DOL also sends a copy of the notification to USCIS and DOS.

Permanent labor certifications remain valid unless and until they are revoked. Officers should provide notice to the petitioner in the form of a Notice of Intent to Deny (NOID) or NOIR if the record reflects that the underlying permanent labor certification has been revoked.[23] This notice gives the petitioner an opportunity to supplement the petition with a valid permanent labor certification. If the rebuttal evidence provided in response to the NOID or NOIR does not include a valid permanent labor certification, USCIS denies or revokes the approval of the petition.

Footnotes

[^ 1] See INA 203(b)(1).

[^ 2] See INA 203(b)(2).

[^ 3] See INA 203(b)(3).

[^ 4] See 20 CFR 656.

[^ 5] Before the new PERM regulation became effective on March 28, 2005, U.S. employers filed the Application for Alien Employment Certification (ETA Form 750) in order to obtain an approved labor certification. Petitioners still use the ETA Form 750 for professional athletes and may submit an uncertified ETA Form 750 or 9089 with a petition seeking a national interest waiver of the labor certification. See Part F, Employment-Based Classifications, Chapter 5, Advanced Degree or Exceptional Ability [6 USCIS-PM F.5] and Chapter 6, Physician [6 USCIS-PM F.6]. The ETA Form 750 has two parts. Part A focuses on the details of the position being certified and describes the name and address of the petitioner, the location of the job opportunity, the proffered wage for the position and the minimum education, training, or experience requirements to successfully perform the duties of the position. Part B focuses on the beneficiary and contains his or her name, date of birth, address, and describes his or her education, training and work history. A valid, approved ETA Form 750 must be signed by the

petitioner in Part A and the beneficiary in Part B, contain the DOL certification stamp, and be signed and dated by the DOL certifying officer in the endorsements section on the front page on Part A of the form.

[^ 6] See 20 CFR 656.17.

[^ 7] For more information about filing ETA Form 9089, see the Foreign Labor Certification webpage.

[^ 8] See *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008-09 (9th Cir. 1983).

[^ 9] See *Matter of Katigbak (PDF)*, 14 I&N Dec. 45 (Reg. Comm. 1971). See *Matter of Wing's Tea House (PDF)*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). See the discussions of priority dates at 8 CFR 204.5(d) and 20 CFR 656.30(a).

[^ 10] DOL amended its regulations at 20 CFR part 656 on May 17, 2007, with an effective date of July 16, 2007. See 72 FR 27904 (PDF) (May 17, 2007).

[^ 11] See 20 CFR 656.30(b).

[^ 12] The Administrative Appeals Office (AAO) lacks appellate jurisdiction to review denials based on the lack of a labor certification. See DHS Delegation No. 0150.1 para. (2)(U) (Mar. 1, 2003), which delegated the AAO's jurisdiction over the decisions listed in 8 CFR 103.1(f)(3)(iii)(B) (PDF) (as the regulations appeared February 28, 2003).

[^ 13] For more information on filing timeframes, see Volume 1, General Policies and Procedures, Part B, Submission of Benefit Requests, Chapter 6, Submitting Requests, Section D, Filing Periods Ending on Weekends or Federal Holidays [1 USCIS-PM B.6(D)].

[^ 14] See 8 CFR 204.5(g)(1). In addition, this regulation provides that an officer may request that other original documents be provided when necessary.

[^ 15] DOL also issues duplicates of lost ETA Form 750 permanent labor certification applications directly to USCIS, upon USCIS' request. DOL replaced ETA Form 750 with ETA Form 9089 on March 28, 2005, however, ETA Form 750 is still used in certain situations. For more information, see Section A, Employer Requirements, Subsection 2, Individual Permanent Labor Certifications [6 USCIS-PM E.6(A)(2)].

[^ 16] Before March 28. 2005, DOL provided duplicate labor certifications only in response to a written request by USCIS.

[^ 17] See 20 CFR 656.30(e).

[^ 18] See Chapter 3, Successor-in-Interest in Permanent Labor Certification Cases, Section F, Factors for Successorship Determinations [6 USCIS-PM E.3(F)].

[^ 19] See 20 CFR 656.11. Before July 16, 2007, USCIS and DOL allowed U.S. employers to substitute a beneficiary named on a pending or approved labor certification with another prospective beneficiary while maintaining the previously established "priority date." Labor certification substitution could occur either while the labor certification application was pending at DOL or while a petition, filed with an approved labor certification, was pending with USCIS. Starting July 16, 2007, USCIS began rejecting all petitions requesting labor certification substitution. In the event USCIS inadvertently accepts such a petition, it denies the petition based on being filed without a valid approved labor certification naming the beneficiary.

[^ 20] See 20 CFR 656.32.

[^ 21] See 20 CFR 656.32(b).

[^ 22] See 20 CFR 656.26.

[^ 23] USCIS also provides the NOIR or a Notice of Revocation to beneficiaries who are otherwise eligible and have properly requested to port to a new employer as USCIS considers them affected parties. For more information, see Chapter 8, Decision and Post-Adjudication, Section C, Revocation [6 USCIS-PM E.8(C)].

Chapter 7 - Schedule A Designation Petitions

A. Background

The U.S. Department of Labor (DOL) adjudicates Applications for Permanent Employment Certification (ETA Form 9089 (PDF)), also referred to as permanent labor certifications. For certain occupations, DOL has predetermined there are not sufficient U.S. workers who are able, willing, qualified, and available pursuant to regulation.[1] These occupations are referred to as Schedule A occupations. DOL has also determined that sheepherders are eligible for special processing.[2]

For these two types of cases, the U.S. employer submits an uncertified application for permanent labor certification to USCIS at the time of filing the Immigrant Petition for Alien Workers (Form I-140), and USCIS reviews the application for permanent labor certification during the adjudication of the petition. USCIS applies DOL's regulations to the application for permanent labor certification regarding whether or not the employer and beneficiary have met certain requirements, and USCIS' regulations to the petition.

DOL requirements for Schedule A occupations and sheepherders are different from the normal requirements for other employment-based immigrant visa classifications. The fact that a petitioner can establish eligibility under DOL's regulations only means that the permanent labor certification requirement is met. It does not mean that the beneficiary is eligible for the requested immigrant visa classification.[3]

B. Eligibility for Schedule A Designation

In order to obtain an employment-based visa classification based on a Schedule A occupation, the petitioning employer must meet the eligibility requirements outlined in the table below.[4]

Eligibility Requirements for Schedule A Designation

Requirement	For More Information
The employer must offer full-time permanent employment to the beneficiary.	20 CFR 656.3 (definitions of employer and employment)
The employment must be in one of the occupations categorized as a Schedule A occupation.	Section C, Schedule A Occupations [6 USCIS-PM E.7(C)]
The employer must offer the beneficiary at least the prevailing wage.	Section D, Prevailing Wage Determinations and Notices of Filing [6 USCIS-PM E.7(D)]

Requirement	For More Information
The employer must provide notice of the position(s) it seeks to fill to the employer's bargaining representative, if applicable, or its employees.	Section D, Prevailing Wage Determinations and Notices of Filing [6 USCIS-PM E.7(D)]
The beneficiary must meet the specific USCIS eligibility requirements.[5]	8 CFR 204.5

C. Schedule A Occupations

For certain occupations, DOL has predetermined that there are not sufficient U.S. workers who are able, willing, qualified, and available. These occupations are referred to as Schedule A occupations, and the process to satisfy the permanent labor certification requirement is referred to as "blanket" labor certification. DOL has predetermined that the wages and working conditions of U.S. workers similarly employed will not be adversely affected by the employment of aliens in those occupations.

The following occupations comprise Schedule A:[6]

- Group I – physical therapists and professional nurses; and
- Group II – immigrants of exceptional ability in the sciences or arts, including college and university teachers, and immigrants of exceptional ability in the performing arts.

Because of the occupational shortage of these U.S. workers, DOL has "pre-certified" Schedule A occupations. This means that an employer who wishes to hire a person for a Schedule A occupation is not required to conduct a test of the labor market and apply for a permanent labor certification with DOL. Rather, this employer must apply for Schedule A designation by submitting an application for permanent labor certification to USCIS in conjunction with the petition.

D. Prevailing Wage Determinations and Notices of Filing

1. Prevailing Wage Determination

An employer must obtain a valid prevailing wage determination from DOL's National Prevailing Wage Center (NPWC) before it can file the petition with USCIS.[7] The prevailing wage determination ensures that the wages offered to the beneficiary are reflective of the wages offered for comparable positions at the location where the job offer exists before the petitioner files the petition. In situations where there are multiple worksites (for example, the employer is a staffing agency), if the employer knows where they will place the beneficiary, the prevailing wage is the wage applicable to the area of intended employment where the worksite is located. If an employer with multiple clients does not know where they will place the beneficiary among its multiple clients, the prevailing wage is derived from the area of its headquarters.[8] The wage offered to the beneficiary must be no less than 100 percent of the prevailing wage.

To obtain a prevailing wage determination, the employer must file an Application for Prevailing Wage Determination (Form ETA-9141 (PDF)) with the NPWC. The NPWC processes prevailing wage determination requests under DOL regulations and guidance and provides the employer with an appropriate prevailing wage rate on Form ETA-9141.

Form ETA-9141 must contain the NPWC's determination date, as well as the validity period of the prevailing wage determination. The validity period may not be less than 90 days or more than 1 year from the determination date. An employer must file a petition within the validity period in order to use the prevailing wage rate provided by the NPWC.[9]

2. Notice of Filing[10]

Notice to Employees

Before an employer can file a petition, it must have also provided a notice of the position(s) it is seeking to fill under Schedule A, Group I or II, to the employer's bargaining representative.[11] Alternatively, if there is no such representative, then the employer must provide notice to its employees.[12] Such notice must be posted for at least 10 consecutive business days[13] in a clearly visible location at the facility or location of employment.[14]

Notice for Every Occupation or Job Classification

An employer must post a separate notice for every occupation or job classification that is the subject of a request for Schedule A designation. However, regulations do not require a separate notice for every petition seeking designation under Schedule A. For example, an employer would post separate notices for a home health nurse and an emergency room nurse because the nurses have different job duties and wage rates. An employer can satisfy the notice of posting requirements with respect to several persons in each job classification with a single notice of posting, if the title, wage, requirements, and job location are the same for each person.[15]

Applications Filed by Private Households

In the case of a private household, notice of filing is required only if the household employs one or more U.S. workers at the time the ETA Form 9089 is filed.[16]

Evidence of Compliance

An employer must be able to document that it complied with the notice of posting requirements.[17]

If the employer notified its bargaining representative, then it may submit as evidence a copy of both the letter and the ETA Form 9089 sent to the bargaining representative(s). If the employer notified its employees, the documentation requirement may be satisfied by providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media, whether electronic or print, that were used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.[18]

3. Notice of Filing: Posting Requirements[19]

Visible and Unobstructed

During the requisite posting period, a notice to the employees must be clearly visible and unobstructed while it is posted, and it must be posted in conspicuous places where the employer's U.S. workers can easily read the posted notice on their way to or from their place of employment. Appropriate locations include locations in the immediate vicinity of DOL-required wage and hour notices or occupational safety and health notices.[20]

Description of Job and Rate of Pay

The notice must contain a description of the job and rate of pay and indicate that it is provided as a result of the filing of an application for permanent employment certification for the relevant position.[21] The rate of pay must meet or exceed the prevailing wage at the time of posting. If the notice contains a range of wages, the lowest wage rate must meet or exceed the prevailing wage at the time of posting.[22]

DOL Certifying Officer Contact Information

In addition, a notice to the employees must also state that any person may provide documentary evidence bearing on the Schedule A labor certification application to the appropriate DOL Certifying Officer holding jurisdiction over the location where the beneficiary would be physically working.[23] The notice must also provide the address of the appropriate Certifying Officer.[24]

Period of Posting

Finally, the notice must be posted for at least 10 consecutive business days (including weekend days and holidays if these days are regular business days for the employer, that is, the employer is "open for business" on these days). In all cases, the burden is on the employer not only to establish that they posted the notice for 10 consecutive business days, but also that it was in an area that was accessible to its employees on each of these business days.

The notice must have been posted between 30 days and 180 days before the employer filed the petition.[25] The last day of the posting must fall at least 30 days before filing in order to provide sufficient time for interested persons to submit, if they so choose, documentary evidence bearing on the application to DOL. Officers should deny the petition and any concurrently filed Form I-485 if the notice was not posted between 30 and 180 days before the petition's filing.

"Business Day" for Purposes of Notice

The term "business day" typically means Monday through Friday, except for federal holidays. However, where an employer is open for business on Saturdays, Sundays, or holidays, the employer may include the Saturday, Sunday, or holiday in its count of the 10 consecutive business day period required for the posting of the notice of filing.[26]

The employer, however, must demonstrate that it was open for business on those days and employees had access to the area where they could view the notice. Similarly, where an employer is not open for business on any day of the week, including Monday through Friday, the employer should not include any such days in its count of the 10 consecutive business days period required for the posting of the notice.

"Open for Business" for Purposes of Notice

If an employer must demonstrate that it was open for business on a Saturday, Sunday, or a holiday at the time of posting, the employer must provide documentation which establishes that on those days:

- Employees were working on the premises and engaged in normal business activity;
- The worksite was open and available to clients or customers, if applicable, as well as to employees; and
- Employees had access to the area where the notice of filing was posted.

4. Notice of Filing: Posting Locations[27]

Posting at Worksite

If the employer knows where the beneficiary will be placed, then the employer must post the notice at the worksite(s) where the beneficiary will perform the work, and publish the notice internally using in-house media (whether electronic or print) according to the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question. The prevailing wage indicated in the notice is the wage applicable to the area of intended employment where the worksite is located.

If the employer currently employs relevant workers at multiple locations and does not know where the beneficiary will be placed, then the employer must post the notice at the worksite(s) of all of its locations or clients where relevant workers currently are placed, and publish the notice of filing internally using in-house media (whether electronic or print) according to the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question.

The situation of multiple work locations may arise in, but is not limited to, a scenario when the employer is a staffing agency which has clients under contract at the time that the employer seeks to post a timely notice of filing. In support of the petition, the employer may provide a copy of one posting notice supported by a list of all locations where the notice was posted and dates of posting in each location. The employer does not have to submit a copy of each notice.[28]

Officers might encounter cases in which the employment is not full-time, permanent employment[29] or where the worksite(s) is unknown and the employer has no current locations or clients. In those cases, the officer may deny the petition because no bona fide job opportunity exists.[30]

In-house Media

An employer is required to publish the notice in all in-house media, whether electronic or print, that the employer normally uses to announce similar positions within its organization.[31] The employer must submit as evidence a copy of all in-house media that was used to distribute notice of the application according to the procedures used for similar positions within the employer's organization.

E. Physical Therapists and Registered Nurses (Group I)

1. General Eligibility

A physical therapist is a person who applies the art and science of physical therapy to the treatment of patients with disabilities, disorders, and injuries to relieve pain, develop or restore function, and maintain performance, using physical means, such as exercise, massage, heat, water, light, and electricity, as prescribed by a physician (or a surgeon).[32]

A professional nurse is a person who applies the art and science of nursing which reflects comprehension of principles derived from the physical, biological, and behavioral sciences. Professional nursing generally includes making clinical judgments involving the observation, care and counsel of persons requiring nursing care; administering of medicines and treatments prescribed by the physician or dentist; and participation in the activities for the promotion of health and prevention of illness in others.

A program of study for professional nurses generally includes theory and practice in clinical areas such as obstetrics, surgery, pediatrics, psychiatry, and medicine.[33] Officers should compare the duties of the proffered position with the duties stated in the definition of "professional nurse" in determining whether the proffered position qualifies as that of a professional nurse.[34] The classification for which the nurse is eligible depends on whether the position requires, and the beneficiary has, an advanced degree.

2. Bona Fide Job Offer

For Schedule A petitions, the petitioner must demonstrate that it is more likely than not that the petitioner is offering a bona fide full-time, permanent position.[35] When considering this question, however, officers may not unilaterally impose novel substantive or evidentiary requirements beyond those set forth in the regulations.[36] Specifically, there is no evidentiary requirement in the relevant and guiding statute or regulations that requires the petitioner to provide all contracts between the petitioner and its third-party clients for petitions generally and for Schedule A cases specifically.[37] Officers may, however, review the terms of the job offer and documentation relevant to the other requirements.

The terms of the job offer are derived from the petition and ETA Form 9089. The headquarters' worksite location and all of the potential client worksites to which the beneficiary could be assigned should be evident from the prevailing wage request and posting notice and other descriptive materials the petitioner voluntarily submits.

Other evidence related to the bona fide nature of the job offer includes that submitted to document the petitioner's ability to pay the proffered wage.[38] The record should also contain evidence of the beneficiary's qualifications for the classification[39] and any special requirements required by the job offer on the ETA Form 9089.[40] Such evidence should illustrate that it is more likely than not that there is a bona fide job offer. An officer should be able to articulate a reasonable concern based on evidence either within or outside of the record to form the basis for a fraud referral for further investigation.

F. Evidence

1. Group I Occupations

For Group I, registered nurse occupations, the employer must submit evidence to establish that the beneficiary currently has (and had at the time of filing):

- A full, unrestricted permanent license to practice nursing in the state of intended employment;
- A certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); or
- Evidence that the beneficiary has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) as of the date of filing.[41]

For Group I, physical therapist occupations, the employer must submit evidence to establish that the beneficiary currently has (and had at the time of filing) a permanent license to practice in the state of intended employment. Minimum requirements must meet all state licensure requirements. In the alternative, the employer may submit a letter or statement signed by an authorized state physical therapy licensing official in the state of intended employment. This letter must indicate that the beneficiary is qualified to take the written licensing examination for physical therapists.[42]

2. Group II Occupations

Immigrants of Exceptional Ability in the Sciences or Arts

To show that a beneficiary is of exceptional ability in the sciences or arts (excluding performing arts), the employer must submit documentary evidence showing the widespread acclaim and international recognition accorded to the beneficiary by recognized experts in the beneficiary's field.[43] DOL defines a science or art as any field of knowledge or skill with respect to which colleges and universities commonly offer specialized courses leading to a degree in the knowledge or skill.[44]

In addition, the employer must submit documentation showing that the beneficiary's work in that field during the past year did, and the intended work in the United States will, require exceptional ability.

Finally, the employer must submit documentation concerning the beneficiary from at least two of the following seven categories,[45] where "field" refers to the one in which the petitioner seeks certification for the beneficiary:

- Documentation of the beneficiary's receipt of internationally recognized prizes or awards for excellence in the field;
- Documentation of the beneficiary's membership in international associations, in the field, which require outstanding achievement of their members, as judged by recognized international experts in their disciplines or fields;
- Published material in professional publications about the beneficiary, about the beneficiary's work in the field, which must include the title, date, and author of such published material;
- Evidence of the beneficiary's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization;
- Evidence of the beneficiary's original scientific or scholarly research contributions of major significance in the field;
- Evidence of the beneficiary's authorship of published scientific or scholarly articles in the field, in international professional journals or professional journals with an international circulation; and
- Evidence of the display of the beneficiary's work, in the field, at artistic exhibitions in more than one country.[46]

Immigrants of Exceptional Ability in the Performing Arts

To show that an alien is of exceptional ability in the performing arts, the employer must submit documentary evidence that the beneficiary's work experience during the past 12 months did, and the intended work in the United States will, require exceptional ability.[47]

Finally, the employer must submit sufficient documentation to show that the beneficiary has this exceptional ability,[48] such as:

- Documentation attesting to the current widespread acclaim and international recognition accorded to the beneficiary, and receipt of internationally recognized prizes or awards for excellence;
- Published material by or about the beneficiary, such as critical reviews or articles in major newspapers, periodicals, or trade journals (the title, date, and author of such material must be indicated);
- Documentary evidence of earnings commensurate with the claimed level of ability;
- Playbills and star billings;

- Documents attesting to the outstanding reputation of theaters, concert halls, night clubs, and other establishments in which the beneficiary has appeared or is scheduled to appear; or
- Documents attesting to the outstanding reputation of theaters or repertory companies, ballet troupes, orchestras, or other organizations in which or with which the beneficiary has performed during the past year in a leading or starring capacity.[49]

G. Eligibility for Employment-based Immigrant Visa Classification

1. Physical Therapists and Professional Nurses (Group I)

For Schedule A, Group I occupations, an employer may seek to classify the beneficiary as a skilled worker or professional (employment-based 3rd preference or EB-3 category).[50] Occasionally, an employer may seek to classify the position as an advanced degree professional (employment-based 2nd preference or EB-2 category).[51]

The minimum requirement for professional nursing occupations is generally less than a bachelor's degree and these occupations are therefore considered under the skilled worker classification.[52] However, the minimum requirement for certain advanced or specialized professional nursing occupations may be a bachelor's degree.

These occupations may be properly considered under the professional classification. In some cases, the minimum requirements may even be an advanced degree. Those occupations may be properly considered under the advanced degree classification. Officers may refer to The Occupational Information Network (O*NET)[53] to determine the minimum educational requirements for professional nursing occupations.

According to O*NET, most physical therapist occupations require graduate school. O*NET classifies the position as a "Job Zone Five" with "extensive preparation needed." Based on the state where the beneficiary will practice, these occupations may require a master's degree, and some may even require a Doctor of Physical Therapy (DPT). Therefore, physical therapist occupations may be properly considered under the advanced degree professional classification if the employer can show that, based on the duties and education requirements on the ETA Form 9089, the position requires an advanced degree.

EB-2 classification is appropriate even if the state of intended employment issues physical therapist licenses to those persons who possess less than an advanced degree based on when the therapist obtained the degree (sometimes referred to as "grandfathering").

As explained below, some states will license a person who only possess a minimum of a bachelor's degree (and not an advanced degree) as a physical therapist based on the date the person obtained that degree.[54] As long as an employer can show that the position requires, at a minimum, an advanced degree (including the regulatory equivalence of a bachelor of physical therapy followed by 5 years of progressive experience),[55] for a worker to satisfactorily perform the job duties, and the physical therapist holds an advanced degree or its equivalent, then a petition may be properly considered under the advanced degree professional classification.

It is not unusual for an employer to require that the position's duties and requirements exceed the state's minimum licensing requirements. For example, the employer may require that the beneficiary possess an advanced degree even though the state only requires a bachelor's degree to obtain licensure as a physical therapist. In this case, a petition may be properly considered under the advanced degree professional classification.

It is possible that the employer does not require that the position's duties and requirements exceed the state's minimum licensing requirements. For example, the employer may only require that the beneficiary possess a bachelor's degree since the state only requires a bachelor's degree to obtain licensure as a physical therapist. Since the minimum requirements are less than an advanced degree, a petition may be properly considered under the professional classification (and not under the advanced degree classification). However, the employer cannot require that the position's duties and requirements be less than the state's minimum licensing requirements.

An advanced degree is commonly the minimum requirement for licensure for the occupation of physical therapist. Previously, a bachelor's degree was the minimum requirement for licensure in the occupation. As noted above, many states have "grandfathering" clauses that allow those who obtained a bachelor's degree under the previous licensing requirements to continue working in the field. If a "grandfathered" beneficiary can show that he or she has 5 years of progressive experience following receipt of the bachelor's degree, then he or she may be able to qualify under the advanced degree professional classification.

USCIS defines an advanced degree as any U.S. academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. USCIS considers an academic or professional degree above that of a bachelor's degree an advanced degree if the occupation requires that degree.

Therefore, a U.S. or foreign equivalent bachelor's degree would not qualify a beneficiary for the advanced degree professional classification, unless the beneficiary also possesses 5 years of progressive experience following the award of the bachelor's degree.

The beneficiary must have obtained both the bachelor's degree and the 5 years of progressive experience before the filing date of the permanent labor certification. In addition, USCIS does not consider training certifications and similar documents that are not academic or professional as advanced degrees.[56]

2. Immigrants of Exceptional Ability (Group II)

For Schedule A, Group II occupations, an employer may seek to classify the position as an advanced degree professional or immigrant of exceptional ability.[57] However, it is possible that an employer may seek to classify the position as a skilled worker or professional if the position does not require an advanced degree or a person of exceptional ability.

Officers should not confuse the requirements to designate a beneficiary under Schedule A, Group II (immigrants of exceptional ability in the sciences or arts, including performing arts) with the requirements to classify someone under the EB-2 category (for immigrants of exceptional ability in the sciences, arts, or business). Though both DOL and USCIS regulations refer to aliens of "exceptional ability," each regulation defines the term "exceptional ability" differently.

DOL defines "exceptional ability" for Schedule A, Group II designation as "widespread acclaim and international recognition accorded the alien by recognized experts in the alien's field." USCIS defines exceptional ability for purposes of the EB-2 category as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts or business."[58]

DOL's standard for Schedule A, Group II designation is therefore somewhat similar to that used to classify a person under the employment-based 1st preference (EB-1A) category (for immigrants of extraordinary ability). Despite this similarity, the standard for the EB-1A category is different than the standard for Schedule A, Group II designation. Therefore, officers should take care not to erroneously apply the standard for the EB-1A category to a request for Schedule A, Group II designation.[59]

The granting of Schedule A, Group II designation is separate from the adjudication of the immigrant visa petition. Eligibility for Schedule A, Group II designation does not guarantee approval of the petition itself, which must be adjudicated under the relevant regulations. Meeting the requirements for Schedule A designation only means that the petition met the permanent labor certification requirement. Officers must still make a separate determination on whether the position and the beneficiary meet the requirements for the requested

classification. Conversely, meeting the eligibility requirements for the classification under the USCIS definition does not establish eligibility for Schedule A, Group II designation under DOL's regulations.

Minimum Job Requirements

Officers should ensure that the actual education, training, and experience needed to perform the job listed in Item H of ETA Form 9089 reflect the true minimum requirements of the position.

For Schedule A positions, the petitioner submits an uncertified ETA Form 9089 concurrently with the petition directly with USCIS. Therefore, in Schedule A cases, USCIS, and not DOL, reviews the ETA Form 9089 using DOL regulations. The duties shown on the permanent labor certification should be appropriate for a Schedule A occupation (such as a position that requires licensure as a professional nurse, licensure as a physical therapist, or performance of a worker of exceptional ability). If necessary, the officer may issue a Request for Evidence to confirm the precise minimum job requirements.

Self-Petitions Not Allowed

An alien may not self-petition for Schedule A, Group II designation. Each request for Schedule A designation requires a job offer, and a petition that includes a request for such designation filed by a U.S. employer.

H. Filing Requirements

For all Schedule A occupations, an employer must apply for permanent labor certification with USCIS. A USCIS denial is conclusive and is not reviewable by the Board of Alien Labor Certification Appeals (BALCA) under the review procedures provided in regulations.[60]

DOL does not certify any occupation that is a Schedule A, Group I occupation under the basic permanent labor certification process.[61] However, if USCIS denies a permanent labor certification application filed by an employer for a Schedule A, Group II occupation, the employer may then apply for a permanent labor certification from DOL using the basic permanent labor certification process.[62]

Required Documentation

In order to apply for Schedule A designation for petitions filed on or after March 28, 2005,[63] the petitioning employer must complete and submit:[64]

- A properly filed Immigrant Petition for Alien Workers (Form I-140), with appropriate filing fees;[65]
- An uncertified Application for Permanent Employment Certification (ETA Form 9089 (PDF)), with the employer and beneficiary's original signatures (along with any representative's signature, if relevant);
- A prevailing wage determination issued by DOL's NPWC, in which the validity period is not less than 90 days or more than 1 year from the determination date and the petition is filed during that validity period;[66]
- A copy of the notice sent to an appropriate collective bargaining unit, if applicable, or a copy of the notice posted at the facility or location of the employment,[67] documenting posting for at least 10 consecutive business days and within the period between 30 and 180 days before the employer filed the petition;
- Copies of all in-house media, whether electronic or printed, in accordance with the normal procedures used in the employer's organization for the recruitment of positions similar to that specified on ETA Form 9089;
- Evidence that the beneficiary meets the specific DOL requirements for Schedule A designation;[68] and
- All other documentation required to show eligibility for the employment-based immigrant visa classification sought, such as evidence of its ability to pay and evidence that the beneficiary meets any additional requirements specified on the ETA Form 9089.

An employer must offer full-time permanent employment to a beneficiary. If USCIS has a reasonable and articulable reason to believe that it is more likely than not that the petitioning employer is not offering a bona fide job offer, officers may request additional evidence, such as copies of the employer's contracts with worksites or clients.[69] An employer that cannot offer full-time permanent employment as a beneficiary's actual employer is ineligible to petition for the beneficiary.[70]

I. Adjudication

If an employer meets all requirements for Schedule A designation and the petition is approvable, USCIS retains the ETA Form 9089 with the petition. If an employer did not meet all requirements for Schedule A designation, or the petition is not approvable, USCIS retains the permanent labor certification application with the petition. The officer does not complete Section O of the permanent labor certification.

The petitioner retains the right to file an appeal of USCIS' decision with the Administrative Appeals Office (AAO).[71] In addition, an employer which cannot meet the requirements for Schedule A, Group II may then apply for a permanent labor certification from DOL using the basic permanent labor certification process.[72] However, DOL does not consider applications for permanent labor certifications for Schedule A, Group I occupations under the basic permanent labor certification process.[73]

Footnotes

[^ 1] See 20 CFR 656.15. See INA 212(a)(5) for the general labor certification standard.

[^ 2] See 20 CFR 656.16.

[^ 3] See 20 CFR 656. For more information, see Chapter 2, Eligibility Requirements [6 USCIS-PM E.2].

[^ 4] See 20 CFR 656.10. See 20 CFR 656.15. These requirements are in addition to the general eligibility requirements for employment-based visa classification. See Chapter 2, Eligibility Requirements [6 USCIS-PM E.2].

[^ 5] The employer must also submit all other documentation required to show eligibility for the employment-based immigrant visa classification sought, such as evidence of its ability to pay, that the beneficiary and position qualify for the classification sought, and that the beneficiary meets the job requirements of the blanket labor certification.

[^ 6] See 20 CFR 656.5.

[^ 7] Before January 1, 2010, the State Workforce Agency (SWA) having jurisdiction over the area of intended employment processed prevailing wage determinations.

[^ 8] See the Office of Foreign Labor Certification (OFLC)'s Frequently Asked Questions and Answers webpage.

[^ 9] While the Schedule A regulations require that the employer obtain a prevailing wage determination that is valid at the time the employer files the petition, there is no requirement that the prevailing wage determination be obtained before the employer posts a notice of the position. In addition, there is no requirement that the wage on the posting notice must match the proffered wage, only that both must meet the prevailing wage.

[^ 10] See 20 CFR 656.10(d).

[^ 11] See 20 CFR 656.10(d)(1)(i).

[^ 12] See 20 CFR 656.10(d)(1)(ii).

[^ 13] See *Period of Posting* section below.

[^ 14] See 20 CFR 656.10(d)(1)(ii).

[^ 15] See generally OFLC's Frequently Asked Questions and Answers webpage regarding the notice of filing.

[^ 16] See 20 CFR 656.10(d)(2).

[^ 17] See 20 CFR 656.15(b)(2). See Section H, Filing Requirements [6 USCIS-PM E.7(H)].

[^ 18] See 20 CFR 656.10(d)(1)(ii).

[^ 19] See Appendix: Sample Notice of Filing [6 USCIS-PM E.7, Appendices Tab].

[^ 20] See 20 CFR 656.10(d)(1)(ii).

[^ 21] See 20 CFR 656.10(d)(6). See 20 CFR 656.10(d)(3)(i).

[^ 22] See 69 FR 77325 (Dec. 27, 2004).

[^ 23] See 20 CFR 656.10(d)(3)(ii).

[^ 24] See 20 CFR 656.10(d)(3)(iii). Before June 1, 2008, there were two addresses depending on the location of the petitioning business: Atlanta or Chicago. On or after June 1, 2008, the employer must list the address of the Atlanta Processing Center on the posting notice. See DOL Employment and Training Administration (ETA) OFLC's National Federal Processing Centers Contact webpage for the current mailing address for the appropriate Certifying Officer.

[^ 25] See 20 CFR 656.10(d)(3)(iv).

[^ 26] See *Matter of Il Cortile Restaurant*, 2010-PER-00683 (BALCA Oct. 12, 2010).

[^ 27] For all petitions filed after March 20, 2006 (or motions to reopen filed after March 20, 2006 to reopen a petition that was filed and denied after March 28, 2005), employers must comply with these posting requirements.

[^ 28] USCIS established a policy for officers to issue a Request for Evidence (RFE) to provide an employer with the opportunity to comply with the posting requirements if the petition was pending on March 20, 2006 (or was denied and a timely filed motion to reopen or reconsider was pending on March 20, 2006), and the employer timely posted a notice but not in the correct location(s) of intended employment as described above. If all posting requirements are met and the notice was posted the requisite 10 business days before the date of the RFE response, USCIS considers the notice of posting timely for adjudication purposes.

[^ 29] See 20 CFR 656.3.

[^ 30] See Section B, Eligibility for Schedule A Designation [6 USCIS-PM E.7(B)]. See OFLC's Frequently Asked Questions and Answers webpage.

[^ 31] See 20 CFR 656.10(d)(1)(ii).

[^ 32] See 20 CFR 656.5(a)(3)(i).

[^ 33] See 20 CFR 656.5(a)(3)(i). DOL's use of the term "professional" in 20 CFR 656.5(a)(3)(ii) has no bearing on the determination of whether a nurse qualifies as a professional or skilled worker under 8 CFR 204.5(l)(2).

[^ 34] See 20 CFR 656.5(a)(3)(ii). See Adjudication of H-1B Petitions for Nursing Occupations, PM-602-0104, issued February 18, 2015.

[^ 35] See 20 CFR 656.20(c)(10). See 20 CFR 656.3.

[^ 36] See *Love Korean Church v. Chertoff*, 549 F.3d 749, 758 (9th Cir. 2008). See *Kazarian v. INS*, 596 F.3d 1115, 1121 (9th Cir. 2010).

[^ 37] Even for Schedule A staffing agency scenarios, the applicable regulatory criteria do not include employment contracts as required evidence. See OFLC's Frequently Asked Questions and Answers webpage, which explains that petitioners are not required to submit employment contracts. For the situation of nurse staffing agencies and "roving" employees (for example, foreign health care workers the petitioner will assign to work at third-party client worksites still to be determined as of the date of filing), DOL advised only that the petitioner should submit a prevailing wage determination for the headquarters location and posting notices at all of its clients' worksites.

[^ 38] See Chapter 8, Documentation and Evidence [6 USCIS-PM E.8].

[^ 39] See Part F, Employment-Based Classifications [6 USCIS-PM F].

[^ 40] The requirements on the ETA Form 9089 should line up with those reflected on the Application for Prevailing Wage Determination (Form ETA-9141 (PDF)) and posting notice.

[^ 41] See 20 CFR 656.15(c)(2). The NCLEX-RN is administered by the National Council of State Boards of Nursing.

[^ 42] See 20 CFR 656.15(c)(1).

[^ 43] See 20 CFR 656.15(d)(1).

[^ 44] See 20 CFR 656.5(b)(1). The beneficiary, however, does not need to have studied at a college or university in order to qualify for Schedule A, Group II designation. See 20 CFR 656.5(b)(1).

[^ 45] See 20 CFR 656.15(d)(1). See *Matter of Chawathe* (PDF), 25 I&N Dec. 369, 376 (AAO 2010) ("[T]ruth is to be determined not by the quantity of evidence alone but by its quality.").

[^ 46] See 20 CFR 656.15(d)(1).

[^ 47] See 20 CFR 656.15(d)(2). See *Matter of Allied Concert Services, Inc.*, 88–INA–14 (BALCA 1988), which provides an example of how the Board of Alien Labor Certification Appeals (BALCA) evaluated the evidence for a Schedule A, Group II case. In *Matter of Allied Concert Services, Inc.*, BALCA stated, ". . . [T]he ultimate fact to be proven is that the alien has exceptional ability as compared with others in the same field; and that the various kinds of documentation mentioned in the regulation are suggested as possible methods of proof."

[^ 48] See *Matter of Chawathe* (PDF), 25 I&N Dec. 369, 376 (AAO 2010) ("[T]ruth is to be determined not by the quantity of evidence alone but by its quality.").

[^ 49] See 20 CFR 656.15(d)(2).

[^ 50] See INA 203(b)(3).

[^ 51] See INA 203(b)(2).

[^ 52] Skilled worker positions require 2 years of training or experience, which can include relevant post-secondary education, such as an associate's degree. See 8 CFR 204.5(l)(2) (definition of skilled worker).

[^ 53] O*NET Online is sponsored by DOL's Employment and Training Administration, and developed by the National Center for O*NET Development.

[^ 54] Officers must differentiate "grandfathering" for purposes of obtaining licensure and the requirements for obtaining EB-2 classification. States that permit a person to obtain licensure with less than an advanced degree specify the date by which the person would have had to obtain his or her baccalaureate degree to be considered "grandfathered." In order to be eligible for EB-2 preference classification, even a grandfathered alien would have to demonstrate that he or she obtained the baccalaureate degree and has at least 5 years of progressive post-baccalaureate experience in the field.

[^ 55] See 8 CFR 204.5(k)(2) (definition of advanced degree).

[^ 56] Evidence of a degree is the official academic record. See 8 CFR 204.5(k)(3)(i)(A). See 8 CFR 204.5(l)(3)(ii)(C).

[^ 57] See INA 203(b)(2).

[^ 58] See 8 CFR 204.5(k)(2) (definition of exceptional ability).

[^ 59] For example, Schedule A, Group II designation requires an employer to file the petition and does not allow for the submission of comparable evidence in place of the regulatory criteria.

[^ 60] See 20 CFR 656.26. See 20 CFR 656.15(e). See 20 CFR 656.15(e). For information on appeals to the USCIS Administrative Appeals Office, see Section I, Adjudication [6 USCIS-PM E.7(I)].

[^ 61] See 20 CFR 656.17. See 20 CFR 656.15(f). See DOL ETA's Foreign Labor Certification webpage.

[^ 62] See 20 CFR 656.17. See Chapter 6, Permanent Labor Certification [6 USCIS-PM E.6] for further discussion of the basic permanent labor certification process.

[^ 63] On December 27, 2004, DOL published a final rule entitled Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, which significantly restructured the permanent labor certification process. See 69 FR 77325 (Dec. 27, 2004). For information on Schedule A requirements before March 28, 2005, see prior 20 CFR 656.10 (PDF) and 20 CFR 656.22 (PDF).

[^ 64] See 20 CFR 656.10. See 20 CFR 656.15.

[^ 65] See Fee Schedule (Form G-1055).

[^ 66] If the petition was filed before January 1, 2010, then the prevailing wage determination would have been issued by the applicable State Workforce Agency (SWA).

[^ 67] For guidance on the appropriate posting location(s) for cases involving multiple worksites, see OFLC's Frequently Asked Questions and Answers webpage.

[^ 68] See 20 CFR 656.5 and 20 CFR 656.15.

[^ 69] If the beneficiary will be assigned to other third-party worksites, that may impact the required contents of the notice of posting, the location of that notice, prevailing wage determination, ETA Form 9089, and the petition.

[^ 70] See 20 CFR 656.3. See Chapter 2, Eligibility Requirements [6 USCIS-PM E.2].

[^ 71] See 20 CFR 656.15(e) (the denial of a Schedule A case cannot be appealed through BALCA). DHS delegated the authority to adjudicate appeals to the AAO under the authority vested in the Secretary through the Homeland Security Act of 2002, Pub. L. 107-296 (PDF) (November 25, 2002). See Delegation Number 0150.1 (effective March 1, 2003). See 8 CFR 2.1. The AAO exercises appellate jurisdiction over matters described in 8 CFR 103.1(f)(3) (PDF) (in effect February 28, 2003), including decisions on petitions for an immigrant visa based on employment.

[^ 72] See 20 CFR 656.17. See Part F, Employment-Based Classifications [6 USCIS-PM F] for further discussion of that category.

[^ 73] See 20 CFR 656.15(f). See Section H, Filing Requirements [6 USCIS-PM E.7(H)].

Chapter 8 - Documentation and Evidence

A. Filing

To seek an employment-based immigrant classification on behalf of a beneficiary, the petitioner must properly file an Immigrant Petition for Alien Workers (Form I-140) with the appropriate fee with the appropriate USCIS location.[1]

1. Priority Dates

The priority date is used in conjunction with the U.S. Department of State's (DOS) Visa Bulletin to determine when a visa is available and the beneficiary can apply for adjustment of status or for an immigrant visa abroad. If an immigrant visa is available for the petition's priority date, and the beneficiary is otherwise eligible for adjustment of status, the beneficiary may file an Application to Register Permanent Residence or Adjust Status (Form I-485) concurrently with the petition.[2]

Schedule A Permanent Labor Certifications and Petitions Not Supported by a Permanent Labor Certification

The priority date for a petition supported by a Schedule A designation, or for a petition approved for a classification that does not require a permanent labor certification, is the date the petition is filed with USCIS.[3]

Individual Permanent Labor Certifications Filed with the U.S. Department of Labor

The priority date for a petition supported by an Application for Permanent Employment Certification (ETA Form 9089) (also referred to as the permanent labor certification application) filed with the U.S. Department of Labor (DOL) on or after March 28, 2005 is the earliest date the application for permanent labor certification is filed with DOL.[4] In some cases, the date of filing in the certification section of the ETA Form 9089 may be blank. In such instances, USCIS may request a corroborative statement or other evidence from DOL that clarifies what the correct priority date should be.

Where the beneficiary's priority date is established by the filing of the permanent labor certification, once the beneficiary's petition has been approved, the beneficiary retains his or her priority date as established by the filing of the permanent labor certification for any future petitions, unless:

- USCIS revokes the approval of the previously approved petition because of fraud or willful misrepresentation;
- DOL revokes the approval of the permanent labor certification; or
- USCIS determines that the petition approval was based on a material error.[5]

Retention of the earlier priority date includes cases where a change of petitioner has occurred; however, the new petitioner must obtain a new permanent labor certification if the classification requested requires a permanent labor certification.[6]

2. Effect of Denial of Petition on Priority Date

If a Schedule A petition or a petition that does not require permanent labor certification is denied, no priority date is established. In addition, no priority date is established by an individual permanent labor certification if a petition based upon that certification was never filed and there is a change of petitioner (except in successor-in-interest cases).[7]

3. Priority Date Based on Earlier Petition

If a beneficiary is the beneficiary of two (or more) approved petitions, the priority date of the earlier petition may be applied to all subsequently filed petitions.[8]

For example, Company A files a permanent labor certification request on behalf of a beneficiary as a scientist with an advanced degree on January 10, 2020. DOL issues the certification on March 20, 2020. Company A later files, and USCIS approves, a relating immigrant visa petition under the employment-based 2nd preference (EB-2) category. On July 15, 2020, the beneficiary files a second petition on his or her own behalf as an extraordinary scientist under the employment-based 1st preference (EB-1) category, which USCIS approves. The beneficiary is entitled to use the January 10, 2020 priority date to apply for adjustment under either the EB-1 or the EB-2 classification.[9]

B. Evidence

1. Job Offers

In most cases, the beneficiary of a petition must have a bona fide job offer from a petitioner in the United States. As evidence of the job offer, most petitioners who file EB-2 and employment-based 3rd preference (EB-3) petitions must first obtain an approved individual permanent labor certification from DOL.

In other cases, where the beneficiary is eligible for Schedule A blanket permanent labor certification, the petitioner submits unapproved permanent labor certification applications to USCIS with the petition. In relatively few cases, such as those involving beneficiaries seeking EB-1 classification,[10] as well as those seeking EB-2 classification who also qualify for a national interest waiver,[11] an individual permanent labor certification from DOL is not required.

2. Licensure

Neither the statute nor the regulations require that the beneficiary of a petition be able to engage in the occupation immediately. There are often licensing and other additional requirements that a person must meet before he or she can engage in the occupation. Unless needed to meet the requirements of a permanent labor certification, such considerations are not a factor in the adjudication of the petition.

Footnotes

[^ 1] See 8 CFR 103.2(a)(7)(ii)(D). See the Direct Filing Addresses for Form I-140, Immigrant Petition for Alien Worker webpage.

[^ 2] See 8 CFR 245.1(g). See Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section C, Concurrent Filings [7 USCIS-PM A.3(C)].

[^ 3] See 8 CFR 204.5(d).

[^ 4] See 8 CFR 204.5(d). The priority date for a petition supported by an Application for Alien Employment Certification (ETA Form 750) filed with DOL before March 28, 2005 is the earliest date the ETA Form 750 was accepted by any office in DOL's employment service system. There may be instances where the petitioner indicates that DOL erred by assigning a new priority date on an ETA Form 9089 filed on or after March 28, 2005, even though the employer previously requested to withdraw the pending ETA Form 750 and refiled an ETA Form 9089 for the identical job opportunity and would have been eligible to use the previously filed ETA Form 750 filing date. For more information on labor certifications, see Chapter 6, Permanent Labor Certification [6 USCIS-PM E.6].

[^ 5] See 8 CFR 204.5(e).

[^ 6] For information about successor-in-interest determinations, see Chapter 3, Successor-in-Interest in Permanent Labor Certification Cases [6 USCIS-PM E.3].

[^ 7] For information on petition denials and portability, see Volume 7, Adjustment of Status, Part E, Employment-Based Adjustment, Chapter 5, Job Portability after Adjustment Filing and Other AC21 Provisions [7 USCIS-PM E.5] and the Form I-485 Supplement J webpage.

[^ 8] See 8 CFR 204.5(e).

[^ 9] Petitions filed under the old third and sixth preferences were automatically converted to one of the new classifications when the provisions of the Immigration Act of 1990, Pub. L. 101-649 (PDF) (November 29, 1990), went into effect. If the application for labor certification was filed before October 1, 1991, the petition must have been filed by October 1, 1993, in order to preserve the date of the labor certification as the priority date. If the application for labor certification was filed before October 1, 1991, but not granted until after October 1, 1993, the petition must have been filed within 60 days after the date of certification to maintain the priority date. Otherwise, the date the petition was filed with USCIS (or before March 1, 2003, legacy Immigration and Naturalization Service) was the priority date.

[^ 10] See INA 203(b)(1)(A). For visa availability, see DOS's Visa Bulletin.

[^ 11] See INA 203(b)(2)(B).

Chapter 9 - Evaluation of Education Credentials

In cases involving foreign degrees, officers may favorably consider a credentials evaluation performed by an independent credentials evaluator who has provided a credible, logical, and well-documented case for such an equivalency determination that is based solely on the alien's foreign degree(s).[1]

In addition, officers may accept a comparable evaluation performed by a school official who has the authority to make such determinations and is acting in his or her official capacity with the educational institution.[2]

Officers should consider the opinions rendered by an education credential evaluator in conjunction with a review of the beneficiary's relevant education credentials and other available credible resource material regarding the equivalency of the education credentials to college degrees obtained in the United States. Opinions rendered that are merely conclusory and do not provide a credible roadmap that clearly lays out the basis for the opinions are not persuasive.

Any educational equivalency evaluation performed by a credentials evaluator or school official is solely advisory in nature; the final determination continues to rest with the officer.[3]

Footnotes

[^ 1] For information on the specific educational requirements for professional and advanced degree professionals, see Part F, Employment-Based Classifications, Chapter 5, Advanced Degree or Exceptional Ability [6 USCIS-PM F.5], Chapter 6, Physician [6 USCIS-PM F.6], and Chapter 7, Skilled Worker, Professional, or Other Worker [6 USCIS-PM F.7].

[^ 2] For the advanced degree and professional classifications, the beneficiary's educational credentials must be equivalent to a U.S. degree. See 8 CFR 204.5(k)(2) and 8 CFR 204.5(l)(2).

[^ 3] See *Matter of Caron International (PDF)*, 19 I&N Dec. 791 (Comm. 1988). See *Matter of Sea, Inc. (PDF)*, 19 I&N Dec. 817 (Comm. 1988). See *Matter of Ho (PDF)*, 19 I&N Dec. 582 (BIA 1988).

Chapter 10 - Decision and Post-Adjudication

A. Approval

If the petitioner properly filed the petition and the officer is satisfied that the petitioner has met the required eligibility standards, the officer approves the petition.

After a petition has been approved and an immigrant visa is available, a beneficiary may apply for an immigrant visa with U.S. Department of State (DOS) or apply with USCIS to adjust status to permanent residence if in the United States.[1]

B. Denial

If the petitioner has not established eligibility, the officer denies the petition.

The officer should write the denial in clear and comprehensive language and cover all grounds for denial.[2] The officer should refer in the denial to the controlling statute or regulations and to any relevant precedent or adopted decisions. The decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider. The denied petition should then be held locally until the time period for an appeal or motion has passed.

The denial decision may be appealed to the Administrative Appeals Office (AAO) if falling within the AAO's jurisdiction.[3] A petitioner may not appeal a denial decision that is based upon lack of permanent labor certification. A petitioner may appeal a case that is denied because the beneficiary does not qualify for the Schedule A designation or for the waiver of the job offer in the national interest, or because USCIS determined that a successor-in-interest does not exist.

C. Revocation

A petition's approval may be revoked, in the agency's discretion, "for good and sufficient cause."[4] A petition may also be withdrawn upon a written request for withdrawal of the petition filed by the petitioner (who in some cases may also be the beneficiary).[5]

DOS may also terminate the registration of a beneficiary with an approved petition if such beneficiary fails to apply for an immigrant visa within 1 year of notification of availability of a visa number. The same statutory provision provides for reinstatement of registration in certain cases.[6]

According to the AAO's adopted decision in *Matter of V-S-G- Inc.*, beneficiaries who are otherwise eligible to and have properly requested to port under the American Competitiveness in the 21st Century Act (AC21) are affected parties.[7] As a result of this decision, USCIS provides a Notice of Intent to Revoke (NOIR) or a Notice of Revocation (NOR) or both to a beneficiary who has an approved petition and an Application to Register Permanent Residence or Adjust Status (Form I-485) that has been pending for 180 days or more, and has properly requested to port.

The porting request is proper when it has been favorably reviewed by USCIS before the issuance of a NOIR or NOR. Before January 17, 2017, a beneficiary requested to port by submitting a request in writing. Beginning January 17, 2017, a beneficiary must request to port by submitting Confirmation of Bona Fide Job Offer or Request for Job Portability Under INA Section 204(j) (Form I-485 Supplement J).[8]

D. Fraudulent Marriage Prohibition

USCIS may not approve a petition, including an employment-based petition, filed on behalf of a beneficiary who has been determined to have attempted or conspired to enter into a marriage for the purpose of evading immigration laws.[9]

Although it is not necessary that the beneficiary has been convicted of, or even prosecuted for the attempt or conspiracy, the evidence of the actual act, attempt, or conspiracy must be contained in the beneficiary's A-file. If a review of the beneficiary's A-file indicates that he or she has attempted or conspired to obtain an immigration benefit by virtue of a fraudulent marriage, USCIS sends the petitioner a Notice of Intent to Deny (NOID) or NOIR that outlines the basis for the determination. The marriage must be shown to have been a sham at its inception for this prohibition to apply.

To overcome this ground of ineligibility, the petitioner must convincingly demonstrate that the beneficiary entered the marriage for the purpose of starting a life with his or her spouse and not strictly for the purpose of obtaining an immigration benefit.

If the evidence provided in response to the NOID or NOIR does not overcome the fraudulent marriage determination, the officer should deny or revoke the approval of a petition filed on behalf of any beneficiary for whom there is substantial and probative evidence of such an attempt or a conspiracy, regardless of whether the beneficiary received a benefit through the attempt or conspiracy.

Footnotes

[^ 1] See Volume 7, Adjustment of Status, Part E, Employment-Based Adjustment [7 USCIS-PM E].

[^ 2] See 8 CFR 103.3(a)(1)(i). See DHS Delegation No. 0150.1 para. (2)(U) (Mar. 1, 2003), which delegated the Administrative Appeals Office's jurisdiction over the decisions listed in 8 CFR 103.1(f)(3)(iii)(B) (PDF) (as they appeared February 28, 2003).

[^ 3] See 8 CFR 103.3(a)(2).

[^ 4] See INA 205.

[^ 5] See 8 CFR 205.1 and 8 CFR 205.2.

[^ 6] See INA 203(g).

[^ 7] See Pub. L. 106-313 (PDF) (October 17, 2000). See *Matter of V-S-G- Inc. (PDF)*, Adopted Decision 2017-06 (AAO Nov. 11, 2017).

[^ 8] For more information, see Volume 7, Adjustment of Status, Part E, Employment-Based Adjustment, Chapter 5, Job Portability after Adjustment Filing and Other AC21 Provisions [7 USCIS-PM E.5].

[^ 9] See INA 204(c). The fraudulent marriage prohibition that is articulated in INA 204(c) and 8 CFR 204.2(a)(1)(ii) does not distinguish between forms, but merely states "a petition for immigrant visa classification." See *Matter of Christo's, Inc. (PDF)*, 26 I&N Dec. 537 (AAO 2015).

Part F - Employment-Based Classifications

Chapter 1 - Purpose and Background

A. Purpose

The Immigration and Nationality Act (INA) and implementing regulations provide for several employment-based immigrant visa classifications. Alien beneficiaries approved in these classifications are eligible to apply for lawful admission as a permanent resident or adjustment of status to permanent residence.

B. Background

In general, for an Immigrant Petition for Alien Workers (Form I-140), a petitioner must demonstrate to USCIS that the beneficiary is qualified for the immigrant classification sought.[1] If the petition is based on an underlying approved permanent labor certification application, then the petition must be filed during the validity period of the permanent labor certification established by the U.S. Department of Labor (DOL).

The petitioner must demonstrate that the beneficiary is qualified for the position certified by DOL. However, as discussed in more detail later in this part, there are several immigrant classifications that do not require the petitioner to first obtain a permanent labor certification. In addition, in certain classifications, the beneficiary is able to self-petition for the classification sought.

General information relating to employment-based immigrant petitions is provided in Part E.[2] This Part F provides a more detailed discussion of the specific immigrant classifications.

Visa Classifications

The following table lists the employment-based immigrant visa classifications, the corresponding codes of admission, and where to find additional guidance about the classifications.

Employment-Based Visa Classifications

Employment-Based Immigrant	Code of Admission	For More Information
Persons of Extraordinary Ability	E11	See Chapter 2, Extraordinary Ability [6 USCIS-PM F.2]
Outstanding Professor Outstanding Researcher	E12	See Chapter 3, Outstanding Professor or Researcher [6 USCIS-PM F.3]
Multinational Executive Multinational Manager	E13	See Chapter 4, Multinational Executive or Manager [6 USCIS-PM F.4]
Professional Holding Advanced Degree Person of Exceptional Ability	E21	See Chapter 5, Advanced Degree or Exceptional Ability [6 USCIS-PM F.5] and Chapter 6, Physician [6 USCIS-PM F.6]
Skilled Worker	E31	See Chapter 7, Skilled Worker, Professional, or Other Worker [6 USCIS-PM F.7]
Professional Holding Baccalaureate Degree	E32	See Chapter 7, Skilled Worker, Professional, or Other Worker [6 USCIS-PM F.7]
Other Worker	EW3	See Chapter 7, Skilled Worker, Professional, or Other Worker [6 USCIS-PM F.7]

C. Legal Authorities

- INA 203(b)(1), (2), (3) – Preference allocation for employment-based immigrants
- 8 CFR 204.5 – Petitions for employment-based immigrants
- 20 CFR 656 – Labor certification process for permanent employment of aliens in the United States

Footnotes

[^ 1] This Part generally uses the simplified terms petition, petitioner, and beneficiary. The term petition refers to the Immigrant Petition for Alien Workers (Form I-140). The term petitioner generally refers to the petitioning employer, though in some circumstances the petitioner may be a self-petitioning alien. The term beneficiary refers to the alien who is the beneficiary of the petition, who in some cases may also be a self-petitioner.

[^ 2] See Part E, Employment-Based Immigration [6 USCIS-PM E].

Chapter 2 - Extraordinary Ability

A. Eligibility

When seeking classification as a person of extraordinary ability, a petitioner files an Immigrant Petition for Alien Workers (Form I-140) on behalf of an alien (who may be the petitioner) with evidence demonstrating that the beneficiary is eligible.[1]

Eligibility for Extraordinary Ability Classification
The person has extraordinary ability in the sciences, arts, education, business, or athletics, which has been demonstrated by sustained national or international acclaim, and whose achievements have been recognized in the field through extensive documentation.
The person seeks to enter the United States to continue work in the area of extraordinary ability.
The person's entry into the United States will substantially benefit the United States in the future.

Self-Petitioners

A petition filed on behalf of a person with extraordinary ability does not need to be supported by a job offer; therefore, anyone can file the petition on behalf of the person, including the alien who may file as a self-petitioner.[2] The person must still demonstrate, however, that he or she intends to continue work in the area of his or her extraordinary ability and that his or her work will substantially benefit the United States in the future.[3]

1. Sustained National or International Acclaim

When filing a petition for a person with extraordinary ability, the petitioner must submit evidence that the person has sustained national or international acclaim and that the person's achievements have been recognized in the field of expertise.[4] In determining whether the beneficiary has enjoyed "sustained" national or international acclaim, the officer should consider that such acclaim must be maintained.[5] However, the term sustained does not imply an age limit on the beneficiary. A beneficiary may be very young or early in his or her career and still be able to show sustained acclaim. There is also no definitive time frame on what constitutes sustained.

If a person was recognized for a particular achievement, the officer should determine whether the person continues to maintain a comparable level of acclaim in the field of expertise since the person was originally afforded that recognition. A person may, for example, have achieved national or international acclaim in the past but then failed to maintain a comparable level of acclaim thereafter.

2. Continuing to Work in the Area of Expertise

To qualify as a person with extraordinary ability, the beneficiary must intend to continue to work in the area of his or her expertise.[6]

The officer may encounter instances where it is difficult to determine whether the person's intended employment falls sufficiently within the bounds of his or her area of extraordinary ability. Some of the most problematic cases are those in which the beneficiary's sustained national or international acclaim is based on his or her abilities as an athlete, but the beneficiary's intent is to come to the United States and be employed as an athletic coach or manager. Competitive athletics and coaching rely on different sets of skills and in general are not in the same area of expertise. However, many extraordinary athletes have gone on to be extraordinary coaches.

Therefore, in general, if a beneficiary has clearly achieved recent national or international acclaim as an athlete and has sustained that acclaim in the field of coaching or managing at a national level, officers can consider the totality of the evidence as establishing an overall pattern of sustained acclaim and extraordinary ability such that USCIS can conclude that coaching is within the beneficiary's area of expertise.

Where the beneficiary has had an extended period of time to establish his or her reputation as a coach beyond the years in which he or she had sustained national or international acclaim as an athlete, depending on the specific facts, officers may place heavier, or exclusive, weight on the evidence of the beneficiary's achievements as a coach or a manager.

USCIS does not consider a male athlete who has gained the necessary acclaim in men's sports and seeks to compete in women's sports in the United States to be seeking to continue work in his area of extraordinary ability.[7]

3. Entry to Substantially Benefit the United States

To qualify as a person with extraordinary ability, the person's entry must substantially benefit the United States in the future.[8] Although neither the statute nor the regulations specifically define the statutory phrase "substantially benefit," it has been interpreted broadly.[9]

Whether the petitioner demonstrates that the person's employment meets this requirement requires a fact-dependent assessment of the case. In some cases, a Request for Evidence (RFE) may be appropriate if an officer is not yet satisfied that the petitioner has met this requirement. There is no standard rule as to what will substantially benefit the United States. However, male athletes seeking to enter the United States to compete in women's sports do not substantially benefit prospectively the United States.[10]

B. Evidence of Extraordinary Ability

The regulations describe various types of evidence that the petitioner must submit in support of a petition as documentation of the beneficiary's extraordinary ability.[11] In general, the petitioner must submit evidence that:

- The person has sustained national or international acclaim; and
- The person's achievements have been recognized in the field of expertise.

This initial evidence must include either evidence of a one-time achievement (for example, a major internationally recognized award, such as the Nobel Prize) or at least three of the types of evidence listed in the regulations.[12]

The evidence provided in support of the petition need not specifically use the words "extraordinary." Rather, the material should be such that it is readily apparent that the person's contributions to the field are qualifying. Also, although some of the regulatory language relating to evidence occasionally uses plurals, it is entirely possible that the presentation of a single piece of evidence in a specific evidentiary category may be sufficient.

On the other hand, the submission of voluminous documentation may not contain sufficient persuasive evidence to establish the beneficiary's eligibility. The evidence provided in support of the petition must ultimately establish that the beneficiary "is one of that small percentage who have risen to the very top of the field of endeavor."[13]

Officers should use a two-step analysis to evaluate the evidence submitted with the petition to demonstrate eligibility for classification as a person with extraordinary ability.[14]

Petition for Extraordinary Ability Classification: Overview of Two-Step Evidentiary Review	
Step 1	Assess whether evidence meets regulatory criteria: Determine, by a preponderance of the evidence, which evidence submitted by the petitioner objectively meets the parameters of the regulatory description that applies to that type of evidence (referred to as "regulatory criteria").
Step 2	Final merits determination: Evaluate all the evidence together when considering the petition in its entirety for the final merits determination, in the context of the high level of expertise required for this immigrant classification.

1. Initial Evidence of Extraordinary Ability

The first step of the evidentiary review is limited to determining whether the evidence submitted with the petition meets the regulatory criteria.[15] The evidence must be comprised of either a one-time achievement (that is, a major, internationally recognized award) or at least three of the ten regulatory criteria or be comparable to at least three of the ten regulatory criteria.[16] The officer should apply a preponderance of the evidence standard when making this determination.

For purposes of the first step of the analysis, officers should consider the quality and caliber of the evidence to determine whether a particular regulatory criterion has been met, to the extent the criterion has qualitative requirements.[17] Officers should not yet make a determination regarding whether or not the person is one of that small percentage who have risen to the very top of the field or if the person has sustained national or international acclaim.[18]

The following tables describe the limited determinations the officer should make in the first step of the analysis to determine whether the person has met the applicable evidentiary criteria, including any qualifying comparable evidence.[19]

Criterion 1: Receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.[20]
First, USCIS determines if the person was the recipient of prizes or awards. Nothing precludes the person from relying on a team award, provided the person is one of the recipients of the award.[21] The description of this type of evidence in the regulation indicates that the focus should be on the person's receipt of the awards or prizes, as opposed to the employer's receipt of the awards or prizes.

Criterion 1: Receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.[20]

Second, USCIS determines whether the award is a lesser nationally or internationally recognized prize or award which the person received for excellence in the field of endeavor. As indicated by the plain language of the regulation, this criterion does not require an award or prize to have the same level of recognition and prestige associated with the Nobel Prize or another award that would qualify as a one-time achievement.

Examples of qualifying awards may include, but are not limited to:

- Certain awards from well-known national institutions or well-known professional associations;
- Certain doctoral dissertation awards; and
- Certain awards recognizing presentations at nationally or internationally recognized conferences.

Considerations:

Relevant considerations regarding whether the basis for granting the prizes or awards was excellence in the field include, but are not limited to:

- The criteria used to grant the awards or prizes;
- The national or international significance of the awards or prizes in the field;
- The number of awardees or prize recipients; and
- Limitations on competitors.

While many scholastic awards do not have the requisite level of recognition, there may be some that are nationally or internationally recognized as awards for excellence such that they may satisfy the requirements of this criterion.

For example, an award available only to persons within a single locality, employer, or school may have little national or international recognition, while an award open to members of a well-known national institution (including an R1 or R2 doctoral university[22]) or professional organization may be nationally recognized.

Similarly, national or international recognition is most often associated with awards given to individuals at the highest level in a given field. However, there is no specific requirement that an award be open to all members of the field, including the most experienced, in order to meet the requirements of this criterion. While limitations on competitors can be a relevant factor, in some instances the evidence may establish that an award or prize is nationally or internationally recognized despite being limited to youth, amateur competitors, or early-career professionals. For instance, awards presented to new players or “rookies” in major sports leagues may garner national or even international media coverage.

Criterion 2: Membership in associations in the field for which classification is sought that require outstanding achievement of their members, as judged by recognized national or international experts in their disciplines or fields.[23]

USCIS determines if the association for which the person claims present or past membership[24] requires that members have outstanding achievements in the field as judged by recognized experts in that field.

Examples of associations in the field requiring outstanding achievement of their members may include, but are not limited to:

- A membership in certain professional associations; and
- A fellowship with certain organizations or institutions.

Considerations:

The petitioner must show that membership in the association requires outstanding achievements in the field for which classification is sought, as judged by recognized national or international experts.

Associations may have multiple levels of membership. The level of membership afforded to the person must show that in order to obtain that level of membership, recognized national or international experts judged the person as having attained outstanding achievements in the field for which classification is sought.

As a possible example, general membership in an international organization for engineering and technology professionals may not meet the requirements of the criterion. However, if that same organization at the fellow level requires, in part, that a nominee have accomplishments that have, for example, contributed importantly to the advancement or application of engineering, science, and technology, and that a council of experts and a committee of current fellows judges the nominations for fellows, that higher, fellow level may be qualifying.

Another possible qualifying example may include membership as a fellow in a scientific society dedicated to artificial intelligence if the membership is based on recognition of a nominee’s significant, sustained contributions to the field of artificial intelligence, and a panel of current fellows makes the selection of new fellows.

Relevant factors that may lead to a conclusion that the person's membership in the association(s) was not based on outstanding achievements in the field include, but are not limited to, instances where the person's membership was based solely on the following factors (by themselves or in the aggregate):

- A level of education or years of experience in a particular field;
- The payment of a fee or by subscribing to an association's publications; and
- A requirement, compulsory or otherwise, for employment in certain occupations, as commonly seen with union membership or guild affiliation for actors.

Criterion 3: Published material about the person in professional or major trade publications or other major media relating to the person's work in the field for which classification is sought. Such evidence must include the title, date, and author of the material, and any necessary translation.[25]

First, USCIS determines whether the published material was related to the person and the person's specific work in the field for which classification is sought.

Criterion 3: Published material about the person in professional or major trade publications or other major media relating to the person's work in the field for which classification is sought. Such evidence must include the title, date, and author of the material, and any necessary translation.[25]

Examples of qualifying media may include, but are not limited to:

- Professional or major print publications (newspaper articles, popular and academic journal articles, books, textbooks, or similar publications) regarding the person and the person's work;
- Professional or major online publications regarding the person and the person's work; and
- Transcripts of professional or major audio or video coverage of the person and the person's work.

Considerations:

The published material should be about the person, relating to the person's work in the field, and not just about the person's employer and the employer's work or about another organization and that organization's work. Marketing materials created for the purpose of selling the person's products or promoting the person's services are not generally considered to be published material about the person (this includes seemingly objective content about the person in major print publications that the person or the person's employer paid for).

However, the person and the person's work need not be the only subject of the material; published material that covers a broader topic but includes a substantial discussion of the person's work in the field and mentions the person in connection to the work may be considered material about the person relating to the person's work.

Moreover, officers may consider material that focuses solely or primarily on work or research being undertaken by a team of which the person is a member, provided that the material mentions the person in connection with the work or other evidence in the record documents the person's significant role in the work or research.

Evidence may include documentation such as print or online newspaper or magazine articles, popular or academic journal articles, books, textbooks, similar publications, or a transcript of professional or major audio or video coverage of the person and the person's work.

Second, USCIS determines whether the publication qualifies as a professional publication, major trade publication, or major media publication.

In evaluating whether a submitted publication is a professional publication, major trade publication, or major media, relevant factors include the intended audience (for professional and major trade publications) and the relative circulation, readership, or viewership (for major trade publications and other major media).

Criterion 4: The person's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.[26]

USCIS determines whether the person has acted as the judge of the work of others in the same or an allied field of specification.

Examples of judging the work of others may include, but are not limited to:

- Peer reviewing for a scholarly journal, as evidenced by a request from the journal to the person to do the review, accompanied by proof that the review was actually completed;
- Peer review of abstracts or papers submitted for presentation at scholarly conferences in the respective field;
- Serving as a member of a Ph.D. dissertation committee that makes the final judgment as to whether a candidate's body of work satisfies the requirements for a doctoral degree, as evidenced by departmental records; and
- Peer reviewer for government research funding programs.

Considerations:

The petitioner must show that the person has not only been invited to judge the work of others, but also that the person actually participated in the judging of the work of others in the same or allied field of specialization. For example, a petitioner might document the person's peer review work by submitting a copy of a request from a journal to the person to do the review, accompanied by evidence confirming that the person actually completed the review.

Criterion 5: The person's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.[27]

First, USCIS determines whether the person has made original contributions in the field.

Second, USCIS determines whether the original contributions are of major significance to the field.

Examples of relevant evidence include, but are not limited to:

- Published materials about the significance of the person's original work;
- Testimonials, letters, and affidavits about the person's original work;
- Documentation that the person's original work was cited at a level indicative of major significance in the field; and
- Patents or licenses deriving from the person's work or evidence of commercial use of the person's work.

Considerations:

Analysis under this criterion focuses on whether the person's original work constitutes major, significant contributions to the field.

Evidence that the person's work was funded, patented, or published, while potentially demonstrating the work's originality, will not necessarily establish, on its own, that the work is of major significance to the field.

For example, published research that has provoked widespread commentary on its importance from others working in the field, and documentation that it has been highly cited relative to others' work in that field, may be probative of the significance of the person's contributions to the field of endeavor.

Criterion 5: The person's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.[27]

Similarly, evidence that the person developed a patented technology that has attracted significant attention or commercialization may establish the significance of the person's original contribution to the field. If a patent remains pending, USCIS generally requires additional supporting evidence to document the originality of the person's contribution, such as detailed reference letters.

Detailed letters from experts in the field explaining the nature and significance of the person's contribution may also provide valuable context for evaluating the claimed original contributions of major significance, particularly when the record includes documentation corroborating the claimed significance.

Submitted letters should specifically describe the person's contribution and its significance to the field and should also set forth the basis of the writer's knowledge and expertise.

Criterion 6: The person's authorship of scholarly articles in the field, in professional or major trade publications or other major media.[28]

First, USCIS determines whether the person has authored scholarly articles in the field.

As defined in the academic arena, a scholarly article reports on original research, experimentation, or philosophical discourse. It is written by a researcher or expert in the field who is often affiliated with a college, university, or research institution. Scholarly articles are also generally peer reviewed by other experts in the field of specialization. In general, it should have footnotes, endnotes, or a bibliography, and may include graphs, charts, videos, or pictures as illustrations of the concepts expressed in the article.

Examples of scholarly article authorship include, but are not limited to:

- Publications in professionally-relevant peer-reviewed journals; and
- Published conference presentations at nationally or internationally recognized conferences.[29]

For other fields, a scholarly article should be written for learned persons in that field. ("Learned" is defined as "having profound knowledge gained by study").[30] Learned persons include all persons having profound knowledge of a field.

Second, USCIS determines whether the publication qualifies as a professional publication, major trade publication, or major media publication.

In evaluating whether a submitted publication is a professional publication or major media, relevant factors include the intended audience (for professional journals) and the circulation or readership relative to other media in the field (for major media).

Criterion 7: Display of the person's work in the field at artistic exhibitions or showcases.[31]

First, USCIS determines whether the work that was displayed is the person's work product.

The description of this type of evidence in the regulation provides that the work must be the person's work product.

Second, USCIS determines whether the venues (virtual or otherwise) where the person's work was displayed were artistic exhibitions or showcases. Merriam-Webster's online dictionary defines "exhibition" as a public showing (as of works of art, objects of manufacture, or athletic skill).[32]

While the dictionary definition includes public showings other than those that are artistic in nature, the plain language of the criterion includes the modifier "artistic" and explicitly requires that the exhibitions or showcases be artistic in nature. USCIS only considers non-artistic exhibitions or showcases as part of a properly supported claim of comparable evidence, discussed in more detail below.

Criterion 8: The person has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.[33]

First, USCIS determines whether the person has performed in a leading or critical role for an organization, establishment, or a division or department of an organization or establishment.

Examples of lead or critical roles may include, but are not limited to:

- Senior faculty or senior research position for a distinguished academic department or program;
- Senior research position for a distinguished non-academic institution or company;
- Principal or named investigator for a department, institution, or business that received a merit-based government award, such as an academic research or Small Business Innovation Research (SBIR) grant;[34]
- Member of a key committee within a distinguished organization;
- Founder or co-founder of, or contributor of intellectual property to, a startup business that has a distinguished reputation; and
- Leading or critical role for a distinguished organization or a distinguished division of an institution or company, as explained in detail by the director or a principal investigator of the relevant organization or division.

Considerations:

In evaluating such evidence, officers examine whether the role is (or was) leading or critical.

Criterion 8: The person has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.[33]

For a leading role, officers look at whether the evidence establishes that the person is (or was) a leader within the organization or establishment or a division or department thereof. A title, with appropriate matching duties, can help to establish that a role is (or was), in fact, leading.

For a critical role, officers look at whether the evidence establishes that the person has contributed in a way that is of significant importance to the outcome of the organization or establishment's activities or those of a division or department of the organization or establishment.

A supporting role may be considered critical if the person's performance in the role is (or was) important. It is not the title of the person's role, but rather the person's performance in the role that determines whether the role is (or was) critical.

This is one criterion where letters from persons with personal knowledge of the significance of the person's leading or critical role can be particularly helpful to officers in making this determination, so long as the letters contain detailed and probative information that specifically addresses how the person's role for the organization, establishment, division, or department was leading or critical. Evidence of experience must consist of letters from employers.[35]

Second, USCIS determines whether the organization or establishment, or the department or division for which the person holds or held a leading or critical role, has a distinguished reputation.

The relative size or longevity of an organization or establishment is not in and of itself a determining factor but is considered together with other information to determine whether a distinguished reputation exists. Other relevant factors for evaluating the reputation of an organization or establishment can include the scale of its customer base or relevant media coverage.

For academic departments, programs, and institutions, officers may also consider relevant and credible national rankings and receipt of government research grants as positive factors.

For a startup business, officers may consider evidence that the business has received significant funding from government entities, venture capital funds, angel investors, or other such funders commensurate with funding rounds generally achieved for that startup's stage and industry, as a positive factor regarding its distinguished reputation.

Merriam-Webster's online dictionary defines "distinguished" as "marked by eminence, distinction, or excellence" or "befitting an eminent person."[36]

Criterion 9: The person has commanded a high salary, or other significantly high remuneration for services, in relation to others in the field.[37]

USCIS determines whether the person's salary or remuneration is high relative to the compensation paid to others working in the field. USCIS does not interpret the phrase "has commanded" to mean that the person must have already earned such salary or remuneration in order to meet the criterion. Rather, a credible contract or job offer showing prospective salary or remuneration may establish that the person has been able to command such compensation.

Evidence relevant to demonstrating high remuneration may include, but is not limited to:

- Tax returns, pay statements, or other evidence of past salary or remuneration for services;
- Contract, job offer letter, or other evidence of prospective salary or remuneration for services; and
- Comparative wage or remuneration data for the person's field, such as geographical or position-appropriate compensation surveys.

Considerations:

Evidence regarding whether the person's compensation is high relative to that of others working in the field may take many forms. Examples may include, but are not limited to, geographical or position-appropriate compensation surveys and organizational justifications to pay above the compensation data. The following websites, among others, may be helpful in evaluating the relative compensation for a given field:

- The Bureau of Labor Statistics (BLS) Overview of BLS Wage Data by Area and Occupation webpage; and
- The Department of Labor's Career One Stop website.

When evaluating whether a comparison between the beneficiary's documented remuneration and the remuneration in the survey is accurate, the following considerations, among others, may be relevant:

- The description of the occupation. Broad descriptions that include multiple occupations or multiple industries may not provide an accurate comparison to others in the field. For example, "directors and producers" might be listed as a single category across industries, but evidence that a film director receives high remuneration based on a broad range of occupational data that include disparate occupations such as film director and radio show producer, may not be sufficiently probative;
- The validity of the survey. Some websites provide user-reported salary data, which may not be a valid comparison if, for example, too few users reported their salaries or the data is otherwise not credible or reliable;
- Location and currency. Officers evaluate persons working outside of the United States based on the wage statistics or comparable evidence relevant to the applicable work location, rather than by simply converting the salary to U.S. dollars and then viewing whether that salary would be considered high in the United States; and
- Salary rate being measured. Officers consider whether the comparison data measures an hourly rate or an annual salary. Another consideration is how that information compares to the beneficiary's pay. Many artists are not paid an hourly rate but instead are paid a daily rate (which may not be equivalent to 8 hours) or are paid a certain amount for a project (involving an unknown number of hours). However, hourly wage data may still be probative if the petitioner submits documentation regarding the number of hours worked. Such documentation can include, but is not limited to, pay statements, personnel records, or testimonial evidence from the relevant employer.

For entrepreneurs or founders of startup businesses, officers consider evidence that the business has received significant funding from government entities, venture capital funds, angel investors, or other such funders in evaluating the credibility of submitted contracts, job offer letters, or other evidence of prospective salary or remuneration for services.

Criterion 10: Commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.[38]
USCIS determines whether the person has enjoyed commercial successes in the performing arts. This criterion focuses on volume of sales and box office receipts as a measure of the person's commercial success in the performing arts. Therefore, the mere fact that a person has recorded and released musical compilations or performed in theatrical, motion picture, or television productions would be insufficient, in and of itself, to meet this criterion. The evidence must show that the volume of sales and box office receipts reflect the person's commercial success relative to others involved in similar pursuits in the performing arts.

Comparable evidence: Comparable evidence to establish the person's eligibility if the standards do not readily apply to the person's occupation.[39]
USCIS determines if the evidence submitted is comparable to the evidence required in 8 CFR 204.5(h)(3). This regulatory provision provides petitioners the opportunity to submit comparable evidence to establish the person's eligibility, if it is determined that the evidentiary criteria described in the regulations do not readily apply to the person's occupation. When evaluating such comparable evidence, officers must consider whether the regulatory criteria are readily applicable to the person's occupation and, if not, whether the evidence provided is truly comparable to the criteria listed in that regulation. A general unsupported assertion that the listed evidentiary criterion does not readily apply to the petitioner’s occupation is not probative. Similarly, general claims that USCIS should accept witness letters as comparable evidence are not persuasive. However, a statement from the petitioner can be sufficient to establish whether a criterion is readily applicable if that statement is detailed, specific, and credible. Although officers do not consider comparable evidence where a particular criterion is readily applicable to the person’s occupation, a criterion need not be entirely inapplicable to the person’s occupation. Rather, the officer considers comparable evidence if the petitioner shows that a criterion is not easily applicable to the person’s job or profession.[40] As with all extraordinary ability petitions, officers may consider comparable evidence in support of petitions for persons working in science, technology, engineering, or mathematics (STEM) fields. Specifically, if a petitioner demonstrates that a particular criterion does not readily apply to the person’s occupation, the petitioner may submit evidence that is of comparable significance to that criterion to establish sustained acclaim and recognition. For instance, if the publication of scholarly articles is not readily applicable to a person whose occupation is in an industry rather than academia, a petitioner might demonstrate that the person’s presentation of work at a major trade show is of comparable significance to that criterion. As another example, if the petitioner demonstrates that receipt of a high salary is not readily applicable to the person’s position as an entrepreneur, the petitioner might present evidence that the person’s highly valued equity holdings in the startup are of comparable significance to the high salary criterion. The following are other non-exhaustive examples of where the comparable evidence provision might apply: • A person who is an Olympic coach whose athlete wins an Olympic medal while under the person's principal tutelage would likely constitute evidence comparable to that in 8 CFR 204.5(h)(3)(v); or • Election to a national all-star or Olympic team might serve as comparable evidence for evidence of memberships in 8 CFR 204.5(h)(3)(ii). There is no comparable evidence for the one-time achievement of a major, international recognized award.

Notably, the evidence evaluated in this step is also reviewed in the next step where the officer must determine whether the person is one of that small percentage who has risen to the very top of the field of endeavor, and that the person has sustained national or international acclaim.

However, objectively meeting the regulatory criteria in the first step alone does not establish that the person in fact meets the requirements for classification as a person with extraordinary ability.[41]

For example:

- Participating in the judging of the work of others in the same or an allied field of specialization alone, regardless of the circumstances, should satisfy the regulatory criteria in the first step of the analysis. However, the second step requires the officer to evaluate the person's participation to determine whether it was indicative of the person being one of that small percentage who have risen to the very top of the field of endeavor and enjoying sustained national or international acclaim.
- Publishing scholarly articles in professional or major trade publications or other major media alone, regardless of the caliber, should satisfy the regulatory criteria in the first step of the analysis. However, the second step requires the officer to evaluate the person's publications to determine whether they were indicative of the person being one of that small percentage who have risen to the very top of the field of endeavor and enjoying sustained national or international acclaim.

The question of whether the person is one of that small percentage who have risen to the very top of the field of endeavor and enjoys sustained national or international acclaim should be addressed in the second step of the analysis (final merits determination). In the first step, the officer is only required to determine if the evidence objectively meets the regulatory criteria.

2. Final Merits Determination

In the second step of the analysis, the officer should consider the petition in its entirety to determine eligibility according to the standard. To establish eligibility, the petition must demonstrate that the person has sustained national or international acclaim and that their achievements have been recognized in the field of expertise, indicating that the person is one of that small percentage who has risen to the very top of the field of endeavor. The officer applies a preponderance of the evidence standard when making this determination.

An officer may not limit the kind of evidence the officer thinks the person should be able to submit and deny the petition if that particular type of evidence (whether one of the prescribed types[42] or comparable evidence[43]) is absent, if the person nonetheless submitted other types of evidence that meet the regulatory requirements for the classification.

For example, an officer may think that if a person is extraordinary, there should be published articles about the person and the person’s work. However, an officer cannot deny the petition because no published articles were submitted, so long as the petitioner has submitted other evidence that meets the three qualifying criteria which demonstrates the person is in fact

extraordinary. Approval or denial of a petition is based on the type and quality of evidence submitted rather than assumptions about the failure to address different criteria.

At this step, officers consider any potentially relevant evidence in the record, even if such evidence does not fit one of the above regulatory criteria or was not presented as comparable evidence. The officers consider all evidence in the totality. Some evidence may weigh more favorably on its own, while other evidence is more persuasive when viewed with other evidence.

The following are examples of situations where evidence in the record may help officers evaluate the quality of the initial or comparable evidence and determine whether in a totality analysis that considers all of the evidence, the person is among the small percentage at the top of the field and has sustained national or international acclaim:[44]

- The record demonstrates that the person has published articles in particularly highly-ranked journals (including published conference proceedings) relative to other journals in the field, as demonstrated by, for example, evidence the petitioner provides regarding the journal's impact factor.[45] Depending on the level of recognition of the journals in question, as demonstrated by evidence in the record, there may be particular prestige or acclaim associated with publication in such journals, especially if the person is the most significant contributor to the published article, a senior author, or the sole author of the article;
- The petitioner provides evidence demonstrating that the total rate of citations to the person's body of published work is high relative to others in the field, such as the person has a high h-index[46] for the field. Depending on the field and the comparative data the petitioner provides, such evidence may indicate a person's high overall standing for the purpose of demonstrating that the person is among the small percentage at the top of the field;[47]
- The petitioner documents the person's employment or research experience with leading institutions in the field (such as U.S. universities that have been recognized as having high or very high research activity by the Carnegie Classification of Institutions of Higher Education,[48] foreign universities with comparably high research activity, or a university that is highly regarded according to a widely recognized metric such as the QS World University Rankings[49]). Such employment or experience can be a positive factor toward demonstrating that the person is among the small percentage at the top of the field;
- The record establishes that the person has received unsolicited invitations to speak or present research at nationally or internationally recognized conferences in the field. This type of invitation is generally indicative of a person's high standing and recognition for achievements in the field; and
- The record establishes that the person is named as an investigator, scientist, or researcher on a peer-reviewed and competitively-funded U.S. government grant or stipend for STEM research. This type of evidence can be a positive factor indicating a person is among the small percentage at the top of the person's field.

In all cases, the petitioner must provide sufficient context regarding the above evidence and considerations to demonstrate that the evidence meets the relevant criteria and to establish the person's extraordinary ability in the totality of the circumstances. This means that the petitioner must explain the significance of the submitted evidence, and how it demonstrates that the person has achieved sustained national or international acclaim and recognition in their field of expertise.

While a person may be stronger in one particular evidentiary area than in others, the totality of the evidence must establish that the person is extraordinary. If the officer determines that the petitioner has failed to demonstrate eligibility, the officer should not merely make general assertions regarding this failure. Rather, the officer must articulate the specific reasons as to why the officer concluded that the petitioner has not demonstrated by a preponderance of the evidence that the person has extraordinary ability.[50] As with all adjudications, if an officer believes that the facts stated in the petition are not true, and can articulate why in the denial, then the officer denies the petition and explains the reasons in the written denial.

If requesting additional evidence is appropriate, officers should provide some explanation of the deficiencies in the evidence already submitted and, if possible, examples of persuasive evidence that the petitioner might provide to corroborate the statements made in the petition. If a petitioner has submitted evidence that the petitioner believes establishes the person's extraordinary ability, merely restating the evidentiary requirements or stating that the evidence submitted is insufficient does not clarify to the petitioner how to overcome the deficiencies.

With respect to demonstrating extraordinary ability in athletics, USCIS considers a male athlete who has been competing against women to be a negative factor in determining whether the alien is among the small percentage at the very top of the field.[51]

3. Other Evidentiary Considerations

Letters of Support

Many petitions to classify a person with extraordinary ability contain letters of support. Letters of support, while not without weight, should not form the cornerstone of a successful claim for this classification. Rather, the statements made by the witnesses should be corroborated by documentary evidence in the record. The letters should explain in specific terms why the witnesses believe the beneficiary to be of the caliber of a person with extraordinary ability. Letters that merely reiterate USCIS' definitions relating to this classification or make general and expansive statements regarding the beneficiary and the beneficiary's accomplishments are generally not persuasive.

The relationship or affiliation between the beneficiary and the witness is also a factor the officer should consider when evaluating the significance of witnesses' statements. It is generally expected that one whose accomplishments have garnered sustained national or international acclaim would have received recognition for their accomplishments well beyond the circle of their personal and professional acquaintances.

In some cases, letters from others in the beneficiary's field may merely make general assertions about the beneficiary, and at most, indicate that the beneficiary is a competent, respected figure within the field of endeavor, but the record lacks sufficient, concrete evidence supporting such statements. These letters should be considered, but do not necessarily show the beneficiary's claimed extraordinary ability.

Evaluating Immigrant Petitions Filed on Behalf of O-1 Nonimmigrants

An officer might encounter a case where a petition is filed on behalf of a person who was previously classified as an O-1 nonimmigrant with extraordinary ability, or extraordinary achievement in the case of persons in the motion picture and television industry.[52] Though the prior approval of an O-1 petition is a relevant consideration and can be an indicator of eligibility in adjudicating an immigrant petition for a person with extraordinary ability, it is not determinative.[53]

Due to the similarities in many of the evidentiary requirements, some courts have asked USCIS to provide an explanation as to why, if the person had previously been classified in a roughly analogous nonimmigrant category, USCIS has determined that the person is not eligible for the employment-based immigrant visa classification in question.

For this reason, where possible, officers issuing denials in such cases should provide a brief discussion as to why, notwithstanding the previous O-1 nonimmigrant visa petition approval, the petitioner has failed to meet its burden to establish that the beneficiary is eligible for classification as an immigrant with extraordinary ability.

Footnotes

[^ 1] See INA 203(b)(1)(A). See 8 CFR 204.5(h).

[^ 2] See 8 CFR 204.5(h)(5). See 8 CFR 204.5(h)(1) (providing that “[a]n alien, or any person on behalf of the alien,” may file the petition).

[^ 3] See INA 203(b)(1)(A)(ii)-(iii).

[^ 4] See INA 203(b)(1)(A)(i). See 8 CFR 204.5(h)(3).

[^ 5] According to Black's Law Dictionary (11th ed. 2019), the definition of sustain is "to support or maintain, especially over a long period of time . . . To persist in making (an effort) over a long period of time."

[^ 6] See INA 203(b)(1)(A)(ii). See 8 CFR 204.5(h)(5).

[^ 7] See Executive Order 14201, Keeping Men Out of Women's Sports, 90 FR 9279 (Feb. 11, 2025), and Executive Order 14168, Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, 90 FR 8615 (Jan. 20, 2025). For more information on evidence of biological sex and the role of biological sex in immigration benefit requests, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 5, Verification of Identifying Information, Section B, Personal Information, Subsection 2, Sex [1 USCIS-PM E.5(B)(2)].

[^ 8] See INA 203(b)(1)(A)(iii).

[^ 9] See *Matter of Price (PDF)*, 20 I&N Dec. 953 (Assoc. Comm. 1994) (golfer of beneficiary’s caliber will substantially benefit prospectively the United States given the popularity of the sport).

[^ 10] See 8 CFR 204.5(h)(3)-(4).

[^ 11] According to an executive order, allowing male athletes (as defined by executive order) to compete in women’s sports is demeaning, unfair, dangerous, and denies women and girls the equal opportunity to participate and excel in competitive sports. See Keeping Men Out of Women's Sports, 90 FR 9279 (Feb. 11, 2025), and Executive Order 14168, Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, 90 FR 8615 (Jan. 20, 2025) (Sec. 2 defining “male” and “men”). For more information on evidence of biological sex and the role of biological sex in immigration benefit requests, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 5, Verification of Identifying Information, Section B, Personal Information, Subsection 2, Sex [1 USCIS-PM E.5(B)(2)].

[^ 12] See 8 CFR 204.5(h)(3).

[^ 13] See 8 CFR 204.5(h)(2).

[^ 14] See *Kazarian v. USCIS (PDF)*, 596 F.3d 1115 (9th Cir. 2010).

[^ 15] See *Kazarian v. USCIS (PDF)*, 596 F.3d 1115 (9th Cir. 2010).

[^ 16] See 8 CFR 204.5(h)(3).

[^ 17] For example, in evaluating an award submitted under 8 CFR 204.5(h)(3)(i), it is necessary to consider the level of recognition the award holds to determine whether it is “nationally or internationally recognized,” consistent with the requirements of the criterion. However, evidence that the beneficiary’s work was displayed at an artistic exhibition alone, regardless of caliber or significance, would satisfy the requirements of 8 CFR 204.5(h)(3)(vii).

[^ 18] See *Kazarian v. USCIS (PDF)*, 596 F.3d 1115, 1122 (9th Cir. 2010).

[^ 19] See 8 CFR 204.5(h)(3).

[^ 20] See 8 CFR 204.5(h)(3)(i).

[^ 21] In general, qualifying awards include team awards where each member receives a trophy, certification, or medal; appears on the podium or stage; or is specifically named in the awarding organization’s announcement of the award selection. Examples include members of a musical group who receive an award and relay team members who appear together on the medal podium. Mere acknowledgment from the award recipient does not constitute receiving the award from the awarding authority.

[^ 22] The Carnegie Classification of Institutions of Higher Education recognizes R1 and R2 doctoral universities as having very high or high research activity, respectively, based on publicly available federal government data regarding the number of doctoral degrees awarded and the amount of total research expenditures. See the Carnegie Classification of Institutions of Higher Education’s Carnegie Classification webpage.

[^ 23] See 8 CFR 204.5(h)(3)(ii).

[^ 24] While current membership is not required to meet the plain language requirements of this criterion, if the petition is not accompanied by any recent evidence, the length of time since membership may be a consideration for whether the person has sustained acclaim in the final merits determination.

[^ 25] See 8 CFR 204.5(h)(3)(iii).

[^ 26] See 8 CFR 204.5(h)(3)(iv).

[^ 27] See 8 CFR 204.5(h)(3)(v).

[^ 28] See 8 CFR 204.5(h)(3)(vi).

[^ 29] While many articles accepted for presentation at conferences do not result in publication, there are conferences that peer review and publish accepted presentations in professional journals (sometimes called proceedings), such that they may qualify as scholarly articles under this criterion.

[^ 30] See Oxford English Dictionary’s definition of “learned.”

[^ 31] See 8 CFR 204.5(h)(3)(vii).

[^ 32] See Merriam-Webster Dictionary's definition of "exhibition."

[^ 33] See 8 CFR 204.5(h)(3)(viii).

[^ 34] See SBIR America's Seed Fund webpage.

[^ 35] See 8 CFR 204.5(g)(1).

[^ 36] See Merriam-Webster Dictionary's definition of "distinguished."

[^ 37] See 8 CFR 204.5(h)(3)(ix).

[^ 38] See 8 CFR 204.5(h)(3)(x).

[^ 39] See 8 CFR 204.5(h)(4).

[^ 40] Consistent with a plain language reading, "readily" means "easily" or "without much difficulty." See Merriam-Webster Dictionary's definition of "readily." The term "occupation" is defined as "the principal business of one's life." See Merriam-Webster Dictionary's definition of "occupation."

[^ 41] See INA 203(b)(1)(A).

[^ 42] See 8 CFR 204.5(h)(3).

[^ 43] See 8 CFR 204.5(h)(4).

[^ 44] Not all cases will have such evidence, nor is such evidence necessary for the petitioner to demonstrate eligibility. Additionally, the list is a non-exhaustive list of examples. While the listed factors may be especially relevant to persons in STEM fields, the guidance applies to all extraordinary ability petitions.

[^ 45] Impact factor is commonly used as a measure of a journal's influence; it represents the average number of citations received per article published in that journal during the 2 preceding years. See Garfield, E, The History and Meaning of the Journal Impact Factor, Journal of the American Medical Association, Vol. 295, Iss. 1, p. 90 (2006).

[^ 46] The h-index is an example of a tool for measuring a researcher's output and impact. It is based on the highest number of the researcher's publications that have been cited at least that same number of times. For example, if a researcher has an h-index of 10, it means the researcher has 10 publications that have 10 or more citations each (but not 11 publications with at least 11 citations each). See Hirsch, J, An Index to Quantify an Individual's Scientific Research Output, Proceedings of the National Academy of Sciences of the United States of America, Vol. 102, Iss. 46, p. 16569 (2005). Other indices for measuring output and impact are also used. When relying on any of these tools, a petitioner should explain its methodology and significance with supporting documentation because the sources for the data and the duration of time involved in the calculation can impact the actual h-index value.

[^ 47] This factor is less relevant for beneficiaries early in their career, as such persons have had less time to accumulate citations but may nevertheless have garnered acclaim and risen to the small percentage at the top of the field as demonstrated by other evidence in the record. As stated above, none of the listed factors are required to demonstrate eligibility.

[^ 48] The Carnegie Classification of Institutions of Higher Education uses the R1 and R2 doctoral university designations to recognize institutions as having very high or high research activity, respectively, based on publicly available federal government data regarding the number of doctoral degrees awarded and the amount of total research expenditures. See the Carnegie Classification of Institutions of Higher Education's Carnegie Classification webpage.

[^ 49] QS is a British analytics company specializing in global higher education. See the QS About Us webpage. The QS World University Rankings annually evaluate universities according to a methodology based on six consistent and empirical metrics: academic reputation (40 percent), employer reputation (10 percent), faculty to student ratio (20 percent), citations per faculty (20 percent), international faculty ratio (5 percent), and international student ratio (5 percent). These metrics are used to rank universities, as well as capture and assess university performance. See the QS World University Rankings Methodology webpage.

[^ 50] As described in INA 203(b)(1)(A).

[^ 51] For more information on this classification, see Volume 2, Nonimmigrants, Part M, Nonimmigrants of Extraordinary Ability or Achievement (O), Chapter 4, O-1 Beneficiaries [2 USCIS-PM M.4].

[^ 52] Each petition is separate and independent and must be adjudicated on its own merits, under the corresponding statutory and regulatory provisions. Moreover, the O-1 nonimmigrant classification has different standards and criteria for persons in the arts and the motion picture and television industry when compared to the definition and standard set forth for immigrants with extraordinary ability. For example, a person in the arts may have extraordinary ability under the O-1 category because the person has distinction, which is defined as a nonimmigrant with extraordinary ability in the arts; but does not meet the definition for extraordinary ability according to the immigrant classification criteria, which is defined as a person who is among the small percentage at the very top of the field.

[^ 53] See Keeping Men Out of Women's Sports, 90 FR 9279 (Feb. 11, 2025). For more information on evidence of biological sex and the role of biological sex in immigration benefit requests, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 5, Verification of Identifying Information, Section B, Personal Information, Subsection 2, Sex [1 USCIS-PM E.5(B)(2)].

Chapter 3 - Outstanding Professor or Researcher

A. Eligibility

A U.S. employer, including a university institution of higher learning or private employer, may petition for a professor or researcher who is internationally recognized as outstanding in a specific academic area to work in a tenured or tenure-track position or a comparable position to conduct research.[1]

B. Evidence

The regulation describes the evidence that the petitioner must submit in support of an Immigrant Petition for Alien Workers (Form I-140) for an outstanding professor or researcher.[2] The petitioner must submit evidence to demonstrate that the beneficiary professor or researcher (beneficiary) is recognized internationally as outstanding in the academic field specified in the petition. Academic field means "a body of specialized knowledge offered for study at an accredited U.S. university or institution of higher education."[3]

By regulatory definition, a body of specialized knowledge is larger than a very small area of specialization in which only a single course is taught or that is the subject of a very specialized dissertation. As such, it would be acceptable to find the beneficiary is an outstanding professor or researcher in particle physics rather than physics in general, as long as the petitioner has demonstrated that the claimed field is "a body of specialized knowledge offered for study at an accredited United States university or institution of higher education."[4]

In addition, the petitioner must submit evidence of an offer from a qualifying prospective employer of tenured or tenure-track employment (for professors) or permanent employment (which can also include tenured or tenure track positions) in the case of research positions.[5] Finally, the petitioner must provide evidence that the beneficiary has had at least 3 years of experience in teaching or research in the academic field in which the beneficiary will be engaged.[6]

Officers should use a two-step analysis to evaluate the evidence submitted with the petition to demonstrate eligibility for classification as an outstanding professor or researcher.[7]

Petition to Classify an Outstanding Professor or Researcher: Overview of Two-Step Evidentiary Review	
Step 1	Assess whether evidence meets regulatory criteria: Determine, by a preponderance of the evidence, which evidence submitted by the petitioner objectively meets the parameters of the regulatory description that applies to that type of evidence (referred to as "regulatory criteria").
Step 2	Final merits determination: Evaluate all the evidence together when considering the petition in its entirety for the final merits determination, in the context of the high level of expertise required for this immigrant classification.

Officers should apply a preponderance of the evidence standard when making these determinations.

1. Assess Whether Evidence Meets Any Regulatory Criteria

The first step of the evidentiary review is limited to determining whether the evidence submitted with the petition is comprised of at least two of the six regulatory criteria.[8]

For purposes of the first step of the analysis, officers should consider the quality and caliber of the evidence to determine whether a particular regulatory criterion has been met, to the extent the criterion has qualitative requirements.[9] Officers should not yet make a determination regarding whether or not the beneficiary is recognized internationally as outstanding in the academic field.

For example:

- Participating in the judging of the work of others in the same or an allied academic field alone, regardless of the circumstances, should satisfy the regulatory criteria in step one. However, for the analysis in step two, the beneficiary's participation should be evaluated to determine whether it was indicative of the beneficiary being recognized internationally as outstanding in a specific academic area.
- Authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field alone, regardless of the caliber, should satisfy the regulatory criteria in step one. However, for the analysis in step two, the beneficiary's authorship of books or articles should be evaluated to determine whether they were indicative of the beneficiary being recognized internationally as outstanding in a specific academic area.

The issue of whether the beneficiary is recognized internationally as outstanding in a specific academic area should be addressed in the second step of the analysis (final merits determination), not in the first step where the officer is only required to determine if the evidence objectively meets the regulatory criteria.

The following tables provide details on the limited determinations that officers should make when first evaluating the evidence, including comparable evidence.

Criterion 1: Receipt of major prizes or awards for outstanding achievement in the academic field.[10]
First, USCIS determines if the beneficiary was the recipient of prizes or awards. The description of this type of evidence in the regulation indicates that the focus must be on the beneficiary's receipt of the major prizes or awards, as opposed to the employer's receipt of the prizes or awards. Second, USCIS determines whether the prizes or awards received are major ones and are for outstanding achievement in the academic field. Examples of qualifying rewards may include, but are not limited to: • Awards from well-known national institutions or well-known professional associations; • Certain doctoral dissertation awards; and • Certain awards recognizing presentations at nationally or internationally recognized conferences. Considerations: Relevant considerations regarding whether the basis for granting the major prizes or awards for outstanding achievement in the academic field include, but are not limited to: • The criteria used to grant the major prizes or awards; • The number of prize recipients or awardees; and • The pool of competitors. For example, an award available only to persons within a single locality, employer, or school may have little international recognition, while an award open to members of an internationally known and respected institution (including an R1 or R2 doctoral university[11]) or professional organization may be internationally recognized.

Criterion 2: Membership in associations in the academic field that require outstanding achievements of their members.[12]
First, USCIS determines if the association for which the beneficiary claims membership requires outstanding achievements in the academic field. Examples of associations in the field requiring outstanding achievement of their members may include, but are not limited to: • Membership in certain professional associations; and

Criterion 2: Membership in associations in the academic field that require outstanding achievements of their members.[12]

- Fellowships with certain organizations or institutions.

Considerations:

The petitioner must show that membership in the association is based on the beneficiary's outstanding achievements in the academic field.

Associations may have multiple levels of membership. The level of membership afforded to the beneficiary must show that it requires outstanding achievements in the academic field for which classification is sought.

As a possible example, general membership in an international organization for engineering and technology professionals may not meet the requirements of the criterion. However, if that same organization at the fellow level requires, in part, that a nominee have accomplishments that have contributed importantly to the advancement or application of engineering, science, and technology, and that a council of experts and a committee of current fellows judges the nominations for fellows, that higher, fellow level may be qualifying.

As another possible example, membership as a fellow in a scientific society dedicated to artificial intelligence is based on recognition of a nominee's significant, sustained contributions to the field of artificial intelligence, and a panel of current fellows makes the selection of new fellows.

Relevant factors that may lead to a conclusion that the beneficiary's membership in the association was not based on outstanding achievements in the academic field include, but are not limited to, instances where the beneficiary's membership was based:

- Solely on a level of education or years of experience in a particular field; or
- On the payment of a fee or by subscribing to an association's publications.

Criterion 3: Published material in professional publications written by others about the beneficiary's work in the academic field. Such material must include the title, date, and author of the material, and any necessary translation.[13]

First, USCIS determines whether the published material was about the beneficiary's work.

Examples of qualifying published material may include, but are not limited to:

- Professional or major print publications (newspaper articles, popular and academic journal articles, books, textbooks, or similar publications) regarding the beneficiary and the beneficiary's work;
- Professional or major online publications regarding the beneficiary and the beneficiary's work; and
- Transcripts of professional or major audio or video coverage of the beneficiary and the beneficiary's work.

Considerations:

The published material should be about the beneficiary's work in the field, not just about the beneficiary's employer or another organization that the beneficiary is associated with. Articles that cite the beneficiary's work as one of multiple footnotes or endnotes are not generally about the beneficiary's work.

However, the beneficiary's work need not be the only subject of the material; published material that covers a broader topic but includes a substantial discussion of the beneficiary's work in the field may be considered material about the beneficiary's work.

Moreover, officers may consider material that focuses solely or primarily on work or research being undertaken by a team of which the beneficiary is a member, provided that the material mentions the beneficiary in connection with the work, or other evidence in the record documents the beneficiary's significant role in the work or research.

Evidence may include documentation such as print or online articles in professional publications or a transcript of professional audio or video coverage of the beneficiary's work.

Second, USCIS determines whether the publication qualifies as a professional publication.

Evidence of published material in professional publications about the beneficiary should establish the circulation (online or in print) or viewership and the intended audience of the publication, as well as the title, date, and author of the material.

Criterion 4: The beneficiary's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field.[14]

USCIS determines whether the beneficiary has participated, either individually or on a panel, as the judge of the work of others in the same or an allied academic field.

Examples of qualifying judging experience may include, but are not limited to:

- Reviewer of abstracts or papers submitted for presentation at scholarly conferences in the respective field;
- Peer reviewer for scholarly publications;
- Member of doctoral dissertation committees; and
- Peer reviewer for government research funding programs.

Considerations:

The petitioner must show that the beneficiary has not only been invited to judge the work of others, but also that the beneficiary actually participated in the judging of the work of others in the same or allied academic field.

Criterion 4: The beneficiary's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field.[14]
For example, a petitioner might document a beneficiary's peer review work by submitting a copy of a request from a journal to the beneficiary to do the review, accompanied by evidence confirming that the beneficiary actually completed the review.

Criterion 5: The beneficiary's original scientific or scholarly research contributions to the academic field.[15]
USCIS determines whether the beneficiary has made original scientific or scholarly research contributions to the academic field. Examples of relevant evidence of qualifying contributions may include, but are not limited to: • Published materials about the significance of the beneficiary's original work; • Testimonials, letters, and affidavits about the beneficiary's original work; • Documentation that the beneficiary's original work was cited at a level indicative of an original scientific or scholarly research contribution to an academic field; and • Patents or licenses deriving from the beneficiary's work or evidence of commercial use of the beneficiary's work. Considerations: The regulations do not require that the beneficiary's contributions be of major significance. That said, the description of this type of evidence in the regulation does not simply require original research, but an original scientific or scholarly research contribution.[16] Moreover, the description of this type of evidence in the regulation requires that the contribution must be to the academic field, rather than an individual laboratory or institution. The regulations include a separate criterion for scholarly articles.[17] Therefore, contributions are a separate evidentiary requirement from scholarly articles. Possible items that could satisfy this criterion include, but are not limited to: • Citation history or patterns for the beneficiary's work, as evidenced by number of citations, as well as an examination of the impact factor for the journals in which the beneficiary publishes.[18] While many scholars publish, not all are cited or publish in journals with significant impact factors. The petitioner may use web tools such as Google Scholar, SciFinder, and the Web of Science to establish the number of citations and the impact factor for journals; and • Detailed letters from experts in the field explaining the nature and significance of the beneficiary's contribution may also provide valuable context for evaluating whether the original work is a contribution to the academic field, particularly when the record includes documentation corroborating the claimed significance. Submitted letters should specifically describe the beneficiary's contribution and its significance to the field and should also set forth the basis of the writer's knowledge and expertise.

Criterion 6: The beneficiary's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field.[19]
First, USCIS determines whether the beneficiary has authored scholarly articles in the field. Examples of qualifying publications may include, but are not limited to: • Publications in professionally-relevant journals; and • Published conference presentations at nationally or internationally recognized conferences.[20] Considerations: As defined in the academic arena, a scholarly article reports on original research, experimentation, or philosophical discourse. It is written by a researcher or expert in the field who is often affiliated with a college or university. Scholarly articles are also generally peer reviewed by other experts in the field of specialization. It should have footnotes, endnotes, or a bibliography, and may include graphs, charts, videos, or pictures as illustrations of the concepts expressed in the article. Second, USCIS determines whether the publication qualifies as a scholarly book or as a scholarly journal with international circulation in the academic field. Evidence of published material in scholarly journals with international circulation should establish that the circulation (online or in print) is, in fact, international, and who the intended audience of the publication is. Scholarly journals are typically written for a specialized audience often using technical jargon. Articles normally include an abstract, a description of methodology, footnotes, endnotes, and bibliography.

Comparable evidence: Comparable evidence to establish the beneficiary's eligibility if the standards do not readily apply.[21]
USCIS determines if the evidence submitted is comparable to the evidence required in 8 CFR 204.5(i)(3)(i). A petitioner for an outstanding professor or researcher does not need to establish that a particular standard is not readily applicable to the beneficiary's occupation. Instead, the petitioner may submit alternative, but qualitatively comparable evidence, if it establishes that the standards do not readily apply to that evidence. The existing evidentiary standards serve as a roadmap for determining, among other things, the quantity and types of evidence that should be submitted in order for such evidence to be considered "comparable."[22]

2. Final Merits Determination

Meeting the minimum requirement by providing at least two types of initial evidence does not, in itself, establish that the beneficiary in fact meets the requirements for classification as an outstanding professor or researcher.[23] Officers also consider the quality of the evidence. In the second step of the analysis in each case, officers should evaluate the evidence together

when considering the petition in its entirety to make a final merits determination of whether or not the petitioner, by a preponderance of the evidence, has demonstrated that the beneficiary is recognized internationally as outstanding in a specific academic area.[24]

At this step, officers consider any potentially relevant evidence, even if such evidence does not fit one of the above regulatory criteria or was not presented as comparable evidence. The officers consider all evidence in the totality. Some evidence may weigh more favorably on its own, while other evidence is more persuasive when viewed with other evidence.

The following are examples of situations where evidence in the record may help officers evaluate the quality of the initial or comparable evidence to determine whether, in a totality analysis that considers all of the evidence, the beneficiary is internationally recognized as outstanding:[25]

- The record demonstrates that the beneficiary has published articles in highly-ranked journals relative to other journals in the field, as demonstrated by, for example, evidence the petitioner provides regarding the journal's impact factor.[26] Depending on the level of recognition of the journals in question, as demonstrated by evidence in the record, there may be a high level of recognition associated with publication in such journals, especially if the beneficiary is the most significant contributor to the publication, a senior author, or the sole author of the article;
- The petitioner provides evidence demonstrating that the total rate of citations to the beneficiary's body of published work is high relative to others in the field, such as the beneficiary has a high h-index[27] for the field. Depending on the field and the comparative data the petitioner provides, such evidence may indicate a beneficiary's high overall standing for the purpose of demonstrating that the beneficiary enjoys international recognition as outstanding;[28]
- The petitioner documents the beneficiary's employment or research experience is with leading institutions in the field (such as U.S. universities that have been recognized as having high or very high research activity by the Carnegie Classification of Institutions of Higher Education,[29] foreign universities with comparably high research activity, or a university that is highly regarded according to a widely recognized metric such as the QS World University Rankings[30]). Such employment or experience can be a positive factor toward demonstrating that the beneficiary enjoys international recognition as outstanding;
- The record establishes that the beneficiary has received unsolicited invitations to speak or present research at nationally or internationally recognized conferences in the field. Although such a role for the conference may not rise to the level of a leading or critical role, this type of invitation is generally indicative of a person's recognition for achievements in the field; and
- The record establishes that the beneficiary is named as an investigator, scientist, or researcher on a peer-reviewed and competitively funded U.S. government grant or stipend for science, technology, engineering, and mathematics (STEM) research. This type of evidence can be a positive factor indicating a beneficiary is recognized internationally as outstanding in the beneficiary's field.

In all cases, the petitioner must provide sufficient context regarding the above evidence and considerations to demonstrate that the evidence meets the relevant criteria and to establish the beneficiary's international recognition in the totality of the circumstances. This means that the petitioner must explain the significance of the submitted evidence, and how it demonstrates that the beneficiary is internationally recognized as outstanding.

When requesting additional evidence or denying a petition, if the officer determines that the petitioner has failed to demonstrate eligibility, the officer should not merely make general assertions regarding this failure. Rather, the officer must articulate the specific reasons as to why the officer concludes that the petitioner, by a preponderance of the evidence, has not demonstrated that the beneficiary is an outstanding professor or researcher.[31] As with all adjudications, if an officer believes that the facts stated in the petition are not true, and can articulate why in the denial, then the officer denies the petition and explains the reasons in the written denial.[32]

C. Qualifying Status of Employer

Although a permanent labor certification is not required for the outstanding professor or researcher classification, the petitioner must provide an offer of employment as initial evidence in support of the petition.[33] The offer of employment must be in the form of a letter from the prospective U.S. employer to the beneficiary and the offer must state that the employer is offering the beneficiary employment in a tenured or tenure-track teaching position or a permanent research position in the beneficiary's academic field.[34] In addition, the petitioner must demonstrate that it has the ability to pay the beneficiary's salary.[35]

The beneficiary of a petition for outstanding professor or researcher must be seeking to work for a university; an institution of higher education; or a department, division, or institute of a private employer if the department, division, or institute employs at least three persons full time in research activities and has achieved documented accomplishments in an academic field.[36]

In general, positions with government agencies at the federal, state, or local level do not fit within the statutory framework unless the government agency is shown to be a U.S. university or an institution of higher learning.[37] Therefore, USCIS may only approve a petition for outstanding professor or researcher in instances where the offer of permanent employment is from a government agency if that agency can establish that it is a U.S. university or an institution of higher learning. Government agencies do not qualify as private employers.

Government agencies that do not fit the statutory framework may have other available immigration avenues for offers of permanent employment to professors or researchers. For example, assuming all of the eligibility requirements for that visa preference category have been met, a government agency may file a petition for the person under the extraordinary ability classification.[38]

D. Offer of Employment

1. Research Positions

The petitioner must submit evidence to establish that the job offer is for a permanent research position.[39] Officers should not deny a petition where the employer is seeking an outstanding researcher solely because the actual employment contract or offer of employment does not contain a "good cause for termination" clause. The petitioning employer, however, must still establish that the offer of employment is intended to be of an indefinite or unlimited duration and that the nature of the position is such that the employee will ordinarily have an expectation of continued employment.

For example, many research positions are funded by grant money received on a yearly basis. Researchers, therefore, are sometimes employed under employment contracts that are valid in 1-year increments. If the petitioning employer demonstrates, however, the intent to continue to seek funding and a reasonable expectation that funding will continue (such as demonstrated prior renewals for extended long-term research projects), such employment can be considered permanent within the meaning of the regulation.[40] Officers should also consider the circumstances surrounding the job offer as well as the benefits attached to the position. A position that appears to be limited to a specific term, such as in the example above, can meet the regulatory test if the position normally continues beyond the term (that is, if the funding grants are normally renewed).

2. Tenure or Tenure-Track Positions

The determination as to whether a position qualifies as a tenured or a tenure-track position is not linked to the regulatory requirement that the position be permanent.[41] The definition of permanent applies only to research positions. Officers do not need to evaluate whether the employment contract for a tenured or tenure-track position has a “good cause for termination” clause and should not deny a petition seeking an outstanding professor for a tenured or tenure-track position on that basis alone.

However, officers should evaluate whether the overall nature of the position is tenured or tenure-track. USCIS does not consider positions that are temporary, adjunct, limited duration fellowships, or similar positions where the employee has no reasonable expectation of long-term employment with the university, to be tenured or tenure-track positions.

Footnotes

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[1] See INA 203(b)(1)(B). See 8 CFR 204.5(i).

[2] See 8 CFR 204.5(i)(3).

[3] See 8 CFR 204.5(i)(2).

[4] See 8 CFR 204.5(i)(2) (definition of academic field).

[5] See 8 CFR 204.5(i)(2), defining “permanent, in reference to a research position” as “either tenured, tenure-track, or for a term of indefinite or unlimited duration, and in which the employee will ordinarily have an expectation of continued employment unless there is good cause for termination.”

[6] See 8 CFR 204.5(i)(3)(iii) and 8 CFR 204.5(i)(3)(iv). See 8 CFR 204.5(i)(2) for definitions for permanent and academic field.

[7] See *Matter of Chawathe (PDF)*, 25 I&N Dec. 369, 376 (AAO 2010) (“[T]ruth is to be determined not by the quantity of evidence alone but by its quality. Therefore, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true”). See *Kazarian v. USCIS (PDF)*, 596 F.3d 1115, 1122 (9th Cir. 2010). USCIS has interpreted *Kazarian* as applicable to outstanding professor and researcher petitions.

[8] See 8 CFR 204.5(i)(3)(i). The regulation at 8 CFR 204.5(i)(3)(ii) allows a petitioner to submit comparable evidence to establish eligibility if the standards in 8 CFR 204.5(i)(3)(i) do not readily apply.

[9] For example, in evaluating an award submitted under 8 CFR 204.5(i)(3)(i)(A), it is necessary to consider the level of recognition the award holds to determine whether it is a major award, consistent with the requirements of the criterion. However, evidence that the beneficiary participated as a judge of the work of others in the same or allied field alone, regardless of the caliber or significance of such judging experience, would satisfy the requirements of 8 CFR 204.5(i)(3)(i)(D).

[10] See 8 CFR 204.5(i)(3)(i)(A).

[11] The Carnegie Classification of Institutions of Higher Education recognizes R1 and R2 doctoral universities as having very high or high research activity, respectively, based on publicly available federal government data regarding the number of doctoral degrees awarded and the amount of total research expenditures. See the Carnegie Classification of Institutions of Higher Education’s Carnegie Classification webpage.

[12] See 8 CFR 204.5(i)(3)(i)(B).

[13] See 8 CFR 204.5(i)(3)(i)(C).

[14] See 8 CFR 204.5(i)(3)(i)(D).

[15] See 8 CFR 204.5(i)(3)(i)(E).

[16] See 8 CFR 204.5(i)(3)(i)(E).

[17] See 8 CFR 204.5(i)(3)(i)(F).

[18] Impact factor is commonly used as a measure of a journal’s influence; it represents the average number of citations received per article published in that journal during the 2 preceding years. See Garfield, E, The History and Meaning of the Journal Impact Factor, Journal of the American Medical Association, Vol. 295, Iss. 1, p. 90 (2006).

[19] See 8 CFR 204.5(i)(3)(i)(F).

[20] While many articles accepted for presentation at conferences do not result in publication, there are conferences that peer review and publish accepted presentations in professional journals (sometimes called proceedings), such that they may qualify as scholarly articles under this criterion.

[21] See 8 CFR 204.5(i)(3)(ii).

[22] See 81 FR 2068, 2075 (PDF) (Jan. 15, 2016).

[23] As described in INA 203(b)(1)(B).

[24] See *Matter of Chawathe (PDF)*, 25 I&N Dec. 369, 376 (AAO 2010) (“[T]ruth is to be determined not by the quantity of evidence alone but by its quality. Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.”). See *Kazarian v. USCIS (PDF)*, 596 F.3d 1115, 1122 (9th Cir. 2010). USCIS has interpreted *Kazarian* as applicable to outstanding professor and researcher petitions.

[25] Not all cases will have such evidence, nor is such evidence required for the petitioner to demonstrate eligibility. Additionally, the examples provided are a non-exhaustive list. While the listed factors may be especially relevant to beneficiaries in STEM fields, the guidance applies to all professors and researchers.

[26] Impact factor is commonly used as a measure of a journal’s influence; it represents the average number of citations received per article published in that journal during the 2 preceding years. See Garfield, E, The History and Meaning of the Journal Impact Factor, Journal of the American Medical Association, Vol. 295, Iss. 1, p. 90 (2006).

[27] The h-index is an example of a tool for measuring a researcher's output and impact. It is based on the highest number of the researcher's publications that have been cited at least that same number of times. For example, if a researcher has an h-index of 10, it means the researcher has 10 publications that have 10 or more citations each (but not 11 publications with at least 11 citations each). See Hirsch, J, An Index to Quantify an Individual's Scientific Research Output, Proceedings of the National Academy of Sciences of the United States of America, Vol. 102, Iss. 46, p. 16569 (2005). Other indices for measuring output and impact are also used. When relying on any of these tools, a petitioner should explain its methodology and significance with supporting documentation because the sources for the data and the duration of time involved in the calculation can impact the actual h-index value.

[28] This factor is less relevant for beneficiaries early in their career, as such persons have had less time to accumulate citations but may nevertheless have garnered acclaim and risen to the small percentage at the top of the field as demonstrated by other evidence in the record. As stated above, none of the listed factors are required to demonstrate eligibility.

[29] The Carnegie Classification of Institutions of Higher Education uses the R1 and R2 doctoral university designations to recognize institutions as having very high or high research activity, respectively, based on publicly available federal government data regarding the number of doctoral degrees awarded and the amount of total research expenditures. See the Carnegie Classification of Institutions of Higher Education's Carnegie Classification webpage.

[30] QS is a British analytics company specializing in global higher education. See the QS About Us webpage. The QS World University Rankings annually evaluate universities according to a methodology based on six consistent and empirical metrics: academic reputation (40 percent), employer reputation (10 percent), faculty to student ratio (20 percent), citations per faculty (20 percent), international faculty ratio (5 percent), and international student ratio (5 percent). These metrics are used to rank universities, as well as capture and assess university performance. See the QS World University Rankings Methodology webpage.

[31] As described in INA 203(b)(1)(B).

[32] See INA 204(b).

[33] See 8 CFR 204.5(i)(3)(iv).

[34] See 8 CFR 204.5(i)(3)(iv). See 8 CFR 204.5(i)(2) (defining "permanent").

[35] See 8 CFR 204.5(g)(2).

[36] See INA 203(b)(1)(B). See 8 CFR 204.5(i)(3)(iii) (which mirrors the language in the Immigration and Nationality Act).

[37] See INA 203(b)(1)(B)(iii).

[38] See INA 203(b)(1)(A). See Chapter 2, Extraordinary Ability [6 USCIS-PM F.2].

[39] See 8 CFR 204.5(i)(2).

[40] See 8 CFR 204.5(i)(2).

[41] See 8 CFR 204.5(i)(2).

Chapter 4 - Multinational Executive or Manager

A. Eligibility

Since 1990, the multinational executive or manager visa classification, which was formerly designated under the U.S. Department of Labor's regulations as Schedule A Group IV, is now a separate visa classification.[1] A petitioning U.S. employer may file an Immigrant Petition for Alien Workers (Form I-140) on behalf of such an executive or manager. The petitioner must demonstrate that the beneficiary has a permanent job offer in a primarily managerial or executive position with a qualifying U.S. employer. A permanent labor certification is not required for this classification.[2] The petitioner must demonstrate that the beneficiary was employed abroad by a qualifying organization for 1 year out of the previous 3 years.[3]

The petitioning U.S. employer must have been doing business in the United States for at least 1 year before filing a petition for its managers and executives (a similar provision was in Schedule A Group IV).[4] Aliens seeking to enter the United States to open a new office are not eligible for the multinational executive or manager immigrant classification.[5] The executive or manager must be coming to an existing business in the United States.[6] This requirement was based in part on the pre-existing Schedule A, Group IV requirement.

The requirement was also based on the fact that, unlike in the case of a new office petition for a nonimmigrant intracompany transferee (L-1), which may only be extended upon a showing that the U.S. entity has been doing business for the previous year,[7] the multinational executive or manager immigrant visa classification is permanent in nature. Further, unlike the immigrant investor fifth preference visa, for example, there is no first preference "conditional resident" status that requires a review of the business after the beneficiary becomes a permanent resident in order for the beneficiary to continue in that status.

A petitioning U.S. employer must demonstrate that the beneficiary has been employed for at least 1 year by a related organization abroad to work in a capacity that is managerial or executive.[8] Managerial capacity includes personnel and function managers while executive capacity focuses on a person's position within an organization.

The petitioning U.S. employer must demonstrate that it and the related organization abroad:

- Maintain a qualifying relationship; and
- Are both actively engaged in doing business.

The petitioning U.S. employer must also show that it has been actively engaged in doing business for at least 1 year.[9] In addition, the petitioner must demonstrate that it has the ability to pay the beneficiary's salary.[10]

B. Petitioner Requirements

When an employer wishes to transfer an alien employee working abroad to a U.S. company location using the multinational executive or manager visa classification, a qualifying relationship must exist between the foreign employer and the petitioning U.S. employer. A qualifying relationship exists when the U.S. employer is an affiliate, parent, or subsidiary of the foreign firm, corporation, or other legal entity.[11]

To establish a qualifying relationship under the statute and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (for example, a U.S. entity with a foreign office) or related as a parent and subsidiary or as affiliates. The officer must examine the factors of ownership and control when determining whether a qualifying relationship exists between the United States and foreign entities for purposes of this visa classification.[12]

Either the foreign or U.S. entity must own and control the other entity or both must be subsidiaries owned and controlled by the same parent entity or person.[13] In the context of this visa classification, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control. Control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity.[14]

In situations where the petitioner has submitted documentation of a qualifying relationship based on control through possession of proxy votes, the petitioner must show that the proxy votes are irrevocable from the time of filing through the time of adjudication. Further, the petitioner must provide evidence demonstrating that the qualifying relationship will continue to exist until the beneficiary becomes a lawful permanent resident.

The Business Structures overview provides more information on the most common business forms or structures, including information on formation, fundamental characteristics, and the tax forms submitted to the Internal Revenue Service.

1. Subsidiary and Parent

The term subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly:

- More than half of the entity and controls the entity;
- Half of the entity and controls the entity;
- 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or
- Less than half of the entity, but in fact controls the entity.[15]

While the term parent is not directly defined by the regulations, it is understood to mean the owner of a subsidiary.

2. Affiliate

There are three types of qualifying affiliate relationships:

- One of two subsidiaries, both of which are owned and controlled by the same parent entity or person;
- One of two legal entities owned and controlled by the same group of people, each owning and controlling approximately the same share or proportion of each entity; and
- A partnership that is organized outside the United States to provide accounting services, along with managerial or consulting services, and markets those services under an internationally recognized name, as part of an agreement with a worldwide coordinating organization (of which the U.S. entity is a member) that is owned and controlled by the member accounting firms, partnership, or similar entity organized outside the United States.[16]

3. Limits on Petitions from Branch Offices and Nonimmigrants

Domestic offices of a foreign employer operated as a branch (that is, not as a separate, domestic legal entity) and nonimmigrants may not offer permanent employment to a beneficiary for the purpose of obtaining an immigrant visa for a multinational executive or manager.[17] The petitioner must be a U.S. citizen or a U.S. corporation, partnership, or other legal entity in order to file an immigrant visa petition for a multinational executive or manager. Therefore, while a U.S. corporation with a branch abroad may file a petition, a foreign corporation operating an office or division in the United States that is not a separate, domestic legal entity may not.[18]

4. Sole-Proprietorship

A sole proprietorship is a business in which an individual owns all the assets, owes all the liabilities, and operates the business in his or her personal capacity.[19] Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner.[20] A sole-proprietorship may not file a petition on behalf of the alien owner, as such would be considered an impermissible self-petition.

There is a difference between a self-incorporated petitioner and a sole proprietorship. Although a self-incorporated petitioner may only have one owner or employee, a corporation is a separate and distinct legal entity from its owners or stockholders and therefore may petition for that owner or employee.[21]

5. Doing Business

Doing business means the regular, systematic, and continuous provision of goods or services or both by a qualifying organization. Doing business does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.[22]

Foreign Employer Must Continue to do Business

Both the U.S. employer and at least one qualifying organization abroad must continue to do business up until the time of visa issuance or adjustment of status.[23]

If the beneficiary’s foreign employer’s operations abroad cease entirely (for example, the company, together with all other otherwise qualifying related organizations, goes out of business or relocates completely to the United States) before the time of visa issuance or adjustment of status, the beneficiary is no longer be eligible for classification as a multinational executive or manager.

U.S. Employer Must Have Been Doing Business for At Least 1 Year

The U.S. employer must have been actively engaged in doing business for at least 1 year at the time of filing of the petition.[24] Therefore, a U.S. organization may have a legal existence in the United States for more than 1 year, but if it has not engaged in the continuous provision of goods and services for at least 1 year, the organization is ineligible to file petitions for multinational executives or managers.

C. Beneficiary Requirements

1. Managerial Capacity

The statutory definition of "managerial capacity" includes both "personnel managers" and "function managers."[25]

As it relates to personnel managers, managerial capacity means an assignment within an organization in which the beneficiary primarily:

- Manages the organization, department, subdivision, function, or component of the organization;
- Supervises and controls the work of other supervisory, professional, or managerial employees;
- Possesses authority to hire and fire or recommend those and other personnel actions (such as promotion and leave authorization) for employees directly supervised; and
- Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.

Contrary to the common understanding of the word “manager” as any person who supervises others, the statute has a much more limited definition of the term manager. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor’s supervisory duties unless the employees supervised are professional.[26]

Further, if staffing levels are used as a factor in determining whether the beneficiary is functioning in a managerial or executive capacity, an officer should not merely rely on the number of employees the beneficiary is supervising, but should look at the beneficiary’s role and function within the organization.[27]

2. Function Managers

The term function manager, sometimes referred to as functional manager, applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization.[28]

In this context, the definition of the term manager includes function managers.[29] A manager may qualify for multinational manager or executive classification as a function manager if the petitioner can show, among other things, that the beneficiary has and will be primarily managing or directing the management of a function of an organization, even if the beneficiary did not or will not directly supervise any employees.

As it relates to function managers, managerial capacity means an assignment within an organization in which the beneficiary primarily:[30]

- Manages the organization or a department, subdivision, function, or component of the organization;
- Manages an essential function within the organization or a department or subdivision of the organization;
- Functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.

The petitioner must clearly demonstrate, however, that the essential function being managed is not also being directly performed by the beneficiary. For example, in *Matter of G-*, the petitioner submitted evidence, including organizational and workflow charts, that indicated that the beneficiary led a financial planning and analysis (FP&A) team that oversaw the monthly revenue forecast process and collected financial data from delivery leads and global sales teams.[31]

The record reflected that the beneficiary would continue to be supported by six direct and three indirect reports. These personnel performed the routine duties associated with the FP&A function, enabling the beneficiary to primarily develop policies and goals and oversee the execution of long-term strategies. The petitioner demonstrated that this staff would continue to relieve the beneficiary from performing day-to-day administrative and reporting tasks, allowing him to primarily manage the FP&A function rather than perform it himself. That he supervised his direct reports did not detract from finding that he primarily manages the function.[32] In contrast, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity.[33]

In applying the statute and applicable regulations to determine whether the beneficiary meets the definition of a function manager, the petitioner must show that the beneficiary will primarily manage that essential function by clearly describing the beneficiary’s duties and indicating the proportion of time dedicated to each duty.[34] While he or she may perform some operational or administrative tasks, the beneficiary must primarily manage the essential function.[35]

In addition, the petitioner must establish that the beneficiary will occupy a senior position in the petitioner’s organizational hierarchy or within the function managed and that the beneficiary will have discretionary authority over the day-to-day operations of that function.

USCIS considers all factors relevant to these criteria, including the nature and scope of the petitioner’s business; the organizational structure and staffing levels; the value of the budgets, products, or services that a beneficiary will manage; and any other factors, such as operational and administrative work performed by staff within the organization, that contribute to understanding the beneficiary’s actual duties and role in the business.[36]

An important, although not necessarily determinative, factor in determining whether a beneficiary qualifies as a function manager is the beneficiary's authority to commit the company to a course of action or expenditure of funds. Function managers perform at a senior level in the organization and may or may not have direct supervision of other employees.

3. Executive Capacity

The statutory definition of the term "executive capacity"[37] focuses on a person's position within an organization. To adjudicate a petition for a multinational executive or manager properly, therefore, the officer should have a basic understanding not only of the position the beneficiary intends to fill, but also of the nature and structure of the organization itself.

The term “executive capacity” means an assignment within an organization in which the employee primarily:

- Directs the management of the organization or a major component or function of the organization;
- Establishes the goals and policies of the organization, component, or function;
- Exercises wide latitude in discretionary decision making; and
- Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.[38]

USCIS does not consider a beneficiary an executive under the statute simply because he or she has an executive title or because some portion of his or her time is spent directing the enterprise as the owner or sole managerial employee; the focus is on the primary duties of the beneficiary. In this regard, there must be sufficient staff (for example, contract employees or others) to perform the day-to-day operations of the petitioning organization in order to enable the beneficiary to be primarily employed in the executive function.

4. Evaluating Managerial or Executive Status

The petitioner must establish that the U.S. entity itself is in fact conducting business at a level that would require the services of a person primarily engaged in executive (or managerial) functions. In making this determination, an officer should consider, as appropriate, the nature of the business, including its size, its organizational structure, and the product or service it provides.

When examining the executive or managerial capacity of the beneficiary, an officer should look first to the petitioner's description of the job duties.[39] Specifics are an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. Merely repeating or paraphrasing the language of the statute or regulations does not satisfy the petitioner's burden of proof.

If the beneficiary performs non-managerial administrative or operational duties, the description of the beneficiary's job duties must demonstrate what proportion of the beneficiary's duties is managerial in nature, and what proportion is non-managerial. A beneficiary who primarily performs non-managerial or non-executive duties does not qualify as a manager or executive under the statutory definitions.

Additionally, officers should review the totality of the evidence, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of other employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in the business. The evidence must demonstrate that the duties of the beneficiary and his or her subordinates correspond to their placement in the organization's structural hierarchy. Artificial tiers of subordinate employees and inflated job titles do not support a finding that the position is managerial.

For smaller organizations, the officer may request a description of the overall management and executive personnel structure supported by position descriptions for the managerial and executive staff members of the organization. For organizations that are substantial in size, the officer may request comparable descriptions for the organizational unit where the beneficiary is to be employed. As with all adjudications, if an officer believes that the facts stated in the petition are not true, and can articulate why in the denial, then the officer denies the petition and explains the reasons in the written denial.[40]

If staffing levels are used to determine whether a beneficiary's job capacity is primarily executive or managerial in nature, an officer considers the reasonable needs of the business enterprise in light of its overall purpose and stage of development.[41] It is the petitioner’s burden to demonstrate the company’s reasonable needs with respect to staff or the organization’s structure.[42] However, in evaluating reasonable needs, an officer should not hold a petitioner to his or her undefined and unsupported view of common business practice or standard business logic.

As indicated above, a single-person office is not precluded from having that sole employee be classified as a multinational manager or executive, provided the requisite corporate affiliation exists and all other requirements are met. However, it may be very difficult for a petitioner to establish that the sole employee will be engaged primarily in a managerial or executive function.

While a sole employee will have some managerial or executive duties, simply to keep the business running, he or she will normally be spending the majority of his or her work time doing the day-to-day work of the business, that is, performing the type of duties that persons who would normally be employed in the business in question would perform.

However, an officer considers the totality of the record, including the nature and scope of the petitioner’s business and organizational structure, staffing levels, the beneficiary’s position and scope of authority, the work performed by other employees and whether it relieves the beneficiary from performing operational and administrative duties, and the reasonable needs of the organization as a whole.[43]

D. Evaluating Petitions Filed on Behalf of L-1A Nonimmigrants

In some cases, an officer may adjudicate an immigrant petition for a multinational executive or manager that was filed on behalf of a beneficiary who was previously granted L-1A nonimmigrant classification as a nonimmigrant manager or executive. Though the prior approval of an L-1A nonimmigrant petition on behalf of the beneficiary may be a relevant consideration in adjudicating the immigrant petition, the fact that the beneficiary was previously approved for L-1A classification is not binding if the facts do not support approval of the immigrant petition.

Eligibility as an L-1A nonimmigrant does not automatically establish eligibility under the criteria for an immigrant visa classification for a multinational executive or manager. Each petition is separate and independent and must be adjudicated on its own merits, under the corresponding statutory and regulatory provisions.

Notwithstanding the fact that each petition must be adjudicated on its own merits, some courts have asked USCIS to provide an explanation as to why, if the beneficiary had previously been classified in a roughly analogous nonimmigrant category, USCIS has determined that the beneficiary is not eligible for classification in the employment-based immigrant visa classification in question. For this reason, where possible, officers issuing denials in these cases should provide a brief discussion as to why, notwithstanding the previous L-1A nonimmigrant visa petition approval, the petitioner has failed to meet its burden to establish eligibility for approval of the immigrant petition for classification as a multinational executive or manager.

Unlike in the case of the L-1B nonimmigrant classification, there is no provision of law that allows a person who was or is employed in a purely specialized knowledge capacity abroad to be classified as a “specialized knowledge” multinational executive or manager immigrant classification.

However, it should be noted that some beneficiaries who are classified as L-1B nonimmigrants might qualify for the multinational executive or manager immigrant classification because their specialized knowledge and employment abroad also would have qualified as managerial or executive employment and because the petitioners intend to employ them in managerial or executive positions on a permanent basis.

Footnotes

[^ 1] See INA 203(b)(1)(C).

[^ 2] See INA 212(a)(5)(D). See 8 CFR 204.5(j)(5).

[^ 3] See 8 CFR 204.5(j)(3)(i)(A). See *Matter of S-P-, Inc.*, Adopted Decision 2018-01 (AAO Mar. 19, 2018). This decision clarifies that a beneficiary who worked abroad for a qualifying multinational organization for at least 1 year, but left the organization for a period of more than 2 years after being admitted to the United States as a nonimmigrant, does not satisfy the 1 year of the previous 3 years foreign employment requirement for immigrant classification as a multinational manager or executive. To cure the interruption in employment, such a beneficiary would need an additional year of qualifying employment abroad before he or she could once again qualify. Unlike the L-1 nonimmigrant classification, the year of qualifying employment does not have to be “continuous.” Compare INA 101(a)(15)(L) (requiring that the beneficiary have been employed “continuously” abroad for the 1-year period) with INA 203(b)(1)(C) (requiring that the beneficiary be employed abroad for “at least 1 year.”)

[^ 4] See 8 CFR 204.5(j)(3)(i)(D).

[^ 5] The ability to enter the United States to open a new office is limited to the L-1 nonimmigrant classification. See 8 CFR 214.2(l)(3)(v).

[^ 6] See 8 CFR 204.5(j)(3)(D).

[^ 7] See 8 CFR 214.2(l)(14)(ii).

[^ 8] See INA 203(b)(1)(C). See 8 CFR 204.5(j).

[^ 9] See 8 CFR 204.5(j)(3).

[^ 10] See 8 CFR 204.5(g)(2).

[^ 11] See 8 CFR 204.5(j)(2).

[^ 12] See INA 203(b)(1)(C). See 8 CFR 204.5(j)(2) (definitions of affiliate and subsidiary).

[^ 13] See 8 CFR 204.5(j)(2) (definition of affiliate and subsidiary).

[^ 14] See *Matter of Church Scientology International (PDF)*, 19 I&N Dec. 593 (Comm. 1988).

[^ 15] See 8 CFR 204.5(j)(2).

[^ 16] See 8 CFR 204.5(j)(2) (definition of affiliate).

[^ 17] See *Matter of Thornhill (PDF)*, 18 I&N Dec. 34 (Comm. 1981).

[^ 18] While the L-1 nonimmigrant visa regulations allow for a branch office to petition for a manager or executive, the immigrant visa regulations do not permit a foreign branch office to petition for a multinational executive or manager. The nonimmigrant regulations define the term branch as "an operating division or office of the same organization housed in a different location." See 8 CFR 214.2(l)(1)(ii)(J).

[^ 19] See Black's Law Dictionary (11th Ed. 2019).

[^ 20] See *Matter of United Investment Group (PDF)*, 19 I&N Dec. 248, 250 (Comm. 1984).

[^ 21] See *Matter of M- (PDF)*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958). See *Matter of Aphrodite Investments Limited (PDF)*, 17 I&N Dec. 530 (Comm. 1980). See *Matter of Tessel (PDF)*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

[^ 22] See 8 CFR 204.5(j)(2). Doing business does not require that the petitioner provide either goods, services, or both to an unaffiliated third party; providing goods or services in a regular, systematic, and continuous manner to related companies is sufficient. See *Matter of Leacheng International, Inc. (PDF)*, 26 I&N Dec. 532 (AAO 2015).

[^ 23] See *Matter of F-M-Co*, Adopted Decision 2020-01 (AAO May 5, 2020). This decision clarifies that for first preference multinational executives or managers, a petitioner must have a qualifying relationship with the beneficiary's foreign employer at the time the petition is filed and must maintain that relationship until the petition is adjudicated. The decision also clarifies that in the event a corporate restructuring affecting the foreign entity occurs prior to the filing of the petition, a petitioner may establish that the beneficiary's qualifying foreign employer continues to exist and do business through a valid successor entity.

[^ 24] See 8 CFR 204.5(j)(3)(i)(D). There is no "new office" provision for persons seeking to immigrate under the multinational executive or manager category as there is for certain aliens who seek admission as L-1 nonimmigrants in order to open or be employed in a new office in the United States. See 8 CFR 214.2(l)(3)(v).

[^ 25] See INA 101(a)(44)(A)(i)-(ii).

[^ 26] See INA 101(a)(44)(A). See 8 CFR 204.5(j)(4)(i).

[^ 27] See 8 CFR 204.5(j)(4)(ii).

[^ 28] See INA 101(a)(44)(A)(ii). See *Matter of G-, Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017), which analyzes the requirements for a function manager and concludes: "In sum, to establish that the beneficiary will be employed in a managerial capacity as a 'function manager' the petitioner must demonstrate that: (1) the function is a clearly defined activity; (2) the function is 'essential,' that is, core to the organization; (3) the beneficiary will primarily manage, as opposed to perform, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations."

[^ 29] See INA 101(a)(44)(A).

[^ 30] See 8 CFR 204.5(j)(2).

[^ 31] See *Matter of G-*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

[^ 32] See *Matter of G-*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

[^ 33] See *Boyang, Ltd. v. INS*, 67 F.3d 305 (9th Cir. 1995) (citing *Matter of Church Scientology International* (PDF), 19 I&N Dec. 593, 604 (Comm. 1988)).

[^ 34] See 8 CFR 204.5(j)(5).

[^ 35] See *Matter of G-*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

[^ 36] See *Matter of G-*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

[^ 37] See INA 101(a)(44)(B).

[^ 38] See INA 101(a)(44)(B).

[^ 39] See 8 CFR 204.5(j)(5).

[^ 40] See INA 204(b).

[^ 41] See INA 101(a)(44)(C). See 8 CFR 204.5(j)(4)(ii).

[^ 42] See INA 101(a)(44)(C).

[^ 43] See *Matter of Z-A-, Inc.*, Adopted Decision 2017-05 (AAO April 14, 2016).

Chapter 5 - Advanced Degree or Exceptional Ability

A. Advanced Degree Professionals

1. Eligibility

To qualify for this immigrant classification as a professional with an advanced degree, the following requirements must be met:

- The beneficiary[1] must be a member of the professions[2] holding an advanced degree or foreign equivalent degree;
- The position certified in the underlying permanent labor certification application or Schedule A application must require, at a minimum, a professional holding an advanced degree or the equivalent;[3] and
- The beneficiary must have not only had the advanced degree or its equivalent on the date that the permanent labor certification application was filed, but also must have met all of the requirements needed for entry into the proffered position at that time.[4]

2. Foreign Equivalent Degrees

An advanced degree is any U.S. academic or professional degree or a foreign equivalent degree above that of baccalaureate.[5] A U.S. baccalaureate degree or a foreign equivalent degree followed by at least 5 years of progressive experience in the specialty is considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the beneficiary must have a U.S. doctorate or a foreign equivalent degree.[6]

A beneficiary can satisfy the advanced degree requirement by holding either a:

- U.S. master's degree or higher or a foreign degree evaluated to be the equivalent of a U.S. master's degree or higher; or
- U.S. bachelor's degree, or a foreign degree evaluated to be the equivalent of a U.S. bachelor's degree, plus 5 years of progressive, post-degree work experience.[7]

A beneficiary who does not possess at least a U.S. bachelor's degree or a foreign equivalent degree is ineligible for this classification.[8]

3. Advanced Degree Position

Mere possession of an advanced degree or its equivalent is not sufficient for establishing a beneficiary's eligibility for this classification. The petitioner must also demonstrate that the position certified in the underlying permanent labor certification application or set forth on the Schedule A application requires a professional holding an advanced degree or the equivalent.[9] The petitioner must demonstrate that the position, and the industry as a whole, normally requires that the position be filled by a person holding an advanced degree.

Where the position requires multiple credentials combined with experience, the issue is not whether a combination of more than one of the foreign degrees or credentials is comparable to a single U.S. bachelor's degree or an advanced degree, but rather that the minimum requirements for the position in the permanent labor certification meet the definition of an advanced degree.[10]

This requirement has resulted in a particular problem involving petitions filed on behalf of registered nurses. Although many such nurses possess advanced degrees, they are filling nursing positions in the United States that generally do not require advanced degrees. Specifically, the Occupational Information Network (O*Net)[11] indicates that, in nursing, only managerial jobs (director of nursing or assistant director of nursing) or advanced level jobs (such as clinical nurse specialist, nurse practitioner) generally require advanced degrees. A registered nurse job, by contrast, usually does not require an advanced degree.

The long waiting periods often required for issuance of third preference employment-based immigrant visas for skilled workers, professionals, or other workers may cause a gap between the available supply of eligible nurses and the high demand for nursing services. Officers must verify the actual minimum requirements for the nursing position offered in the advanced degree petition. As stated, most nursing positions do not qualify for the advanced degree classification.

B. Exceptional Ability

1. Eligibility

The term exceptional ability is defined as a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.[12] This standard is lower than the standard for extraordinary ability classification.[13] A beneficiary[14] may qualify for the exceptional ability visa preference classification if:

- He or she has exceptional ability in the sciences, arts, or business;
- He or she will substantially benefit the national economy, cultural or educational interests, or welfare of the United States in the future;[15] and
- His or her services in one of those fields are sought by an employer in the United States.[16]

2. Evidence

Officers should use a two-step analysis to evaluate the evidence submitted with the petition to demonstrate eligibility for exceptional ability classification.

Petition for Exceptional Ability Classification: Overview of Two-Step Evidentiary Review	
Step 1	Assess whether evidence meets regulatory criteria: Determine, by a preponderance of the evidence, which evidence submitted by the petitioner objectively meets the parameters of the regulatory description that applies to that type of evidence (referred to as "regulatory criteria").

Petition for Exceptional Ability Classification: Overview of Two-Step Evidentiary Review	
Step 2	Final merits determination: Evaluate all the evidence together when considering the petition in its entirety for the final merits determination, considering the high level of expertise required for this immigrant classification.

Assess Whether Evidence Meets Any Regulatory Criteria

The first step of the evidentiary review is limited to determining whether the evidence submitted with the petition is comprised of at least three of the six regulatory criteria.[17] The officer should apply a preponderance of the evidence standard when making this determination.

While officers should consider the quality and caliber of the evidence to determine whether a particular regulatory criterion has been met, officers should not yet make a determination regarding whether or not the beneficiary qualifies for exceptional ability in this first step.

The initial evidence must include at least three of the following six types of evidence listed in the regulations:

- An official academic record showing that the beneficiary has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
- Evidence in the form of letter(s) from current or former employer(s) showing that the beneficiary has at least 10 years of full-time experience in the occupation in which he or she is being sought;
- A license to practice the profession or certification for a particular profession or occupation;
- Evidence that the beneficiary has commanded a salary or other remuneration for services that demonstrates exceptional ability. (To satisfy this criterion, the evidence must show that the beneficiary has commanded a salary or remuneration for services that is indicative of his or her claimed exceptional ability relative to others working in the field);
- Evidence of membership in professional associations; and
- Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.[18]

In some cases, evidence relevant to one criterion may be relevant to other criteria.

Additionally, if these types of evidence do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.[19] This provides petitioners the opportunity to submit comparable evidence to establish the beneficiary's eligibility if the regulatory standards[20] do not readily apply to the beneficiary's occupation. When evaluating such comparable evidence, officers consider whether the criteria are readily applicable to the beneficiary's occupation and, if not, whether the evidence provided is truly comparable to the criteria listed in the regulation.

General assertions that any of the six objective criteria do not readily apply to the beneficiary's occupation are not acceptable. Similarly, claims that USCIS should accept witness letters as comparable evidence are not persuasive. The petitioner should explain why the evidence it has submitted is comparable.[21]

Objectively meeting the regulatory criteria alone does not establish that the beneficiary in fact meets the requirements for exceptional ability classification.[22] For example, being a member of professional associations alone, regardless of the caliber, should satisfy one of the three required regulatory criteria. However, the beneficiary's membership should also be evaluated to determine whether it is indicative of the beneficiary having a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. However, this secondary evaluation should be conducted as part of the final merits determination.

Final Merits Determination

Meeting the minimum requirement by providing at least three types of initial evidence does not, in itself, establish that the beneficiary in fact meets the requirements for exceptional ability classification.[23] Officers must also consider the quality of the evidence. In the second part of the analysis, officers should evaluate the evidence together when considering the petition in its entirety for the final merits determination. The officer must determine whether or not the petitioner, by a preponderance of the evidence, has demonstrated that the beneficiary has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

When requesting additional evidence or drafting a denial, if the officer determines that the petitioner has failed to demonstrate this requirement, he or she should not merely make general assertions regarding this failure. Rather, the officer must articulate the specific reasons as to why the officer concludes that the petitioner, by a preponderance of the evidence, has not demonstrated that the beneficiary qualifies for exceptional ability classification.

The petitioner must demonstrate that the beneficiary is above others in the field; qualifications possessed by most members of a given field cannot demonstrate a degree of expertise significantly above that ordinarily encountered. The mere possession of a degree, diploma, certificate or similar award from a college, university, school, or other institution of learning is not by itself considered sufficient evidence of exceptional ability.[24]

Furthermore, formal recognition in the form of certificates and other documentation that are contemporaneous with the beneficiary's claimed contributions and achievements may have more weight than letters prepared for the petition recognizing the beneficiary's achievements. As with all adjudications, if an officer believes that the facts stated in the petition are not true, and can articulate why in the denial, then the officer denies the petition and explains the reasons in the written denial.[25]

With respect to demonstrating exceptional ability in athletics, USCIS considers a male athlete who has been competing against women to be a negative factor in determining whether the alien has a degree of expertise significantly above that ordinarily encountered in athletics.[26]

3. Schedule A, Group II Permanent Labor Certification

Schedule A, Group II permanent labor certification for persons of "exceptional ability in the sciences or arts"[27] is distinct from classification as an person of "exceptional ability in the sciences, arts, professions, or business."[28] Under the U.S. Department of Labor (DOL)'s regulations, an employer seeking permanent labor certification on behalf of an person of "exceptional ability in the sciences or arts" may apply directly to USCIS for Schedule A, Group II permanent labor certification instead of applying to DOL for issuance of a permanent labor certification.[29]

C. Professional Athletes

1. Eligibility

The Immigration and Nationality Act (INA) defines professional athletes for the purpose of allowing them to retain the validity of the underlying permanent labor certification if they change employers.[30] These athletes may qualify for exceptional ability classification.[31] Specifically, the precedent decision *Matter of Masters* held that a professional golfer could, if he was otherwise eligible, qualify as for exceptional ability classification in the arts.[32]

This holding has been interpreted to apply to exceptional ability petitions filed on behalf of any athlete. However, the fact that the beneficiary has signed a contract to play for a major league team may not be sufficient to establish exceptional ability as a professional athlete.

Definition of Professional Athlete

For purposes of this classification, the term professional athlete means a person who is employed as an athlete by:

- A team that is a member of an association of six or more professional sports teams whose total combined revenues exceed $10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or
- Any minor league team that is affiliated with such an association.[33]

Permanent Labor Certification Validity

A petition for classification of a professional athlete is supported by an underlying permanent labor certification filed on the beneficiary's behalf, which remains valid even if the athlete changes employers, so long as the new employer is a team in the same sport as the team that filed the petition.[34]

Employers filing permanent labor certification applications on behalf of beneficiaries to be employed as professional athletes on professional sports teams file permanent labor certification applications under special procedures for professional athletes directly with the appropriate DOL processing center.[35]

2. Evidence

As is the case with all petitions for persons of exceptional ability, the petitioner must provide, as initial evidence, documentation demonstrating that the beneficiary qualifies for exceptional ability classification, as specified in the regulations.[36] However, submission of evidence that meets the three required regulatory criteria does not necessarily establish that the beneficiary is qualified for the classification. An officer must assess the quality of such evidence, in addition to the quantity of the evidence presented, in determining whether the petitioner has met its burden in establishing that the beneficiary is qualified for the classification.

Similarly, an approved permanent labor certification submitted on behalf of a professional athlete does not prove that the beneficiary qualifies as an athlete of exceptional ability. Officers should look for evidence of exceptional ability beyond the mere existence of a contract with a major league team or an approved permanent labor certification.

An approved permanent labor certification submitted on behalf of the beneficiary does not bind USCIS to a determination that the person is of exceptional ability. Notwithstanding the grant of a permanent labor certification, the beneficiary may, for any number of reasons, be unable to fulfill the underlying purpose of the petition.

Many athletes, for example, enjoy substantial signing bonuses, but may not, thereafter, prove to be of "major league," let alone exceptional caliber. Similarly, the fact that a beneficiary played for a portion of a season for a major league team does not automatically establish that the beneficiary will continue to play at an exceptional ability level. It would be inappropriate to approve an immigrant visa petition on behalf of a major league player on the basis of exceptional ability if the beneficiary is unlikely to continue to perform the duties specified in the underlying petition for a reasonable period following approval of lawful permanent resident status.

Additionally, the beneficiary could be cut from the major league roster, may announce his permanent retirement as a player in the sport, or suffer from a career-ending injury prior to adjudication of the petition, thereby removing the job offer that formed the basis of the petition, which would result in a denial of the petition.

D. National Interest Waiver of Job Offer

Since 1990, the INA has provided that a person of exceptional ability[37] may obtain a waiver of the job offer requirement if USCIS deems such waiver to be in the "national interest."[38] A subsequent technical amendment to the INA[39] extended the job offer waiver to certain professionals.[40] This waiver provision applies only to the second preference (EB-2) classification for members of the professions holding advanced degrees and persons of exceptional ability. This waiver of the job offer is known as the national interest waiver.

A petition filed with a request for a national interest waiver on behalf of a person does not need to be supported by a job offer; therefore, the person may file as a self-petitioner. A waiver of a job offer also includes a waiver of the permanent labor certification requirement.[41] In support of the petition, however, the petitioner must submit the employee-specific portions of a permanent labor certification (without DOL approval).[42] The petitioner may submit either the Form ETA 750B or Form ETA 9089.

1. Eligibility for Second Preference Classification

To establish eligibility for a national interest waiver, a petitioner must first demonstrate the person's qualification for the underlying EB-2 visa classification as either a member of the professions holding an advanced degree or an individual of exceptional ability in the sciences, arts, or business.[43] If the person does not have the qualifications for the EB-2 classification, the petition is statutorily ineligible for the national interest waiver.

Because USCIS evaluates threshold eligibility for the EB-2 classification prior to addressing the national interest waiver eligibility, in cases where the person does not have the qualifications for the EB-2 classification, USCIS may request additional evidence or issue a Notice of Intent to Deny, as appropriate, or issue a denial without reaching the national interest waiver determination.

Whether demonstrating EB-2 eligibility as an advanced degree professional or as a person of exceptional ability, the petitioner must clearly describe in a straightforward manner the person's occupation and proposed endeavor.[44] The intended occupation is the one through which the person plans to advance the proposed endeavor, and the proposed endeavor is more specific than the general occupation. For example, in *Matter of Dhanasar*, the occupation was engineer while the endeavor was engaging in research and development relating to air and space propulsion systems.[45]

Meeting Requirements of a Member of the Professions Holding an Advanced Degree

The intended occupation[46] through which the person plans to advance the proposed endeavor must meet the definition of a profession.[47] Officers must make this determination in the absence of a DOL-certified labor certification that contains the minimum job requirements for the occupation.[48] Separately, for those relying on a bachelor's degree followed by 5 years of progressive experience in the specialty, that experience must be in the specialty, as required by regulation.[49]

For the second preference classification, a profession is defined as one of the occupations listed in INA 101(a)(32), or any occupation for which a U.S. bachelor's degree or its foreign degree equivalent is the minimum requirement for entry into the occupation.

A professional occupation is determined by the general requirements to enter the intended occupation, and not by the credentials of any one person seeking to work in that field.[50] Therefore, not everyone who holds an advanced degree (or its defined equivalent) necessarily qualifies for classification as a member of the professions holding an advanced degree; the occupation underlying the endeavor must also require a bachelor's degree for entry into the occupation.[51]

It is the petitioner's burden to establish, by a preponderance of the evidence, that the intended occupation requires at least a bachelor's degree or its foreign equivalent degree for entry. USCIS considers, on a case-by-case basis, whether the occupation in which the person proposes to advance the intended endeavor (including certain entrepreneurial endeavors) is a profession.

For example, while a person with a master's degree or Ph.D. in engineering proposing an endeavor in the field of engineering may qualify as an advanced degree professional, a similarly educated person who intends to start a bakery may have difficulty establishing that they are an advanced degree professional. While the engineering degree is an advanced degree and the occupation of engineer is a profession, the occupation of baker does not typically require a bachelor's degree or its foreign equivalent degree for entry into the occupation.[52] The occupation underlying the endeavor is determinative.

With respect to individuals who seek to qualify as an advanced degree professional based on a combination of a bachelor's degree and "five years of progressive experience in the specialty,"[53] such experience must occur after completion of the bachelor's degree or foreign equivalent degree.[54] Absent a labor certification through which the DOL has certified the job requirements, USCIS must necessarily review the proposed endeavor. The following paragraphs discuss how USCIS considers "experience in the specialty" in national interest waiver cases.

Where the person has 5 years of progressive post-baccalaureate experience in the same specialty as the degree and seeks to work in a related endeavor, the experience is generally considered to be qualifying. On the other hand, there may be cases where the post-baccalaureate experience is not qualifying because either the experience is unrelated to the degree, unrelated to the endeavor, or both.

For professions that do not require a degree in a specific field, for purposes of national interest waivers USCIS generally interprets the person's specialty as related to the proposed endeavor.[55]

Progressive experience in a field unrelated to the bachelor's degree does not equate to an advanced degree in that field. For example, a bachelor's degree in chemistry followed by 5 years of experience as a restaurant manager generally does not equate to a master's degree in chemistry for the purpose of pursuing a chemistry-related endeavor.[56] It is the petitioner's burden to demonstrate by a preponderance of the evidence that the progressive experience is related to the specialty. USCIS determines whether experience is related to the specialty on a case-by-case basis.

Meeting Requirements of the Person of Exceptional Ability Classification

Similar to the analysis for advanced degree professionals, the analysis for a petition requesting classification as a person with exceptional ability seeking a national interest waiver must also be conducted by an officer in the absence of a DOL-certified labor certification that contains the minimum job requirements for the occupation.

Independent of the national interest waiver analysis, to qualify for the exceptional ability classification, a person must substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States because of their exceptional ability.[57]

All persons seeking the exceptional ability EB-2 classification must demonstrate their eligibility by satisfying at least three of the six categories of evidence outlined in the regulations.[58] Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.

If a person meets at least three of the six categories of evidence, USCIS then conducts a final merits determination to decide whether the evidence in its totality shows that the person is recognized as having exceptional ability in the sciences, arts, or business; specifically, expertise significantly above that ordinarily encountered in the respective field of sciences, arts, or business.[59]

In the context of a national interest waiver request, the claimed "area of exceptional ability"[60] must also be directly related to the person's proposed endeavor.

For example, a person who has computer science education or experience that does not equate to the definition of an advanced degree and who is proposing an endeavor related to computer science may qualify as a person with exceptional ability if USCIS determines that they have satisfied at least three of the six regulatory criteria and demonstrated their exceptional ability in an area such as computer science, which is directly related to their endeavor.[61]

However, if a person with the same credentials were to propose an endeavor that does not relate to the area of computer science, that person would generally not qualify for the classification even if they have exceptional ability in the area of computer science.

It is the petitioner's burden to demonstrate the connection between their exceptional ability and the proposed endeavor.[62] In evaluating the relationship between exceptional ability and the endeavor, USCIS considers whether the area of exceptional ability and the proposed endeavor share skillsets, knowledge, or expertise. USCIS makes the determination as to exceptional ability on a case-by-case basis.

2. Eligibility for the National Interest Waiver

To establish eligibility for the national interest waiver, the petitioner has the burden of demonstrating that:

- The person qualifies as either a member of the professions holding an advanced degree or as a person of exceptional ability;[63] and
- The waiver of the job offer requirement, and thus, the labor certification requirement, is in the "national interest."

Qualification for the EB-2 classification as a member of the professions holding an advanced degree or as a person of exceptional ability does not automatically mean that the person qualifies for a national interest waiver. Regardless of whether the person is an advanced degree professional or demonstrates exceptional ability, the petitioner seeking a waiver of the job offer must not only demonstrate eligibility for the classification, but also demonstrate that the waiver itself is in the national interest.[64]

Specifically, in the exceptional ability context, the INA requires that all petitions for a person of exceptional ability show that the person's presence in the United States would substantially benefit the national economy, cultural or educational interests, or welfare of the United States in the future. Even if the petitioner demonstrates such exceptional ability, if the petitioner is

seeking a waiver of the job offer, the petitioner must also demonstrate the additional requirement of national interest.[65] Neither the INA nor the regulations define the term "national interest."

The burden rests with the petitioner to establish that the waiver of the job offer requirement is in the national interest. USCIS considers every petition on a case-by-case basis.

USCIS may grant a national interest waiver as a matter of discretion if the petitioner demonstrates eligibility by a preponderance of the evidence, based on the following three prongs:[66]

- The person's proposed endeavor has both substantial merit and national importance;
- The person is well positioned to advance the proposed endeavor; and
- On balance, it would be beneficial to the United States to waive the job offer and thus the permanent labor certification requirements.[67]

The subsections below provide: an overview of the three prongs that are part of the analysis; guidance specific to persons with advanced degrees in science, technology, engineering, or mathematics (STEM); guidance related to letters of support and other evidence from interested government agencies and quasi-governmental entities; and guidance specific to entrepreneurs.

When an officer denies a national interest waiver petition, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider.[68]

3. Overview of the Three Prongs

First Prong: The Proposed Endeavor has both Substantial Merit and National Importance

When reviewing the proposed endeavor, officers determine whether the evidence presented demonstrates, by a preponderance of the evidence, the proposed endeavor has substantial merit and national importance. The term "endeavor" is more specific than the general occupation; a petitioner should offer details not only as to what the occupation normally involves, but what types of work the person proposes to undertake specifically within that occupation.[69]

For example, while engineer is an occupation, the explanation of the proposed endeavor should describe the specific projects and goals, and the area of engineering in which the person will work, rather than simply listing the duties and responsibilities of an engineer. When explaining the endeavor, the petitioner should do so in a straightforward manner and clearly lay out the potential direct impacts of the endeavor and whether the endeavor will be furthered through the course of the person's duties at a particular employer or some other way.

The endeavor's merit may be demonstrated in areas including, but not limited to, business, entrepreneurship, science, technology, culture, health, or education.

In addition, officers may consider evidence of the endeavor's potential significant economic impact, but "merit may be established without immediate or quantifiable economic impact" and "endeavors related to research, pure science, and the furtherance of human knowledge may qualify, whether or not the potential accomplishments in those fields are likely to translate into economic benefits for the United States."[70]

Officers must also examine the national importance of the specific endeavor proposed by considering its potential prospective impact. Officers should focus on the nature of the proposed endeavor, rather than only the geographic breadth of the endeavor.[71]

For example, the endeavor "may have national importance because it has national or even global implications within a particular field, such as certain improved manufacturing processes or medical advances." Economically, it may have "significant potential to employ U.S. workers," that is, at a level that is significant with respect to the population and economic circumstances of the relevant region, or it may offer "other substantial positive economic effects, particularly in an economically depressed area."[72] Therefore, petitioners should submit a detailed description explaining the proposed endeavor and supporting documentary evidence to establish that the endeavor is of national importance.

In determining national importance, the officer's analysis focuses on what the person will be doing rather than the specific job title or occupational classification. The analysis considers whether the petition contains substance that explains and substantiates how working in the proposed endeavor meets the national importance standard.

For example, a proposed endeavor to engage in classroom teaching, without broader implications for a field or region, generally does not rise to the level of having national importance for the purpose of establishing eligibility for a national interest waiver. Citing the general importance of the profession of classroom teaching would not alone be sufficient to demonstrate national importance in the context of a national interest waiver request. Proposing to work in an occupation with a national shortage or serve in a consulting capacity for others seeking to work in an occupation with a national shortage alone, is also insufficient.

As another example, assertions regarding the general importance of business owners or entrepreneurs for job creation or other economic benefits would not alone be sufficient to demonstrate national importance in the context of a national interest waiver request. A petition involving a startup company should demonstrate in detail how this specific endeavor meets the national interest requirement.[73]

Benefits to a specific employer alone, even an employer with a national footprint, are not sufficiently relevant to the question of whether a person's endeavor has national importance. At issue is whether the petitioner can demonstrate that the person's own individual endeavor stands to have broader implications, such as for a field, a region, or the public at large.

For example, a person developing a drug for a pharmaceutical company may establish national importance by demonstrating the prospective public health benefits of the drug, instead of solely projecting the profits that will accrue to the employer.

As another example, a person developing a particular technology for use or sale by a given company may not be able to establish national importance based on evidence that this technology will have benefits for the company or its clients alone. To establish broader public or commercial implications at a level consistent with national importance for this field or industry, the petitioner could demonstrate, through the submission of relevant evidence, widespread interest in adoption or licensing of the technology, a novel and important manufacturing or operational process, or how the technology stands to impact the development of similar technology by other companies.

As a final example, a software engineer adapting their employer's code for various clients will have difficulty demonstrating the national importance of that endeavor, absent additional broader impacts supported by specific evidence.

Ultimately, if the evidence of record demonstrates that the person's proposed endeavor has the significant potential to broadly enhance societal welfare or cultural or artistic enrichment, or to contribute to the advancement of a valuable technology or field of study, it may rise to the level of national importance.[74]

Second Prong: The Person is Well Positioned to Advance the Proposed Endeavor

Unlike the first prong, which focuses on the merit and importance of the proposed endeavor, the second prong centers on the person. Specifically, the petitioner must demonstrate that the person is well positioned to advance the endeavor.

In evaluating whether the person is well positioned to advance the endeavor, USCIS considers factors[75] including, but not limited to:

- The person's education, skills, knowledge, and record of success in related or similar efforts;
- Evidence of a detailed proposal or plan that the person developed, or played a significant role in developing, for future activities related to the proposed endeavor;
- Any progress towards achieving the proposed endeavor; and
- The interest or support garnered by the person from potential customers, users, investors, or other relevant entities or persons.

The petitioner should submit evidence to document the person's past achievements, explain how those achievements relate to the proposed endeavor or provide evidence of progress towards achieving the endeavor, and corroborate projections related to the proposed endeavor. While there are many types of evidence a petitioner may choose to submit, ultimately the evidence must show that the person is well-positioned to advance the endeavor.

A person may be well-positioned to advance an endeavor even if the person cannot demonstrate that the proposed endeavor is more likely than not to ultimately succeed.[76] However, unsubstantiated claims would not meet the petitioner's burden of proof.

Below is a non-exhaustive list of the types of evidence that may demonstrate that the person is well positioned to advance a proposed endeavor. This list is not meant to be a checklist or to indicate that any one type of evidence is either required or sufficient to establish eligibility.

- Degrees, certificates, or licenses in the field;
- Patents, trademarks, or copyrights developed by the person;
- Published articles or media reports about the person's achievements or current work;
- Documentation demonstrating a strong citation history of the person's work or excerpts of published articles showing positive discourse around, or adoption of, the person's work;
- Evidence that the person's work has influenced the field of endeavor;
- A plan describing how the person intends to continue the proposed work in the United States;[77]
- Correspondence from prospective or potential customers, users, investors, or other relevant entities;
- Documentation reflecting feasible plans for financial support;[78]
- Evidence that the person has received investment from U.S. investors, such as venture capital firms, angel investors, or start-up accelerators, and that the amounts are appropriate to the relevant endeavor;
- Copies of contracts, agreements, or licenses showing the potential impact of the proposed endeavor;
- Letters from government agencies or quasi-governmental entities in the United States demonstrating that the person is well positioned to advance the proposed endeavor (see below for a more detailed discussion of supporting evidence from interested government agencies and quasi-governmental entities);[79]
- Evidence that the person has received awards or grants or other indications of relevant non-monetary support (for example, using facilities free of charge) from federal, state, or local government entities with expertise in economic development, research and development, or job creation; and
- Evidence demonstrating how the person's work is being used by others, such as, but not limited to:
  - Contracts with companies using products that the person developed or assisted in developing;
  - Documents showing technology that the person invented, or contributed to inventing, and how others use that technology; and
  - Patents or licenses for innovations the person developed with documentation showing why the patent or license is significant to the field.

Letters may be persuasive when they are from experts in the person's field who have first-hand knowledge of the person's achievements, describe those achievements, provide specific examples of how the person is well positioned to advance the person's endeavor, and are supported by other independent evidence. Business plans or other similar descriptions of the person's plans, while useful in explaining the person's objectives, should be supported by other independent evidence.

In each case, officers must consider the totality of circumstances to determine whether the preponderance of evidence establishes that the person is well positioned to advance the proposed endeavor.

USCIS decides each petition on a case-by-case basis, and the more integral a person is to an endeavor, the stronger the case the person presents that they are well-positioned to advance the endeavor.

Third Prong: On Balance, it Would be Beneficial to the United States to Waive the Job Offer and thus the Permanent Labor Certification Requirements

Once officers have determined that the petitioner met the first two prongs, they proceed with the analysis of the third prong. This last prong requires the petitioner to demonstrate that the factors in favor of granting the waiver outweigh those that support the requirement of a job offer and thus a labor certification, which is intended to ensure that the admission of foreign workers will not adversely affect the job opportunities, wages, and working conditions of U.S. workers.[80]

A person is not precluded from seeking a national interest waiver because the person's employer has applied or could apply to DOL for a labor certification. Congress sought to protect U.S. workers and wages through the labor certification program, and Congress also recognized that in certain instances the national interest is better served by a waiver of the job offer and thus the labor certification requirement. In such cases, a national interest waiver outweighs the benefits inherent to the labor certification process, which primarily focuses on a geographically limited labor market. Within the context of national interest waiver adjudications, Congress entrusted the Secretary of Homeland Security to balance this interest.

For the third prong, an officer assesses whether the person's endeavor and the person being well-positioned to advance that endeavor, taken together, provide benefits to the nation such that a waiver of the labor certification requirement outweighs the benefits that ordinarily flow from that requirement. For example, in the case of an entrepreneur, where the person is self-employed in a manner that generally does not adversely affect U.S. workers,[81] or where the petitioner establishes or owns a business that provides jobs for U.S. workers, there may be little benefit from the labor certification.

In establishing eligibility for the third prong, petitioners may submit evidence relating to one or more of the following factors, as outlined in *Matter of Dhanasar*:

- Whether, in light of the nature of the person's qualifications or proposed endeavor, it would be impractical to obtain a labor certification;[82]
- The benefit to the United States from the prospective alien's contributions, even if other U.S. workers were also available;[83] and
- The national interest in the person's contributions is sufficiently urgent to warrant forgoing the labor certification process,[84] such as a time-sensitive public health or safety benefit offered by the endeavor.

- Whether the labor certification process may prevent an employer from hiring a person with unique knowledge or skills exceeding the minimum requirements standard for that occupation,[85] which cannot be appropriately captured by the labor certification;[86]

More specific considerations may include:

- Whether the person's endeavor has the potential to generate considerable economic impact consistent, for example, with economic revitalization;[87] and
- Whether the person's endeavor may lead to potential job creation.

Note that evidence of a national labor shortage in the person's occupation would not, by itself, satisfy this third prong.

With respect to athletics, according to an executive order, allowing men to compete in women's sports is demeaning, unfair, dangerous, and denies women and girls the equal opportunity to participate and excel in competitive sports.[88] Consistent with this reasoning, it is not in the national interest to the United States to waive the job offer and, thus, the labor certification, for male athletes[89] whose proposed endeavor is to compete in women's sports.[90]

4. Specific Evidentiary Considerations for Persons with Advanced Degrees in Science, Technology, Engineering, or Mathematics (STEM) Fields

There are specific evidentiary considerations relating to STEM degrees and fields, although the analysis is the same regardless of endeavor, so these considerations may apply in non-STEM endeavors where the petitioner demonstrates that such considerations are applicable.[91] USCIS recognizes the importance of progress in STEM fields and the essential role of persons with advanced STEM degrees in fostering this progress, especially in focused critical and emerging technologies[92] or other STEM areas important to U.S. competitiveness or national security.

To identify a critical and emerging technology field, officers consider governmental, academic, and other authoritative and instructive sources, and all other evidence submitted by the petitioner.

Officers may find that a STEM area is important to competitiveness or security in a variety of circumstances, for example, when the evidence in the record demonstrates that an endeavor will help the United States to remain ahead of strategic competitors or current and potential adversaries, or relates to a field, including those that are research and development-intensive industries,[93] where appropriate activity and investment, both early and later in the development cycle, may contribute to the United States achieving or maintaining technology leadership or peer status among allies and partners.

With respect to the first prong, as in all cases, the evidence must demonstrate that a STEM endeavor has both substantial merit and national importance. Many proposed endeavors that aim to advance STEM technologies and research, whether in academic or industry settings, not only have substantial merit in relation to U.S. science and technology interests, but also have sufficiently broad potential implications to demonstrate national importance.

On the other hand, while proposed classroom teaching activities in STEM, for example, may have substantial merit in relation to U.S. educational interests, such activities, by themselves, generally are not indicative of an impact in the field of STEM education more broadly, and therefore generally would not establish their national importance.[94]

For the second prong, as mentioned above, the person's education and skillset are relevant to whether the person is well positioned to advance the endeavor.[95] USCIS considers an advanced degree, particularly a Doctor of Philosophy (Ph.D.), in a STEM field tied to the proposed endeavor and related to work furthering a critical and emerging technology or other STEM area important to U.S. competitiveness or national security, an especially positive factor to be considered along with other evidence for purposes of the assessment under the second prong.[96]

Persons with a Ph.D. in a STEM field, as well as certain other persons with advanced STEM degrees relating to the proposed endeavor, have scientific knowledge in a narrow STEM area since doctoral dissertations and some master's theses concentrate on a particularized subject matter. Officers should then consider whether that specific STEM area relates to the proposed endeavor. Even when the area of concentration is in a theoretical STEM area (theoretical mathematics or physics, for example), it may further U.S. competitiveness or national security as described in the proposed endeavor.

Examples of evidence that can supplement the person's education are listed above,[97] but a petitioner may submit any relevant evidence, including letters from interested government agencies as discussed below,[98] to show how the person is well positioned to advance the proposed endeavor. A degree in and of itself, however, is not a sufficient basis to determine that a person is well positioned to advance the proposed endeavor.

Finally, with respect to the third prong, it is the petitioner's burden to establish that factors in favor of granting the waiver outweigh those that support the requirement of a job offer and thus a labor certification.

When evaluating the third prong and whether the United States may benefit from the person's entry, regardless of whether other U.S. workers are available (as well as other factors relating to prong three discussed above, such as urgency), USCIS considers the following combination of facts contained in the record to be a strong positive factor:

- The person possesses an advanced STEM degree, especially a Ph.D.;
- The person will be engaged in work furthering a critical and emerging technology or other STEM area important to U.S. competitiveness; and
- The person is well positioned to advance the proposed STEM endeavor of national importance.

The benefit is especially weighty where the endeavor has the potential to support U.S. national security or enhance U.S. economic competitiveness, or when the petition is supported by letters from interested U.S. government agencies as discussed in the next subsection.

5. The Role of Interested Government Agencies or Quasi-Governmental Entities

While not required, letters from interested government agencies or quasi-governmental entities in the United States (for example federally-funded research and development centers) can be helpful evidence and, depending on the contents of the letters, can be relevant to all three prongs. Specifically, letters from an interested government agency or quasi-governmental entity could prove favorable for purposes of the first prong if, for example, they establish that the agency or entity has expertise in the proposed endeavor and that the proposed STEM endeavor promises to advance a critical and emerging technology or is otherwise important for purposes of maintaining the United States' technological prominence.

Detailed letters of government or quasi-governmental interest that provide relevant information about how well-positioned the person is to advance the endeavor are valuable for purposes of assessing the second prong.[99] Finally, an interested government agency or quasi-governmental entity can help explain how granting the waiver may outweigh the benefits of the job offer and labor certification requirement by explaining a particular urgency or detailing how the United States would benefit from the prospective alien's contributions, even if other U.S. workers are available.

6. Specific Evidentiary Considerations for Entrepreneurs

There may be unique aspects of evidence submitted by an entrepreneur petitioner[100] undertaking a proposed endeavor, including through an entity based in the United States in which the petitioner typically possesses (or will possess) an ownership interest, and in which the petitioner maintains (or will maintain) an active and central role such that the petitioner's knowledge, skills, or experience would significantly advance the proposed endeavor.

Not every entrepreneur qualifies for a national interest waiver. While USCIS decides each case on its merits, broad assertions regarding general benefits to the economy and potential to create jobs will not establish an entrepreneur's qualification for a national interest waiver.

For example, an entrepreneur cannot demonstrate national importance under the first prong solely by opening a consulting firm for those working or seeking to work in a nationally important occupation. Similarly, statements and evidence regarding the importance of the relevant industry overall, such as the car dealership industry, will not demonstrate that a person seeking to start a car dealership satisfies the national importance prong.

As an example related to the second prong, evidence that a person has general work experience in a given field may not be sufficient to demonstrate that such person is well positioned to start a consulting business providing expertise in that field. For instance, if a person's experience in banking is limited to working as a teller or accounts manager, USCIS may determine that the person has not established they are well positioned to advance an entrepreneurial endeavor to establish a consulting business that will advise U.S. banks nationally on how to improve customer relations.

Strong petitions would discuss how the person's record of success would translate to a proposed plan or forecast for continued success, and steps they have taken toward those proposed activities, and plans that tie into the person's background and expertise. A persuasive petition could delineate clear details such as whether the person has met certain achievements toward the endeavor that may have generated interest from potential customers, users, investors, or other relevant entities or individuals. Beyond this, USCIS would also welcome probative evidence to support how the person has anticipated relevant metrics such as market size and share, job creation, and revenue growth.

When evaluating whether petitions for entrepreneurs satisfy the three-pronged framework, officers may consider the fact that many entrepreneurs do not follow traditional career paths and there is no single way in which an entrepreneurial venture entity must be structured.

In addition to the more generally applicable evidence described above, an entrepreneur petitioner may submit the types of evidence discussed under the italicized subheadings below to substantiate any business plans and to establish that the endeavor has substantial merit and national importance, that the petitioner is well positioned to advance the endeavor, and that, on balance, it would be beneficial to waive the job offer and thus labor certification requirements.

USCIS evaluates all of the evidence in the aggregate; not every piece of evidence necessarily establishes eligibility.[101] For example, ownership of a company, while relevant to whether the person is well positioned to advance the endeavor, rarely establishes eligibility on its own. USCIS reviews all of the evidence submitted, including the person's education, experience, and skills when determining eligibility.

Evidence of Ownership and Role in the U. S.-Based Entity

The petitioner may have an ownership interest in an entity based in the United States, of which the petitioner may also be the founder or co-founder. The petitioner may also play an active and central role in the operations of the entity as evidenced by the petitioner's appointment as an officer (or similar position of authority) of the entity or in another key role within the entity. Such evidence may have probative value in demonstrating the petitioner is well positioned to advance the endeavor.

Degrees, Certifications, Licenses, Letters of Experience

This evidence may indicate that the petitioner has knowledge, skills, or experience that would significantly advance the proposed endeavor being undertaken by the entity. Education and employment history, along with other factors related to the petitioner's background, may serve to corroborate the petitioner's claims. Some examples include successfully leading prior start-up entities or having a combination of relevant degrees and experience to equip the petitioner to advance the proposed endeavor.

Investments

An investment, binding commitment to invest, or other evidence demonstrating a future intent to invest in the entity by an outside investor, consistent with industry standards, may provide independent validation and support of a finding of the substantial merit of the proposed endeavor or the petitioner being well positioned to advance the proposed endeavor.

This investment may come from persons, such as angel investors, or established organizations, such as venture capital firms. Because different endeavors have different capital needs, USCIS also considers the amount of capital that would be appropriate to advance the endeavor in determining whether the petitioner has secured sufficient investments.

Incubator or Accelerator Participation

Incubators are private or public entities that provide resources, support, and assistance to entrepreneurs to foster the growth and development of an idea or enterprise. Accelerators are generally private venture capital entities and focus on helping entrepreneurs and their start-ups speed the launch, growth, and scale of their businesses.

Officers may consider evidence of an entrepreneur's admission into an incubator or accelerator as an endorsement of the petitioner's proposed plan or past track record, and the petitioner being well positioned to advance the endeavor. Petitioners may submit evidence of the past success of the incubator for officers to consider when evaluating this evidence.

Awards or Grants

Relevant funds may come from federal, state, or local government entities with expertise in economic development, research and development, or job creation. In addition, awards or grants may be given by other entities, such as policy or research institutes. Like investment from outside investors, this evidence may provide independent validation and support for a finding of substantial merit, national importance, or both, of the proposed endeavor or the petitioner being well positioned to advance the proposed endeavor.

Intellectual Property

Intellectual property, including relevant patents held by the petitioner or one of the petitioner's current or prior start-up entities, accompanied by documentation showing why the intellectual property is significant to the field or endeavor, may serve as probative evidence of a prior record of success and potential progress toward achieving the endeavor. The petitioner should submit evidence to document how the petitioner contributed to the development of the intellectual property and how it has or may be used internally or externally.

Published Materials about the Petitioner, the Petitioner's U.S.-Based Entity, or Both

Relevant published materials may consist of printed or online newspaper or magazine articles or other similar published materials evidencing that the petitioner or the petitioner's entity, with some reference to the petitioner's role, has received significant attention or recognition by the media. Petitioners may submit evidence of the media outlet's reputation for officers to consider when evaluating this evidence.

Revenue Generation, Growth in Revenue, and Job Creation

Relevant growth metrics may support that the proposed endeavor, the petitioner's start-up entity, or both, has substantial merit or that the petitioner is well positioned to advance the proposed endeavor. Such evidence may include a showing that the entity has exhibited growth in terms of revenue generation, jobs created in the United States, or both, and the petitioner's contribution to such growth.

This evidence may also support that the proposed endeavor, the petitioner's start-up entity, or both, have national importance when coupled with, for example, evidence that the current or proposed start-up entity is located in an economically depressed area that has benefited or will benefit from jobs created by the start-up entity or that the potential job creation will otherwise be at a significant level with respect to the population and economic circumstances of the relevant area.

Letters and Other Statements from Third Parties

Letters may be from, for example, relevant government entities, outside investors, or established business associations with knowledge of:

The research, products, or services developed by the petitioner, the petitioner's entity, or both; or the petitioner's knowledge, skills, or

Experience that would advance the proposed endeavor.

While entrepreneurs typically do not undergo the same type of peer review common in academia, entrepreneurs may operate in a variety of high-tech or cutting-edge industries that have their own industry or technology experts that provide various forms of peer review.[102]

Additionally, the merits of the entrepreneur's business, business plan, product, or technology may undergo various forms of review by third parties, such as prospective investors, retailers, or other industry experts. Accordingly, letters and other statements from relevant third-party reviewers, may have probative value in demonstrating the substantial merit and national importance of the endeavor and that the individual is well positioned to advance the endeavor.

Generally, many entrepreneurial endeavors are measured in terms of revenue generation, profitability, valuations, cash flow, or customer adoption. However, other metrics may be of equal importance in determining whether the petitioner has established each of the three prongs.

As noted in *Matter of Dhanasar*, "many innovations and entrepreneurial endeavors may ultimately fail, in whole or in part, despite an intelligent plan and competent execution."[103] Accordingly, petitioners are not required to establish that the proposed endeavor is more likely than not to ultimately succeed based solely on the typical metrics used to measure entrepreneurial endeavors (although such showings may be considered favorably).

They instead need to show that the proposed endeavor has both substantial merit and national importance, that the petitioner is well positioned to advance the proposed endeavor, and that on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

Evidence establishing the petitioner's past entrepreneurial achievements and that corroborates projections of future work in the national interest are favorable factors. Claims lacking corroborating evidence are not sufficient to meet the petitioner's burden of proof. As in all cases, officers must consider the totality of circumstances to determine whether each of the three prongs is established by a preponderance of the evidence.

Footnotes

[^ 1] This section uses the term beneficiary to refer to the alien; however, if the advanced degree professional also seeks a national interest waiver of the job offer, he or she can self-petition. See Section D, National Interest Waiver of Job Offer [6 USCIS-PM F.5(D)].

[^ 2] See 8 CFR 204.5(k)(2) (defining profession as one of the occupations listed in INA 101(a)(32), as well as any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation).

[^ 3] See INA 203(b)(2)(A). See 8 CFR 204.5(k).For a discussion of considerations for petitioners seeking a national interest waiver where the U.S. Department of Labor (DOL) does not certify the job requirements, see Section D, National Interest Waiver of Job Offer, Subsection 1, Eligibility for Second Preference Classification [6 USCIS-PM F.5(D)(1)].

[^ 4] See 8 CFR 204.5(k)(4).

[^ 5] For additional information on medical degrees as advanced degrees, see Chapter 6, Physicians [6 USCIS-PM F.6]. For general information about evaluations of education credentials, see Part E, Employment-Based Immigration, Chapter 9, Evaluation of Education Credentials [6 USCIS-PM E.9].

[^ 6] See 8 CFR 204.5(k)(2).

[^ 7] The Joint Explanatory Statement of the Committee of Conference, made at the time Congress adopted the Immigration Act of 1990, stated that the equivalent of an advanced degree is a bachelor's degree plus at least 5 years progressive experience in the professions. See 60 FR 29771 (PDF). USCIS has incorporated this standard with respect to establishing equivalency to a master's degree. See 8 CFR 204.5(k)(3)(i)(B).

[^ 8] Whether the beneficiary has completed all substantive requirements for the degree as of the date on a provisional certificate is a case-specific analysis; but if the petitioner establishes that the beneficiary had completed those requirements, USCIS considers the date of the provisional certificate for purposes of calculating post-baccalaureate experience. See *Matter of O-A-, Inc.* (PDF, 95.16 KB), Adopted Decision 2017-03 (AAO Apr. 17, 2017).

[^ 9] For a discussion of considerations for petitioners seeking a national interest waiver where DOL does not certify the job requirements, see Section D, National Interest Waiver of Job Offer, Subsection 1, Eligibility for Second Preference Classification [6 USCIS-PM F.5(D)(1)].

[^ 10] See 8 CFR 204.5(k)(2).

[^ 11] See the Occupational Information Network (O*Net) website, which is sponsored by U.S. Department of Labor (DOL)'s Employment and Training Administration, and developed by the National Center for O*NET Development.

[^ 12] See 8 CFR 204.5(k)(2).

[^ 13] See Chapter 2, Extraordinary Ability [6 USCIS-PM F.2].

[^ 14] This section uses “beneficiary” to refer to the alien; however, if the person of exceptional ability also seeks a national interest waiver of the job offer, he or she can self-petition. See Section D, National Interest Waiver of the Job Offer [6 USCIS-PM F.5(D)].

[^ 15] See INA 203(b)(2)(A). According to an executive order, allowing male athletes (as defined by executive order) is demeaning, unfair, dangerous, and denies women and girls the equal opportunity to participate and excel in competitive sports. See Keeping Men Out of Women's Sports, 90 FR 9279 (Feb. 11, 2025) and Executive Order 14168, Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, 90 FR 8615 (Jan. 20, 2025) (Sec. 2 defining “male” and “men”). Consistent with this reasoning, male athletes seeking to enter the United States to compete in women’s sports do not substantially benefit prospectively the United States. For more information on evidence of biological sex and the role of biological sex in immigration benefit requests, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 5, Verification of Identifying Information, Section B, Personal Information, Subsection 2, Sex [1 USCIS-PM E.5(B)(2)].

[^ 16] See INA 203(b)(2)(A). See 8 CFR 204.5(k).

[^ 17] See 8 CFR 204.5(k)(3)(ii).

[^ 18] See 8 CFR 204.5(k)(3)(ii).

[^ 19] See 8 CFR 204.5(k)(3)(iii).

[^ 20] See 8 CFR 204.5(k)(3)(ii).

[^ 21] See 8 CFR 204.5(k)(3)(ii).

[^ 22] See INA 203(b)(2).

[^ 23] See *Matter of Chawathe* (PDF), 25 I&N Dec. 369, 376 (AAO 2010) (“[T]ruth is to be determined not by the quantity of evidence alone but by its quality. Therefore, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.”). See *Kazarian v. USCIS* (PDF), 596 F.3d 1115, 1122 (9th Cir. 2010). USCIS has interpreted *Kazarian* as applicable to exceptional ability petitions. See Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions the A*djudicator's Field Manual (AFM)* Chapter 22.2, *AFM* Update AD11-14, PM-602-0005.1, issued December 22, 2010.

[^ 24] See INA 203(b)(2)(C).

[^ 25] See INA 204(b).

[^ 26] See Keeping Men Out of Women's Sports, 90 FR 9279 (Feb. 11, 2025). For more information on evidence of biological sex and the role of biological sex in immigration benefit requests, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 5, Verification of Identifying Information, Section B, Personal Information, Subsection 2, Sex [1 USCIS-PM E.5(B)(2)].

[^ 27] See 20 CFR 656.15(d).

[^ 28] See INA 203(b)(2).

[^ 29] See 20 CFR 656.15(d). See Part E, Employment-Based Immigration, Chapter 7, Schedule A Designation Petitions [6 USCIS-PM E.7].

[^ 30] See INA 212(a)(5)(A)(iii).

[^ 31] See INA 203(b)(2)(A).

[^ 32] See *Matter of Masters* (PDF), 13 I&N Dec. 125 (Dist. Dir. 1969).

[^ 33] See INA 212(a)(5)(A)(iii). See 20 CFR 656.40(f).

[^ 34] See INA 212(a)(5)(A)(iv).

[^ 35] See 73 FR 11954 (PDF). See DOL’s Foreign Labor Certification webpage.

[^ 36] See 8 CFR 204.5(k)(3)(ii)-(iii). See Section B, Exceptional Ability, Subsection 2, Evidence [6 USCIS-PM F.5(B)(2)].

[^ 37] See Section B, Exceptional Ability [6 USCIS-PM F.5(B)].

[^ 38] See INA 203(b)(2)(B)(i). See 8 CFR 204.5(k)(4)(ii).

[^ 39] See Section 302(b)(2) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. 102-232 (PDF), 105 Stat. 1733, 1743 (December 12, 1991).

[^ 40] See Section A, Advanced Degree Professionals [6 USCIS-PM F.5(A)].

[^ 41] See 8 CFR 204.5(k)(4)(ii).

[^ 42] See 8 CFR 204.5(k)(4)(ii).

[^ 43] See INA 203(b)(2), INA 203(b)(2)(A), and INA 203(b)(2)(B)(i).

[^ 44] USCIS recognizes that many national interest waiver petitioners are involved in highly technical occupations and proposed endeavors. However, it would be helpful to describe those in a way that an average person could understand.

[^ 45] See *Matter of Dhanasar*, 26 I&N 884, 891 (AAO 2016).

[^ 46] See *Matter of Dhanasar*, 26 I&N 884, 891 (AAO 2016).

[^ 47] See 8 CFR 204.5(k)(2) ("Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation."). See also INA 101(a)(32) which provides that "[t]he term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries."

[^ 48] For a discussion of the analysis of the job requirements on a labor certification for advanced degree professionals where the petitioner does not seek a national interest waiver, see Section A, Advanced Degree Professionals [6 USCIS-PM F.5(A)].

[^ 49] See 8 CFR 204.5(k)(2) (definition of advanced degree).

[^ 50] The person's credentials, however, are relevant to whether the person has an advanced degree.

[^ 51] See *Matter of Katigbak* (PDF), 14 I&N Dec. 45, 46 (Reg. Comm. 1971) (The degree or major must be academically appropriate to the profession for which petitioned.).

[^ 52] See U.S. Bureau of Labor Statistics, Occupational Outlook Handbook, Bakers, indicating no formal education credential is typically required to work as a baker.

[^ 53] A specialty generally refers to the field of study related to the baccalaureate degree.

[^ 54] See 8 CFR 204.5(k)(2) (definition of advanced degree).

[^ 55] In its joint explanatory statement, Congress' conference committee on the 1990 amendments to the INA stated: "The conferees intend that the equivalent of an advanced degree be defined to mean a bachelor's degree plus at least five years' experience in the particular profession." See H.R. Rep. 101-955 (1990). Accordingly, the legislative history indicates that the profession, rather than a required major field of study, determines the specialty.

[^ 56] This analysis would be the same for a petition supported by a labor certification, while also taking into account the job requirements DOL certified.

[^ 57] See INA 203(b)(2)(A).

[^ 58] See 8 CFR 204.5(k)(3)(ii)(A)-(F). For a discussion of exceptional ability in general, see Section B, Exceptional Ability [6 USCIS-PM F.5(B)].

[^ 59] See 8 CFR 204.5(k)(2) (defining exceptional ability in the sciences, arts, or business as a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business). For a discussion of exceptional ability in general, see Section B, Exceptional Ability [6 USCIS-PM F.5(B)].

[^ 60] See 8 CFR 204.5(k)(3)(ii)(A).

[^ 61] For a discussion of how USCIS analyzes exceptional ability, see Section B, Exceptional Ability [6 USCIS-PM F.5(B)].

[^ 62] In discussing persons of exceptional ability seeking a national interest waiver, *Matter of Dhanasar* references such ability in the "given area of endeavor." See *Matter of Dhanasar*, 26 I&N Dec. 884, 886 n.3 (AAO 2016).

[^ 63] See 8 CFR 204.5(k)(1)-(3) (providing definitions and considerations for making advanced degree professional and person of exceptional ability determinations). As explained in *Matter of Dhanasar*, 26 I&N Dec. 884, 886 n.3 (AAO 2016), advanced degree professionals and persons of exceptional ability are generally subject to the labor certification requirement and are not exempt because of their advanced degree or exceptional ability. See *Matter of Dhanasar*, 26 I&N Dec. 884, 893 (AAO 2016).

[^ 64] Therefore, whether a given person seeks classification as a person of exceptional ability or as a member of the professions holding an advanced degree, that person cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in the person's field of expertise. See *Matter of Dhanasar*, 26 I&N Dec. 884, 886 n.3 (AAO 2016).

[^ 65] See INA 203(b)(2).

[^ 66] The three prongs derive from the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). The references to the facts in that case in this guidance, however, are illustrative and do not set the standard.

[^ 67] See *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016). See *Poursina v. USCIS* (PDF), 936 F.3d 868 (9th Cir. 2019).

[^ 68] See 8 CFR 103.3(a).

[^ 69] For instance, although the petitioner was an engineer by occupation, the decision discusses his specific proposed endeavors "to engage in research and development relating to air and space propulsion systems, as well as to teach aerospace engineering." See *Matter of Dhanasar*, 26 I&N Dec. 884, 891 (AAO 2016).

[^ 70] See *Matter of Dhanasar*, 26 I&N Dec. 884, 892 (AAO 2016) (finding that the petitioner's proposed research "aims to advance scientific knowledge and further national security interests and U.S. competitiveness in the civil space sector" and therefore has substantial merit).

[^ 71] See *Matter of Dhanasar*, 26 I&N Dec. 884, 887 (AAO 2016) (finding that "certain locally- or regionally-focused endeavors may be of national importance despite being difficult to quantify with respect to geographic scope").

[^ 72] See *Matter of Dhanasar*, 26 I&N Dec. 884, 889-90 (AAO 2016).

[^ 73] For more information, see Subsection 6, Specific Evidentiary Considerations for Entrepreneurs [6 USCIS-PM F.5(D)(6)].

[^ 74] See *Matter of Dhanasar*, 26 I&N Dec. 884, 889-90 (AAO 2016) (explaining that "an endeavor that has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area, for instance, may well be understood to have national importance"). See *Matter of Dhanasar*, 26 I&N Dec. 884, 892 (AAO 2016) (finding that the petitioner's evidence demonstrated the national importance of advancements in STEM fields, specifically hypersonic propulsion technologies and research).

[^ 75] See *Matter of Dhanasar*, 26 I&N Dec. 884, 890, 892-93 (AAO 2016).

[^ 76] See *Matter of Dhanasar*, 26 I&N Dec. 884, 890, (AAO 2016).

[^ 77] In the case of a petitioner who does not intend to be self-employed, USCIS considers a job offer or communications with prospective employers, while not required, relevant to demonstrate the circumstances or capacity in which the person intends to carry out the endeavor and the feasibility of that plan.

[^ 78] For a discussion of financing for entrepreneurs, see Subsection 6, Specific Evidentiary Considerations for Entrepreneurs [6 USCIS-PM F.5(D)(6)].

[^ 79] For a discussion of letters from interested government agencies, see Subsection 5, The Role of Interested Government Agencies or Quasi-Governmental Entities [6 USCIS-PM F.5(D)(5)].

[^ 80] See 20 CFR 656.1. See Part E, Employment-Based Immigration, Chapter 6, Permanent Labor Certification, Section A, Employer Requirements, Subsection 2, Individual Permanent Labor Certifications [6 USCIS-PM E.6(A)(2)].

[^ 81] See discussion of entrepreneurs in Subsection 6, Specific Evidentiary Considerations for Entrepreneurs [6 USCIS-PM F.5(D)(6)].

[^ 82] See *Matter of Dhanasar*, 26 I&N Dec. 884, 890 (AAO 2016).

[^ 83] See *Matter of Dhanasar*, 26 I&N Dec. 884, 891, 893 (AAO 2016) (holding that “because of his record of successful research in an area that furthers U.S. interests, we find that this petitioner offers contributions of such value that, on balance, they would benefit the United States even assuming that other qualified U.S. workers are available”). In that case, the Administrative Appeals Office (AAO) noted that the petitioner holds three graduate degrees in fields tied to the proposed endeavor, that his proposed research has significant implications for U.S. national security and competitiveness, and that his work had attracted interest from government agencies. Therefore, the AAO considered the petitioner’s endeavor in the field of aerospace engineering, and his level and extent of expertise within that field, taken together, to have the potential to provide great benefit to the United States such that waiver of the job offer was in the national interest.

[^ 84] See *Matter of Dhanasar*, 26 I&N Dec. 884, 891 (AAO 2016).

[^ 85] An employer may only list the minimum job requirements on a labor certification application. See 20 CFR 656.17(i).

[^ 86] See *Matter of Dhanasar*, 26 I&N Dec. 884, 890 (AAO 2016).

[^ 87] See *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016) (explaining that when evaluating the first prong, “the potential to create a significant economic impact may be favorable but is not required”). The potential economic impact is an appropriate inquiry when weighing the relative benefit of granting the national interest waiver.

[^ 88] See Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, 90 FR 8615 (Jan. 20, 2025).

[^ 89] As defined in Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, 90 FR 8615 (Jan. 20, 2025).

[^ 90] See Keeping Men Out of Women's Sports, 90 FR 9279 (Feb. 11, 2025). For more information on evidence of biological sex and the role of biological sex in immigration benefit requests, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 5, Verification of Identifying Information, Section B, Personal Information, Subsection 2, Sex [1 USCIS-PM E.5(B)(2)].

[^ 91] “STEM” is not defined in the regulations describing the national interest waiver benefit, but officers may refer to the definition found in the context of STEM optional practical training for students for guidance. See 8 CFR 214.2(f)(10)(ii)(C)(2)(i) (defining STEM as “science, technology, engineering, or mathematics”).

[^ 92] Critical and emerging technologies are those that are critical to U.S. national security, including military defense and the economy. While those technologies necessarily evolve and USCIS reviews the specifics of each proposed endeavor on a case-by-case basis, examples may include, but are not limited to, certain critical areas of artificial intelligence or quantum information science. When adjudicating this discretionary benefit, officers should review the entire record and, where officers have concerns, work closely with their supervisors and fraud, benefit integrity, and national security personnel in their offices.

[^ 93] In general, research-intensive industries are those with higher value added from research and development. For example, the Science and Technology Policy Institute provided a list of research and development intensive industries at Appendix C of a report on Economic Benefits and Losses from Foreign STEM Talent in the United States (October 2021).

[^ 94] See *Matter of Dhanasar*, 26 I&N Dec. 884, 893 (AAO 2016).

[^ 95] See *Matter of Dhanasar*, 26 I&N Dec. 884, 892-93 (AAO 2016). In that case, the AAO favorably considered documentation that the petitioner played a significant role in projects funded by grants from the National Aeronautics and Space Administration (NASA) and the Air Force Research Laboratories (AFRL) within the then-U.S. Department of Defense. Therefore, the significance of the petitioner’s research in his field was corroborated by evidence of peer and government interest in his research, as well as by consistent government funding of the petitioner’s research projects. The AAO concluded that the petitioner’s education, experience, and expertise in his field; the significance of his role in research projects; as well as the sustained interest of and funding from government entities such as NASA and AFRL, positioned him well to continue to advance his proposed endeavor of hypersonic technology research.

[^ 96] See *Matter of Dhanasar*, 26 I&N Dec. 884, 893 (AAO 2016). In that case, the AAO noted that the petitioner holds three graduate degrees in fields tied to the proposed endeavor, including a Ph.D. in a STEM field (Engineering) from a regionally accredited U.S. university.

[^ 97] See Subsection 3, Overview of the Three Prongs [6 USCIS-PM F.5(D)(3)].

[^ 98] For a discussion of letters from interested government agencies, see Subsection 5, The Role of Interested Government Agencies or Quasi-Governmental Entities [6 USCIS-PM F.5(D)(5)].

[^ 99] See *Matter of Dhanasar*, 26 I&N Dec. 884, 893 (AAO 2016) (finding detailed expert letters describing U.S. government interest and investment in the petitioner’s research to be persuasive).

[^ 100] This section, because it discusses self-petitions by entrepreneurs, does not distinguish between “petitioner” and “person” as they are one and the same.

[^ 101] See *Matter of Chawathe* (PDF), 25 I&N Dec. 369, 376 (AAO 2010) (USCIS examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.).

[^ 102] Petitioners may submit evidence related to the credentials of experts who support a petition for officers to consider when assigning weight to the letter.

[^ 103] See *Matter of Dhanasar*, 26 I&N Dec. 884, 890 (AAO 2016).

Chapter 6 - Physician

A. Petition for Physician Supported by Permanent Labor Certification

1. Determining Whether Physician has met Minimum Requirements for Position

Officers must determine whether the alien physician (physician) met the minimum education, training, and experience requirements of the permanent labor certification as of the date of its filing with the U.S. Department of Labor (DOL) in order to establish the physician's eligibility for the classification.[1] Although a permanent labor certification may not specify that a license is required for a physician position, physicians involved in patient care must obtain a license to practice medicine in the location where they are to be employed in the United States as a matter of state or territorial law.[2]

Therefore, it follows that any candidate for such a position must, at the time of the permanent job offer, either possess a permanent license to practice medicine or be eligible for such a license in the state of the intended employment in order to be qualified for entry into the position. In the case of a physician petition supported by a permanent labor certification, the job offer is considered to have been made as of the date of the filing of the permanent labor certification.

License to Practice Medicine[3]

Each U.S. state has a medical board that devises its own educational, training, and experience requirements that physicians must meet in order to be granted a permanent license, more specifically, a full and unrestricted license, to practice medicine in that state. A full and unrestricted license to practice differs from a limited license to practice medicine. Limited licensure is typically granted to physicians who are still working towards obtaining the credentials required for full licensure or who may be providing limited medical care, such as a physician who is working at a summer camp as a camp physician for a short period of time.

In general, there are two pathways to obtain permanent licensure to practice medicine as a physician: either as an initial applicant for licensure, or as an applicant for licensure by endorsement.

The initial applicant pathway is for medical school graduates who have never obtained a permanent license to practice medicine as a physician in the United States, or in some instances, Canada. An initial applicant must show that he or she has any requisite medical degree, post-graduate training, residency, and board certifications, and has passed the medical examinations required by the state medical board.

All U.S. states require licensing candidates to make an application for licensure with their medical board to demonstrate that they meet the requirements of licensure regardless of previous licensure.[4] This pathway is often referred to as an endorsement application and involves:

- A verification of the standing of the applicant's license(s) issued by another U.S. state or territory, and in some cases by a foreign country; and
- A review of the applicant's education, training, and medical examinations to determine if the applicant meets the requirements of the state medical board.

U.S. states do not generally allow a physician to practice medicine within their jurisdictional boundaries based on a license issued by another state or territory (referred to as automatic reciprocity). Certain exceptions may exist for physicians practicing at federal medical facilities and in other very limited circumstances.

In some states, applicants must pass medical examinations, such as the U.S. Medical Licensing Examination (USMLE), within a certain number of attempts or within a certain timeframe in order for the examination results to be considered valid for licensure. In addition, approximately 75 percent of the U.S. states require foreign medical school graduates to complete additional post-graduate medical training or residencies beyond that required for U.S. medical school graduates.

In order to approve a petition supported by a permanent labor certification filed on behalf of a physician, the petitioner must show that, at the time of the filing of the permanent labor certification, the physician:

- Possesses a permanent license to practice medicine in the area of intended employment; or
- Has met all of the requirements to be eligible to obtain such a license in the area of intended employment, notwithstanding eligibility requirements that are contingent upon his or her immigration status in the United States.

Some state medical boards do not issue a license to practice medicine unless the applicant presents evidence that he or she is legally authorized to be employed in the United States or has obtained a U.S. Social Security Number (SSN). State licensure criteria relating to the applicant's U.S. immigration status, such as a requirement that the applicant must be a lawful permanent resident (LPR) or must otherwise possess employment authorization or an SSN, should not be considered relevant to the adjudication of the petition as the petition is the means by which the physician would obtain LPR status and eligibility to accept employment and obtain an SSN in the United States.

Officers review the evidence provided in support of the petition to determine if the physician had a permanent license to practice or was eligible to obtain such a license in the location of intended employment at the time of filing of the permanent labor certification. Information regarding the licensure requirements for U.S. states can be obtained from the Federation of State Medical Boards[5] and at the various U.S. medical board websites.

2. Foreign Medical Degree Equivalency

The United States is one of the few countries where medical school applicants are required to obtain a bachelor's degree as a requirement for admission to medical school. As a result, a U.S. medical degree is considered to be an advanced degree.

In many other countries, a person may be admitted to medical school directly out of high school. In these instances, the program of study for the foreign medical degree is longer in length (generally 5-7 years in duration) than is required for a less specialized foreign bachelor's degree (generally 3-4 years in duration). In some countries, the name of the degree is "Bachelor of Medicine, Bachelor of Surgery," and the program of study may involve only medicine, to include some limited basic sciences.

A foreign medical degree may qualify as the equivalent of a U.S. medical degree and therefore an advanced degree for purposes of this visa classification if, at the time of the filing of the permanent labor certification application, the following two conditions are met:

Condition 1: The beneficiary:

- Has been awarded a foreign medical degree from a medical school that requires applicants to obtain a degree equivalent to a U.S. bachelor's degree as a requirement for admission;
- Has been awarded a foreign medical degree, and the petitioner has provided a foreign education credential evaluation that credibly describes how the foreign medical degree is equivalent to a medical degree obtained from an accredited medical school in the United States; or
- Has been awarded a foreign medical degree and has passed the National Board of Medical Examiners Examination (NBMEE) or an equivalent examination, such as the USMLE, Steps 1, 2, and 3.

Condition 2: The beneficiary was fully eligible for the position described on the permanent labor certification application on the date that it was filed, and the petitioner has established that:[6]

- The beneficiary had a full and unrestricted license to practice medicine in the place of intended employment and continues to hold such unrestricted license; or
- The beneficiary's foreign medical degree meets the medical degree requirements to be eligible for full and unrestricted licensure specified by the medical board governing the place of intended employment.

Each U.S. state, the District of Columbia, and the U.S. territories have a medical board that devises its own medical degree requirements that candidates must meet in order to be licensed to practice medicine in that jurisdiction.

B. Physician National Interest Waiver

1. Purpose, Background, and Legal Authority

Statutory and Regulatory Authorities[7]

The Nursing Relief for Disadvantaged Areas Act (Nursing Relief Act) of 1999 amended the Immigration and Nationality Act[8] to establish a national interest waiver (NIW) of the DOL's permanent labor certification process for certain physicians petitioning for advanced degree professional or exceptional ability classification.[9]

USCIS grants a NIW of the job offer requirement, and therefore the permanent labor certification requirement, for any physician seeking advanced degree professional or exceptional ability classification:

- The physician agrees to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and
- A federal agency or a department of public health in any state has previously determined that the physician's work in such an area or at such facility is in the public interest.[10]

The physician may not receive LPR status until he or she has worked full time as a physician for an aggregate of 5 years in the shortage area, or 3 years in the shortage area if the physician petitioned for the NIW before November 1, 1998.[11]

On September 6, 2000, legacy Immigration and Naturalization Service (INS), now USCIS, issued an interim rule implementing the physician NIW provisions.[12]

Consistent with the statute, the regulations allow filing of a physician NIW and an adjustment application without the physician first completing the 3 or 5 years of service in shortage areas. The regulations include provisions that:

- Require physicians who had an NIW denied prior to November 12, 1999, to complete the 5-year rather than the 3-year service requirement;
- Require NIW physicians to comply with reporting requirements, including submitting initial evidence within 120 days of the completion of the second year of service and additional evidence within 120 days of completing the fifth year of service to establish that they were still engaged in the area of medical practice that was the basis for approval of the NIW; and
- Limit NIW eligibility to physicians who practiced in a medical specialty that was within the scope of the shortage designation for the geographic area.

Schneider v. Chertoff

Plaintiffs in *Schneider v. Chertoff*[13] challenged specific provisions of the agency's physician NIW regulations and, in its decision issued on June 7, 2006, the Ninth Circuit found that three regulatory provisions were beyond the scope of the statutory language.[14] The court held that:

- Medical practice completed before the approval of the employment-based petition (except medical practice as a J-1 nonimmigrant) counts toward the service requirement;
- NIW physicians who had immigrant visa petitions filed on their behalf before November 1, 1998, but were denied before November 12, 1999, need only fulfill the 3-year service requirement; and
- The regulatory period of 4 years (where 3 years of service is required) or 6 years (where 5 years of service is required) within which NIW physicians must complete the medical service requirement is not a permissible interpretation of the statute.

On the remaining two challenged provisions, the court held that USCIS has the authority to impose reporting requirements on NIW physicians to ensure compliance with the statute and declined to address the question related to whether medical specialists should be covered under the statute.[15] The plaintiff who raised the claim had his NIW and petition denied due to abandonment, thereby mooting the issue.

USCIS remains committed to advancing the congressional intent of providing quality medical care in designated underserved areas and also is mindful of the states' direct interest in obtaining necessary medical care in underserved areas and their critical role in coordinating with USCIS in the NIW process.

USCIS, however, is not required to allow a physician with an approved NIW and pending adjustment application to continue receiving interim work and travel authorization for an unlimited period without some evidence that the physician is pursuing or intends to pursue the type of medical service that was the basis for the NIW approval.

Therefore, while USCIS amended NIW procedures to meet the *Schneider* decision (for example, not impose a specific timeframe within which the required medical service must be performed), an officer may exercise discretion to deny employment authorization or an adjustment application if he or she believes that the physician is using the pending adjustment application solely as a means for employment in areas or occupations other than medical service in the designated shortage areas.

2. Eligibility

The basic eligibility requirements for the physician are:

- The petitioner has filed a petition under INA 203(b)(2), along with the physician NIW request;
- The physician agrees to work full time in a clinical practice providing primary or specialty care in an underserved area or at a U.S. Department of Veterans Affairs (VA) health care facility for an aggregate of 5 years (not counting any time in J-1 status, but including such time that may have preceded the petition filing);[16] and
- A federal agency or a state department of public health, with jurisdiction over the medically underserved area, has determined that the physician's work in the underserved area or the VA facility is in the public interest (and, to the extent that past work is presented, that it was in the public interest).[17]

Primary or Specialty Care

Since 2000, legacy INS, and now USCIS, has given state departments of health more flexibility to sponsor waivers for physicians willing to work in medically underserved areas. For instance, under the Conrad 30 Waiver program, state departments of health may sponsor waivers for J-1 specialist physicians who will provide services to medically underserved populations (MUP).[18] The Conrad program is similar to the NIW program as they both have a medical service requirement under which the physician must work in a medically underserved area.

Based on the U.S. Department of Health and Human Services' (HHS) criteria published in 2000, USCIS (and legacy INS) limited its definition of qualified physicians in designated shortage areas to those who practiced primary care medicine, including family or general medicine, pediatrics, general internal medicine, obstetrics and gynecology, and psychiatry.[19]

As of January 23, 2007, USCIS began accepting NIW petitions on behalf of primary and specialty care physicians who agree to work full time in areas designated by the HHS as having a shortage of healthcare professionals (for example, health professional shortage area (HPSA), medically underserved area (MUA), MUP, and, at the time, physician scarcity areas (PSA)).

In addition, in 2016 the Administrative Appeals Office clarified that, regardless of whether the shortage designation is seemingly limited to primary care physicians, in addition to primary care and specialty care physicians, medical specialists who agree to practice in any area designated by HHS as having a shortage of health care professionals may be eligible for the physician NIW.[20]

The Nursing Relief Act[21] requires USCIS to recognize HHS designations of health professionals without limitation to primary care. Accordingly, USCIS recognizes NIW physicians in primary care and specialty care. A specialty physician is defined as other than a general practitioner, family practice practitioner, general internist, obstetrician, or gynecologist. Dentists, chiropractors, podiatrists, and optometrists do not qualify for the physician scarcity bonus as specialty physicians, and therefore, cannot qualify for the NIW.

A physician or employer must submit evidence showing that a geographic area is or was designated by HHS as having a shortage of health care professionals. The designation must be valid at the time the NIW employment began. If the area loses its HHS designation after the physician starts working, a physician can remain at the facility and the time worked after that point qualifies as NIW employment so long as the employment continues to satisfy all other NIW requirements.

Medically Underserved Areas

In designating areas of the country as "underserved," the Secretary of Health and Human Services addresses the shortage of family or general medicine and sub-specialist physicians (designations include HPSA, MUP, and MUA). For work that preceded the filing of the petition, the area must have been a designated shortage area at the time the work commenced but need not have retained such designation. For shortage designations, see these sources:

- HHS Health Resources and Services Administration to determine if a geographic area is an MUA or MUP.
- HHS Centers for Medicare and Medicaid Services to determine if a geographic area is an HPSA.[22]

Physicians serving at VA facilities are not bound by the HHS categories noted above. The VA may petition for physicians who specialize in various fields of medicine, and the location of the work need not be in an underserved area.

Time Limit to Complete the Required Medical Service

The physician has no set time limitation to complete the 3 or 5 years of aggregate service, which may include periods of service prior to the filing or approval of the petition. While there is no set time limitation, a NIW physician must submit interim evidence of compliance with the medical service requirement before USCIS approves the adjustment application.

While officers cannot revoke the approval of a petition or deny an adjustment application for a physician solely because the physician did not complete the 3- or 5-year service requirement within a certain timeframe, officers may deny an adjustment application as a matter of discretion if the physician appears to be using the pending adjustment application solely as a means for employment in areas or occupations other than medical service in the designated shortage areas.[23]

3. Evidence

Physicians seeking an NIW based on service in an underserved area or at a VA facility must submit the following supplemental documentation with the petition:[24]

- Employment contract or employment commitment letter covering the required period of clinical medical practice. For work that the physician has not yet started, the contract or employment commitment letter must be issued and dated within the 6-month period before the filing date of the petition.[25] This 6-month requirement does not apply to work that has been completed or that started before the filing date of the petition.
- Public interest letter from the federal agency or state department of public health attesting that the physician's work is or will be in the public interest. For work that the physician has not yet started, the letter must be issued and dated within the 6-month period before the filing date of the petition.[26] This 6-month requirement does not apply to work that has been completed or that started before the filing date of the petition.

If a physician acquired experience with more than one employer, the record must contain evidence of all service in an underserved area or at a VA facility. The physician must also submit evidence to demonstrate that the physician has met all other eligibility requirements for classification as a person with an advanced degree or exceptional ability,[27] other than the permanent labor certification.

In particular, a physician needing a waiver of the J-1 foreign residency requirement must still obtain such a waiver under INA 212(e) and satisfy all the waiver conditions[28] (including 3 years of service) before USCIS may approve the physician's adjustment application.[29]

Admissibility Requirements

The Immigration and Nationality Act (INA) requires physicians to meet specific admissibility requirements relating to passing professional medical examinations and English language competency.[30]

The physician must provide evidence that he or she has passed parts I and II of the NBMEE or an equivalent examination as determined by the Secretary of Health and Human Services. The NBMEE, also known as the NBME, ceased to be administered in 1992. The USMLE, which was first administered in 1992, is considered an equivalent examination.[31]

In addition to having passed either the NBMEE, USMLE, or one of its equivalents, the physician is also required to provide evidence of competency in oral and written English. An Educational Commission for Foreign Medical Graduates (ECFMG) certification showing the physician has passed the English language proficiency test meets this requirement.[32]

Physicians seeking a physician NIW must provide documentation to establish admissibility[33] at the time of filing of the petition.[34] In contrast, physicians filing petitions with a permanent labor certification must establish admissibility[35] at the time of the filing of the permanent labor certification.

Requests to Practice in a Different Underserved Area

USCIS regulations allow a physician with an approved petition and a pending adjustment application to practice medicine in a different underserved area or a different VA facility. Physicians must follow certain procedures, including filing an amended petition, in order to request such a change of practice.[36]

Footnotes

[^ 1] See *Matter of Wing's Tea House (PDF)*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

[^ 2] See the American Medical Association's Navigating State Medical Licensure.

[^ 3] See the American Medical Association's Navigating State Medical Licensure.

[^ 4] See Physician Licensure Application Fees and Timelines by State.

[^ 5] See the Federation of State Medical Boards website.

[^ 6] See *Matter of Wing's Tea House (PDF)*, 16 I&N Dec. 158 (BIA 1977). See 20 CFR 656.17(h). See 20 CFR 656.10(c)(7).

[^ 7] See INA 203(b)(2)(B)(ii). See 8 CFR 204.12.

[^ 8] See INA 203(b)(2)(B)(ii)(I).

[^ 9] See Section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. 106-95 (PDF), 113 Stat. 1312, 1318 (November 12, 1999), codified at INA 203(b)(2)(B). Before this law, a qualified physician could obtain a discretionary waiver of the labor certification process by showing that his or her admission or adjustment to permanent residence would be in the national interest of the United States under the same standard as for all other occupations.

[^ 10] See INA 203(b)(2)(B)(ii)(I).

[^ 11] See INA 203(b)(2)(B)(ii)(II) and INA 203(b)(2)(B)(ii)(IV).

[^ 12] See 65 FR 53889 (PDF) (Sep. 6, 2000) (implementing regulations for physician NIW at 8 CFR 204.12 and 8 CFR 245.18).

[^ 13] See *Schneider v. Chertoff*, 450 F.3d 944 (9th Cir. 2006).

[^ 14] The court specifically reviewed the statutory language in INA 203(b)(2)(B).

[^ 15] See *Schneider v. Chertoff*, 450 F.3d 944, 959 (9th Cir. 2006). See *Matter of H-V-P-*, Adopted Decision 2016-01 (AAO Feb. 9, 2016).

[^ 16] Or 3 years (not counting any time in J-1 status but including such time that may have preceded the petition filing), if the petition was filed before November 1, 1998.

[^ 17] See 8 CFR 204.12.

[^ 18] See INA 214(l).

[^ 19] See 8 CFR 204.12(a)(2)(i). See 65 FR 53889 (PDF), 53890 (September 6, 2000).

[^ 20] See INA 203(b)(2)(B)(ii). See *Matter of H-V-P-*, Adopted Decision 2016-01 (AAO Feb. 9, 2016).

[^ 21] See Section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. 106-95 (PDF), 113 Stat. 1312, 1318 (November 12, 1999), codified at INA 203(b)(2)(B).

[^ 22] See the HHS Health Resources and Services Administration website to determine if a geographic area is a MUA or MUP. See the HHS Centers for Medicare and Medicaid Services website to determine if a geographic area is an HPSA.

[^ 23] If a physician's adjustment application was denied and the petition's approval revoked on or after September 6, 2000, but before January 23, 2007, solely because the physician did not complete the 3 or 5 years of medical service within the 4- or 6-year time limit, USCIS allowed such applicants to file, with appropriate fees, a motion to reopen the petition or adjustment application or both within 1 year of January 23, 2007. The January 23, 2007, date derives from the memorandum Interim guidance for adjudication national interest waiver (NIW) petitions and related adjustment applications for physicians serving in medically underserved areas in light of Schneider v. Chertoff, 450 F.3d 944 (9th Cir. 2006) ("Schneider decision"), HQ 70/6.2, issued January 23, 2007.

[^ 24] For a complete list and detailed explanation of this supplemental evidence, see 8 CFR 204.12(c).

[^ 25] See 8 CFR 204.12(c)(1).

[^ 26] See 8 CFR 204.12(c)(3).

[^ 27] See 8 CFR 204.5(k)(1)-(3).

[^ 28] See INA 214(l).

[^ 29] See 8 CFR 204.12(g).

[^ 30] See INA 212(a)(5)(B).

[^ 31] Previously, the Visa Qualifying Examination (which was administered from 1977 through 1984) and the Comprehensive Foreign Medical Graduate Examination in the Medical Sciences (which was administered from 1984 through 1993) were also considered equivalent examinations.

[^ 32] For information regarding this certification, see the ECFMG website.

[^ 33] See INA 212(a)(5)(B).

[^ 34] See 8 CFR 204.12(c)(4).

[^ 35] See INA 212(a)(5)(B).

[^ 36] See 8 CFR 204.12(f).

Chapter 7 - Skilled Worker, Professional, or Other Worker

A total of 40,000 visas are available each fiscal year for employment-based 3rd preference workers, of which not more than 10,000 may be issued to “other” (unskilled)[1] workers. The visas for skilled workers (requiring at least 2 years training or experience)[2] and professionals (persons holding a bachelor’s degree or its equivalent in the specific field in which they are to be engaged)[3] are deducted from the same 30,000 number allotment.

A petitioning U.S. employer may file an Immigrant Petition for Alien Workers (Form I-140) on behalf of a beneficiary for classification as a skilled worker, professional, or other (unskilled) worker.[4]

A. Eligibility

In all cases, the beneficiary must have the minimum education and work experience requirements that are specified on the permanent labor certification.[5] Therefore, if the permanent labor certification specifies that a bachelor’s degree in a given field is the minimum requirement for entry into the position, the beneficiary must possess a minimum of a U.S. bachelor’s degree or its foreign equivalent degree in the field.

Where the labor certification permits educational and experience equivalence to a bachelor’s degree, however, the beneficiary may qualify as a skilled worker if he or she meets the requirements on the labor certification.[6] On the other hand, if the permanent labor certification states a requirement of “2 years college and 2 years experience,” mere possession of a bachelor’s degree, without 2 years of experience, would not qualify, although it would meet the education requirement.

Sheepherders

A sheepherder is an unskilled worker. An alien sheepherder who has been legally employed as a nonimmigrant sheepherder in the United States for at least 33 of the preceding 36 months is not required to obtain an approved permanent labor certification from the U.S. Department of Labor. Instead, the petitioner files the permanent labor certification application directly with the appropriate USCIS office or the U.S. Department of State. This procedure relates only to the permanent labor certification process and has no bearing on the amount of training or experience needed to perform the job.

Footnotes

[^ 1] See 8 CFR 204.5(l)(2), defining an other worker as one capable of performing unskilled labor (requiring less than 2 years training or experience).

[^ 2] Relevant post-secondary education may be considered as training. See 8 CFR 204.5(l)(2) (definition of skilled worker).

[^ 3] See 8 CFR 204.5(l)(2) (definition of professional).

[^ 4] See INA 203(b)(3). See 8 CFR 204.5(l).

[^ 5] See *Matter of Wing's Tea House (PDF)*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

[^ 6] See 8 CFR 204.5(l)(4).

Part G - Investors

Chapter 1 - Purpose and Background

A. Purpose

The Immigration and Nationality Act (INA) makes visas available to qualified immigrant investors who will contribute to the economic growth of the United States by investing in U.S. businesses and creating jobs for U.S. workers.[1] Congress created this employment-based 5th preference (EB-5) immigrant visa category to benefit the U.S. economy by providing an incentive for foreign capital investment in commercial enterprises that create or preserve U.S. jobs. Petitioners participating in the Regional Center Program, discussed more under the background section below, may meet statutory job creation based on estimates of indirect job creation,[2] rather than relying only on jobs directly created by the new commercial enterprise.

The INA authorizes approximately 10,000 visas each fiscal year for immigrant investors (including their spouses and unmarried children under the age of 21) who have invested or are actively in the process of investing in a new commercial enterprise and satisfy the applicable job creation requirements. To encourage certain types of investments, Congress amended the INA on March 15, 2022, to reserve 20 percent of the EB-5 visas for investors in rural areas, 10 percent for investors in high unemployment areas, and 2 percent for investors in infrastructure projects.[3] In addition, EB-5 visas are authorized for investors in the Regional Center Program through September 30, 2027.[4]

The INA initially established a threshold investment amount of $1,000,000 U.S. dollars per investor and provided the ability to raise the amount by regulation.[5] On July 24, 2019, DHS published the EB-5 Immigrant Investor Program Modernization Rule (EB-5 Modernization Rule), which raised the investment amount for petitions filed on or after November 21, 2019.[6] However, on June 22, 2021, the U.S. District Court for the Northern District of California in *Behring Regional Center LLC v. Wolf* vacated the EB-5 Modernization Rule.[7] Accordingly, USCIS does not apply the amounts from the vacated rule to any petitions, regardless of when filed.

On March 15, 2022, the EB-5 Reform and Integrity Act of 2022 was signed into law, which raised the standard investment amount to $1,050,000.[8] Petitions filed on or after March 15, 2022, are subject to this higher amount. The minimum amount for investing in a targeted employment area (TEA) was previously set at 50 percent of the standard minimum investment amount, $500,000 U.S. dollars per investor,[9] but increased to $800,000 for petitions filed on or after March 15, 2022, and now also includes investments into infrastructure projects.[10]

The following table outlines the minimum investment amounts by filing date and investment location.

Petition Filing Date	Standard Minimum Investment Amount	Reduced Investment Amount	High Employment Area Investment Amount
Before March 15, 2022[11]	$1,000,000	$500,000 TEA only	$1,000,000
On or After March 15, 2022[12]	$1,050,000	$800,000 TEA and infrastructure projects	$1,050,000

Upon adjustment of status or admission to the United States, immigrant investors and their derivative family members receive conditional permanent resident status for a 2-year period. Ultimately, if the applicable requirements have been satisfied, USCIS removes the conditions and the immigrants become lawful permanent residents (LPRs) of the United States without conditions.

B. Background

1. EB-5 Category Beginnings

In 1990, Congress created the EB-5 immigrant visa category.[13] The legislation envisioned LPR status, initially for a 2-year conditional period, for immigrant investors who established,[14] invested (or were actively in the process of investing) in, and engaged in the management of job-creating or job-preserving for-profit enterprises.[15] Congress placed no restriction on the type of the business if the immigrant investor invested the required capital and directly created at least 10 jobs for U.S. workers.

2. Creation of the Regional Center Program

In 1992, Congress expanded the allowable measure of job creation for the EB-5 category by launching the Immigrant Investor Pilot Program (referred to in this guidance as the Regional Center Program).[16] Congress designed this program to determine the viability of pooling investments in designated regional centers.[17]

As originally drafted, the Regional Center Program was different from the direct job creation (standalone) model because it allowed for the use of reasonable economic or statistical methodologies to demonstrate job creation. Reasonable methodologies are used, for example, to credit indirect (including induced) jobs to immigrant investors. Indirect jobs are jobs held outside the enterprise that receives immigrant investor capital.

3. Program Evolution

Congress initially authorized the Regional Center Program as a trial pilot program, set to expire after 5 years. Congress extended the Regional Center Program several times before codifying the Regional Center Program into INA 203(b)(5) as part of the EB-5 Reform and Integrity Act of 2022, which became effective on May 14, 2022 and authorizes the Regional Center Program through September 30, 2027.[18] The EB-5 Reform and Integrity Act of 2022 also included other substantive revisions to the EB-5 program more generally.[19]

Evolution of EB-5 Program

Acts and Amendments	Key Changes
Sections 121(a)-(b) of the Immigration Act of 1990[20]	• Congress created the employment-based fifth preference (EB-5) immigrant visa category. • The EB-5 category provides a path to LPR status, initially on a 2-year conditional basis, to qualified immigrant investors who contribute to U.S. economic growth by investing in domestic businesses and creating employment. • Intended for immigrant investors to establish, invest in, and engage in the management of job-creating commercial enterprises.
Section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993[21]	• Congress created an Immigrant Investor Pilot Program (the Regional Center Program) to have a number of the available EB-5 visas set aside each fiscal year for immigrant investors (and eligible family members) who invest in a commercial enterprise associated with a designated Regional Center. • USCIS designated regional centers for the promotion of economic growth. • Regional Center investors may claim credit for direct and indirect job creation.[22]

Acts and Amendments	Key Changes
Sections 11035-37 of the 21st Century Department of Justice Appropriations Authorization Act[23]	• Included a specific reference to limited partnerships as commercial enterprises and eliminated the requirement that immigrant investors prove they have established a commercial enterprise themselves. Investors need only show they have invested or are actively in the process of investing in a commercial enterprise, among other requirements. • Defined full-time employment as employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position. • Allowed regional center proposals to be based on general but economically and statistically sound predictions submitted with the proposal concerning the kinds of enterprises that will receive capital from immigrant investors, the jobs that will be created directly or indirectly as a result of the investments, and other positive economic effects of the investments.
Section 1 of Pub. L. 112-176 (PDF)[24]	• Eliminated the word pilot from the name of the Regional Center Program.
Division O, Section 204 of Pub. L. 116-260 (PDF)[25]	• Last reauthorization of the original Regional Center Program, through June 30, 2021. Starting July 1, 2021, USCIS suspended adjudication of pending Regional Center-affiliated investor petitions and most Regional Center applications.
Sections 101 and 102 of the EB-5 Reform and Integrity Act of 2022 (PDF)[26]	• Repealed Section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act,[27] and codified the substantially reformed Regional Center Program within INA 203(b)(5). • Includes several integrity provisions for the Regional Center program as well as more general revisions to the overall EB-5 program, including adjusting to LPR status based on the EB-5 category.

C. Legal Authorities

- INA 203(b)(5); 8 CFR 204.6 (PDF)[28] – Employment creation immigrants
- INA 204(a)(1)(H)
- INA 216A; 8 CFR 216.6 – Conditional permanent resident status for certain alien entrepreneurs, spouses, and children
- 8 CFR 216.3 – Termination of conditional permanent resident status
- Section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993, repealed on March 15, 2022[29]
- EB-5 Reform and Integrity Act of 2022 (PDF)[30]

Footnotes

[^ 1] See INA 203(b)(5).

[^ 2] For petitions filed on or after March 15, 2022, there are limits on the percentage of indirect job creation. See Chapter 2, Immigrant Petition Eligibility Requirements, Section D, Creation of Jobs, Subsection 4, Measuring Job Creation [6 USCIS-PM G.2(D)(4)]

[^ 3] See INA 203(b)(5)(B). See the EB-5 Reform and Integrity Act of 2022, Div. BB of the Consolidated Appropriations Act of 2022, Pub. L. 117-103 (PDF), 136 Stat. 49 (March 15, 2022).

[^ 4] See INA 203(b)(5)(E). See the EB-5 Reform and Integrity Act of 2022, Div. BB of the Consolidated Appropriations Act of 2022, Pub. L. 117-103 (PDF), 136 Stat. 49 (March 15, 2022).

[^ 5] See INA 203(b)(5)(B) and INA 203(b)(5)(C) prior to March 15, 2022.

[^ 6] See 84 FR 35750 (PDF) (July 24, 2019).

[^ 7] See 544 F. Supp. 3d 937 (N.D. Cal. 2021). Because a federal court vacated the Modernization Rule, links to regulations in this chapter are to those regulatory provisions in effect prior to the vacated rule. The regulations also do not reflect any updates to certain provisions superseded by statute. In those situations, such as the investment amount, this chapter cites to the statutory authority instead of the regulations.

[^ 8] See INA 203(b)(5)(C). See the EB-5 Reform and Integrity Act of 2022, Div. BB of the Consolidated Appropriations Act of 2022, Pub. L. 117-103, 136 Stat. 49 (March 15, 2022).

[^ 9] See INA 203(b)(5)(B) and INA 203(b)(5)(C) prior to March 15, 2022.

[^ 10] See INA 203(b)(5)(C). See the EB-5 Reform and Integrity Act of 2022, Div. BB of the Consolidated Appropriations Act of 2022, Pub. L. 117-103, 136 Stat. 49 (March 15, 2022).

[^ 11] See 8 CFR 204.6(f) (PDF)

[^ 12] See INA 203(b)(5)(C). These amounts automatically adjust on January 1, 2027, and every 5 years thereafter. See INA 203(b)(5)(C)(iii). USCIS will update this Part accordingly.

[^ 13] See Section 121(a) of the Immigration Act of 1990 (IMMACT90), Pub. L. 101-649 (PDF), 104 Stat. 4978, 4987 (November 29, 1990).

[^ 14] In 2002, Congress eliminated the requirement that an immigrant investor establish the new commercial enterprise. See Section 11036 of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107-273 (PDF), 116 Stat. 1758, 1846 (November 2, 2002).

[^ 15] See Sections 121(a)-(b)(1) of IMMACT90, Pub. L. 101-649 (PDF), 104 Stat. 4978, 4987 (November 29, 1990).

[^ 16] See Section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. 102-395 (PDF), 106 Stat. 1828, 1874 (October 6, 1992).

[^ 17] See S. Rep. 102-331 at 118 (July 23, 1992).

[^ 18] For information on the current expiration date, see the About the EB-5 Visa Classification webpage.

[^ 19] See the EB-5 Reform and Integrity Act of 2022, Div. BB of the Consolidated Appropriations Act of 2022, Pub. L. 117-103, 136 Stat. 49 (March 15, 2022).

[^ 20] See Pub. L. 101-649 (PDF), 104 Stat. 4978, 4987 (November 29, 1990).

[^ 21] See Pub. L. 102-395 (PDF), 106 Stat. 1828, 1874 (October 6, 1992).

[^ 22] For a discussion on indirect jobs, see Chapter 2, Immigrant Petition Eligibility Requirements, Section D, Creation of Jobs [6 USCIS-PM G.2(D)].

[^ 23] See Pub. L. 107-273 (PDF), 116 Stat. 1758, 1846 (November 2, 2002).

[^ 24] See 126 Stat. 1325, 1325 (September 28, 2012).

[^ 25] See 134 Stat. 1182, 2148 (December 27, 2020).

[^ 26] See the EB-5 Reform and Integrity Act of 2022, Div. BB of the Consolidated Appropriations Act of 2022, Pub. L. 117-103, 136 Stat. 49 (March 15, 2022).

[^ 27] See Pub. L. 102-395 (PDF), 106 Stat. 1828, 1874 (October 6, 1992), as amended.

[^ 28] DHS published the EB-5 Immigrant Investor Program Modernization Rule, effective November 21, 2019. See 84 FR 35750 (PDF), 35808 (July 24, 2019). However, that rule was vacated by *Behring Regional Center LLC v. Wolf*, 544 F. Supp. 3d 937 (N.D. Cal. 2021). Therefore, all links to regulations in this part are to those in effect prior to that rule.

[^ 29] See Pub. L. 102-395, 106 Stat. 1828, 1874 (October 6, 1992), as amended. Repealed on March 15, 2022, by the EB-5 Reform and Integrity Act of 2022, Div. BB of the Consolidated Appropriations Act of 2022, Pub. L. 117-103, 136 Stat. 49 (March 15, 2022).

[^ 30] See the EB-5 Reform and Integrity Act of 2022, Div. BB of the Consolidated Appropriations Act of 2022, Pub. L. 117-103, 136 Stat. 49 (March 15, 2022).

Chapter 2 - Immigrant Petition Eligibility Requirements

The immigrant investor category requires three main elements:

- An investment of capital;
- Engagement in a new commercial enterprise; and
- Job creation.

Each element is explained in this chapter in the context of:

- The standalone program and the Regional Center Program for petitions filed before March 15, 2022;
- For standalone petitions filed on or after March 15, 2022; and
- New Regional Center Program petitions filed on or after May 14, 2022.[1]

For the general requirements, the term immigrant investor in this part of the Policy Manual refers to any employment-based 5th preference (EB-5) investor-petitioner, whether investing through the standalone program or the Regional Center Program. Where distinctions between the two programs exist, the term standalone immigrant investor refers to petitioners using the standalone program, and the term regional center immigrant investor refers to petitioners using the Regional Center Program.

A. Investment of Capital

Congress created the immigrant investor category so the U.S. economy can benefit from an immigrant's contribution of capital. This benefit is greatest when capital is at risk and invested in a new commercial enterprise that, because of the investment, creates at least 10 full-time jobs for U.S. workers. The regulations that govern the category define the terms capital and investment with this economic benefit in mind.[2]

1. Capital

The word capital does not mean only cash. Instead, the broad definition of capital takes into account the many different ways in which a person can make a contribution of financial value to a business.

The following table outlines how the EB-5 Reform and Integrity Act of 2022 refined the definition of capital.

Definition of Capital

For petitions filed before March 15, 2022	For petitions filed on or after March 15, 2022[3]
Capital includes cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the immigrant investor, provided the immigrant investor is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.[4] All capital must be valued at fair market value in U.S. dollars.	Congress has similarly defined "capital" as "cash and all real, personal, or mixed tangible assets owned and controlled by the . . . investor, or held in trust for the benefit of the [investor] and to which the [investor] has unrestricted access."[5] Also consistent with past definitions, the statute now provides that capital must be valued at fair market value in U.S. dollars, in accordance with Generally Accepted Accounting Principles or other standard accounting practice adopted by the U.S. Securities and Exchange Commission, at the time it is invested.[6]

The immigrant investor must establish that they are the legal owner of the capital invested[7] and has obtained the capital through lawful means. USCIS does not consider as capital any assets acquired directly or indirectly by unlawful means, such as criminal activity.[8] As of May 14, 2022, gifts and loans to the investor are expressly permitted as capital, provided certain conditions are met.[9]

Promissory Notes

Capital can include the immigrant investor's promise to pay (a promissory note), as long as the immigrant investor is personally and primarily liable for the promissory note debt and his or her assets adequately secure the note. Any security interest must be perfected[10] to the extent provided for by the jurisdiction in which the asset is located.[11] Further, the assets securing the promissory note:

- Cannot include assets of the company in which the immigrant is investing;
- Must be specifically identified as securing the promissory note; and
- Must be fully amenable to seizure by a U.S. noteholder.[12]

The fair market value of a promissory note depends on its present value, not the value at any different time. In addition, to qualify as capital, nearly all of the money due under a promissory note must be payable within 2 years, without provisions for extensions.[13]

Investing Indebtedness

When investing indebtedness, an immigrant investor must demonstrate:

- The immigrant investor is personally and primarily liable for the debt;
- The indebtedness is secured by assets the immigrant investor owns; and
- The assets of the new commercial enterprise are not used to secure any of the indebtedness.

The immigrant investor must have primary responsibility, under the loan documents, for repaying the debt used to satisfy his or her minimum required investment amount.[14]

The immigrant investor must also demonstrate that his or her own collateral secures the indebtedness, and that the value of the collateral is sufficient to secure the amount of indebtedness that satisfies the immigrant investor's minimum required investment amount. Any indebtedness secured by the immigrant investor's assets qualifies as capital only up to the fair market value of the immigrant investor's pledged assets.

2. Investment

The immigrant investor is required to invest his or her own capital. The petitioner must document the path of the funds to establish that the investment was made, or is actively in the process of being made, with the immigrant investor's own funds.[15] For petitions filed on or after March 15, 2022, the capital must be expected to remain invested for not less than 2 years.[16]

To invest means to contribute capital. A loan from the immigrant investor to the new commercial enterprise does not count as a contribution of capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the immigrant investor and the new commercial enterprise is not a capital investment.[17]

To qualify as an investment, the immigrant investor must actually place his or her capital at risk. The mere intent to invest is not sufficient.[18]

Purchasing a share of a business from an existing shareholder, without more, does not qualify, since the payment goes to the former shareholder rather than to the new commercial enterprise.

Guaranteed Returns

If the immigrant investor is guaranteed a return, or a rate of return, on all or a portion of their capital, then the amount of any guaranteed return is not at risk.[19] For the capital to be at risk, there must be a risk of loss and a chance for gain.

Additionally, if the investor is guaranteed the right to eventual ownership or use of a particular asset in consideration of the investor's contribution of capital into the new commercial enterprise, the expected present value of the guaranteed ownership or use of such asset counts against the total amount of the investor's capital contribution in determining how much money was placed at risk. For example, if the immigrant investor is given a right of ownership or use of real estate, the present value of that real estate is not counted as investment capital put at risk of loss.[20]

Nothing prevents an immigrant investor from receiving a return on his or her capital in the form of a distribution of profits from the new commercial enterprise. This distribution of profits may happen during the conditional residency period and may happen before creating the required jobs. However, the distribution cannot be a portion of the investor's minimum qualifying investment and cannot have been guaranteed to the investor.

Redemption Language for Petitions Filed Before March 15, 2022

USCIS relies on regulatory language and precedent decisions to address redemption agreements. The regulatory definition of "invest" excludes capital contributions that are "in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement."[21]

An agreement evidencing a preconceived intent to exit the investment as soon as possible after removing conditions on permanent residence may constitute an impermissible debt arrangement.[22] Funds contributed in exchange for a debt arrangement do not constitute a qualifying contribution of capital.[23] In general, the petitioner may not enter into the agreement knowing that he or she has a willing buyer at a certain time and for a certain price.[24]

Any agreement between the immigrant investor and the new commercial enterprise that provides the investor with a contractual right to repayment is an impermissible debt arrangement. In such a case, the investment funds do not constitute a qualifying contribution of capital.[25] Mandatory redemptions and options exercisable by the investor are two examples of agreements where the investor has a right to repayment. The impermissibility of such an arrangement cannot be remedied with the addition of other requirements or contingencies, such as conditioning the repurchase of the securities on the availability of funds; the delay of the repurchase until a date in the future (including after the adjudication of the Petition by Investor to Remove Conditions on Permanent Resident Status (Form I-829)); or the possibility that the investor might not exercise the right. In other words, repayment does not need to be

guaranteed in order to be impermissible. It is the establishment of the investor's right to demand a repurchase, regardless of the new commercial enterprise's ability to fulfill the repurchase, that constitutes an impermissible debt arrangement.[26]

The following table describes certain characteristics that might be present in agreements and explains whether their inclusion creates an impermissible debt arrangement.

Characteristics of Redemption Provisions

Type of Provision	Description	Impermissible Agreement?
Mandatory redemptions	Arrangements that require the new commercial enterprise to redeem all or a portion of the petitioner's equity at a specified time or upon the occurrence of a specified event (for example, once the conditions are removed on the petitioner's permanent resident status) and for a specified price (whether fixed or subject to a specified formula).	USCIS considers this an impermissible debt arrangement. Such impermissible obligations are not subject to the discretion of the new commercial enterprise (although it may have some discretion regarding the timing and manner in which the redemption is performed).
Options exercisable by the investor	Arrangements that grant the petitioner the option to require the new commercial enterprise to redeem all or a portion of his or her equity at a specified time or upon the occurrence of a specified event (for example, once the conditions are removed on the petitioner's permanent resident status) and for a specified price (whether fixed or subject to a specified formula).	USCIS considers this an impermissible debt arrangement.
Option exercisable by the new commercial enterprise	A redemption agreement between the immigrant investor and the new commercial enterprise that does not provide the investor with a right to repayment. One example of such an agreement is a discretionary option held by the new commercial enterprise to repurchase investor shares. These options are typically structured similarly to options exercisable by the investor, except that the option is held and may be exercised by the new commercial enterprise. When executed, these options require an investor to sell all or a portion of his or her ownership interest back to that entity.	USCIS generally does not consider these arrangements to be impermissible debt arrangements.[27] However, such an option may be impermissible if there is evidence the parties construct it in a manner that effectively converts it to a mandatory redemption or an option exercisable by the investor (considered a debt arrangement). For example, an arrangement would be impermissible if ancillary provisions or agreements obligate the new commercial enterprise to either (a) exercise the option (at a specified time, upon the occurrence of a specified event, or at the request of the investor) or (b) if it chooses not to exercise the option, liquidate the assets and refund the investor a specific amount.

Redemption Language for Petitions Filed on or after March 15, 2022

On March 15, 2022, Congress enacted specific statutory provisions relating to agreements between the immigrant investor and the new commercial enterprise. For petitions filed on or after March 15, 2022, capital does not include:

- Capital invested in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the investor and the new commercial enterprise;
- Capital invested with a guaranteed rate of return on the amount invested by the investor; or
- In general, invested capital that is subject to any agreement between the investor and the new commercial enterprise that provides the investor with a contractual right to repayment, such as a mandatory redemption at a certain time or upon the occurrence of a certain event, or a put or sell-back option held by the investor, even if such contractual right is contingent on the success of the new commercial enterprise, such as having sufficient available cash flow.[28]

However, the new statutory definition of capital includes (in other words, does not prohibit) capital invested that:

- Is subject to a buy back option that may be exercised solely at the discretion of the new commercial enterprise; and
- Results in the investor withdrawing their petition unless the investor has fulfilled their sustainment period and other program requirements.[29]

Business Activity

An immigrant investor must provide evidence of the actual undertaking of business activity. Merely establishing and capitalizing a new commercial enterprise and signing a commercial lease are not sufficient to show that an immigrant investor has placed his or her capital at risk.[30] Without some evidence of business activity, no assurance exists that the funds will be used to carry out the business of the commercial enterprise.[31]

Made Available

The full amount of the investment must be made available to the business(es) most closely responsible for creating the employment upon which the petition is based.[32] In the regional center context, the immigrant investor must establish that the capital was invested into the new commercial enterprise and that the full amount was subsequently made available to the job-creating business(es), if separate.

In cases with a separate job-creating entity or entities, the payment of administrative fees, management fees, attorneys' fees, finders' fees, syndication fees, and other types of expenses or costs by the new commercial enterprise that erode the amount of capital made available to the job-creating entity do not count toward the minimum required investment amount.[33] The payment of these fees and expenses must be in addition to the minimum required capital investment amount.

Sole Proprietors and Funds in Bank Accounts

A standalone investor who is operating a new commercial enterprise as a sole proprietor cannot consider funds in his or her personal bank account as capital committed to the new commercial enterprise. Funds in a personal bank account are not necessarily committed to the new commercial enterprise. The funds must be in business bank accounts.[34] However, even a deposit into a business account over which petitioner exercises sole control, without more, may not satisfy the at-risk requirement.[35]

Escrow Accounts

An immigrant investor's money may be held in escrow until the investor has obtained conditional permanent resident status if the immediate and irrevocable release of the escrowed funds is contingent only upon:

- Approval of the investor's petition for classification under INA 203(b)(5); and
- Visa issuance and admission to the United States as a conditional permanent resident, or approval of the investor's Application to Register Permanent Residence or Adjust Status (Form I-485).

An immigrant investor's funds may be held in escrow within the United States to avoid any evidentiary issues that may arise with respect to issues such as significant currency fluctuations[36] and foreign capital export restrictions.

Use of foreign escrow accounts is not prohibited as long as the petition establishes that it is more likely than not that the minimum qualifying capital investment will be transferred to the new commercial enterprise in the United States upon the investor obtaining conditional permanent resident status.

When adjudicating the immigrant investor's petition to remove conditions,[37] USCIS requires evidence verifying that the escrowed funds were released and that the investment was sustained in the new commercial enterprise for the period of the immigrant investor's residence in the United States.

Deployment of Capital

Before the job creation requirement is met, a new commercial enterprise may deploy capital directly or through any financial instrument so long as applicable requirements are satisfied, including the following:

- The immigrant investor must have placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk;
- There must be a risk of loss and a chance for gain;
- Business activity must actually be undertaken;
- The full amount of the investment must be made available to the business(es) most closely responsible for creating the employment upon which the petition is based;[38] and
- A sufficient relationship to commercial activity (namely, engagement in commerce, that is, the exchange of goods or services) exists such that the enterprise is and remains commercial.[39]

The purchase of financial instruments traded on secondary markets generally does not satisfy these requirements because such secondary market purchases generally:

- Are not related to the actual undertaking of business activity;
- Do not make capital available to the job-creating business; and
- Represent an activity that is solely or primarily financial rather than commercial in nature.

Further Deployment After the Job Creation Requirement is Satisfied

Once the job creation requirement has been met and the investment capital is returned or otherwise available to the new commercial enterprise, the new commercial enterprise may further deploy such capital within a reasonable amount of time[40] in order to satisfy applicable requirements for continued eligibility.[41] The capital may be further deployed, as described above, into any commercial activity that is consistent with the purpose of the new commercial enterprise to engage in the "ongoing conduct of lawful business,"[42] including as may be evidenced in any amendments to the offering documents made to describe the further deployment into such activities.[43]

Consistent with precedent case decisions and existing regulatory requirements, further deployment must continue to meet all applicable eligibility requirements within the framework of the initial bases of eligibility,[44] including the same new commercial enterprise.[45] The further deployment does not need to remain with the same (or any) job creating entity or in a targeted employment area (TEA).

For example, if a new commercial enterprise associated with a regional center loaned pooled investment capital to a job-creating entity that created sufficient jobs through the construction of a residential building in a TEA, the new commercial enterprise, upon repayment of the loan that resulted in the required job creation, may generally further deploy the repaid capital anywhere in the United States or its territories (regardless of whether it would qualify as a TEA) into any commercial activity that satisfies applicable requirements such as one or more similar loans to other entities.

For regional center petitions filed on or after May 14, 2022, further deployment is permitted under the following conditions:

- The new commercial enterprise has executed the business plan for a capital investment project in good faith without a material change;
- The new commercial enterprise has created a sufficient number of new full-time positions to satisfy the job creation requirements of the program for all investors in the new commercial enterprise, either directly or indirectly, as evidenced by the methodologies set forth in the statute;[46]
- The job creating entity has repaid the capital initially deployed in conformity with the initial investment contemplated by the business plan; and
- The capital, after repayment by the job creating entity, remains at risk and it is not redeployed in passive investments, such as stocks or bonds.[47]

3. Required Amount of Investment

The immigrant investor must invest at least the standard minimum investment amount in capital in a new commercial enterprise that creates no fewer than 10 jobs for U.S. workers. An exception exists if the immigrant investor invests their capital in a new commercial enterprise that is principally doing business in and creates jobs in a TEA or, for regional center petitions filed on or after May 14, 2022, in an infrastructure project.

This means that the present fair market value, in U.S. dollars, of the immigrant investor's lawfully-derived capital must be at least $1,000,000, or $500,000 if investing in a TEA for petitions filed before March 15, 2022.[48] For petitions filed on or after March 15, 2022, those amounts are $1,050,000 or $800,000 if investing in a TEA or infrastructure project, and will automatically increase January 1, 2027, and every 5 years thereafter.[49]

Immigrant investors may diversify their investment across a portfolio of businesses or projects, but only if the minimum investment amount is first placed in a single new commercial enterprise. In such a case, it is necessary to show how eligibility has been established (for example, the minimum investment amount, evidence of an at-risk investment,[50] and job creation) with respect to each job-creating entity at the time of filing.

For standalone investors, the capital may be deployed into a portfolio of wholly owned businesses, so long as all capital is deployed through a single commercial enterprise comprised of a holding company and its wholly owned subsidiaries and all jobs are created directly within that commercial enterprise (in other words, through the portfolio of wholly owned subsidiaries that received the capital through the holding company).

For example, for a petition filed before March 15, 2022, based on an investment in an area in which the minimum investment amount is $1,000,000, the standalone investor can satisfy the statute by investing in a holding company that deploys $600,000 of the investment toward one subsidiary that the holding company wholly owns, and $400,000 of the investment toward another subsidiary that the holding company wholly owns.[51] In this example, the two wholly owned subsidiaries would have to create an aggregate of 10 new jobs between them. However, a standalone investor cannot qualify by separately investing $600,000 in one commercial enterprise and $400,000 in a different commercial enterprise, since these enterprises would be separate rather than consisting of a singular commercial enterprise comprised of a holding company and its wholly owned subsidiaries.

In the regional center context, where indirect jobs may be counted, the commercial enterprise may create jobs indirectly through multiple investments in corporate affiliates or in unrelated entities, but the regional center investor cannot qualify by investing directly in those multiple entities. Instead, the regional center investor's capital must still be invested in a single commercial enterprise, which can then deploy that capital to multiple job-creating entities as long as the portfolio of businesses or projects can create the required number of jobs.

4. Lawful Source of Funds

For Petitions Filed before May 14, 2022[52]

The immigrant investor must demonstrate by a preponderance of the evidence that the capital invested, or actively in the process of being invested, in the new commercial enterprise was obtained through lawful means.[53] Any assets acquired directly or indirectly by unlawful means, such as criminal activity, are not considered capital.[54] In establishing that the capital was acquired through lawful means, the immigrant investor must provide evidence demonstrating the direct and indirect source of his or her investment capital.[55]

As evidence of the lawful source of funds, the immigrant investor's petition must be accompanied, as applicable, by:

- Foreign business registration records;
- Corporate, partnership, or any other entity in any form which has filed in any country or subdivision thereof any return described in this list, and personal tax returns, including income, franchise, property (whether real, personal, intangible), or any other tax returns of any kind filed within 5 years, with any taxing jurisdiction in or outside the United States by or on behalf of the immigrant investor;
- Evidence identifying any other source(s) of capital; or
- Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the immigrant investor from any court in or outside the United States within the past 15 years.[56]

The immigrant investor is required to submit evidence identifying any other source of capital. Such evidence may include:

- Corporate, partnership, or other business entity annual reports;
- Audited financial statements;
- Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by the immigrant investor's own assets, other than those of the new commercial enterprise, and for which the immigrant investor is personally and primarily liable;
- Evidence of income such as earnings statements or official correspondence from current or prior employers stating when the immigrant investor worked for the company and how much income the immigrant investor received during employment;
- Gift instrument(s) documenting gifts to the immigrant investor;
- Evidence, other than tax returns,[57] of payment of individual income tax, such as an individual income tax report or payment certificate, on the following:
  - Wages and salaries;
  - Income from labor and service or business activities;
  - Income or royalties from published books, articles, photographs, or other sources;
  - Royalties or income from patents or special rights;
  - Interest, dividends, and bonuses;
  - Rental income;
  - Income from property transfers;
  - Any incidental income or other taxable income determined by the relevant financial department;
- Evidence of property ownership, including property purchase or sale documentation; or
- Evidence identifying any other source of capital.

For Petitions Filed on or after May 14, 2022[58]

Effective on May 14, 2022, the immigrant investor must submit the following evidence, as applicable, to demonstrate the lawful source of the invested funds and any funds used to pay administrative costs and fees:

- Business and tax records, or similar records, including:
  - Foreign business registration records; and
  - Corporate or partnership tax returns (or tax returns of any other entity in any form filed in any country or subdivision of such country);
- Personal tax returns, including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind, filed during the past 7 years (or another period to be determined by the Secretary to ensure that the investment is obtained from a lawful source of funds) with any taxing jurisdiction within or outside the United States by or on behalf of the investor;
- Any other evidence identifying any other source of capital or administrative fees; and
- Evidence related to monetary judgments against the investor, including:
  - Certified copies of any judgments, and evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving possible monetary judgments against the investor from any court within or outside the United States; and
  - The identity of all persons who transfer into the United States, on behalf of the investor, any funds that are used to meet the capital requirement.[59]

As of May 14, 2022, by statute, gifts and borrowed funds are expressly permissible for petitions filed on or after that date, provided:

- They were gifted or loaned to the investor in good faith; and
- They were not gifted or loaned to circumvent any limitations imposed on permissible sources of capital, including, but not limited to, proceeds from illegal activity.[60]

Investors relying on gifted or borrowed funds must demonstrate the lawful source of those funds by submitting the evidence described above for the donor or, if not a bank, the lender.[61]

5. Targeted Employment Area

A TEA is a rural area or an area that has experienced high unemployment.[62] A rural area is any area other than an area within a standard metropolitan statistical area (MSA) (as designated by the Office of Management and Budget) or within the outer boundary of any city or town having a population of 20,000 or more based on the most recent decennial census of the United States.[63] For petitions filed before March 15, 2022, a high unemployment area is an area that has experienced unemployment of at least 150 percent of the national average rate.[64] For petitions filed on or after March 15, 2022, a high unemployment area is an area designated as such by the Secretary of Homeland Security under INA 203(b)(5)(B)(ii).

Congress provided for a reduced investment amount in a TEA to encourage investment in new commercial enterprises principally doing business in and creating jobs in areas of greatest need. For the lower capital investment amount to apply, the new commercial enterprise into which the immigrant invests or the actual job-creating entity must be principally doing business in the TEA.

A new commercial enterprise is principally doing business in the location where it regularly, systematically, and continuously provides goods or services that support job creation. If the new commercial enterprise provides such goods or services in more than one location, it will be principally doing business in the location most significantly related to the job creation.

Factors considered in determining where a new commercial enterprise is principally doing business include, but are not limited to, the location of:

- Any jobs directly created by the new commercial enterprise;
- Any expenditure of capital related to the creation of jobs;
- The new commercial enterprise's day-to-day operation; and
- The new commercial enterprise's assets used in the creation of jobs.[65]

Investments through regional centers allow the immigrant investor to seek to establish indirect job creation. In these cases, the job-creating entity, rather than the new commercial enterprise, determines where the entity is principally doing business. The job-creating entity must be principally doing business in the TEA for the lower capital investment amount to apply.[66]

To demonstrate that the area of the investment is a TEA, the immigrant investor must demonstrate that the TEA meets the statutory and regulatory criteria by submitting:

- For rural areas, evidence that the area is not located within any MSA as designated by the Office of Management and Budget, nor within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States;[67]
- For high unemployment areas in petitions filed before March 15, 2022,[68] either:
  - A letter from the state government designating a geographic or political subdivision located outside a rural area but within its own boundaries as a high unemployment area;[69] or
  - Unemployment data for the relevant MSA or county;[70] or
- For high unemployment areas in standalone petitions filed on or after March 15, 2022, a description of the census tract(s) and unemployment statistics that allows USCIS to make a case-specific designation as an area of high unemployment.[71] The area must consist of the census tract or contiguous census tract(s) in which the new commercial enterprise is principally doing business, and may also include any or all census tracts directly adjacent to such census tract(s).[72] The immigrant investor must demonstrate that the weighted average of the unemployment rate for the requested area (that is, the area comprised of multiple census tracts), based on the labor force employment measure for each census tract, is at least 150 percent of the national average unemployment rate.[73]

To promote predictability in the capital investment process, an officer identifies the appropriate date to examine in order to determine whether the immigrant investor's capital investment qualifies for the lower capital investment amount according to the following table:

Targeted Employment Area Analysis

Petition Filing Timeframe	TEA Analysis
Petition filed on or after March 15, 2022	USCIS designates TEAs based on the Immigrant Petition by Standalone Investor (Form I-526) filing for standalone petitions and as part of the Application for Approval of an Investment in a Commercial Enterprise (I-956F), for regional center-affiliated projects.[74]
Petitions filed before March 15, 2022, and standalone petitions[75] filed on or after March 15, 2022	• If the investment of capital is made into the new commercial enterprise, and made available to the job-creating entity in the case of investment through a regional center, before the filing of the Form I-526, then the TEA analysis should focus on whether the area in which the new commercial enterprise, or job-creating entity in the case of investment through a regional center, is principally doing business qualifies as a TEA at the time of the investment. • If the investment of capital has yet to be made into the new commercial enterprise, or made available to the job-creating entity in the case of investment through a regional center, at the time of the Form I-526 petition filing, then the TEA analysis should focus on whether the area in which the new commercial enterprise, or job-creating entity in the case of investment through a regional center, is principally doing business qualifies as a TEA at the time of the filing of the Form I-526 petition.

A geographic area that once qualified as a TEA may no longer qualify as employment rates or population increase over time. Immigrant investors occasionally request eligibility for the reduced investment threshold based on the fact that other immigrant investors who previously invested in the same new commercial enterprise qualified for the lower capital investment amount. The immigrant investor must establish, however, that at the time of investment or at the time of filing the immigrant petition, as applicable, the geographic area in question qualified as a TEA. An immigrant investor cannot rely on previous TEA determinations made based on facts that have subsequently changed.

For petitions filed on or after March 15, 2022, USCIS designations of TEAs are valid for 2 years from the date of investment for standalone investors or 2 years from the date a regional center properly files the Form I-956F for regional center investors and may be renewed for one or more 2-year periods.[76] An immigrant investor who has invested the amount of capital required for a TEA during an approved designation does not have to increase their investment if the designation expires.[77]

The area in question may qualify as a TEA at the time the investment is made or the Form I-526 immigrant petition is filed, whichever occurs first, but may cease to qualify by the time the Petition by Investor to Remove Conditions on Permanent Resident Status (Form I-829) is filed. The investor is not required to demonstrate that the area in question remains a TEA at the time the Form I-829 petition is filed. Changes in population size or unemployment rates within the area during the period of conditional permanent residence are acceptable, since increased job creation is a primary goal, which has been met if the area was a TEA at the time the investment was made, or the Form I-526 was filed.

A State's Designation of a Targeted Employment Area Before March 15, 2022

For petitions filed before March 15, 2022, a state government could designate a geographic or political subdivision within its boundaries as a TEA based on high unemployment. Before the state could make such a designation, an official of the state must have notified USCIS of the agency, board, or other appropriate state governmental body that would be delegated the authority to certify that the geographic or political subdivision was a high unemployment area.[78] The state was then able to send a letter from the authorized body of the state certifying that the geographic or political subdivision of the MSA or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business had been designated a high unemployment area.[79]

Consistent with the regulations in effect before March 15, 2022, USCIS deferred to state determinations of the appropriate boundaries of a geographic or political subdivision that constitutes the TEA. However, for all TEA designations, USCIS still ensured compliance with the statutory requirement that the proposed area designated by the state had an unemployment rate of at least 150 percent above the national average. To do this, USCIS reviewed state determinations of the unemployment rate and assessed the method or methods by which the state authority obtained the unemployment statistics.

Acceptable data sources for calculating unemployment included U.S. Census Bureau data (including data from the American Community Survey) and data from the Bureau of Labor Statistics (including data from Local Area Unemployment Statistics).

There has never been a provision allowing a state to designate a rural area.

6. Infrastructure Projects

For regional center-based petitions filed on or after May 14, 2022, investors may qualify for the reduced investment amount by investing in an infrastructure project. These projects are ones:

- That are administered by a governmental entity (such as a federal, state, or local agency or authority);
- Where the governmental entity, which serves as the job-creating entity, contracts with a regional center or new commercial enterprise to receive capital investment under the regional center program from investors or the new commercial enterprise; and
- That involve financing for maintaining, improving, or constructing a public works project.[80]

USCIS determines whether a project meets the definition of infrastructure project during adjudication of the Form I-956F.[81] A standalone investor cannot establish eligibility through an infrastructure project.

B. Comprehensive Business Plan

For standalone investor petitions filed at any time and regional center investor petitions filed before March 15, 2022, a comprehensive business plan should contain, at a minimum, a description of the business, its products or services (or both), and its objectives.[82]

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market and prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources.

The plan should detail any contracts executed for the supply of materials or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, costs, and income projections and detail the basis of such projections.

Most importantly, the business plan must be credible.[83]

USCIS reviews business plans in their totality. An officer must determine if it is more likely than not that the business plan is comprehensive and credible. A business plan is not required to contain all of the detailed elements, but the more details the business plan contains, the more likely it is that USCIS considers the plan comprehensive and credible.[84]

As of May 14, 2022, regional centers file a Form I-956F before investors file their Immigrant Petition by Regional Center Investor (Form I-526E).[85]

C. New Commercial Enterprise

A new commercial enterprise is any commercial enterprise established after November 29, 1990.[86] Therefore, the immigrant investor can invest the required amount of capital in a commercial enterprise established after November 29, 1990, provided the remaining eligibility criteria are met.

The following table outlines the definition of new commercial enterprise, depending on when the petition was filed.

Petitions filed before March 15, 2022	Petitions filed on or after March 15, 2022
A commercial enterprise is any for-profit activity formed for the ongoing conduct of lawful business.[87] This broad definition is consistent with the realities of the business world and the many different forms and structures that job-creating activities can have. Types of commercial enterprises include, but are not limited to: • Sole proprietorship; • Partnership (whether limited or general);	The term new commercial enterprise means any for-profit organization formed in the United States for the ongoing conduct of lawful business, including sole proprietorship, partnership (whether limited or general), holding company and its wholly owned subsidiaries (provided that each subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business), joint venture, corporation, business trust, limited liability company, or other entity (which may be publicly or privately owned) that receives, or is established to receive, capital investment from immigrant investors.[90]

Petitions filed before March 15, 2022	Petitions filed on or after March 15, 2022
• Holding company; • Joint venture; • Corporation; • Business trust; or • Other entity, which may be publicly or privately owned.[88] A commercial enterprise can consist of a holding company and its wholly owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. Noncommercial activities, including owning and operating a personal residence, do not qualify.[89] The commercial enterprise must be formed to make a profit, unlike, for example, some charitable organizations.	

The Business Structures overview provides more information on the most common business forms or structures, including information on formation, fundamental characteristics, and the tax forms submitted to the Internal Revenue Service.

1. Enterprise Established on or before November 29, 1990

A new commercial enterprise also includes a commercial enterprise established on or before November 29, 1990, if the enterprise will be restructured or expanded through the immigrant's investment of capital.

Purchase of an Existing Business that is Restructured or Reorganized

The immigrant investor can invest in a business that existed on or before November 29, 1990, provided that the existing business is simultaneously or subsequently restructured or reorganized such that a new commercial enterprise results.[91] Cosmetic changes to the décor, a new marketing strategy, or a simple change in ownership do not qualify as restructuring.[92]

However, a business plan that modifies an existing business, such as converting a restaurant into a nightclub or adding substantial crop production to an existing livestock farm, could qualify as a restructuring or reorganization.

Expansion of an Existing Business

The immigrant investor can invest in a business that existed on or before November 29, 1990, provided a substantial change in the net worth or number of employees results from the investment of capital.[93]

Substantial change is defined as a 40 percent increase either in the net worth or in the number of employees, so that the new net worth or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees.[94]

Investment in a new commercial enterprise in this manner does not exempt the immigrant investor from meeting the requirements relating to the amount of capital that must be invested and the number of jobs that must be created.[95]

2. Pooled Investments in Original EB-5 Program

For petitions filed before March 15, 2022, a new commercial enterprise may be used as the basis for the petitions of more than one standalone immigrant investor. For petitions filed on or after March 15, 2022, pooled investments with more than one EB-5 investor are only permitted under the regional center program.[96] For petitions filed before March 15, 2022, each standalone immigrant investor must invest the required amount of capital and each immigrant investor's investment must result in the required number of jobs. Furthermore, the new commercial enterprise can have owners who are not immigrant investors provided that the sources of all capital invested are identified and all invested capital has been derived by lawful means.[97]

3. Documentation of New Commercial Enterprise

Except for petitions filed by regional center investors on or after May 14, 2022,[98] to document the new commercial enterprise, the immigrant investor must present the following evidence, in addition to any other evidence that USCIS deems appropriate:

- As applicable, articles of incorporation, certificate of merger or consolidation, partnership agreement, certificate of limited partnership, joint venture agreement, business trust agreement, or other similar organizational document for the new commercial enterprise;
- A certificate evidencing authority to do business in a state or municipality or, if the form of the business does not require any such certificate or the state or municipality does not issue such a certificate, a statement to that effect; or
- Evidence that, after November 29, 1990, the required amount of capital for the area in which an enterprise is located has been transferred to an existing business, and that the investment has resulted in a substantial increase in the net worth or number of employees of the business to which the capital was transferred.

This evidence must be in the form of stock purchase agreements, investment agreements, certified financial reports, payroll records, or any similar instruments, agreements, or documents evidencing the investment in the commercial enterprise and the resulting substantial change in the net worth or number of employees.[99]

4. Investment in New Commercial Enterprise

To show that the immigrant investor has committed the required amount of capital to the new commercial enterprise, the evidence presented may include, but is not limited to, the following:

- Bank statements showing amounts deposited in U.S. business accounts for the enterprise;

- Evidence of assets which have been purchased for use in the U.S. enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;
- Evidence of property transferred from abroad for use in the U.S. enterprise, including U.S. Customs and Border Protection commercial entry documents, bills of lading, and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;
- Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or
- Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing secured by the immigrant investor's assets, other than those of the new commercial enterprise, and for which the immigrant investor is personally and primarily liable.[100]

5. Engagement in Management of New Commercial Enterprise

The immigrant investor must be engaged in the management of the new commercial enterprise, either through the exercise of day-to-day managerial responsibility or through policy formulation.[101]

To show that the immigrant investor is or will be engaged in the exercise of day-to-day managerial control or policy formulation, the immigrant investor must submit:

- A statement of the position title that the immigrant investor has or will have in the new enterprise and a complete description of the position's duties;[102]
- Evidence that the immigrant investor is a corporate officer or a member of the corporate board of directors;[103] or
- If the new enterprise is a partnership, either limited or general, evidence that the immigrant investor is engaged in either direct management or policymaking activities. The immigrant investor is sufficiently engaged in the management of the new commercial enterprise if the investor is a limited partner and the limited partnership agreement provides the investor with certain rights, powers, and duties normally granted to limited partners under the Uniform Limited Partnership Act.[104]

D. Creation of Jobs

The creation of jobs for U.S. workers is a critical element of the EB-5 category. It is not enough that the immigrant investor invests funds into the U.S. economy. The investment of the required amount of capital must be in a new commercial enterprise that creates[105] at least 10 jobs for qualifying employees. It is important to recognize that while the investment must result in the creation of jobs for qualifying employees, it is the new commercial enterprise that creates the jobs.[106]

Example: Standalone Investments Before March 15, 2022

Ten standalone immigrant investors seek to establish a hotel as their new commercial enterprise. The establishment of the new hotel requires capital to pay financing costs to unrelated third parties, purchase the land, develop the plans, obtain the licenses, build the structure, maintain the grounds, staff the hotel, as well as many other types of expenses involved in the development and operation of a new hotel.

The standalone immigrant investor's capital can be used to pay part or all of these expenses. Each standalone immigrant investor's investment of capital helps the new commercial enterprise (the new hotel) create 10 jobs. The 10 immigrants' investments must result in the new hotel's creation of 100 jobs (10 jobs for each investor's capital investment) for qualifying employees.[107]

1. Bridge Financing

A developer or principal of a new commercial enterprise, either directly or through a separate job-creating entity, may use interim, temporary, or bridge financing, in the form of either debt or equity, prior to receipt of immigrant investor capital. If the project starts based on the interim or bridge financing prior to receiving immigrant investor capital and subsequently replaces that financing with immigrant investor capital, the new commercial enterprise may still receive credit for the job creation under the regulations.

Generally, the replacement of temporary or bridge financing with immigrant investor capital should have been contemplated prior to acquiring the original temporary financing. However, even if the immigrant investor financing was not contemplated prior to acquiring the temporary financing, as long as the financing to be replaced was contemplated as short-term temporary financing that would be subsequently replaced by more permanent long-term financing, the infusion of immigrant investor financing could still result in the creation of, and credit for, new jobs.

For example, if traditional financing originally contemplated to replace the temporary financing is no longer available to the commercial enterprise, a developer is not precluded from using immigrant investor capital as an alternative source. Immigrant investor capital may replace temporary financing even if this arrangement was not contemplated prior to obtaining the bridge or temporary financing.

The full amount of the immigrant's investment must be made available to the business or businesses most closely responsible for creating the jobs upon which eligibility is based. In the regional center context if the new commercial enterprise is not the job-creating entity, then the full amount of the capital must be invested first in the new commercial enterprise and then made available to the job-creating entity or entities.[108]

2. Multiple Job-Creating Entities

If invested in a single new commercial enterprise and where the offering and organizational documents provide, an investor's full investment may be distributed to more than one job-creating entity in a portfolio investment strategy. The record must demonstrate that the new commercial enterprise will create the requisite jobs through the portfolio of projects. In addition, each investor (or regional center for regional center-based petitions filed on or after May 14, 2022) must demonstrate that the full amount of money is made available to the business(es) most closely responsible for creating the employment upon which the petition is based, which may be one or multiple job-creating entities in a portfolio.

3. Full-Time Positions for Qualifying Employees

The investment into a new commercial enterprise must create full-time positions for not fewer than 10 qualifying employees.[109] An employee is defined as a person who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise. In the case of the Regional Center Program, an employee also means a person who provides services or labor in a job that has been created indirectly through investment in the new commercial enterprise.[110]

Qualifying Employee

For the purpose of the job creation requirement, the employee must be a qualifying employee. A qualifying employee is a U.S. citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized for employment in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in

the United States under suspension of deportation. This definition does not include the immigrant investor, the immigrant investor's spouse, sons, daughters, or any nonimmigrant.[111]

Full-Time Employment

For the purpose of the job creation requirement, the position must be a full-time employment position.[112] Full-time employment is defined as employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week.[113] In the case of the Regional Center Program, full-time employment also means employment of a qualifying employee in a position that has been created indirectly that requires a minimum of 35 working hours per week.

Two or more qualifying employees can fill a full-time employment position in a job-sharing arrangement. Job sharing is permissible so long as the 35 working hours per week requirement is met. However, the definition of full-time employment does not include combinations of part-time positions, even if those positions when combined meet the hourly requirement per week.[114]

A job-sharing arrangement whereby two or more qualifying employees share a full-time position counts as full-time employment provided the hourly requirement per week is met. To demonstrate that a full-time position is shared by more than one employee, the following evidence, among others, may be relevant:

- A written job-sharing agreement;
- A weekly schedule that identifies the positions subject to a job-sharing arrangement and the hours to be worked by each employee under the job-sharing arrangement; and
- Evidence of the sharing of the responsibilities or benefits of a permanent, full-time position between the employees subject to the job-sharing arrangement.

Jobs that are intermittent, temporary, seasonal, or transient in nature do not qualify as permanent full-time jobs. However, jobs that are expected to last at least 2 years are generally not considered intermittent, temporary, seasonal, or transient in nature.

4. Measuring Job Creation

The immigrant investor seeking to enter the United States through the EB-5 program must invest the required amount of capital in a new commercial enterprise that will create full-time positions for at least 10 qualifying employees. There are three methods of measuring job creation depending on the new commercial enterprise and where it is located.

Troubled Business

The U.S. economy benefits when the immigrant investor's capital helps preserve the troubled business's existing jobs. Immigrant investors investing in a new commercial enterprise that is a troubled business, must show that the number of existing employees in the troubled business is being, or will be, maintained at no less than the pre-investment level for a period of at least 2 years.[115] This applies in the regional center context as well.

The troubled business regulatory provision does not decrease the number of jobs required. An immigrant investor who invests in a troubled business must still demonstrate that 10 jobs have been preserved, created, or some combination of the two. For example, an investment in a troubled business that creates four qualifying jobs and preserves all six pre-investment jobs would satisfy the job creation requirement.

The regulatory definition of a troubled business is a business that has:

- Been in existence for at least 2 years;
- Has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the 12-month or 24-month period prior to the priority date on Form I-526 or Form I-526E; and
- Had a loss for the same period at least equal to 20 percent of the troubled business's net worth prior to the loss.[116]

For purposes of determining whether or not the troubled business has been in existence for 2 years, USCIS deems the successors-in-interest to the troubled business to have been in existence for the same period of time as the business they succeeded.[117]

New Commercial Enterprise Not Located Within a Regional Center

For a new commercial enterprise not located within a regional center, the full-time positions must be created directly by the new commercial enterprise to be counted. This means that the new commercial enterprise (or its wholly owned subsidiaries) must itself be the employer of the qualifying employees.[118]

New Commercial Enterprise Located Within a Regional Center

For regional center-based petitions filed before July 1, 2021, the date that the previous authorization of the regional center program lapsed, full-time positions can be created either directly or indirectly by a new commercial enterprise located within a designated regional center.[119] For regional center-based petitions filed on or after March 15, 2022, up to 90 percent of full-time positions may be created indirectly.[120] The general EB-5 program requirements still apply to investors investing in new commercial enterprises in the regional center context except that they may rely on indirect job creation. Employees filling indirect jobs do not work directly for the new commercial enterprise. Immigrant investors must use reasonable methodologies to establish the number of indirect jobs created.[121]

Direct jobs are those jobs that establish an employer-employee relationship between the new commercial enterprise and the persons it employs. For regional center-based petitions filed on or after March 15, 2022, direct jobs that count towards the requisite 10 percent of jobs include direct employees, including those estimated by economically and statistically valid methodologies, of both the new commercial enterprise and the job creating entity.[122]

Indirect jobs are those that are held outside of the new commercial enterprise but are created as a result of the new commercial enterprise. For example, indirect jobs can include, but are not limited to, those held by employees of the job-creating entity (when the job-creating entity is not the new commercial enterprise) as well as employees of producers of materials, equipment, or services used by the new commercial enterprise or job-creating entity.

In addition, a sub-set of indirect jobs, known as induced jobs, are created when the new direct and indirect employees spend their earnings on consumer goods and services. Indirect jobs can qualify and be counted as jobs attributable to a new commercial enterprise associated with a regional center, based on reasonable methodologies, even if the jobs are located outside of the geographic boundaries of a regional center.

For petitions filed on or after May 15, 2022, Congress enacted certain limits on how jobs created by construction activity lasting less than 2 years can count towards estimated indirect and direct jobs.[123]

Due to the nature of accepted job creation modeling practices, USCIS relies upon reasonable economic models to determine that it is more likely than not that the indirect jobs are created. USCIS may request additional evidence that the indirect jobs created, or to be created, are full-time. USCIS may also request additional evidence to verify that the direct jobs (those held at the new commercial enterprise) will be or are full-time and permanent, which may include a review of W-2 forms or similar evidence.

Multiple Investors

For petitions filed on or after March 15, 2022, pooled investments with more than one EB-5 investor are only permitted under the regional center program.[124] For petitions filed before March 15, 2022, and all regional center-based petitions, when there are multiple investors in a new commercial enterprise, USCIS allocates the total number of full-time positions created for qualifying employees only to those immigrant investors who have used the establishment of the new commercial enterprise as the basis for their immigrant petition. An allocation does not need to be made among persons not seeking classification through the EB-5 category. Also, jobs need not be allocated to non-natural persons, such as corporations investing in a new commercial enterprise.[125] USCIS allocates full-time positions to immigrant investors based on the date their petition to remove conditions was filed, unless otherwise stated in the relevant documents.[126]

In general, multiple immigrant investors may not claim credit for the same job. An immigrant investor may not seek credit for the same specifically identified job position that has already been allocated to another immigrant investor in a previously approved case.

5. Evidence of Job Creation

To show that a new commercial enterprise will create no fewer than 10 full-time positions for qualifying employees, and except as provided below for regional center-based petitions filed on or after May 14, 2022, an immigrant investor must submit the following evidence:

- Documentation consisting of photocopies of relevant tax records, Employment Eligibility Verification (Form I-9), or other similar documents for 10 qualifying employees, if such employees have already been hired; or
- A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than 10 qualifying employees will result within the next 2 years and the approximate dates employees will be hired.[127]

The 2-year period[128] is deemed to begin 6 months after adjudication of Form I-526. The business plan filed with the immigrant petition should reasonably demonstrate that the requisite number of jobs will be created by the end of this 2-year period.

Troubled Business

In the case of a troubled business, a comprehensive business plan must accompany the other required evidentiary documents.[129]

Regional Center-Based Petitions Filed before July 1, 2021

In the case of a new commercial enterprise within a regional center, the direct or indirect job creation may be demonstrated by the types of documents identified in this section along with reasonable methodologies.[130] If a regional center immigrant investor seeks to rely on jobs that will be created to satisfy the job creation requirement, a comprehensive business plan is required.

Additionally, if the regional center immigrant investor seeks to demonstrate job creation through the use of an economic input-output model, USCIS requires the investor to demonstrate that the methodology is reasonable. For example, if the inputs into the input-output model reflect jobs created directly at the new commercial enterprise or job-creating entity, USCIS requires the investor to demonstrate that the direct jobs input is reasonable. Relevant documentation may include Form I-9, tax or payroll records or if the jobs are not yet in existence, a comprehensive business plan demonstrating how many jobs will be created and when the jobs will be created.

If the inputs into the model reflect expenditures, USCIS requires the investor to demonstrate that the expenditures input is reasonable. Relevant documentation may include receipts and other financial records for expenditures that have occurred and a detailed projection of sales, costs, and income projections such as a pro-forma cash flow statement associated with the business plan for expenditures that will occur.

If the inputs into the model reflect revenues, USCIS requires the investor to demonstrate that the revenues input is reasonable. Relevant documentation may include tax or other financial records for revenues that have occurred or a detailed projection of sales, costs, and income projections such as a pro-forma income statement associated with the business plan for revenues that will occur.

In reviewing whether an economic methodology is reasonable, USCIS analyzes whether the multipliers and assumptions about the geographic impact of the project are reasonable. For example, when reviewing the geographic level of the multipliers used in an input-output model, the following factors, among others, may be considered:

- The area's demographic structure (for example, labor pool supply, work-force rate, population growth, and population density);
- The area's contribution to supply chains of the project; and
- Connectivity with respect to socioeconomic variables in the area (for example, income level and purchasing power).

Regional Center-Based Petitions Filed on or after May 14, 2022

As of May 14, 2022, regional centers file a Form I-965F with USCIS before a regional center investor may file an individual petition.

6. Guidance on Tenant Occupancy Methodology

As of May 15, 2018, USCIS rescinded its prior guidance on tenant occupancy methodology. That update applies to all USCIS employees with respect to determinations of all the former Immigrant Petitions by Alien Investors (Form I-526),[131] Petitions by Investors to Remove Conditions on Permanent Resident Status (Form I-829), and the former Applications for Regional Center Designation Under the Immigrant Investor Program (Form I-924) filed on or after that date and prior to March 15, 2022.[132] USCIS also gives deference to Form I-526 and Form I-829 petitions directly related to projects approved before May 15, 2018, absent material change, fraud or misrepresentation, or legal deficiency of the prior determination.[133]

Previously, on December 20, 2012, USCIS had issued policy guidance defining the criteria to be used in the adjudication of applications and petitions relying on tenant occupancy to establish indirect jobs.[134] In November 2016, USCIS published consolidated policy guidance on immigrant investors in this Policy Manual, including guidance on the tenant occupancy methodology. That guidance provided that investors could (1) map a specific amount of direct, imputed, or subsidized investment to new jobs, or (2) use a facilitation-based approach to demonstrate the project would remove a significant market-based constraint.

The first method requires mapping a specific amount of direct, imputed, or subsidized investment to new jobs such that there is an equity or direct financial connection between the EB-5 capital investment and the employees of prospective tenants. In practice, however, the construction of standard office or retail space alone does not lead to a sufficient connection for this type of mapping such that tenant jobs can be credited to the new commercial enterprise. The existence of numerous other factors, such as the identity of future tenants and demand for that type of business, makes it difficult to relate individual jobs to a specific space.

The second method looks at whether the investment removes a significant market-based constraint, referred to in the 2012 guidance as the "facilitation based approach." In providing this approach as an option, USCIS explicitly allowed applicants and petitioners to avoid having to establish an equity or direct financial connection between the EB-5 capital investment and the employees of prospective tenants. As of May 15, 2018, however, USCIS determined that that allowance was ill-advised, because a direct financial connection between the EB-5 capital investment and the job creation is necessary to determine a sufficient nexus between the two. Reliance on a showing of constraint on supply or excess of demand by itself does not establish a causal link between specific space and a net new labor demand such that it would overcome the lack of a sufficient nexus.

Moreover, allowing applicants and petitioners to use prospective tenant jobs as direct inputs into regional growth models to generate the number of indirect and induced jobs that result from the credited tenant jobs leads to a more attenuated and less verifiable connection to the investment. There is also no reasonable test to confirm that jobs claimed through either tenant-occupancy methodology are new rather than relocated jobs such that they should qualify as direct inputs in the first place.

In sum, tenant-occupancy methodologies described in the 2012 Operational Guidance and previously incorporated into the Policy Manual result in a connection or nexus between the investment and jobs that is too tenuous[135] and therefore are no longer considered reasonable methodologies or valid forecasting tools under the regulations.[136]

As of May 14, 2022, regional center petitioners may include jobs estimated to be created under a methodology that attributes jobs to prospective tenants occupying commercial real estate created or improved by capital investments if the number of such jobs estimated to be created has been determined by an economically and statistically valid methodology and such jobs are not existing jobs that have been relocated.[137]

E. Burden of Proof

The petitioner or applicant must establish each element by a preponderance of the evidence.[138] The petitioner or applicant does not need to remove all doubt. Even if an officer has some doubt as to the truth, if the petitioner or applicant submits relevant, probative, and credible evidence that leads to the conclusion that the claim is more likely than not (that is, probably true), the petitioner or applicant has satisfied the preponderance of evidence standard.

F. Priority Dates

A priority date is the date the completed, signed petition is properly filed with USCIS.[139]

If an immigrant investor files an amended Form I-526E in the case of termination or debarment of the petitioner's regional center, new commercial enterprise, or job-creating entity, the petitioner may use the priority date of their original petition for purposes of the amended Form I-526E filed on or after May 15, 2022, for which the petitioner qualifies.[140]

Footnotes

[^ 1] The effective date for the newly codified regional center program is 60 days after the March 15, 2022, enactment date. See Section 103(b)(2) of the EB-5 Reform and Integrity Act of 2022, Div. BB of the Consolidated Appropriations Act of 2022, Pub. L. 117-103 (PDF), 136 Stat. 49 (March 15, 2022).

[^ 2] See 8 CFR 204.6(e) (PDF). DHS published the EB-5 Immigrant Investor Program Modernization Rule, effective November 21, 2019. See 84 FR 35750 (PDF), 35808 (July 24, 2019). However, that rule was vacated by *Behring Regional Center LLC v. Wolf*, 544 F. Supp. 3d 937 (N.D. Cal. 2021). Therefore, all links to regulations in this chapter are to those in effect prior to that rule.

[^ 3] The effective date for the newly codified regional center program is 60 days after the March 15, 2022, enactment date. See Section 103(b)(2) of the EB-5 Reform and Integrity Act of 2022, Div. BB of the Consolidated Appropriations Act of 2022, Pub. L. 117-103, 136 Stat. 49 (March 15, 2022).

[^ 4] See 8 CFR 204.6(e) (PDF).

[^ 5] See INA 203(b)(5)(D)(ii).

[^ 6] See INA 203(b)(5)(D)(ii).

[^ 7] See *Matter of Ho (PDF)*, 22 I&N Dec. 206 (Assoc. Comm. 1998).

[^ 8] See S. Rep. No. 101-55 (1989). See 8 CFR 204.6(e) (PDF). See INA 203(b)(5)(D)(ii) and INA 203(b)(5)(L). For more discussion of lawful source of funds requirements, see Subsection 4, Lawful Source of Funds [6 USCIS-PM G.2(A)(4)].

[^ 9] See INA 203(b)(5)(L)(iii). For more discussion of gifts and loans, see Subsection 4, Lawful Source of Funds [6 USCIS-PM G.2(A)(4)].

[^ 10] Perfecting a security interest relates to the additional steps required to make a security interest effective against third parties or to retain its effectiveness in the event of default by the grantor of the security interest.

[^ 11] See *Matter of Hsiung (PDF)*, 22 I&N Dec. 201, 202 (Assoc. Comm. 1998).

[^ 12] See *Matter of Hsiung (PDF)*, 22 I&N Dec. 201, 202-03 (Assoc. Comm. 1998).

[^ 13] See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 193-94 (Assoc. Comm. 1998).

[^ 14] See 8 CFR 204.6(e) (PDF). USCIS no longer follows its interpretation of indebtedness as including the investment of loan proceeds as of November 30, 2018, the date of the district court decision *Zhang v. USCIS*, 978 F.3d 1314 (D.C. Cir. 2020).

[^ 15] See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 195 (Assoc. Comm. 1998).

[^ 16] See INA 203(b)(5)(A)(i).

[^ 17] See INA 203(b)(5)(D)(ii)(III)(bb). See 8 CFR 204.6(e) (PDF).

[^ 18] See 8 CFR 204.6(j)(2) (PDF).

[^ 19] See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 180-188 (Assoc. Comm. 1998). For petitions filed on or after March 15, 2022, INA 203(b)(5)(D)(ii)(III)(cc) also applies.

[^ 20] See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 184 (Assoc. Comm. 1998).

[^ 21] The full definition of invest is provided at 8 CFR 204.6(e) (PDF).

[^ 22] See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 183-188 (Assoc. Comm. 1998).

[^ 23] EB-5 regulations contain two basic requirements in order to have a legitimate qualifying investment: (1) 8 CFR 204.6(e) (PDF) defines “invest” to require a qualifying (that is, non-prohibited) contribution of capital; and (2) 8 CFR 204.6(j)(2) (PDF) requires a qualifying use of such capital (placing such capital at risk for the purpose of generating a return). In order to satisfy the evidentiary requirement set forth at 8 CFR 204.6(j)(2) (PDF), an investor must first properly contribute capital in accordance with the definition of invest at 8 CFR 204.6(e) (PDF). If the contribution of capital fails to meet the definition of invest, it is not a qualifying investment, even if it is at risk for the purpose of generating a return.

[^ 24] See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 186-187 (Assoc. Comm. 1998).

[^ 25] See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 188 (Assoc. Comm. 1998). *Matter of Izummi (PDF)* addressed redemption agreements in general, and not only those where the investor holds the right to repayment. USCIS generally disfavors redemption provisions that indicate a preconceived intent to exit the investment as soon as possible, and notes that one district court has drawn the line at whether the investor holds the right to repayment. See *Chang v. USCIS*, 289 F. Supp.3d 177 (D.D.C. Feb. 7, 2018).

[^ 26] See *Matter of Izummi (PDF)*, 22 I&N Dec. 169 (185-86) (Assoc. Comm. 1998).

[^ 27] See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 188 (Assoc. Comm. 1998). See *Chang v. USCIS*, 289 F. Supp.3d 177 (D.D.C. Feb. 7, 2018).

[^ 28] See INA 203(b)(5)(D)(ii)(III).

[^ 29] See INA 203(b)(5)(D)(ii)(IV).

[^ 30] See *Matter of Ho (PDF)*, 22 I&N Dec. 206, 209-210 (Assoc. Comm. 1998).

[^ 31] See *Matter of Ho (PDF)*, 22 I&N Dec. 206, 210 (Assoc. Comm. 1998).

[^ 32] See *Matter of Izummi (PDF)*, 22 I&N 169, 179, 189 (Assoc. Comm. 1998).

[^ 33] See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 178-79 (Assoc. Comm. 1998).

[^ 34] See 8 CFR 204.6(j)(2) (PDF).

[^ 35] See *Matter of Ho (PDF)*, 22 I&N Dec. 206, 210 (Assoc. Comm. 1998).

[^ 36] When funds are held in escrow outside the United States, USCIS reviews currency exchange rates at the time of adjudicating the Form I-526 petition to determine if it is more likely than not that the petitioner will make the minimum qualifying capital investment. With the Petition by Investor to Remove Conditions on Permanent Resident Status (Form I-829), USCIS reviews the evidence in the record, including currency exchange rates at the time of transfer, to determine that, when the funds were actually transferred to the United States, the petitioner actually made the minimum qualifying capital investment.

[^ 37] See Petition by Investor to Remove Conditions on Permanent Resident Status (Form I-829).

[^ 38] See *Matter of Ho (PDF)*, 22 I&N Dec. 206, 209-210 (Assoc. Comm. 1998). See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 179, 189 (Assoc. Comm. 1998).

[^ 39] See 8 CFR 204.6(e) (PDF).

[^ 40] Based on an internal review and analysis of typical EB-5 capital deployment structures, USCIS generally considers 12 months to be a reasonable amount of time to further deploy capital for most types of commercial enterprises but considers evidence showing that a longer period is reasonable for a specific type of commercial enterprise or into a specific commercial activity under the totality of the circumstances.

[^ 41] The requirement to make the full amount of capital available to the business(es) most closely responsible for creating the employment upon which the petition is based is generally satisfied through the initial deployment of capital resulting in the creation of the required number of jobs.

[^ 42] See 8 CFR 204.6(e) (PDF) for the definition of commercial enterprise.

[^ 43] This clarification is meant to address potential confusion among stakeholders regarding prior language about the “scope” of the new commercial enterprise while remaining consistent with applicable eligibility requirements.

[^ 44] See 8 CFR 103.2(b)(1). See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 175-6, 189 (Assoc. Comm. 1998). See Chapter 3, Immigrant Petition Adjudication, Section C, Material Change [6 USCIS-PM G.3(C)].

[^ 45] See INA 203(b)(5)(A), which refers to a single new commercial enterprise: “Visas shall be made available . . . to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise.”

[^ 46] See INA 203(b)(5)(E)(iv) and INA 203(b)(5)(E)(v).

[^ 47] See INA 203(b)(5)(F)(v).

[^ 48] In a rule effective November 21, 2019, DHS raised the investment amounts to $1,800,000 and $900,000. See 84 FR 35750, 35808 (PDF) (July 24, 2019). On June 22, 2019, however, a federal court vacated that rule. See *Behring Regional Center LLC v. Wolf*, 544 F. Supp. 3d 937 (N.D. Cal. 2021). Therefore, all petitions filed before March 15, 2022, are subject to the original investment amounts set in 1990.

[^ 49] See INA 203(b)(5)(C).

[^ 50] The full amount of money must be made available to the business(es) most closely responsible for creating the employment upon which the petition is based. See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 179 (Assoc. Comm. 1998).

[^ 51] See 8 CFR 204.6(e) (PDF).

[^ 52] The effective date for the new lawful source of funds provisions outlined in the EB-5 Reform and Integrity Act of 2022 is 60 days after the Act's March 15, 2022, enactment date. See Section 103(b)(2) of Div. BB of the Consolidated Appropriations Act of 2022, Pub. L. 117-103, 136 Stat. 49 (March 15, 2022).

[^ 53] See 8 CFR 204.6(j)(3) (PDF). See *Matter of Ho (PDF)*, 22 I&N Dec. 206, 210-11 (Assoc. Comm. 1998).

[^ 54] See 8 CFR 204.6(e) (PDF).

[^ 55] See 8 CFR 204.6(e) (PDF) and 8 CFR 204.6(j)(3) (PDF).

[^ 56] See 8 CFR 204.6(j)(3) (PDF).

[^ 57] As required under 8 CFR 204.6(j)(3)(ii) (PDF).

[^ 58] The effective date for these provisions outlined in the EB-5 Reform and Integrity Act of 2022 is 60 days after the Act's March 15, 2022, enactment date. See Section 103(b)(2) of Div. BB of the Consolidated Appropriations Act of, 2022, Pub. L. 117-103, 136 Stat. 49 (March 15, 2022).

[^ 59] See INA 203(b)(5)(L).

[^ 60] See INA 203(b)(5)(L)(iii)(I).

[^ 61] See INA 203(b)(5)(L)(iii)(II).

[^ 62] See INA 203(b)(5)(B)(ii) (prior to March 15, 2022). See INA 203(b)(5)(D)(viii).

[^ 63] See INA 203(b)(5)(B)(ii) (prior to March 15, 2022) and INA 203(b)(5)(D)(vii). See 8 CFR 204.6(e) (PDF).

[^ 64] See INA 203(b)(5)(B)(ii) (prior to March 15, 2022). See 8 CFR 204.6(e) (PDF).

[^ 65] See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 174 (Assoc. Comm. 1998).

[^ 66] See 8 CFR 204.6(j)(6) (PDF). See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 171-73 (Assoc. Comm. 1998).

[^ 67] See 8 CFR 204.6(j)(6)(i) (PDF).

[^ 68] In a rule effective November 21, 2019, DHS eliminated the ability for states to designate TEAs and set rules for how USCIS would make those determinations. See 84 FR 35750, 35808 (PDF) (July 24, 2019). On June 22, 2019, however, a federal court vacated that rule. See *Behring Regional Center LLC v. Wolf*, 544 F. Supp. 3d (N.D. Cal. 2021). Therefore, all petitions filed before March 15, 2022, are subject to the previous rules on TEAs and may rely on state designations.

[^ 69] See 8 CFR 204.6(j)(6)(ii)(B) (PDF).

[^ 70] See 8 CFR 204.6(j)(6)(ii)(A) (PDF).

[^ 71] USCIS makes designations as part of the standalone petition adjudication. See INA 203(b)(5)(B)(ii). USCIS makes designations for regional center filings on or after May 14, 2022, as part of the Form I-956F adjudication. See INA 203(b)(5)(F). USCIS does not issue separate designation notices.

[^ 72] See 8 CFR 204.6(j)(6)(i) (PDF) and 8 CFR 204.6(j)(6)(ii)(B) (PDF).

[^ 73] See 8 CFR 204.6(j)(6)(i) (PDF).

[^ 74] See INA 203(b)(5)(F)(i) and INA 204(a)(1)(H)(i) requiring the filing of a Form I-956F before an investor in that offering can file a petition for classification.

[^ 75] For regional center petitions filed after May 14, 2022, USCIS makes the TEA determination at the project application stage and designations are valid for 2 years. See INA 203(b)(5)(B)(ii).

[^ 76] See INA 203(b)(5)(B)(ii)(IV).

[^ 77] See INA 203(b)(5)(B)(ii)(V).

[^ 78] See 8 CFR 204.6(j)(6)(i) (PDF).

[^ 79] See 8 CFR 204.6(j)(6)(ii)(B) (PDF).

[^ 80] See INA 203(b)(5)(D)(iv).

[^ 81] See INA 203(b)(5)(B)(iii)(I).

[^ 82] See *Matter of Ho (PDF)*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998).

[^ 83] See *Matter of Ho (PDF)*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998).

[^ 84] See *Matter of Ho (PDF)*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998).

[^ 85] See INA 203(b)(5)(F).

[^ 86] See 8 CFR 204.6(e) (PDF).

[^ 87] See 8 CFR 204.6(e) (PDF).

[^ 88] See 8 CFR 204.6(e) (PDF).

[^ 89] See 8 CFR 204.6(e) (PDF).

[^ 90] See INA 203(b)(5)(D)(vi).

[^ 91] See 8 CFR 204.6(h)(2) (PDF).

[^ 92] See *Matter of Soffici (PDF)*, 22 I&N Dec. 158 (Assoc. Comm. 1998).

[^ 93] See 8 CFR 204.6(h)(3) (PDF).

[^ 94] See 8 CFR 204.6(h)(3) (PDF).

[^ 95] See 8 CFR 204.6(h)(3) (PDF).

[^ 96] See INA 204(a)(1)(H)(i).

[^ 97] See 8 CFR 204.6(g) (PDF).

[^ 98] For regional center-based petitions filed on or after May 14, 2022, USCIS reviews the new commercial enterprise as part of the Form I-965F for regional center-affiliated projects. See INA 203(b)(5)(F).

[^ 99] See 8 CFR 204.6(j)(1) (PDF).

[^ 100] See 8 CFR 204.6(j)(2)(i)-(v) (PDF).

[^ 101] See 8 CFR 204.6(j)(5) (PDF).

[^ 102] See 8 CFR 204.6(j)(5)(i) (PDF).

[^ 103] See 8 CFR 204.6(j)(5)(i) (PDF).

[^ 104] See 8 CFR 204.6(j)(5)(iii) (PDF).

[^ 105] Job maintenance is also permitted under certain circumstances. See Subsection 4, Measuring Job Creation [6 USCIS-PM G.2(D)(4)].

[^ 106] See 8 CFR 204.6(j)(4)(i) (PDF).

[^ 107] See 8 CFR 204.6(j) (PDF) (stating that it is the new commercial enterprise that must create the 10 jobs).

[^ 108] See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 179 (Assoc. Comm. 1998).

[^ 109] See 8 CFR 204.6(j) (PDF).

[^ 110] See INA 203(b)(5)(E)(iv) and INA 203(b)(5)(E)(v). See 8 CFR 204.6(e) (PDF).

[^ 111] See INA 203(b)(5)(A)(ii).

[^ 112] See INA 203(b)(5)(A)(ii).

[^ 113] See 8 CFR 204.6(e) (PDF).

[^ 114] See 8 CFR 204.6(e) (PDF).

[^ 115] See 8 CFR 204.6(j)(4)(ii) (PDF).

[^ 116] See 8 CFR 204.6(j)(4)(ii) (PDF).

[^ 117] See 8 CFR 204.6(e) (PDF).

[^ 118] See 8 CFR 204.6(e) (PDF).

[^ 119] See 8 CFR 204.6(j)(4)(iii) (PDF).

[^ 120] See INA 203(b)(5)(E)(iv)(I).

[^ 121] See 8 CFR 204.6(m)(1) (PDF) and 8 CFR 204.6(m)(7) (PDF). See INA 203(b)(5)(E)(v).

[^ 122] See INA 203(b)(5)(E)(iv)(I) and INA 203(b)(5)(E)(v).

[^ 123] See INA 203(b)(5)(E)(iv)(II) (limiting the percentage of estimated indirect jobs to 75 percent). See INA 203(b)(5)(E)(V)(II)(cc) (regarding the calculation of direct jobs).

[^ 124] See INA 204(a)(1)(H)(i).

[^ 125] See 8 CFR 204.6(g)(2) (PDF).

[^ 126] USCIS recognizes any reasonable agreement made among immigrant investors in regard to the identification and allocation of qualifying positions. See 8 CFR 204.6(g)(2) (PDF).

[^ 127] See 8 CFR 204.6(j)(4)(i) (PDF).

[^ 128] The 2-year period is described in 8 CFR 204.6(j)(4)(i)(B) (PDF).

[^ 129] See 8 CFR 204.6(j)(4)(ii) (PDF).

[^ 130] See 8 CFR 204.6(j)(4)(iii) (PDF).

[^ 131] In response to the EB-5 Reform and Integrity Act of 2022, Division BB of the Consolidated Appropriations Act of 2022, Pub. L. 117-103 (PDF), 136 Stat. 49, 1070 (March 15, 2022), USCIS bifurcated and renamed the Form I-526, resulting in the Immigrant Petition by Standalone Investor (Form I-526) and the Immigrant Petition by Regional Center Investor (Form I-526E).

[^ 132] See INA 203(b)(5)(E)(v)(II)(aa), allowing regional center investors to rely on relocated jobs.

[^ 133] See Chapter 3, Immigrant Petition Adjudication, Section A, Petitions Associated with Regional Centers, Subsection 2, Previous Determinations and Amendments [6 USCIS-PM G.3(A)(2)].

[^ 134] See Operational Guidance for EB-5 Cases Involving Tenant-Occupancy, GM-602-0001, issued December 20, 2012.

[^ 135] See, for example, *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 179 (Assoc. Comm. 1998) (holding that the full amount of the money must be made available to the business(es) most closely responsible for creating the employment on which the petition is based).

[^ 136] See 8 CFR 204.6(j)(4)(iii) (PDF) and 8 CFR 204.6(m)(3) (PDF).

[^ 137] See INA 203(b)(5)(E)(v)(II).

[^ 138] See *Matter of Chawathe (PDF)*, 25 I&N Dec. 369, 375-376 (AAO 2010). For general information, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 4, Burden and Standards of Proof [1 USCIS-PM E.4].

[^ 139] See 8 CFR 204.6(d) (PDF).

[^ 140] See INA 203(b)(M)(v)(I). Priority date preservation was included in the EB-5 Modernization Rule, effective November 21, 2019. See 84 FR 35750, 35808 (PDF) (July 24, 2019). That rule, however, was vacated. See *Behring Regional Center LLC v. Wolf*, 544 F. Supp. 3d 937 (N.D. Cal. 2021).

Chapter 3 - Immigrant Petition Adjudication

An immigrant investor must file an initial immigrant petition, either Immigrant Petition by Standalone Investor (Form I-526) or Immigrant Petition by Regional Center Investor (Form I-526E), and supporting documentation to receive employment-based 5th preference (EB-5) immigrant classification.[1] Upon adjustment of status or admission to the United States, the immigrant investor will be a conditional permanent resident (CPR).[2]

A. Petitions Associated with Regional Centers

1. Initial Filing

Each regional center investor must demonstrate that they invested, or are actively in the process of investing, lawfully obtained capital in a new commercial enterprise located within a designated regional center in the United States.[3] The investor must also demonstrate that this investment will create at least 10 direct or indirect full-time jobs for qualifying employees.[4]

For petitions filed on or after May 14, 2022, the investor can only file Form I-526E after the regional center files the Application for Approval of an Investment in a Commercial Enterprise (Form I-956F) (project application).[5] The investor may file Form I-526E while the project application remains pending. However, USCIS does not make a final decision on a regional center investor's immigrant visa petition until USCIS makes a final decision on the regional center's associated project application.

To show that a regional center investor has invested, or is actively in the process of investing, in a new commercial enterprise located within a regional center, the investor should submit a receipt notice documenting that the regional center has filed a project application and evidence of the investment.[6]

2. Previous Determinations and Amendments

When adjudicating Form I-526 petitions, USCIS generally defers to prior determinations on regional center filings and reviews amendments according to the relevant law and policy at the time of the filing date.

Petitions Filed Before May 14, 2022

If the regional center requested to expand its geographic area, the instructions for Application for Regional Center Designation Under the Immigrant Investor Program (Form I-924)[7] required that a Form I-924 amendment be filed, and approved, to expand the regional center's geographic area. The Form I-924 amendment must have been approved before a Form I-526 petitioner may demonstrate eligibility at the time of filing their petition based on an investment in the expanded area.[8]

There are distinct eligibility requirements at each stage of the EB-5 immigration process. Where USCIS has previously evaluated and approved certain aspects of an investment, USCIS generally defers to that favorable determination at a later stage in the process. This deference policy promotes predictability for immigrant investors, new commercial enterprises, and their employees. Deference also conserves agency resources, which should not be used to duplicate previous efforts.

As a general matter, USCIS does not reexamine determinations made earlier in the EB-5 process, and presumes that such earlier determinations were properly decided. When USCIS has previously concluded that an economic methodology is reasonable to project future job creation as applied to the facts of a particular project, USCIS defers to this determination for all related adjudications directly linked to the specific project for which the economic methodology was previously approved.

For example, if USCIS approved Form I-924 or Form I-526 presenting a comprehensive business plan[9] and a specific economic methodology, USCIS will defer to the earlier finding that the methodology was reasonable in subsequent adjudications of Form I-526 presenting the same related facts and methodology. However, USCIS still conducts a de novo review of each

prospective immigrant investor's lawful source of funds and other individualized eligibility criteria.

Conversely, USCIS does not defer to a previously favorable decision in later proceedings when, for example, the underlying facts upon which a favorable decision was made have materially changed, there is evidence of fraud or willful misrepresentation, or the previously favorable decision is determined to be legally deficient. A change is material if it would have a natural tendency to influence, or is predictably capable of affecting, the decision.[10]

When a new filing involves a different project from a previous approval, or the same previously approved project with material changes to the project plan, USCIS does not defer to the previous adjudication.

Since USCIS presumes that prior determinations were properly decided, USCIS does not consider a prior favorable determination to be legally deficient for purposes of according deference unless the prior determination involved an objective mistake of fact or an objective mistake of law evidencing ineligibility for the benefit sought, but excluding those subjective evaluations related to evaluating eligibility. Unless there is reason to believe that a prior adjudication involved an objective mistake of fact or law, officers should not reexamine determinations made earlier in the EB-5 process. Absent a material change in facts, fraud, or willful misrepresentation, officers should not re-adjudicate prior agency determinations that are subjective, such as whether the business plan is comprehensive and credible or whether an economic methodology estimating job creation is reasonable.

Petitions Filed On or After May 14, 2022

The approval of the regional center's Form I-956F project application[11] is binding for purposes of the adjudication of a related regional center investor's petitions seeking benefits based on investment in that offering, unless:

- The applicant engaged in fraud, misrepresentation, or criminal misuse;
- Such approval would threaten public safety or national security;
- There has been a material change that affects eligibility;
- The discovery of other evidence affecting program eligibility was not disclosed by the applicant during the adjudication process; or
- The previous adjudication involved a material mistake of law or fact.[12]

In addition, upon approval of a timely filed amendment to an approved project application, any changes reflected in the amendment may be incorporated into and considered in the adjudication of a related investor's petition.[13]

B. Standalone Petitions

An immigrant investor not associated with a regional center must, together with the Form I-526 petition, demonstrate that they have invested, or are actively in the process of investing, lawfully obtained capital in a new commercial enterprise located within the United States that will create at least 10 direct full-time jobs for qualifying employees.[14] For petitions filed on or after March 15, 2022, an immigrant investor seeking to pool their investment with one or more additional immigrant investors seeking EB-5 classification must file for such classification in association with a regional center.[15]

C. Material Change

1. In General

A petitioner must establish eligibility at the time of filing. USCIS does not approve petitions if, after filing, the immigrant investor becomes eligible under a new set of facts or circumstances. Changes that are considered material that occur after the filing of an immigrant investor petition result in the investor's ineligibility if the investor has not obtained CPR status.[16]

If material changes occur after the approval of the immigrant petition, but before the investor has obtained CPR status, such changes would generally constitute good and sufficient cause to issue a notice of intent to revoke and, if not overcome, would generally constitute good cause to revoke the approval of the petition. A change is material if the changed circumstances would have a natural tendency to influence or are predictably capable of affecting the decision.[17]

Changes that occur in accordance with a business plan and other supporting documents as filed will generally not be considered material. For example, if at the time of filing the immigrant petition no jobs have yet been created, but after approval of the immigrant petition and before the investor has obtained CPR status, the investment in the new commercial enterprise results in the creation of 10 jobs in accordance with the investor's business plan as filed, such a change would generally not be considered material.

If the organizational documents for a new commercial enterprise contain a liquidation provision that does not otherwise constitute an impermissible debt arrangement, the documents may generally be amended to remove such a provision in order to allow the new commercial enterprise to continue to operate through the regional center investor's period of CPR status. Such an amendment would generally not be considered a material change because facts related to the immigrant investor's eligibility would not change.

In general, if, at the time of adjudication, the investor is asserting eligibility under a materially different set of facts that did not exist when they filed the immigrant petition, the investor must file a new immigrant petition.

2. Material Changes to Regional Center Project Applications for Petitions Filed on or After March 15, 2022

In general, an approved Form I-956F project application is binding in the adjudication of associated petitions unless there has been a material change that affects eligibility.[18] However, a regional center may submit a timely filed amendment to an approved project application reflecting such changes and, if approved, those changes may be incorporated into and considered in determining eligibility when adjudicating the related investor petitions.[19]

D. Decision

1. Approval

If the petitioner properly filed the petition and the petitioner has met the required eligibility standards, the officer approves the petition.

After a petition has been approved and an immigrant visa is available, an immigrant investor may apply for an immigrant visa with U.S. Department of State or, if eligible, adjust status to CPR status if in the United States.[20]

2. Denial

If the petitioner has not established eligibility, the officer denies the petition.

The officer should write the denial in clear and comprehensive language and cover all grounds for denial.[21] In the denial, the officer should refer to the controlling statute or regulations and to any relevant precedent or adopted decisions. The decision must include information about the petitioner's right to appeal to the Administrative Appeals Office and the opportunity to file a motion to reopen or reconsider.

USCIS may deny a petition if USCIS determines, in its discretion, that it was predicated on or involved fraud, deceit, intentional material misrepresentation, or criminal misuse[22] or that the approval of such petition is contrary to the national interest of the United States for reasons relating to threats to public safety or national security.[23]

3. Revocation

USCIS, in its discretion, may revoke the approval of any petition for good and sufficient cause.[24] A petition may also be withdrawn upon a written request for withdrawal of the petition filed by the petitioner.[25]

As of May 14, 2022, USCIS may also revoke the approval of a petition on the following bases:

- USCIS has reason to believe the petitioner was a knowing participant in the conduct that led to the termination of a regional center, new commercial enterprise or job-creating entity;[26]
- USCIS determines, in its discretion, that approval of the petition is contrary to the national interest of the United States for reasons relating to threats to public safety or national security;[27] or
- USCIS determines, in its discretion, that the petition was predicated on or involved fraud, deceit, intentional material misrepresentation, or criminal misuse.[28]

E. Good Faith Investors Following Program Noncompliance by a Regional Center, New Commercial Enterprise, or Job-Creating Entity

Following the termination or debarment from the program of a regional center, new commercial enterprise, or job creating entity, investors with a pending or approved petition, including petitions filed prior to enactment of the EB-5 Reform and Integrity Act of 2022, may retain eligibility under certain circumstances.

In the case of the termination of a regional center, the investor may retain eligibility if their new commercial enterprise associates with an approved new regional center (regardless of its approved geographical boundaries) or if the investor makes a qualifying investment in another new commercial enterprise.[29]

In the case of debarment of a new commercial enterprise or job-creating entity, the investor may retain eligibility if they associate with a new commercial enterprise in good standing and invest additional capital solely to the extent necessary to satisfy remaining job creation requirements.[30] The petitioner must generally file an amendment to their petition or otherwise notify USCIS that they continue to meet applicable eligibility requirements notwithstanding termination or debarment, as applicable, no later than 180 days after notification of termination or debarment.[31]

In these circumstances, investors may amend their petitions to demonstrate that they meet applicable eligibility requirements. For purposes of determining eligibility, USCIS will not consider changes to the business plan underlying the amendment as a material change. In addition, the investor may include any funds obtained or recovered by the investor, directly or indirectly, from claims against third parties, including insurance proceeds, or any additional investment capital provided by the investor, as their investment capital.[32]

Petitions that continue to meet applicable eligibility requirements in these circumstances, including following an amendment, retain the immigrant visa priority date related to the original petition and prevent age-out of derivative beneficiaries. USCIS may hold these petitions in abeyance and extend any applicable deadlines.[33]

USCIS may not approve an investor petition or remove the conditions of a conditional resident investor if, after providing notice and an opportunity to respond, it has reason to believe that the investor was a knowing participant in the conduct that led to the termination or debarment of a regional center, new commercial enterprise, or job-creating entity.[34]

Special Considerations for Investors Who Filed Their Form I-526 Petitions Before March 15, 2022

USCIS recognizes that there are distinct considerations that may apply to investors who filed their underlying Form I-526 prior to March 15, 2022, for purposes of retaining eligibility under INA 203(b)(5)(M). In general, these investors may continue to rely on direct and indirect job creation despite termination of their associated regional center. Specifically, officers may generally determine, in their discretion and on a case-by-case basis, that these investors continue to be eligible for classification notwithstanding termination of their associated regional center.

For example, where an investor's capital remains invested and at-risk with their new commercial enterprise and the requisite jobs have been or will be created in accordance with their existing business plan, termination of their associated regional center for failure to pay the EB-5 Integrity Fund fee or for reasons related to a different new commercial enterprise would generally not, by itself, negatively impact the investor's eligibility.

In other circumstances where an investor's eligibility is impacted, such as where USCIS terminates or debars a regional center or debars a new commercial enterprise for misappropriating investor capital, the investor may seek to retain eligibility by reassociating with another regional center or making an investment in another new commercial enterprise.

USCIS generally reviews potentially impacted petitions in the normal course of adjudication and issues any necessary notice to the investor at that time. Until a new form is developed to standardize the filing of amendments to Form I-526 petitions filed before March 15, 2022, the investor may amend their petition for purposes of meeting applicable eligibility requirements by submitting new documentation within 180 days of USCIS notifying them of the termination or debarment.[35]

The new documentation when making a qualifying investment or reassociating with another new commercial enterprise may include evidence such as a subscription agreement, private placement memorandum, business plan, and economic impact analysis. If the investor's new commercial enterprise is reassociating with a new regional center, the investor may include a new regional center affiliation agreement documenting the change and updated offering documents as applicable.

If the investor chooses to make a qualifying investment in another new commercial enterprise following regional center termination, the investment amount required is the amount required by statute at the time the investor initially filed the Form I-526.[36]

Footnotes

[^ 1] See INA 203(b)(5) and INA 204(a)(1)(H). See 8 CFR 103.2(b) and 8 CFR 204.6(a) (PDF). For information on EB-5 eligibility, see Chapter 2, Immigrant Petition Eligibility Requirements [6 USCIS-PM G.2].

[^ 2] See INA 216A(a). For information regarding removal of the conditional basis of the investor's permanent resident status, see Chapter 7, Removal of Conditions [6 USCIS-PM G.7].

[^ 3] See INA 203(b)(5)(A)(i).

[^ 4] See INA 203(b)(5)(A)(ii).

[^ 5] See INA 203(b)(5)(F)(i) and INA 204(a)(1)(H)(i).

[^ 6] For information regarding evidence to demonstrate an investment in a new commercial enterprise, see Chapter 2, Immigrant Petition Eligibility Requirements, Section C, New Commercial Enterprise, Subsection 4, Investment in New Commercial Enterprise [6 USCIS-PM G.2(C)(4)].

[^ 7] On May 13, 2022, USCIS published the new Application for Regional Center Designation (Form I-956), replacing the Form I-924. This new form aligns with the new regional center requirements in the EB-5 Reform and Integrity Act of 2022, Division BB of the Consolidated Appropriations Act of 2022, Pub. L. 117-103 (PDF), 136 Stat. 49, 1070 (March 15, 2022).

[^ 8] If the regional center's geographic area expansion request was submitted either through a Form I-924 amendment or investor petition filed before February 22, 2017, and the request was ultimately approved, USCIS continues to adjudicate additional investor petitions associated with investments in that area under prior policy guidance issued on May 30, 2013. See EB-5 Adjudications Policy (PDF, 829.48 KB), PM-602-0083, issued May 30, 2013.

[^ 9] For a discussion of what constitutes a comprehensive business plan, see Chapter 2, Immigrant Petition Eligibility Requirements, Section B, Comprehensive Business Plan [6 USCIS-PM G.2(B)]. See *Matter of Ho (PDF)*, 22 I&N Dec. 206 (Assoc. Comm. 1998).

[^ 10] See *Kungys v. United States*, 485 U.S. 759, 770-72 (1988).

[^ 11] For more information on the Form I-956F project application, see Chapter 5, Project Applications [6 USCIS-PM G.5].

[^ 12] See INA 203(b)(5)(F)(ii).

[^ 13] See INA 203(b)(5)(F)(iii)(II).

[^ 14] For discussion of eligibility and evidentiary requirements for standalone petitioners, see Chapter 2, Immigrant Petition Eligibility Requirements, Section D, Creation of Jobs [6 USCIS-PM G.2(D)].

[^ 15] See INA 204(a)(1)(H)(i).

[^ 16] See *Matter of Izummi (PDF)*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). See 8 CFR 103.2(b)(1).

[^ 17] See *Kungys v. United States*, 485 U.S. 759, 770-72 (1988).

[^ 18] See INA 203(b)(5)(F)(ii)(III).

[^ 19] See INA 203(b)(5)(F)(iii)(II).

[^ 20] See Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures [7 USCIS-PM A]. For information on concurrent filing of the adjustment of status application either at the time of filing the immigrant visa petition or while the petition is pending, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section C, Concurrent Filings [7 USCIS-PM A.3(C)]. See Chapter 7, Removal of Conditions [6 USCIS-PM G.7] for the process of removing conditions on residence.

[^ 21] See 8 CFR 103.3(a)(1)(i).

[^ 22] See INA 203(b)(5)(O)(i). For more information on discretionary determinations, see Chapter 8, Sanctions and Discretionary Determinations, Section B, Discretionary Determinations [6 USCIS-PM G.8(B)].

[^ 23] See INA 203(b)(5)(N)(i). For more information on discretionary determinations, see Chapter 8, Sanctions and Discretionary Determinations, Section B, Discretionary Determinations [6 USCIS-PM G.8(B)].

[^ 24] See INA 205.

[^ 25] See 8 CFR 205.1(a)(3)(iii)(C). An employment-based preference petition is automatically revoked upon written notice of withdrawal filed by the petitioner less than 180 days after approval unless an associated adjustment of status application has been pending for 180 days or more.

[^ 26] See INA 203(b)(5)(M)(vi).

[^ 27] See INA 203(b)(5)(N). For more information on discretionary determinations, see Chapter 8, Sanctions and Discretionary Determinations, Section B, Discretionary Determinations [6 USCIS-PM G.8(B)].

[^ 28] See INA 203(b)(5)(O)(i). For more information on discretionary determinations, see Chapter 8, Sanctions and Discretionary Determinations, Section B, Discretionary Determinations [6 USCIS-PM G.8(B)].

[^ 29] See INA 203(b)(5)(M)(ii)(I).

[^ 30] See INA 203(b)(5)(M)(ii)(II).

[^ 31] See INA 203(b)(5)(M)(iii).

[^ 32] See INA 203(b)(5)(M)(iii).

[^ 33] See INA 203(b)(5)(M)(v)(I).

[^ 34] See INA 203(b)(5)(M)(vi).

[^ 35] See INA 203(b)(5)(M)(iii)(I).

[^ 36] For more information on the impact of sanctions, see Chapter 4, Regional Center Applications, Section H, Terminations, Suspensions, and Other Sanctions [6 USCIS-PM G.4(H)] and Chapter 8, Sanctions and Discretionary Determinations [6 USCIS-PM G.8].

Chapter 4 - Regional Center Applications

The goal of the Regional Center Program is to stimulate economic growth in a specified geographic area.[1] Regional centers allow investors to pool their investments with other investors in already defined investment opportunities.

As of May 14, 2022, an entity seeking regional center designation to participate in the Regional Center Program submits a proposal using the Application for Regional Center Designation (Form I-956) accompanied by the Bona Fides of Persons Involved with Regional Center Program (Form I-956H).[2]

As of May 14, 2022, a designated regional center may file an Application for Approval of an Investment in a Commercial Enterprise (Form I-956F) to request approval of each particular investment offering through an associated new commercial enterprise.[3] An investor in that offering may file an Immigrant Petition by Regional Center Investor (Form I-526E)[4] once the regional center has filed the project application. A regional center can be associated with one or more new commercial enterprises and files a Form I-956F for each particular investment offering.

A. Eligibility

A regional center must operate within a defined, contiguous, and limited geographic area as described in the application and consistent with the purpose of concentrating pooled investment within such area.[5] The application for regional center designation must demonstrate that the pooled investment will have a substantive economic impact on the proposed geographic area.[6]

B. Documentation and Evidence

In general, Form I-956 should include:

- Reasonable predictions, supported by economically and statistically valid and transparent forecasting tools, concerning the amount of investment that will be pooled, the kinds of commercial enterprises that will receive such investments, details of the jobs that will be created directly or indirectly as a result of such investments, and other positive economic effects such investments will have;
- A description of the policies and procedures in place reasonably designed to monitor new commercial enterprises and any associated job-creating entities to seek to ensure compliance with applicable federal and state laws;[7]
- A description of the policies and procedures in place that are reasonably designed to ensure program compliance;
- Form I-956H for all persons involved in the regional center, as defined in the following subsection, confirming that all persons involved in the regional center meet applicable requirements;[8] and
- A certification related to securities law compliance.[9]

1. Persons Involved with the Regional Center Program

In general, and unless USCIS determines otherwise, a person is involved with a regional center, a new commercial enterprise, or any affiliated job-creating entity, as applicable, if the person is, directly or indirectly, in a position of substantive authority to make operational or managerial decisions over pooling, securitization, investment, release, acceptance, or control or use of any funding that was procured under the Regional Center Program. A person may be in a position of substantive authority if the person serves as a principal, a representative, an administrator, an owner, an officer, a board member, a manager, an executive, a general partner, a fiduciary, an agent, or in a similar position at the regional center, new commercial enterprise, or job-creating entity, respectively.[10]

To be involved with a regional center, the person must be a national or a lawful permanent resident of the United States, and may not be in rescission or removal proceedings.[11]

In addition, no agency, official, or other similar entity or representative of a foreign government entity may provide capital to, or be directly or indirectly involved with the ownership or administration of, a regional center, a new commercial enterprise, or a job-creating entity. However, a foreign or domestic investment fund or other investment vehicle that is wholly or partially owned, directly or indirectly, by a bona fide foreign sovereign wealth fund or a foreign state-owned enterprise otherwise permitted to do business in the United States may be involved with the ownership, but not the administration, of an unaffiliated job-creating entity.[12]

Finally, a person may not be involved with any regional center, new commercial enterprise, or job-creating entity if the person:

- Has been found to have committed certain offenses;[13]
- Is subject to a final order, for the duration of any penalty imposed by such order, of a state securities commission (or an agency or officer of a state performing similar functions), a state authority that supervises or examines banks, savings associations, or credit unions, a state insurance commission (or an agency or officer of a state performing similar functions), an appropriate federal banking agency, the Commodity Futures Trading Commission, the Securities and Exchange Commission (SEC), a financial self-regulatory organization recognized by the SEC, or the National Credit Union Administration, which is based on a violation of certain laws or regulations;[14]
- Is determined by USCIS to be engaged in, has ever been engaged in, or seeks to engage in any illicit trafficking in any controlled substance or in any listed chemical;[15] any activity relating to espionage, sabotage, or theft of intellectual property; any activity related to money laundering;[16] any terrorist activity;[17] any activity constituting or facilitating human trafficking or a human rights offense; any Nazi persecution, genocide, or commission of torture or extrajudicial killing activity;[18] or the violation of any statute, regulation, or Executive Order regarding foreign financial transactions or foreign asset control; or
- Has been, during the preceding 10 years, included on the U.S. Department of Justice's List of Currently Disciplined Practitioners; or has received a reprimand or has otherwise been publicly disciplined for conduct related to fraud or deceit by a state bar association of which the person is or was a member.[19]

2. Geographic Area

An applicant should submit a map or illustration of the geographic area, which must be defined, contiguous, and limited. An applicant should also include a list of the geographic components that make up the proposed geographic area of the regional center.[20]

To demonstrate that the proposed geographic area is limited, the regional center applicant should submit evidence demonstrating the linkages between proposed economic activities within the proposed area based on different variables. Examples of variables to demonstrate linkages between economic activities include but are not limited to:

- Regional connectivity;
- The labor pool and supply chain; and
- Interdependence between projects.

Moreover, in assessing the likelihood that the proposed economic activity will have a substantive economic impact[21] on the proposed geographic area, an officer reviews the impact of the activity relative to relevant economic conditions. The size of the proposed area should be limited and consistent with the scope and scale of the proposed economic activity, as the regional center applicant is required to focus on a geographic region of the United States.[22]

3. Reasonable Predictions

An applicant must submit evidence that the regional center's pooled investment will have a substantive economic impact on the proposed geographic area. The proposal must include reasonable predictions, supported by economically and statistically valid and transparent forecasting tools, concerning the amount of investment that will be pooled, the kinds of commercial enterprises that will receive such investments, details of the jobs that will be created directly or indirectly as a result of such investments, and other positive economic effects such investments will have.[23]

4. Policies and Procedures

An applicant must provide a description of the policies and procedures in place reasonably designed to monitor new commercial enterprises and any associated job-creating entity to seek to ensure compliance with applicable federal and state laws as well as the employment-based 5th preference (EB-5) program.[24] Such evidence may include, but is not limited to, a written policy document that describes the policies and procedures in place reasonably designed to:

- Monitor new commercial enterprises and any associated job-creating entity to seek to ensure compliance with all applicable federal and state laws; and
- Ensure EB-5 program compliance.

Applicable federal and state laws that entities must comply with include:

- Applicable laws, regulations, and Executive Orders of the United States, including immigration laws, criminal laws, and securities laws; and
- All securities laws of each state in which securities offerings will be conducted, investment advice will be rendered, or the offerors or offerees reside.[25]

C. Adjudication

1. Approval

If the applicant properly filed the application and the applicant has met the required eligibility standards, the officer approves the application. The approval notice provides information about the responsibilities and obligations of the designated regional center. The approval notice also lists the evidence to submit in support of regional center-associated individual EB-5 petitions, as well as details on the reporting, oversight and other compliance requirements for regional centers.

2. Denial

If the applicant has not established eligibility for the benefit sought, the officer denies the application. The officer should write the denial in clear and comprehensive language and cover all grounds for denial.[26] In the denial, the officer should refer to the controlling statute or regulations and to any relevant precedent or adopted decisions. The decision must include information about the applicant’s right to appeal to the Administrative Appeals Office and the opportunity to file a motion to reopen or reconsider.

USCIS may deny an application if USCIS determines, in its discretion, that it was predicated on or involved fraud, deceit, intentional material misrepresentation, or criminal misuse[27] or that the approval of such application is contrary to the national interest of the United States for reasons relating to threats to public safety or national security.[28]

D. Amendments

A designated regional center must notify USCIS no later than 120 days before the implementation of significant proposed changes to its organizational structure, ownership, or administration, including the sale of such center, or other arrangements which would result in individuals becoming involved with the regional center that were not previously subject to the requirements under INA 203(b)(5)(H).[29] Such notice is required within 5 business days after one of those changes if exigent circumstances are present.[30] USCIS will continue to adjudicate business plans and petitions during any notice period as long as the amendment to the business or petition does not negatively impact program eligibility.[31]

E. Record-Keeping and Audits

1. Record-Keeping

A regional center must make and preserve, during the 5-year period beginning on the last day of the federal fiscal year in which any transactions occurred, books, ledgers, records, and other documentation from the regional center, new commercial enterprise, or job-creating entity used to support:

- Any claims, evidence, or certifications contained in the regional center’s annual statements;[32] and
- Associated petitions by investors seeking EB-5 classification or removal of conditions.[33]

2. Audits

USCIS audits each regional center at least once every 5 years.[34] Each audit includes a review of any documentation required to be maintained under the record-keeping requirements described above for the preceding 5 fiscal years and a review of the flow of immigrant investor capital into any capital investment project.[35] To the extent multiple regional centers are located at a single site, USCIS may audit multiple regional centers in a single site visit.[36]

F. Annual Statements

A designated regional center must submit a Regional Center Annual Statement (Form I-956G) for each fiscal year (October 1 through September 30) on or before December 29 of the calendar year in which the fiscal year ended.[37] If the regional center was designated on or before September 30, it must file an annual statement on or before December 29 of the same calendar year. If the regional center was designated on or after October 1, it does not need to file its first annual statement until on or before December 29 of the following calendar year.[38]

Each statement must include:

- A certification stating that, to the best of the certifier's knowledge, after a due diligence investigation, the regional center is in compliance with the statutory provisions pertaining to the bona fides of those involved with the regional center;[39]
- A certification relating to compliance with securities laws;
- A certification stating that, to the best of the certifier's knowledge, after a due diligence investigation, the regional center is in compliance with the requirement to maintain written agreements with promoters operating on its behalf;[40]
- A description of any pending material litigation or bankruptcy proceedings, or material litigation or bankruptcy proceedings resolved during the preceding fiscal year, involving the regional center, the new commercial enterprise, or any affiliated job-creating entity;
- An accounting of all individual immigrant investor capital invested in the regional center, new commercial enterprise, and job-creating entity; and
- A description of the regional center’s policies and procedures that are designed to enable the regional center to comply with applicable federal labor laws.[41]

For each new commercial enterprise associated with the regional center, the regional center must also provide:

- An accounting of the aggregate capital invested in the new commercial enterprise and any job-creating entity by immigrant investors for each capital investment project being undertaken by the new commercial enterprise;
- A description of how the capital invested is being used to execute each capital investment project in the filed business plan or plans;
- Evidence that 100 percent of the capital invested has been committed to each capital investment project;
- Detailed evidence of the progress made toward the completion of each capital investment project;
- An accounting of the aggregate direct jobs created or preserved;
- To the best of its knowledge, a description of all fees collected from investors by the regional center, new commercial enterprise, any affiliated job-creating, other affiliated issuer of securities or any promoter, finder, broker-dealer, or other entity engaged to locate investors, an accounting of the entities that received such fees, and the purpose for which such fees were collected;[42]
- Any documentation submitted with an Application for Approval of an Investment in a New Commercial Enterprise (Form I-956F) if there has been a material change during the preceding fiscal year; and
- A certification by the regional center that the information pertaining to each new commercial enterprise is accurate, to the best of the certifier’s knowledge, after a due diligence investigation.[43]

G. Integrity Fund

Every October 1st, each designated regional center[44] must pay the following amounts into the EB-5 Integrity Fund (the Fund):

- $20,000; or
- $10,000 if the regional center has 20 or fewer investors.[45]

On March 2, 2023, USCIS exercised its discretion to set an enforcement policy for how it will evaluate whether a regional center has appropriately counted the number of its total investors and, accordingly, paid the correct fee.[46] USCIS developed this policy to adhere as closely to the plain statutory language as possible and in line with the general understanding of the term “investors” by EB-5 stakeholders.[47]

Under that policy, USCIS generally considers an individual to be an investor beginning from the filing of a petition for classification (either Immigrant Petition by Alien Investor (Form I-526)[48] or Form I-526E) and through the filing of a Petition by Investor to Remove Conditions on Permanent Resident Status (Form I-829).[49]

For example, a regional center may have investors who have filed the following petitions on or before September 30 of the relevant fiscal year (including filings from prior fiscal years):

- 30 associated Form I-526 petitions;[50]
- 10 associated Form I-526E petitions; and
- 20 associated Form I-829 petitions.

In that situation, USCIS generally would estimate that the regional center has 20 total investors (30 plus 10, minus 20) in its new commercial enterprises for a given fiscal year for purposes of calculating the applicable Fund fee for the following fiscal year.[51] Therefore, it would likely owe the reduced fee amount of $10,000.[52] USCIS, however, retains discretion to review this question on a case-by-case basis that accounts for any other facts or evidence in the record in the totality of the circumstances, including any evidence provided by a regional center that believes it has greater or fewer total investors.[53]

H. Terminations, Suspensions, and Other Sanctions

1. In General

In general, USCIS may impose a variety of sanctions on a regional center for violations of various statutory provisions. Depending on the violation, the range of sanctions may include:

- Fines of 10 percent or less of the total capital invested by immigrant investors in the regional center’s new commercial enterprises or job-creating entities directly involved in such violations, the payment of which must not in any circumstance utilize any of such immigrant investors’ capital investments, and which must be deposited into the EB-5 Integrity Fund;
- Temporary suspension from participation in the Regional Center Program, which may be lifted by USCIS if the individual or entity cures the alleged violation after being provided such an opportunity by USCIS;

- Permanent bar from participation in the Regional Center Program for one or more individuals or business entities associated with the regional center, new commercial enterprise, or job-creating entity; and
- Termination of regional center designation.[54]

The regional center may appeal any suspension, termination, or other sanction to the Administrative Appeals Office.[55]

2. Violations Permitting Various Sanctions

USCIS may sanction a regional center, including suspension or termination, in situations including but not limited to when:

- The regional center fails to submit an annual statement or USCIS determines that the regional center knowingly submitted or caused to be submitted a statement, certification, or any information that contained an untrue statement of material fact or is conducting itself in a manner inconsistent with its designation;[56]
- The regional center knowingly involves an individual or entity that does not meet statutory requirements for being involved with a regional center by failing, within 14 days of acquiring such knowledge, to take commercially reasonable efforts to discontinue that individual or entity's involvement or provide notice of its actions to USCIS;[57] or
- The regional center fails to provide an attestation or information on Bona Fides of Persons Involved with Regional Center Program (Form I-956H), for an individual or entity involved with the regional center or knowingly provides false attestation or information on Form I-956H for an individual or entity involved with the regional center.[58]

USCIS may, in its discretion, also sanction a regional center, including suspension or termination, if the regional center, or any parties associated with the regional center[59] that the regional center knew or reasonably should have known:

- Are permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction in connection with the offer, purchase, or sale of a security or the provision of investment advice;
- Are subject to any final order of the SEC or a state securities regulator that bars such individual or entity from association with an entity regulated by the SEC or the state securities regulator; or constitutes a final order based on a finding of an intentional violation or a violation related to fraud or deceit in connection with the offer, purchase, or sale of, or investment advice relating to, a security; or
- Submitted, or caused to be submitted, a certification of compliance with securities laws that contained either an untrue statement of a material fact or omitted a material fact such that the omission renders the statement misleading.[60]

3. Violations Requiring Termination

In addition to other sanctions that USCIS may impose, USCIS must terminate a regional center's designation if:

- The regional center fails to consent to or deliberately attempts to impede an audit;[61]
- USCIS determines that one of the regional center's new commercial enterprises violates statutory provisions relating to redeployment of funds invested in the regional center;[62]
- The regional center fails to pay the EB-5 Integrity Fund fee within 90 days after its due date;[63] or
- USCIS determines, in its discretion, that the regional center's designation is contrary to the national interest of the United States for reasons relating to threats to public safety or national security or was predicated on or involved fraud, deceit, intentional material misrepresentation, or criminal misuse.[64]

Additional information on the process for issuing sanctions appears in Chapter 8, Sanctions and Discretionary Determinations [6 USCIS-PM G.8].

Footnotes

[^ 1] See INA 203(b)(5)(E)(iii).

[^ 2] On March 15, 2022, Congress codified a substantially revised Regional Center Program into INA 203(b)(5). See the EB-5 Reform and Integrity Act of 2022, Division BB of the Consolidated Appropriations Act of 2022, Pub. L. 117-103 (PDF), 136 Stat. 49, 1070 (March 15, 2022). For information on the Regional Center Program as it existed before that date, see Appendix: Regional Center Program Prior to March 15, 2022 [6 USCIS-PM G, Appendices Tab].

[^ 3] For more information on the project application, see Chapter 5, Project Applications [6 USCIS-PM G.5].

[^ 4] See INA 203(b)(5)(F)(i). For more information on investor eligibility, see Chapter 2, Immigrant Petition Eligibility Requirements [6 USCIS-PM G.2].

[^ 5] See INA 203(b)(5)(E)(iii).

[^ 6] See INA 203(b)(5)(E)(iii).

[^ 7] For more information on requirements for these policies and procedures, see Subsection 4, Policies and Procedures [6 USCIS-PM G.4(B)(4)].

[^ 8] See INA 203(b)(5)(H)(iii). In addition to providing attestations and information confirming that all persons involved with the regional center meet applicable requirements, the regional center applicant must also separately identify all natural persons involved with the regional center on the Form I-956.

[^ 9] See INA 203(b)(5)(I)(ii)(I).

[^ 10] See INA 203(b)(5)(H)(v).

[^ 11] See INA 203(b)(5)(H)(ii)(I).

[^ 12] See INA 203(b)(5)(H)(ii)(II).

[^ 13] Disqualifying offenses include a criminal or civil offense involving fraud or deceit within the previous 10 years; a civil offense involving fraud or deceit that resulted in a liability in excess of $1,000,000; or a crime for which the person was convicted and sentenced to a term of imprisonment of more than 1 year.

[^ 14] Relevant laws and regulations include those that prohibits fraudulent, manipulative, or deceptive conduct; or bars the person from associating with an entity regulated by such commission, authority, agency, or officer; appearing before such commission, authority, agency, or officer; engaging in the business of securities, insurance, or banking; or engaging in savings association or credit union activities.

[^ 15] As defined in 21 U.S.C. 802.

[^ 16] As described in 18 U.S.C. 1956 or 18 U.S.C. 1957.

[^ 17] As defined in INA 212(a)(3)(B).

[^ 18] As described in INA 212(a)(3)(E).

[^ 19] See INA 203(b)(5)(H)(i).

[^ 20] For more information on evidence that may demonstrate the geographic area, see the instructions for Form I-956.

[^ 21] See INA 203(b)(5)(E)(iii).

[^ 22] See INA 203(b)(5)(E)(iii).

[^ 23] For more information on reasonable predictions, see the instructions for Form I-956.

[^ 24] See INA 203(b)(5)(E)(iii)(II) and INA 203(b)(5)(E)(iii)(IV).

[^ 25] See INA 203(b)(5)(H)(iii). For more information on policies and procedures, see the instructions for Form I-956.

[^ 26] See 8 CFR 103.3(a)(1)(i).

[^ 27] See INA 203(b)(5)(O)(i). For more information on discretionary determinations, see Chapter 8, Sanctions and Discretionary Determinations, Section B, Discretionary Determinations [6 USCIS-PM G.8(B)].

[^ 28] See INA 203(b)(5)(N)(i). For more information on discretionary determinations, see Chapter 8, Sanctions and Discretionary Determinations, Section B, Discretionary Determinations [6 USCIS-PM G.8(B)].

[^ 29] See INA 203(b)(5)(E)(vi)(I)(aa).

[^ 30] See INA 203(b)(5)(E)(vi)(I)(bb).

[^ 31] See INA 203(b)(5)(E)(vi)(II).

[^ 32] For information on annual statements, see Section F, Annual Statements [6 USCIS-PM G.4(F)].

[^ 33] See INA 203(b)(5)(E)(vii)(I).

[^ 34] See INA 203(b)(5)(E)(vii)(II).

[^ 35] See INA 203(b)(5)(E)(vii)(II).

[^ 36] See INA 203(b)(5)(E)(vii)(II).

[^ 37] See INA 203(b)(5)(G). See the instructions for the Regional Center Annual Statement (Form I-956G).

[^ 38] See the instructions for Form I-956G.

[^ 39] For information on the requirements for those involved with a regional center, see Section B, Documentation and Evidence, Subsection 1, Persons Involved with the Regional Center Program [6 USCIS-PM G.4(B)(1)].

[^ 40] For information on third party promoters, see Chapter 6, Direct and Third-Party Promoters [6 USCIS-PM G.6].

[^ 41] See INA 203(b)(5)(G)(i).

[^ 42] The applicant should provide this information for all fees, including administrative fees, loan monitoring fees, loan management fees, commissions, and similar transaction-based compensation collected from immigrant investors by the regional center, the new commercial enterprise, any affiliated job-creating entity, any affiliated issuer of securities intended to be offered to immigrant investors, or any promoter, finder, broker-dealer, or other entity engaged by any of the aforementioned entities to locate individual investors.

[^ 43] See INA 203(b)(5)(G)(i).

[^ 44] Beginning on October 1, 2022, USCIS also collects a fee of $1,000 for the integrity fund with each petition filed by a regional center investor. See INA 203(b)(5)(J)(II).

[^ 45] See INA 203(b)(5)(J)(ii)(I).

[^ 46] See 88 FR 13141 (PDF) (Mar. 2, 2023) (notice of fee).

[^ 47] Although the term investor is not specifically defined for purposes of INA 203(b)(5), it is used extensively throughout that section to refer to aliens seeking classification, or classified, under INA 203(b)(5). See 88 FR 13141, 13142 (PDF) (Mar. 2, 2023) (notice of fee).

[^ 48] USCIS includes Forms I-526 in this analysis as regional center investors used this form on or before June 30, 2021, the date the Regional Center Program lapsed. USCIS subsequently bifurcated and renamed the Form I-526, resulting in the Immigrant Petition by Standalone Investor (Form I-526) and the Immigrant Petition by Regional Center Investor (Form I-526E) in response to the EB-5 Reform and Integrity Act of 2022, Division BB of the Consolidated Appropriations Act of 2022, Pub. L. 117-103 (PDF), 136 Stat. 49, 1070 (March 15, 2022).

[^ 49] See 88 FR 13141, 13142 (PDF) (Mar. 2, 2023) (notice of fee).

[^ 50] Filed on or before June 30, 2021, the date the Regional Center Program lapsed.

[^ 51] See 88 FR 13141, 13142 (PDF) (Mar. 2, 2023) (notice of fee).

[^ 52] See 88 FR 13141, 13142 (PDF) (Mar. 2, 2023) (notice of fee).

[^ 53] See 88 FR 13141, 13143 (PDF) (Mar. 2, 2023) (notice of fee).

[^ 54] See INA 203(b)(5)(E)(vii)(III), INA 203(b)(5)(F)(v)(II), INA 203(b)(5)(G)(iii), INA 203(b)(5)(H)(iv), INA 203(b)(5)(I)(iv), and INA 203(b)(5)(J)(iv).

[^ 55] See INA 203(b)(5)(P)(i).

[^ 56] See INA 203(b)(5)(G)(iii)(I). For more information on annual statements, see Section F, Annual Statements [6 USCIS-PM G.4(F)]. Depending on the severity of the violation, sanctions under INA 203(b)(5)(G)(iii) may also include fines and permanent bar in addition to suspension or termination. USCIS may also impose sanctions on individuals or entities associated with the regional center.

[^ 57] See INA 203(b)(5)(H)(iv). For more information on who may be involved with a regional center, new commercial enterprise, or job-creating entity, see Section B, Documentation and Evidence, Subsection 1, Persons Involved with the Regional Center Program [6 USCIS-PM G.4(B)(1)].

[^ 58] See INA 203(b)(5)(H)(iv). For more information on the required attestation of the bona fides of those involved with a regional center, see Section B, Documentation and Evidence [6 USCIS-PM G.4(B)].

[^ 59] Parties associated with a regional center include the regional center; any new commercial enterprise or affiliated job-creating entity or issuer of securities associated with the regional center; the regional center's and new commercial enterprise's owners, officers, directors, manager, partners, agents, employees, promoters, and attorneys, or similar positions as determined by USCIS; and any individual or entity under the control of the regional center, new commercial enterprise, or issuer of securities associated with the regional center who is responsible for the marketing, offering, or sale of any security offered in connection with the capital investment project. See INA 203(b)(5)(I)(v).

[^ 60] See INA 203(b)(5)(I)(iv).

[^ 61] See INA 203(b)(5)(E)(vii)(III). For more information on audits, see Section E, Record-Keeping and Audits, Subsection 2, Audits [6 USCIS-PM G.4(E)(2)].

[^ 62] See INA 203(b)(5)(F)(v)(II). For more information on redeployment, see Chapter 2, Immigrant Petition Eligibility Requirements, Section A, Investment of Capital, Subsection 2, Investment [6 USCIS-PM G.2(A)(2)].

[^ 63] See INA 203(b)(5)(J)(iv)(II). For more information on the Integrity Fund, see Section G, Integrity Fund [6 USCIS-PM G.4(G)]. In general, the statute provides that the fee for the EB-5 Integrity Fund is due on October 1 and, therefore, a regional center must pay the fee on or before December 30 (within 90 days after October 1) or its designation will be subject to termination.

[^ 64] See INA 203(b)(5)(N)-(O).

Chapter 5 - Project Applications

A designated regional center files an Application for Approval of an Investment in a Commercial Enterprise (Form I-956F) (project application) to request approval for each particular investment offering through an associated new commercial enterprise. A regional center must file Form I-956F with USCIS before any investor may file an Immigrant Petition by Regional Center Investor (Form I-526E) based on their investment in that offering.[1]

Approval of Form I-956F, and in some cases, the former Application for Regional Center Designation Under the Immigrant Investor Program (Form I-924) exemplar approved before enactment of the EB-5 Reform and Integrity Act of 2022, is generally binding for the adjudication of associated petitions.[2]

A. Eligibility

1. New Commercial Enterprise and Job Creating Entity

A project application describes a particular pooled investment offering through a new commercial enterprise[3] that generally funds a specific capital investment project undertaken by a separate job-creating entity or directly by the new commercial enterprise.

A new commercial enterprise is any for-profit organization formed in the United States for the ongoing conduct of lawful business, including sole proprietorship, partnership (whether limited or general), holding company and its wholly owned subsidiaries (provided that each subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business), joint venture, corporation, business trust, limited liability company, or other entity (which may be publicly or privately owned) that receives, or is established to receive, capital investment from immigrant investors.[4]

A job-creating entity is any organization formed in the United States for the ongoing conduct of lawful business, including sole proprietorship, partnership (whether limited or general), corporation, limited liability company, business trust, or other entity, which may be publicly or privately owned that receives, or is established to receive, capital investment from immigrant investors or a new commercial enterprise under the Regional Center Program and which is responsible for creating jobs. A job-creating entity may be an entity consisting of a holding company and its wholly owned subsidiaries or affiliates (provided that each subsidiary or affiliate is engaged in an activity formed for the ongoing conduct of a lawful business).[5]

Where a job-creating entity is controlled, managed, or owned by any of the persons involved with the regional center or new commercial enterprise, it is considered an affiliated job-creating entity.[6]

2. Targeted Employment Area

Regional center investors may take advantage of the reduced required investment amount[7] when investing in an offering into a new commercial enterprise principally doing business[8] in a targeted employment area (TEA).[9] A TEA is a rural area or a high unemployment area.[10] A rural area is any area other than an area:

- Within a standard metropolitan statistical area (MSA) (as designated by the Office of Management and Budget); or
- Within the outer boundary of any city or town having a population of 20,000 or more based on the most recent decennial census of the United States.[11]

For petitions filed on or after March 15, 2022, a high unemployment area is an area designated as such by the Secretary of Homeland Security.[12]

3. Infrastructure Project

Similar to investment in a TEA, regional center investors filing petitions on or after May 14, 2022, may take advantage of the reduced required investment amount[13] when investing in an offering into a new commercial enterprise that will provide capital to an infrastructure project.[14] An infrastructure project is a capital investment project in a filed or approved business plan in a Form I-956F project application, which is administered by a governmental entity (such as a federal, state, or local agency or authority) that is the job-creating entity contracting with a regional center or new commercial enterprise to receive capital investment under the Regional Center Program from investors or the new commercial enterprise for purposes of financing for maintaining, improving, or constructing a public works project.[15]

4. Job Creation

For regional center investors filing petitions for classification on or after May 14, 2022, up to 90 percent of the employment creation requirement may be satisfied with jobs that are estimated to be created indirectly through investment in a regional center project.[16] USCIS may consider an employee of the new commercial enterprise or job-creating entity to hold a job that has been directly created.[17] A project application may rely on economically and statistically valid methodologies for determining the number of jobs created by the program, including:

- Jobs estimated to have been created directly, which may be verified using such methodologies; and
- Jobs estimated to have been directly or indirectly created through capital expenditures, revenues generated from increased exports, improved regional productivity, job creation, and increased domestic capital investment resulting from the program.[18]

Construction Activity Lasting Less than 2 Years

When calculating job creation, the following limitations on construction activity lasting less than 2 years apply:

- For indirect job creation purposes, those jobs may satisfy only up to 75 percent of the job creation requirement.[19]
- For direct job creation purposes, the number of such jobs must be calculated by multiplying the total number of such jobs estimated to be created by the fraction of the 2-year period that the construction activity lasts.[20]

Prospective Tenant Jobs

In determining compliance with the job creation requirement, a project application may include jobs estimated to be created under a methodology that attributes jobs to prospective tenants occupying commercial real estate created or improved by capital investments if:

- The number of such jobs estimated to be created has been determined by an economically and statistically valid methodology; and
- Such jobs are not existing jobs that have been relocated.[21]

B. Documentation and Evidence

1. New Commercial Enterprise

The applicant should provide a description and documentation of the business structure of the new commercial enterprise (NCE) that will be associated with the regional center, such as articles or certificates of formation, bylaws, partnership or LLC agreements, or other formation and governing documents for the NCE.[22]

2. Comprehensive Business Plan

A project application must include a credible and comprehensive business plan that contains, at a minimum, a description of the business, its products or services (or both), and its objectives.[23] The plan should also identify the form of the investment (for example, equity stake, loan, or some other financial arrangement) from the NCE into the job-creating entity (JCE), if any.

3. Economic Analysis

An applicant must submit a credible economic analysis regarding estimated job creation that is based upon economically and statistically valid and transparent methodologies.[24]

4. Investment and Offering Documents

An applicant must submit all investment and offering documents, including:

- Subscription agreements;
- Investment agreements;
- Partnership agreements;
- Operating agreements;
- Private placement memoranda;
- Term sheets;
- Biographies of management, officers, directors, and any person with similar responsibilities;
- The description of the business plan to be provided to potential investors; and
- Marketing materials used, or drafts prepared for use, in connection with the offering.

These documents must also contain references, as appropriate, to various statutorily required information.[25]

5. Securities-Related Documentation and Certifications

An applicant must include a description of the policies and procedures, such as those related to internal and external due diligence, reasonably designed to cause the regional center and any associated issuer of securities intended to be offered to investors, to comply with the securities laws of the United States and the applicable states in connection with the offer, purchase, or sale of securities.[26]

The applicant must also provide a certification from the regional center, as well as from any issuer of securities intended to be offered to investors in connection with the relevant capital investment project, regarding their securities law compliance.[27] The certifier must certify, to the best of their knowledge and after a due diligence investigation, that their respective agents and employees, and any parties associated with them are in compliance with the securities laws of the United States and the laws of the applicable states in connection with the offer, purchase, or sale of securities described in the project application.[28]

6. High Unemployment Area Designation

A high unemployment area is an area designated as such by USCIS that is comprised of the census tract or tracts in which the new commercial enterprise is principally doing business, which may also include certain adjacent census tract or tracts, and in which the weighted average unemployment rate of the tract or tracts is at least 150 percent of the national average rate.[29]

To demonstrate that the project is based on an investment in a high unemployment area, if applicable, an applicant must submit a listing of the census tract (or contiguous census tracts) where the new commercial enterprise will be principally doing business, as well as any directly adjacent census tracts used in the calculation to demonstrate that the area is a high unemployment area.[30]

The calculation should use reliable, internally consistent, and verifiable data to calculate the unemployment rate. For example, if the regional center uses data from the U.S. Census Bureau's American Community Survey (ACS) to determine the unemployment rate for the requested area, the applicant should also rely on ACS data to determine the national unemployment rate to which the area identified is compared.[31]

A designation will be in effect for the 2-year period beginning on the date on which the Form I-956F project application was filed.[32] The designation may be renewed for additional 2-year periods if the area continues to meet applicable criteria for designation as a high unemployment area.[33]

7. Rural Area

To demonstrate that a project is based on an investment in a rural area, if applicable, an applicant should provide evidence, such as a map or other representation of the project area, to demonstrate that the new commercial enterprise is principally doing business in a rural area.[34]

8. Infrastructure Project Designation

To demonstrate that a project is an infrastructure project, if applicable, an applicant should provide evidence, such as the contract between the regional center or new commercial enterprise and the JCE, to demonstrate that the JCE is administered by a governmental entity (such as a federal, state, or local agency or authority) and will receive capital investment from investors or the new commercial enterprise for the purpose of financing for maintaining, improving, or constructing a public works project.[35]

C. Adjudication

1. Approval

If the applicant properly filed the application and the applicant has met the required eligibility standards, the officer approves the application.

Approval of Form I-956F is binding for the adjudication of associated petitions seeking classification or removal of conditions based on investments in the same offering, absent:

- Fraud, misrepresentation, or criminal misuse;
- A threat to public safety or national security;
- A material change that affects eligibility;
- The discovery of other evidence affecting program eligibility that was not disclosed during the adjudication process; or
- A material mistake of law or fact.[36]

The approval of an initial or amendment Form I-924 based on an exemplar[37] Immigrant Petition by Alien Investor (Form I-526) filed before enactment of the EB-5 Reform and Integrity Act of 2022[38] is also binding absent the above circumstances.

However, if a regional center seeks new investors who will file for classification under the new provisions added by the EB-5 Reform and Integrity Act of 2022 through an offering described in a previously approved Form I-924 exemplar, the regional center must file a Form I-956F to show compliance with the new statutory requirements. All aspects of the previously approved Form I-924 exemplar will remain binding for purposes of the related Form I-956F adjudication except to the extent superseded by new requirements added by the EB-5 Reform and Integrity Act of 2022.

A change made to a business plan, or any other aspect of the approved Form I-924 exemplar, to comply with the EB-5 Reform and Integrity Act of 2022, will not be considered a material change.[39]

2. Denial

If the applicant has not established eligibility for the benefit sought, the officer denies the application. The officer should write the denial in clear and comprehensive language and cover all grounds for denial.[40] In the denial, the officer should refer to the controlling statute or regulations and to any relevant precedent or adopted decisions. The decision must include information about the applicant's right to appeal to the Administrative Appeals Office and the opportunity to file a motion to reopen or reconsider.

USCIS may deny an application if USCIS determines, in its discretion, that it was predicated on or involved fraud, deceit, intentional material misrepresentation, or criminal misuse[41] or that the approval of such application is contrary to the national interest of the United States for reasons relating to threats to public safety or national security.[42]

D. Amendments

A regional center should file an amendment to an approved project application that reflects changes to any information, documents, or other aspects of the investment offering described in such approved application no later than 30 days after any such changes.[43]

Upon the approval of a timely filed amendment to an approved application, any changes reflected in such amendment may be incorporated into and considered in determining eligibility of:

- Pending petitions from immigrants investing in the offering described in the approved application who are seeking classification under the Regional Center Program; and
- Petitions to remove conditions on residence.[44]

E. Revocations and Sanctions

USCIS may revoke the approval of an application if it determines, in its discretion, that the application was predicated on or involved fraud, deceit, intentional material misrepresentation, or criminal misuse[45] or that the approval of such application is contrary to the national interest of the United States for reasons relating to threats to public safety or national security.[46]

USCIS may temporarily or permanently suspend or debar a new commercial enterprise or job-creating entity, or any individual or business entity associated with those entities, for specified statutory violations, such as knowingly involving an individual or entity who does not meet the statutory bona fides requirements, by failing to take commercially reasonable efforts to discontinue the prohibited individual or entity's involvement, or provide notice to USCIS within 14 days of acquiring such knowledge.[47]

Additional information on the process for issuing sanctions appears in Chapter 8, Sanctions and Discretionary Determinations [6 USCIS-PM G.8].

Footnotes

[^ 1] See INA 203(b)(5)(F)(i).

[^ 2] For more information on the binding nature of project applications, see Section C, Adjudication, Subsection 1, Approval [6 USCIS-PM G.5(C)(1)].

[^ 3] For more information on new commercial enterprises, see Chapter 2, Immigrant Petition Eligibility Requirements, Section C, New Commercial Enterprise [6 USCIS-PM G.2(C)].

[^ 4] See INA 203(b)(5)(D)(vi).

[^ 5] See INA 203(b)(5)(D)(v).

[^ 6] See INA 203(b)(5)(D)(i).

[^ 7] For more information on the required investment amounts, see Chapter 2, Immigrant Petition Eligibility Requirements, Section A, Investment of Capital, Subsection 3, Required Amount of Investment [6 USCIS-PM G.2(A)(3)].

[^ 8] For more information on what is considered principally doing business, see Chapter 2, Immigrant Petition Eligibility Requirements, Section A, Investment of Capital, Subsection 5, Targeted Employment Area [6 USCIS-PM G.2(A)(5)].

[^ 9] See INA 203(b)(5)(C).

[^ 10] See INA 203(b)(5)(D)(viii). For more information on TEAs as they existed before March 15, 2022, see Chapter 2, Immigrant Petition Eligibility Requirements, Section A, Investment of Capital, Subsection 5, Targeted Employment Area [6 USCIS-PM G.2(A)(5)].

[^ 11] See 8 CFR 204.6(e) (PDF). See INA 203(b)(5)(D)(vii).

[^ 12] See INA 203(b)(5)(B)(ii). For more information on the evidence required to demonstrate that an area qualifies as a high unemployment area, see Section B, Documentation and Evidence, Subsection 6, High Unemployment Area Designation [6 USCIS-PM G.5(B)(6)].

[^ 13] For more information on the required investment amounts, see Chapter 2, Immigrant Petition Eligibility Requirements, Section A, Investment of Capital, Subsection 3, Required Amount of Investment [6 USCIS-PM G.2(A)(3)].

[^ 14] See INA 203(b)(5)(C).

[^ 15] See INA 203(b)(5)(D)(iv).

[^ 16] See INA 203(b)(5)(E)(iv)(I).

[^ 17] See INA 203(b)(5)(E)(iv)(I).

[^ 18] See INA 203(b)(5)(E)(v)(I).

[^ 19] See INA 203(b)(5)(E)(iv)(II).

[^ 20] See INA 203(b)(5)(E)(v)(II)(cc).

[^ 21] See INA 203(b)(5)(E)(v)(II)(aa).

[^ 22] See the instructions for Form I-956F.

[^ 23] For more information on comprehensive business plans, see Chapter 2, Immigrant Petition Eligibility Requirements, Section B, Comprehensive Business Plan [6 USCIS-PM G.2(B)].

[^ 24] See INA 203(b)(5)(F)(i)(II).

[^ 25] See INA 203(b)(5)(F)(i)(IV).

[^ 26] See INA 203(b)(5)(F)(V).

[^ 27] See INA 203(b)(5)(F)(i)(VI).

[^ 28] See INA 203(b)(5)(F)(i)(VI).

[^ 29] See INA 203(b)(5)(B)(ii)(I).

[^ 30] See INA 203(b)(5)(B)(ii). For more information on suggested evidence that may meet the statutory definition, see the instructions for Form I-956F.

[^ 31] For more information on suggested evidence that may meet the statutory definition, see the instructions for Form I-956F.

[^ 32] See INA 203(b)(5)(A)(ii)(IV)(aa).

[^ 33] See INA 203(b)(5)(A)(ii)(IV)(bb).

[^ 34] For the definition of rural, see Section A, Eligibility, Subsection 2, Targeted Employment Area [6 USCIS-PM G.5(A)(2)].

[^ 35] See INA 203(b)(5)(D)(iv).

[^ 36] See INA 203(b)(5)(F)(ii). See the September 1, 2022, settlement approved by the U.S. District Court for the Northern District of California in *Behring Regional Center LLC and IIUSA v. Mayorkas, et al.*, 3:22-cv-02487-VC (N.D. Cal. Aug. 24, 2022), and EB5 Capital, et al., v. Dept. of Homeland Security, et al., 3:22-cv-3948-VC (N.D. Cal. Aug. 24, 2022).

[^ 37] The term exemplar referred to a sample Immigrant Petition by Alien Investor (Form I-526) filed with Form I-924 for an actual project. Before March 15, 2022, this type of regional center proposal contained copies of the commercial enterprise's organizational and transactional documents, which USCIS reviewed to determine if they were in compliance with applicable eligibility requirements.

[^ 38] See the EB-5 Reform and Integrity Act of 2022, Division BB of the Consolidated Appropriations Act of 2022, Pub. L. 117-103 (PDF), 136 Stat. 49, 1070 (March 15, 2022).

[^ 39] See the September 1, 2022, settlement approved by the U.S. District Court for the Northern District of California in *Behring Regional Center LLC and IIUSA v. Mayorkas, et al.*, 3:22-cv-02487-VC (N.D. Cal. Aug. 24, 2022), and EB5 Capital, et al., v. Dept. of Homeland Security, et al., 3:22-cv-3948-VC (N.D. Cal. Aug. 24, 2022).

[^ 40] See 8 CFR 103.3(a)(1)(i).

[^ 41] See INA 203(b)(5)(O)(i). For more information on discretionary determinations, see Chapter 8, Sanctions and Discretionary Determinations, Section B, Discretionary Determinations [6 USCIS-PM G.8(B)].

[^ 42] See INA 203(b)(5)(N)(i). For more information on discretionary determinations, see Chapter 8, Sanctions and Discretionary Determinations, Section B, Discretionary Determinations [6 USCIS-PM G.8(B)].

[^ 43] See INA 203(b)(5)(F)(iii)(I).

[^ 44] See INA 203(b)(5)(F)(iii)(II).

[^ 45] See INA 203(b)(5)(O)(i). For more information on discretionary determinations, see Chapter 8, Sanctions and Discretionary Determinations, Section B, Discretionary Determinations [6 USCIS-PM G.8(B)].

[^ 46] See INA 203(b)(5)(N)(i). For more information on discretionary determinations, see Chapter 8, Sanctions and Discretionary Determinations, Section B, Discretionary Determinations [6 USCIS-PM G.8(B)].

[^ 47] See INA 203(b)(5)(H)(iv).

Chapter 6 - Direct and Third-Party Promoters

Individuals and organizations may serve as direct or third-party promoters (including migration agents) of a regional center, any new commercial enterprise, an affiliated job-creating entity, or an issuer of securities intended to be offered to immigrant investors in connection with a particular capital investment project. This includes subagents or employees of entities with agreements in place to promote a regional center, any new commercial enterprise, an affiliated job-creating entity, or an issuer of securities intended to be offered to alien investors that are promoting the regional center, new commercial enterprise, affiliated job-creating entity, or issuer of securities to alien investors.[1]

Direct and third-party promoters must comply with any rules and standards prescribed by the Secretary of Homeland Security to oversee the promotion of any offering of securities related to the employment-based 5th preference (EB-5) program. These rules and standards include, but are not limited to, registration with USCIS and certification of compliance with statutory provisions relating to the bona fides of persons involved with the Regional Center Program.[2]

Each regional center, new commercial enterprise, and affiliated job creating entity must maintain a written agreement between or among such entities and each promoter operating on their behalf that outlines the rules and standards applicable to promoters under the EB-5 program.[3]

Promoters register with USCIS by filing Registration for Direct and Third-Party Promoters (Form I-956K) with USCIS, supported by the written agreement between or among the regional center, new commercial enterprise, or affiliated job-creating entity and each direct or third-party promoter operating on behalf of such entities. If the promoter is an organization, the promoter should also submit formation documents.

A regional center, new commercial enterprise, job-creating entity, or issuer of securities is not exempt from being considered a promoter to the extent such entities engage in promotional activities of EB-5-related securities. However, because regional centers, new commercial enterprises, and job-creating entities will already be captured on the Application for Regional Center Designation (Form I-956) and Application for Approval of an Investment in a Commercial Enterprise (Form I-956F), USCIS will not require that they separately register as a promoter using Form I-956K to the extent that they promote securities already covered by a related form.[4]

USCIS may suspend or permanently bar any promoter who violates applicable requirements.[5]

Additional information on the process for issuing sanctions appears in Chapter 8, Sanctions and Discretionary Determinations [6 USCIS-PM G.8].

Footnotes

[^ 1] See the instructions for Registration for Direct and Third-Party Promoters (Form I-956K).

[^ 2] See INA 203(b)(5)(K)(i). For the provisions discussing the bona fides of persons involved with the Regional Center Program, see INA 203(b)(5)(H)(i). For more information on the required attestation of the bona fides of those involved with a regional center, see Chapter 4, Regional Center Applications, Section B, Documentation and Evidence [6 USCIS-PM G.4(B)].

[^ 3] See INA 203(b)(5)(K)(iii).

[^ 4] See the instructions for Form I-956K.

[^ 5] See INA 203(b)(5)(K)(ii).

Chapter 7 - Removal of Conditions

ALERT: On June 22, 2021, the U.S. District Court for the Northern District of California, in *Behring Regional Center LLC v. Wolf*, 20-cv-09263-JSC, vacated the EB-5 Immigrant Investor Program Modernization Final Rule (PDF).

See more

On June 22, 2021, the U.S. District Court for the Northern District of California, in *Behring Regional Center LLC v. Wolf*, 20-cv-09263-JSC, vacated the EB-5 Immigrant Investor Program Modernization Final Rule (PDF). While USCIS considers this decision, we will apply the EB-5 regulations that were in effect before the rule was finalized on Nov. 21, 2019, including:

- No priority date retention based on an approved Form I-526;
- The required standard minimum investment amount of $1 million and the minimum investment amount for investment in a Targeted Employment Area (TEA) of $500,000;
- Permitting state designations of high unemployment TEAs; and
- Prior USCIS procedures for the removal of conditions on permanent residence.

In other words, we are applying the regulations in effect before Nov. 21, 2019 in this chapter.

ALERT: On March 15, 2022, the EB-5 Reform and Integrity Act of 2022 (PDF) was enacted. The Regional Center Program is authorized through September 30, 2027. USCIS is reviewing the new legislation and will provide additional guidance, including an eventual revision of Policy Manual content. For the latest updates, see the EB-5 Immigrant Investor Program webpage.

To seek removal of the conditions on permanent resident status, the immigrant investor must file a Petition by Investor to Remove Conditions on Permanent Resident Status (Form I-829) within 90 days prior to the 2-year anniversary of the date conditional permanent resident status was granted (for example, adjustment of status application was approved or investor admitted into the United States on an immigrant visa).

The immigrant investor must submit the following evidence with his or her petition to remove conditions:

- Evidence that the immigrant investor invested, or was actively in the process of investing the required capital and sustained the investment throughout the period of the immigrant investor's residence in the United States; and
- Evidence that the new commercial enterprise created or can be expected to create, within a reasonable time, at least 10 full-time positions for qualifying employees.[1] In the case of a troubled business, the investor must submit evidence that the commercial enterprise maintained the number of existing employees at no less than the pre-investment level for the period following his or her admission as a conditional permanent resident.[2]

A. Evidence of Investment and Sustainment

1. Investment

The petition must be accompanied by evidence that the immigrant investor invested or was actively in the process of investing the requisite capital. Such evidence may include, but is not limited to, an audited financial statement or other probative evidence.[3]

2. Sustainment of the Investment

The immigrant investor must provide evidence that he or she sustained the investment throughout the period of his or her status as a conditional permanent resident of the United States.

USCIS considers the immigrant investor to have sustained the actions required for removal of conditions if he or she has, in good faith, substantially met the capital investment requirement and continuously maintained his or her capital investment over the sustainment period.[4] When filing a petition to remove conditions, the full amount of required capital does not need to have been invested, but the immigrant investor must provide evidence that he or she has substantially met the requirement. The evidence may include, but is not limited to:

- Bank statements;
- Invoices;
- Receipts;
- Contracts;
- Business licenses;
- Federal or state income tax returns; and
- Federal or state quarterly tax statements.[5]

B. Evidence of Job Creation

The immigrant investor can meet the job creation requirement by showing that at least 10 full-time positions for qualifying employees have been created, or will be created within a reasonable time. The non-regional center investor must show that the new commercial enterprise directly created these full-time positions for qualifying employees. The regional center investor may show that these jobs were directly or indirectly created by the new commercial enterprise. The evidence to prove job creation may include, but is not limited to the following:

- For direct jobs created as a result of the immigrant investor's investment, evidence such as payroll records, relevant tax documents, and Employment Eligibility Verification (Form I-9) showing employment by the new commercial enterprise;
- For direct jobs maintained or created in a troubled business, evidence such as payroll records, relevant tax documents, and Form I-9 showing employment at the time of investment and at the time of filing the petition to remove the conditions on residence; or
- For jobs created indirectly as a result of an investment in the regional center context, reasonable methodologies, including multiplier tables, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and other economically or statistically valid forecasting devices.

If the regional center investor seeks to demonstrate job creation through the use of an economic input-output model, the investor must demonstrate that the methodology is reasonable. Further, the investor must submit relevant documents previously submitted with the Immigrant Petition by Alien Investor (Form I-526), including the comprehensive business plan and economic impact analysis, if he or she is relying on such documents to meet his or her burden of proof. This information is necessary to indicate whether there are material changes that would impact deference.

Where the inputs into the model reflect jobs created directly at the new commercial enterprise or job-creating entity, the investor must demonstrate that the direct jobs input is reasonable. Relevant documentation may include Form I-9, tax or payroll records, or if the jobs are not yet in existence, a comprehensive business plan demonstrating how many jobs will be created and when the jobs will be created.

If the inputs into the model reflect expenditures, the investor must demonstrate that the expenditures input is reasonable. Relevant documentation may include receipts and other financial records for expenditures that have occurred and a detailed projection of sales, costs, and income projections such as a pro-forma cash flow statement associated with the business plan for expenditures that will occur.

If the inputs into the model reflect revenues, the investor must demonstrate the revenues input is reasonable. Relevant documentation may include tax or other financial records for revenues that have occurred or a detailed projection of sales, costs, and income projections such as a pro-forma income statement associated with the business plan for revenues that will occur.

In making the determination as to whether or not the immigrant investor has created the requisite number of jobs, USCIS does not require that the jobs still be in existence at the time of the petition to remove conditions adjudication in order to be credited to the investor. Instead, the job creation requirement is met if the investor can show that at least 10 full-time jobs for qualifying employees were created by the new commercial enterprise as a result of his or her investment and such jobs were considered to be permanent jobs when created.[6]

Full-time positions will be allocated to immigrant investors based on the date their petition to remove conditions was filed, unless otherwise stated in the relevant documents.[7] For example, if the new commercial enterprise creates 25 jobs, yet there are three immigrant investors associated with the new commercial enterprise, and the record is silent on the issue of allocation, the first two immigrant investors to file the petition to remove conditions will each get to count 10 of the 25 jobs. The third immigrant investor to file the petition to remove conditions is allocated the remaining five jobs.

Direct jobs that are intermittent, temporary, seasonal, or transient in nature do not qualify as permanent full-time jobs. However, jobs that are expected to last for at least 2 years generally are not considered intermittent, temporary, seasonal, or transient in nature.

Although employment in some industries such as construction or tourism can be intermittent, temporary, seasonal or transient, officers should not exclude jobs simply because they fall into such industries. The focus of the adjudication will continue to be on whether the position, as described in the petition, is continuous full-time employment.

For example, if a petition reasonably describes the need for general laborers in a construction project that is expected to last several years and would require a minimum of 35 hours per week over the course of that project, the positions would meet the full-time employment requirement. However, if the same project called for electrical workers to provide services during a small number of 5-week periods over the course of the project, such positions would be deemed intermittent and not meet the definition of full-time employment.

1. Position Focused, Not Employee Focused

The full-time employment criterion focuses on the position, not the employee. Accordingly, the fact that the position may be filled by more than one employee does not exclude the position from consideration as full-time employment. For example, the positions described in the preceding paragraph would not be excluded from being considered full-time employment if the general laborers needed to fill the positions varied from day-to-day or week-to-week as long as the need for the positions remain constant.

2. Within a Reasonable Time Standard

A petitioner may demonstrate that jobs will be created within a reasonable period of time after adjudication of the Form I-829 petition.[8] This permits a degree of flexibility to account for the realities and unpredictability of starting a business venture, but it is not an open-ended allowance. The business plan submitted with the Form I-526 immigrant petition must establish a likelihood of job creation within the next 2 years,[9] demonstrating an expectation that EB-5 projects will generally create jobs within such a timeframe.

USCIS may determine, based upon a totality of the circumstances, that a lengthier timeframe is reasonable. USCIS has latitude under the law to request additional evidence concerning those circumstances. Because 2 years is the expected baseline period in which job creation will take place, jobs that will be created within a year of the 2-year anniversary of the immigrant investor's admission as a conditional permanent resident or adjustment to conditional permanent resident may generally be considered to be created within a reasonable period of time.

Jobs projected to be created more than 3 years after the immigrant investor's admission in, or adjustment to, conditional permanent resident status usually will not be considered to be created within a reasonable time unless extreme circumstances [10] are presented.

Not all of the goals of capital investment and job creation need to be fully realized before the conditions on the immigrant investor's status have been removed. The investor must establish that it is more likely than not that the investor is in substantial compliance with the capital requirements and that the jobs will be created within a reasonable time.

C. Material Change

USCIS recognizes the process of carrying out a business plan and creating jobs depends on a wide array of variables of which an investor may not have any control. In order to provide flexibility to meet the realities of the business world, USCIS permits an immigrant investor who has been admitted to the United States on a conditional basis to remove those conditions when circumstances have changed.

An immigrant investor may proceed with the petition to remove conditions and present documentary evidence demonstrating that, notwithstanding the business plan contained in the initial Form I-526 immigrant petition, the requirements for the removal of conditions have been satisfied. USCIS does not deny petitions to remove conditions based solely on the failure to adhere to the business plan contained in the Form I-526 immigrant petition. An immigrant investor may pursue alternative business opportunities within an industry category not previously approved for the regional center.

Therefore, during the conditional residence period, an investment may be further deployed in a manner not contemplated in the initial Form I-526, as long as the further deployment otherwise satisfies the requirement to sustain the capital at risk. In addition, further deployment may be an option during the conditional residence period in various circumstances. For example, further deployment may be possible in cases where the requisite jobs were created by the investment in accordance with the business plan, as well as in cases where the requisite jobs were not created in accordance with the original business plan, and even if further deployment had not been contemplated at the time of the Form I-526 filing. For petitions filed before November 21, 2019, amendments or supplements to any offering necessary to maintain compliance with applicable securities laws based upon regulatory changes effective on November 21, 2019, may not be considered material.[11]

The initial Form I-526 immigrant petition must be filed in good faith and with full intention to follow the plan outlined in that petition. If the immigrant investor does not demonstrate that he or she filed the immigrant petition in good faith, USCIS may conclude that the investment in the commercial enterprise was made as a means of evading the immigration laws. Under these circumstances, USCIS may terminate the immigrant investor's conditional status.[12]

While USCIS allows this flexibility in Form I-829 filings, nothing in this policy relieves an immigrant investor from the requirements for removal of conditions.[13] Therefore, even in the event of a change in course, an immigrant investor must always be able to demonstrate that:

- The required funds were placed at risk throughout the period of the petitioner's conditional permanent residence in the United States;
- The required amount of capital was made available to the business or businesses most closely responsible for creating jobs (unless the job creation requirement has already been satisfied);
- This at-risk investment was sustained throughout the period of the petitioner's conditional permanent residence in the United States; and
- The investor created (or maintained, if applicable), or can be expected to create within a reasonable period of time, the requisite number of jobs.

Accordingly, if an immigrant investor fails to meet any of these requirements, he or she would not be eligible for removal of conditions.

Further, with respect to the impact of regional center termination, an immigrant investor's conditional permanent resident status, if already obtained, is not automatically terminated if he or she has invested in a new commercial enterprise associated with a regional center that USCIS terminates. The conditional permanent resident investor will continue to have the opportunity to demonstrate compliance with EB-5 program requirements, including through reliance on indirect job creation.

D. Extension of Conditional Permanent Residence While Form I-829 is Pending

USCIS sends a receipt Notice of Action (Form I-797) to conditional permanent residents who properly file a Form I-829.[14] The notice serves as proof of USCIS' receipt of the Form I-829. The notice also serves as evidence of USCIS' extension of the validity of the conditional permanent resident's status for the time period specified in the notice. In these cases, the notice, combined with the expiring or expired conditional Permanent Resident Card serves as evidence of conditional permanent resident status and may be used to prove employment authorization and authorization to return to the United States after temporary foreign travel.[15]

A conditional permanent resident whose Permanent Resident Card has expired and whose extension notice period has also expired, or a conditional permanent resident who can demonstrate the need for evidence of a longer extension than remains, may request documentation of status for travel, employment, or other purposes by calling the USCIS Contact Center to schedule an appointment with a USCIS field office. At the appointment, an officer may issue the conditional permanent resident an Alien Documentation, Identification and Telecommunication (ADIT) stamp (also known as an I-551 stamp) to serve as temporary evidence of status. An officer may only place an ADIT stamp on a Form I-94 (with photo) or in an unexpired passport.

An immigrant investor whose Form I-829 has been denied may seek review of the denial in removal proceedings.[16] USCIS issues the immigrant a temporary Form I-551 until an order of removal becomes administratively final. An order of removal is administratively final if the decision is not appealed or, if appealed, when the appeal is dismissed by the Board of Immigration Appeals.

Footnotes

[^ 1] See 8 CFR 216.6(a)(4)(ii)-(iv).

[^ 2] See 8 CFR 216.6(a)(4)(iv).

[^ 3] See 8 CFR 216.6(a)(4)(ii).

[^ 4] See 8 CFR 216.6(c)(1)(iii). The sustainment period is the investor's 2 years of conditional permanent resident status. USCIS reviews the investor's evidence to ensure sustainment of the investment for 2 years from the date the investor obtained conditional permanent residence. An investor does not need to maintain his or her investment beyond the sustainment period.

[^ 5] See 8 CFR 216.6(a)(4)(iii).

[^ 6] See *Matter of Ho (PDF)*, 22 I&N Dec. 206, 212-13 (Assoc. Comm. 1998).

[^ 7] USCIS recognizes any reasonable agreement made among immigrant investors with regard to the identification and allocation of qualifying positions. See 8 CFR 204.6(g)(2).

[^ 8] See 8 CFR 216.6(a)(4)(iv).

[^ 9] See 8 CFR 204.6(j)(4)(i)(B).

[^ 10] For example, *force majeure*.

[^ 11] See Chapter 3, Immigrant Petition Adjudication [6 USCIS-PM G.3].

[^ 12] See INA 216A(b)(1)(A).

[^ 13] See INA 216A(d)(1). See 8 CFR 216.6(a)(4).

[^ 14] See 8 CFR 216.6(a)(1).

[^ 15] For more information on travel documents for conditional permanent residents, see U.S. Customs and Border Protection's Carrier Information Guide.

[^ 16] See INA 216A(c)(3)(D). See 8 CFR 216.6(d)(2).

Chapter 8 - Sanctions and Discretionary Determinations

A. Sanctions

The EB-5 Reform and Integrity Act of 2022 (RIA) authorizes USCIS to levy different types of sanctions for noncompliance by various participants in the EB-5 program, including suspensions, debarment, and termination.

1. General Process

If USCIS determines that a violation has occurred and suspension, debarment, or termination is appropriate, USCIS issues a notice of intent to sanction to the affected individual or entity. The notice includes:

- A summary of the violations; and
- A description of the length, if applicable, and terms of the sanction, for example, whether the violation might be cured.

USCIS typically provides 30 days for response after issuing a notice of intent to sanction and may, in its discretion, consider responses received after 30 days.[1] If USCIS determines, after considering any response, that suspension, debarment, or termination is warranted, USCIS issues a final notice of sanction explaining the reasons for the sanction.

USCIS may issue sanctions to more than one party for any given violation as needed. Each individual or entity receives their own notice for each sanction. For example, USCIS may both terminate a regional center and suspend an associated party.

USCIS may also issue more than one sanction to the same individual or entity for any given violation as needed. For example, USCIS may first suspend, but later, after a new notice of intent to sanction, terminate a regional center if the regional center does not take remedial action or new facts support a different sanction.

If USCIS terminates a regional center, it may end other sanctions against the entity. USCIS includes any such decision about earlier sanctions in the final notice of sanction.

A sanctioned individual or entity may appeal the sanction to the Administrative Appeals Office (AAO).[2] Each party who receives their own notice of sanction must file their own appeal if they wish to contest the sanction.

Where applicable, USCIS considers all relevant factors when deciding on the appropriate severity of the sanction, including, but not limited to:

- History of previous violations, including violations that predate March 15, 2022, and violations of other areas of the law;[3]
- The willfulness or recklessness of the violation, including concealment of material facts or prohibited actions;
- Good faith attempts to achieve rapid compliance after notification of a violation;
- Harm to the reputation or integrity of the EB-5 program;
- Cooperation with USCIS or other governmental agencies;
- Any relevant disciplinary history;
- If an entity, senior management's awareness of and involvement in the conduct;
- If an entity, the entity's risk management process, the comprehensive nature of its monitoring plan, and resource allocation;
- If an entity, the level of training and communication about misconduct;
- If an entity, its reporting structure and investigation process;
- If an entity, the level of due diligence to its third party relationships;
- If an entity, the impact of such a sanction on innocent parties;
- Whether the violation involved a national security or public safety concern; and
- Whether the violation involved either multiple or repeated instances of fraud or material misrepresentation.

Suspensions, debarments, and terminations are final upon the expiration of the period in which to file an appeal or, if appealed, upon the decision on that appeal. Investors need only reassociate within 180 days of their receipt of USCIS notification of the debarment or termination to take advantage of the ability to reassociate under INA 203(b)(5)(M).[4]

2. Types of Sanctions

Suspensions

Suspensions typically last for the period specified in the notice or, as applicable, until the individual or entity cures the violation. A suspension continues until the end of the date specified in the notice, if included in the notice. If no date is listed, the suspension lasts until USCIS determines that the violation has been cured and notifies the individual or entity that it is lifting the suspension.

Generally, suspension refers to temporarily disallowing the suspended individual or entity from some or all forms of participation in the EB-5 program. For regional centers, a suspension does not terminate the regional center designation and the regional center must continue to comply with all requirements applicable to designated regional centers, including the filing of annual statements and annual payment of the EB-5 Integrity Fund fee. The notice identifies the specific activities in which the individual or entity is prohibited from participating.

In general, during the period a regional center is suspended:

- USCIS may continue to adjudicate Immigrant Petitions by Regional Center Investor (Form I-526E) for investors affiliated with an approved Application for Approval of an Investment in a Commercial Enterprise (Form I-956F);
- USCIS may hold adjudication of pending Form I-956F applications and any associated Form I-526E petitions; and
- USCIS may reject or deny any new Form I-956F applications from the suspended regional center.

In general, during the period a new commercial enterprise or job-creating entity is suspended, where USCIS has approved a Form I-956F application, USCIS holds adjudication of investor Form I-526E petitions associated with that project.[5]

Officers issuing notices of suspension, however, retain discretion to determine the scope of suspensions on a case-by-case basis.

Debarments

Debarment by USCIS typically prevents individuals or entities from participating in the EB-5 program, precluding all future involvement of the individual or entity with the EB-5 program. While the INA provides authority to terminate the participation of new commercial enterprises or job-creating entities in the EB-5 program,[6] USCIS has not and does not designate new commercial enterprises or job-creating entities for participation in the program as it does and has done for regional centers. Moreover, these provisions of the INA do not distinguish between termination of a regional center's designation and the other types of sanctions that could apply to new commercial enterprises or job-creating entities that would similarly end their participation in the EB-5 program, such as debarment.[7]

Importantly, the good faith investor protections[8] only arise upon either the termination of a regional center or debarment of a new commercial enterprise or job-creation entity. Consequently, termination of a new commercial enterprise or job-creating entity other than debarment would not trigger these investor protections, contrary to Congressional intent. USCIS therefore interprets its authority to terminate the participation of new commercial enterprises or job-creating entities in the program as equivalent to debarment and debars such entities as appropriate under applicable authorities permitting their termination from the program.

In general, USCIS debars individuals or entities based on noncompliance with or prohibited conduct under applicable statutory provisions[9] and does not debar individuals or entities for merely failing to establish investor eligibility for visa classification or removal of conditions, such as not creating sufficient employment, or upon receipt of requests for debarment.

With respect to threats to the national interest and fraud, misrepresentation, deceit, and criminal misuse,[10] USCIS also permanently debars any individual or entity associated with a regional center, new commercial enterprise, or job-creating entity that has had its designation or participation in the EB-5 program terminated or has been debarred on these grounds if USCIS determines, in its discretion, that such individual or entity was a knowing participant in the conduct that led to the termination or debarment.[11] USCIS may consider debarment based on actual or constructive knowledge and direct or indirect participation.

If USCIS debars a regional center, new commercial enterprise, or job creating entity, it also notifies affected investors. Upon notification, affected investors have 180 days to reassociate with a new regional center, new commercial enterprise, or job creating entity.[12]

Terminations

When USCIS terminates a regional center, that entity is no longer designated under the program and may not file project applications or solicit investors. If USCIS terminates a regional center, it also notifies affected investors. Upon notification, affected investors have 180 days to reassociate with a new regional center or new commercial enterprise.[13]

B. Discretionary Determinations

USCIS denies or revokes the approval of an EB-5 related petition, application, or benefit (which may include termination of regional center designation or debarment of a new commercial enterprise or job-creating entity, as applicable) if USCIS determines, in its discretion, that approval of the petition, application, or benefit is contrary to the national interest for reasons relating to threats to public safety or national security, or if the petition, application, or benefit is predicated on or involved fraud, deceit, intentional material misrepresentation, or criminal misuse.[14]

The exercise of discretion in all situations may not be arbitrary, inconsistent, or dependent on intangible or imagined circumstances.

1. National Interest Grounds

In general, under INA 203(b)(5)(N) threats to public safety may include, but are not limited to, aggravated felonies as defined at INA 101(a)(43). National security concerns may include, but are not limited to, activities described in INA 212(a)(3)(A) (general security and related grounds), (B) (terrorist activities), or (F) (association with terrorist organizations) or INA 237(a)(4)(A) (general security and related grounds) or (B) (terrorist activities).

2. Fraud and Related Grounds

Fraud and Intentional Material Misrepresentation

The statutory language of INA 203(b)(5)(O) differs from fraud and material misrepresentation findings otherwise made by USCIS for admissibility under INA 212(a)(6)(C). Existing agency guidance regarding fraud and misrepresentation in the inadmissibility context is specific to fraud or misrepresentation committed by an individual or entity against the U.S. government.

However, the authority to take adverse actions based on determinations under INA 203(b)(5)(O) with respect to whether an EB-5 petition, application, or benefit is predicated on or involves fraud or misrepresentation is broader and not limited solely to fraud or misrepresentations made by an individual or entity against the U.S. government.

While general USCIS guidance on inadmissibility concerning willfulness, intent, and materiality is relevant to determining whether an EB-5 petition, application, or benefit was predicated on or involves fraud or misrepresentation, the guidance below expands on that existing guidance to cover the additional situations covered by INA 203(b)(5)(O).[15]

USCIS interprets the statutory terms, generally, in accordance with their plain language meanings and in each case as related to the petition, application, or benefit.

For fraud findings made under INA 203(b)(5)(O), USCIS generally considers a petition, application, or benefit to have been predicated on or involve fraud based on a finding that an individual or entity related to the petition, application, or benefit knowingly made a false representation of or knowingly concealed a material fact with intent, for example, to induce action or to deceive.[16]

For findings of intentional material misrepresentation under INA 203(b)(5)(O), USCIS generally considers a petition, application or benefit to have been predicated on or involve intentional material misrepresentation based on a finding that an individual or entity related to the petition, application, or benefit made a false or misleading assertion about a material fact with the intent to deceive.[17]

Deceit

USCIS generally considers a petition, application, or benefit to have been predicated on or involve deceit based on a finding that an individual or entity related to the petition, application, or benefit intentionally led another person to believe something that is not true.[18]

Criminal Misuse

USCIS generally considers a petition, application, or benefit to have been predicated on or involve criminal misuse based on a finding that an individual or entity related to the petition, application, or benefit improperly used the EB-5 program or capital obtained through the EB-5 program in connection with or in furtherance of a crime.

In the context of the EB-5 program, criminal misuse is most likely to arise in the context of misuse of EB-5 capital in connection with or in furtherance of financial crime.[19]

Examples of actions that may trigger findings under INA 203(b)(5)(O)

Types of fraud, deceit, intentional material misrepresentation, or criminal misuse that may arise with individual investor petitions; those associated with regional centers, new commercial enterprises, and job creating entities; attorneys; migration agents; preparers; and promoters may include but are not limited to the following actions:

- The applicant, petitioner, or beneficiary engaged in financial fraud or financial crimes, including misappropriation of funds (Ponzi scheme, embezzlement, wire fraud, etc.);
- The applicant or petitioner falsified claims of job creation, economic development, or both;
- The applicant, petitioner, or beneficiary intentionally misrepresented the information provided or intentionally omitted required information;
- The attorney, preparer, promoter, or migration agent intentionally misrepresented the EB-5 program to an immigrant investor, either current or future;
- The attorney, preparer, promoter, or migration agent represented themselves as a registered broker but was not registered;
- The applicant or petitioner falsified one or more responses to the bona fide question set under INA 203(b)(5)(H);
- The applicant or petitioner falsified information about their background on a form (such as their credentials, education, employment), or presented altered or counterfeit documents;
- The applicant, petitioner, or beneficiary misrepresented, or concealed the source of funds or the path of funds;
- The petitioner presented derivatives that are not legal family members; or
- The petitioner or derivative assumed an alternate identity to attain an immigration benefit.

Footnotes

[^ 1] USCIS generally follows the procedures at 8 CFR 103.2(b)(8)(iv) regarding requests for evidence and notices of intent to deny.

[^ 2] See INA 203(b)(5)(P)(i)(V).

[^ 3] While USCIS does not sanction a regional center based directly on pre-RIA violations or violations of other areas of the law, USCIS may still consider significant or recurring pre-RIA violations or violations of other areas of the law for the purpose of evaluating the severity of sanctionable post-RIA violations of applicable provisions of the INA.

[^ 4] For more information on good faith investors, see Chapter 3, Immigrant Petition Adjudication, Section E, Good Faith Investors following Program Noncompliance by a Regional Center, New Commercial Enterprise, or Job-Creating Entity [6 USCIS-PM G.3(E)].

[^ 5] USCIS understands that treatment of investor petitions associated with an approved Form I-956F for a suspended new commercial enterprise or job-creating entity differs from treatment of investor petitions associated with an approved Form I-956F for a suspended regional center; however, the scope of involvement of these entities with respect to any particular Form I-956F is different and the suspension of a regional center does not terminate its designation and may not necessarily impact the bases for investor eligibility of a previously approved Form I-956F. Conversely, the suspension of a new commercial enterprise or job-creating entity associated with a previously approved Form I-956F directly implicates bases for eligibility of associated investors since they derive benefits directly from the conduct of such entities. Consequently, USCIS generally continues to adjudicate Form I-526E petitions associated with a previously approved Form I-956F for a suspended regional center but reserves the right to hold adjudication of such petitions should the circumstances warrant (such as where the basis for regional center suspension implicates the investment offering or project associated with a previously approved Form I-956F).

[^ 6] SeeINA 203(b)(5)(H)(iv), INA 203(b)(5)(N)(iii), and INA 203(b)(5)(O)(ii).

[^ 7] See INA 203(b)(5)(G)(iii)(II) which, unlike INA 203(b)(5)(H)(iv), INA 203(b)(5)(N)(iii) and INA 203(b)(5)(O)(ii), authorizes debarment to end the participation of non-regional center persons in the EB-5 program while limiting usage of the term termination to sanctioning a regional center's designation.

[^ 8] See INA 203(b)(5)(M).

[^ 9] See, for example, INA 203(b)(5)(G)(iii)(II)(cc), INA 203(b)(5)(H)(iv), INA 203(b)(5)(I)(iv), INA 203(b)(5)(K)(ii), INA 203(b)(5)(N)(iii), and INA 203(b)(5)(O)(ii).

[^ 10] See INA 203(b)(5)(N)-(O).

[^ 11] See INA 203(b)(5)(N)-(O).

[^ 12] For more information on how investors may retain eligibility following debarment or termination, see Chapter 3, Immigrant Petition Adjudication, Section E, Good Faith Investors following Program Noncompliance by a Regional Center, New Commercial Enterprise, or Job-Creating Entity [6 USCIS-PM G.3(E)].

[^ 13] For more information on how investors may retain eligibility following debarment or termination, see Chapter 3, Immigrant Petition Adjudication, Section E, Good Faith Investors following Program Noncompliance by a Regional Center, New Commercial Enterprise, or Job-Creating Entity [6 USCIS-PM G.3(E)].

[^ 14] See INA 203(b)(5)(N)-(O).

[^ 15] To the extent that USCIS makes a finding in accordance with INA 203(b)(5)(O) and a finding of fraud or willful misrepresentation under INA 212(a)(6)(C) that would impact an individual's admissibility, USCIS annotates those findings separately.

[^ 16] See definition of “fraud,” Black’s Law Dictionary (11th ed. 2019).

[^ 17] See definition of “misrepresentation,” Black’s Law Dictionary (11th ed. 2019).

[^ 18] See definition of “deceit,” Black’s Law Dictionary (11th ed. 2019).

[^ 19] See definition of “misuse,” Black’s Law Dictionary (11th ed. 2019).

Part H - Designated and Special Immigrants

Chapter 1 - Purpose and Background

A. Purpose

A special immigrant is an alien who may qualify for lawful permanent residence under certain provisions of the Immigration and Nationality Act (INA). Special immigrants are eligible to apply for lawful admission as a permanent resident or adjustment of status to permanent residence.

B. Background

The INA defines the term “special immigrant” to include various categories of aliens, such as religious workers, special immigrant juveniles, and employees and former employees of the U.S. government or others who have benefited or faithfully served the U.S. government abroad.[1] Congress also created additional special immigrant classifications through public laws not incorporated in the INA. Special immigrant classifications are subject to the numerical limitations on admissions set forth in the INA.[2] Certain special immigrant classifications are exempt from these numerical limits, to include: Iraqis employed by or on behalf of the U.S. government;[3] Afghans employed by or on behalf of the U.S. government;[4] and Iraqi and Afghan translators and interpreters.[5]

C. Scope

This Part addresses the following classes of special immigrants:

- Religious workers;[6]
- Panama Canal Zone employees;[7]
- Certain physicians;[8]
- Certain G-4 or NATO-6 employees and their family members;[9]
- Members of the U.S. armed forces;[10]
- Certain broadcasters;[11]
- Certain Iraqi nationals;[12]
- Certain Afghan nationals;[13] and
- Certain Iraqi and Afghan translators and interpreters.[14]

Part H does not address the following classes of special immigrants:

- An immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad;[15]
- An immigrant who was a citizen of the United States who may apply for reaquisition of citizenship;[16]
- Certain employees or retired employees of the U.S. government abroad;[17] and
- Certain dependents of a juvenile court or immigrants otherwise under certain legal commitment or state custody orders.[18]

D. Legal Authorities

- INA 101(a)(27) – Special immigrant classifications
- INA 203(b)(4) – Certain special immigrants
- 8 CFR 204.5 – Petitions for employment-based immigrants
- 8 CFR 204.9 – Special immigrant status for certain aliens who have served honorably (or are enlisted to serve) in the Armed Forces of the United States for at least 12 years
- Section 1059 of the National Defense Authorization Act for Fiscal Year 2006, as amended – Special immigrant status for persons serving as translators and interpreters with the U.S. armed forces[19]
- Section 1244 of the National Defense Authorization Act for Fiscal Year 2008, as amended – Special immigrant status for certain Iraqis[20]
- Section 602(b) of the Afghan Allies Protection Act of 2009, as amended – Special immigrant status for certain Afghans[21]

Footnotes

[^ 1] See INA 101(a)(27).

[^ 2] See INA 203(b)(4). See Chapter 2, Religious Workers [6 USCIS-PM H.2].

[^ 3] See Chapter 8, Certain Iraqi Nationals [6 USCIS-PM H.8].

[^ 4] See Chapter 9, Certain Afghan Nationals [6 USCIS-PM H.9].

[^ 5] See Chapter 10, Certain Iraqi and Afghan Translators and Interpreters [6 USCIS-PM H.10].

[^ 6] See INA 101(a)(27)(C).

[^ 7] See INA 101(a)(27)(E). See INA 101(a)(27)(F). See INA 101(a)(27)(G).

[^ 8] See INA 101(a)(27)(H).

[^ 9] See INA 101(a)(27)(I). See INA 101(a)(27)(L).

[^ 10] See INA 101(a)(27)(K).

[^ 11] See INA 101(a)(27)(M).

[^ 12] See Section 1244 of the National Defense Authorization Act (NDAA) for Fiscal Year 2008, Pub. L. 110-181 (PDF), 122 Stat. 3, 396 (January 28, 2008), as amended by Section 1 of the Special Immigrant Status for Certain Iraqis, Pub. L. 110-242 (PDF), 122 Stat. 1567 (June 3, 2008), by Section 1 of Pub. L. 113-42 (PDF), 127 Stat. 552 (October 4, 2013), by Section 1218 of the NDAA for FY 2014, Pub. L. 113-66 (PDF), 127 Stat. 672, 910 (December 26, 2013), and by Section 403 of the Emergency Security Supplemental Appropriations Act of 2021, Pub. L. 117-31 (PDF), 135 Stat. 309, 318 (July 30, 2021).

[^ 13] See Section 602(b) of the Afghan Allies Protection Act of 2009 (AAPA), Title VI of Pub. L. 111-8 (PDF), 123 Stat. 524, 807 (March 11, 2009), as amended by Section 1219 of the FY 2014 NDAA, Pub. L. 113-66 (PDF), 127 Stat. 672 (December 26, 2013), by Section 7034(o) the Consolidated Appropriations Act of 2014, Pub. L. 113-76 (PDF), 128 Stat. 5 (January 17, 2014), by Section 1 of the Emergency Afghan Allies Extension Act of 2014, Pub. L. 113-160 (PDF), 128 Stat. 1853 (August 8, 2014), by Section 1227 of the Carl Levin and Howard P. “Buck” McKeon FY 2015 NDAA, Pub. L. 113-291 (PDF), 128 Stat. 3292 (December 19, 2014), by Section 1216 of the FY 2016 NDAA, Pub. L. 114-92 (PDF), 129 Stat. 726 (November 25, 2015), by Section 1214 of the FY 2017 NDAA, Pub. L. 114-328 (PDF), 130 Stat. 2000 (December 23, 2016), by Section 7083 of the Consolidated Appropriations Act, 2017, Pub. L. 115-31 (PDF), 131 Stat. 135 (May 5, 2017), by Section 1213 of the NDAA for FY 2018, Pub. L. 115-91 (PDF), 131 Stat. 1283 (December 12, 2017), by Section 1222 of the John S. McCain NDAA for FY 2019, Pub. L. 115-232 (PDF), 132 Stat. 1636 (August 13, 2018), by Section 7076 of the Consolidated Appropriations Act of 2019, Pub. L. 116-6 (PDF), 133 Stat. 13 (February 15, 2019), by Section 1215 of the FY 2020 NDAA, Pub. L. 116-92 (PDF), 133 Stat. 1198, 1632 (December 20, 2019), by Section 7034 of the Consolidated Appropriations Act, 2021, Pub. L. 116-260 (PDF), 134 Stat. 1182 (December 27, 2020), by Section 1212 of the William M. (Mac) Thornberry NDAA for FY21, Pub. L. 116-283 (PDF), 134 Stat. 3388 (January 1, 2021), and by Sections 401 and 403 of the Emergency Security Supplemental Appropriations Act of 2021, Pub. L. 117-31 (PDF), 135 Stat. 309, 315, 318 (July 30, 2021). For current program extension and visa numbers, see the Green Card for an Afghan Who Was Employed by or on Behalf of the U.S. Government webpage.

[^ 14] See Section 1059 of the NDAA for FY 2006, Pub. L. 109-163 (PDF), 119 Stat. 3136 (January 6, 2006), as amended by Pub. L. 110–36 (PDF), 121 Stat. 227 (June 15, 2007), and by Pub. L. 110-242 (PDF), 122 Stat. 1567 (June 3, 2008).

[^ 15] See INA 101(a)(27)(A). See 9 FAM 502.7-2(B), Returning Resident Status.

[^ 16] See INA 101(a)(27)(B).

[^ 17] See INA 101(a)(27)(D) (allowing for special immigrant status for an alien (and derivatives) who is an employee or is an honorably retired employee of the U.S. government outside the United States), as amended by Section 403 of the Emergency Security Supplemental Appropriations Act of 2021, Pub. L. 117-31 (PDF), 135 Stat. 309, 318 (July 30, 2021) (allowing for special immigrant status for the surviving spouse or child of an employee of the U.S. government abroad provided that the employee performed faithful service for a total of not less than 15 years or was killed in the line of duty). The U.S. Department of State adjudicates petitions for classification as special immigrant international employees of the U.S. government abroad. For more information, see Volume 7, Adjustment of Status, Part F, Special Immigrant-Based Adjustment, Chapter 3, International Employees of U.S. Government Abroad [7 USCIS-PM F.3].

[^ 18] For information about special immigrant juveniles defined by INA 101(a)(27)(J), see Part J, Special Immigrant Juveniles [6 USCIS-PM J].

[^ 19] See Section 1059 of the NDAA for FY 2006, Pub. L. 109-163 (PDF), 119 Stat. 3136 (January 6, 2006), as amended by Pub. L. 110–36 (PDF), 121 Stat. 227 (June 15, 2007), and by Pub. L. 110-242 (PDF), 122 Stat. 1567 (June 3, 2008).

[^ 20] See Section 1244 of the Defense Authorization Act for FY 2008, Pub. L. 110-181 (PDF), 122 Stat. 3 (January 28, 2008), as amended by Section 1 of the Special Immigrant Status for Certain Iraqis, Pub. L. 110-242 (PDF), 122 Stat. 1567 (June 3, 2008), by Section 1 of Pub. L. 113-42 (PDF), 127 Stat. 552, 552 (October 4, 2013), by Section 1218 of the NDAA for FY 2014, Pub. L. 113-66 (PDF), 127 Stat. 672 (December 26, 2013), and by Section 403 of the Emergency Security Supplemental Appropriations Act of 2021, Pub. L. 117-31 (PDF), 135 Stat. 319 (July 30, 2021).

[^ 21] See Section 602(b) of the AAPA, Title VI of Pub. L. 111-8 (PDF), 123 Stat. 524, 807 (March 11, 2009), as amended by Section 1219 of the FY 2014 NDAA, Pub. L. 113-66 (PDF), 127 Stat. 672 (December 26, 2013), by Section 7034(o) the Consolidated Appropriations Act of 2014, Pub. L. 113-76 (PDF), 128 Stat. 5 (January 17, 2014), by Section 1 of the Emergency Afghan Allies Extension Act of 2014, Pub. L. 113-160 (PDF), 128 Stat. 1853 (August 8, 2014), by Section 1227 of the Carl Levin and Howard P. “Buck” McKeon FY 2015 NDAA, Pub. L. 113-291 (PDF), 128 Stat. 3292 (December 19, 2014), by Section 1216 of the FY 2016 NDAA, Pub. L. 114-92 (PDF), 129 Stat. 726 (November 25, 2015), by Section 1214 of the FY 2017 NDAA, Pub. L. 114-328 (PDF), 130 Stat. 2000 (December 23, 2016), by Section 7083 of the Consolidated Appropriations Act of FY 2017, Pub. L. 115-31 (PDF), 131 Stat. 135 (May 5, 2017), by Section 1213 of the FY 2018 NDAA, Pub. L. 115-91 (PDF), 131 Stat. 1283 (December 12, 2017), by Section 1222 of the John S. McCain FY 2019 NDAA, Pub. L. 115-232 (PDF), 132 Stat. 1636 (August 13, 2018), by Section 7076 of the Consolidated Appropriations Act of 2019, Pub. L. 116-6 (PDF), 133 Stat. 13 (February 15, 2019), by Section 1215 of the FY 2020 NDAA, Pub. L. 116-92 (PDF), 133 Stat. 1198, 1632 (December 20, 2019), by Section 7034 of the Consolidated Appropriations Act, 2021, Pub. L. 116-260 (PDF), 134 Stat. 1182 (December 27, 2020), by Section 1212 of the William M. (Mac) Thornberry NDAA for FY21, Pub. L. 116-283 (PDF), 134 Stat. 3388 (January 1, 2021), and by Sections 401 and 403 of the Emergency Security Supplemental Appropriations Act of 2021, Pub. L. 117-31 (PDF), 135 Stat. 309, 315, 318 (July 30, 2021). For current program extension and visa numbers, see the Green Card for an Afghan Who Was Employed by or on Behalf of the U.S. Government webpage.

Chapter 2 - Religious Workers

A. General Requirements

The Immigration and Nationality Act (INA) provides separate immigration classifications for religious workers depending on whether they seek to work in the United States on a permanent or a temporary basis.[1] Ministers and non-ministers in religious vocations and occupations may immigrate to or adjust status in the United States for the purpose of performing religious work in a full-time, compensated position under the employment-based 4th preference visa classification.[2]

In 2005, the USCIS Office of Fraud Detection and National Security (FDNS) conducted a Benefit Fraud Assessment of the special immigrant religious worker program by randomly selecting and reviewing pending and approved cases. As a result, USCIS issued a report finding significant fraud and non-compliance in the use of this classification.[3] This led USCIS to reconsider how it administered the special immigrant religious worker program.

In 2008, USCIS promulgated regulations that added requirements to establish eligibility for the special immigrant and nonimmigrant religious worker programs.[4] Among other changes, the regulations provided USCIS with discretionary authority to verify the submitted evidence through any means it determines appropriate, up to and including an on-site inspection of the petitioning organization.[5]

1. General Eligibility

In general, the petitioner must demonstrate that the prospective employer is either a bona fide non-profit religious organization, or a bona fide organization that is affiliated with the religious denomination[6] and that the beneficiary has been a member of the same type of religious denomination as that of the employer for the 2 years immediately preceding the time of application for admission.[7] In addition, the religious worker must be coming to the United States to work in a full-time (average of at least 35 hours per week), compensated position:

- Solely as a minister of the U.S. employer's denomination;
- In a religious vocation either in a professional or nonprofessional capacity; or
- In a religious occupation either in a professional or nonprofessional capacity.[8]

The religious worker must have been carrying on, after the age of 14 years, such work continuously for at least 2 years preceding the filing of the petition.[9]

2. Filing Process

A U.S. employer (petitioner) or an alien (self-petitioner) may file a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) for special immigrant religious worker classification.[10] If applicable, the petitioner must submit a Religious Denomination Certification that is also a part of the petition.[11]

Religious workers in a religious vocation or occupation are included in the special immigrant religious worker program by statute on a temporary basis, the end date of which has been extended several times. Accordingly, such workers must enter the United States with a valid immigrant visa or adjust to permanent resident status (have an approved Application to Register Permanent Residence of Adjust Status (Form I-485)) before the expiration date stated in the most recent statutory renewal.[12] USCIS provides the most recent expiration date for non-minister religious workers on the USCIS website. There is no fixed expiration date for ministers.[13]

If a petitioner believes that one of the requirements for this classification substantially burdens the organization's exercise of religion, it may seek an exemption under the Religious Freedom Restoration Act (PDF) of 1993 (RFRA).[14] A written request for the exemption from a provision's requirement should accompany the initial filing, and it must explain how the provision:

- Requires participation in an activity prohibited by a sincerely held religious belief; or
- Prevents participation in conduct motivated by a sincerely held religious belief.

The petitioner must support the request with relevant documentation.[15] The petitioner bears the burden of showing that it qualifies for an RFRA exemption. USCIS decides exemption requests on a case-by-case basis.

B. Petitioner Requirements

1. Qualifying Organization

The petitioner must establish that the prospective employer is a bona fide nonprofit religious organization or a bona fide organization that is affiliated with the denomination and is exempt from taxation.[16]

Bona Fide Nonprofit Religious Organization in the United States

A bona fide nonprofit religious organization is a religious organization exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code (IRC). The organization must have a currently valid determination letter from the Internal Revenue Service (IRS) confirming the tax exemption.[17] Tax-exempt organization is defined below. The petitioner may submit an individual 501(c)(3) determination letter if the religious organization has its own ruling from the IRS or a letter for the group if it is covered under a group ruling.[18]

Bona Fide Organization That is Affiliated with the Religious Denomination

A bona fide organization that is affiliated with the religious denomination is an organization that is closely associated with a religious denomination. The organization must be exempt from taxation as described in section 501(c)(3) of the IRC. The organization must also have a currently valid determination letter from the IRS confirming the tax exemption.[19] If the bona fide organization affiliated with the denomination was granted tax-exempt status as something other than a religious organization, the petitioner must also submit additional documentation.[20]

Religious Denomination

Religious denomination means a religious group or community of believers that is governed or administered under a common type of ecclesiastical government and includes one or more of the following:

- A recognized common creed or statement of faith shared among the denomination's members;
- A common form of worship;
- A common formal code of doctrine and discipline;
- Common religious services and ceremonies;
- Common established places of religious worship or religious congregations; or
- Comparable indicia of a bona fide religious denomination.

Tax-Exempt Organization

A tax-exempt organization is one that has received a determination letter from the IRS establishing that it, or a group that it belongs to, is exempt from taxation under section 501(c)(3) of the IRC.[21]

2. Attestation and Denomination Certification

As part of the Form I-360, an authorized official of the prospective U.S. employer must complete, sign, and date the Employer Attestation and, if applicable, an authorized official of the denomination must complete the Religious Denomination Certification.[22] The authorized official must sign the attestation, certifying under penalty of perjury that the attestation is true and correct.

If the religious worker is a self-petitioner and is also an authorized official of the prospective U.S. employer, the self-petitioner may sign the attestation.[23]

On the Employer Attestation portion of the Form I-360, the prospective employer must specifically attest to the following:[24]

- The prospective employer's status as a bona fide non-profit religious organization or a bona fide organization that is affiliated with a religious denomination and is exempt from taxation;
- The number of members of the prospective employer's organization;
- The number of employees who work at the same location where the religious worker will be employed and a summary of those employees' responsibilities;
- Number of aliens holding special immigrant or nonimmigrant religious worker status currently employed or employed within the past 5 years;
- Number of petitions for special immigrant and nonimmigrant religious workers for employment with the prospective employer filed on Form I-360 and Petition for a Nonimmigrant Worker (Form I-129) within the past 5 years;
- The title of the position offered to the religious worker;
- The complete package of salaried or non-salaried compensation being offered;
- A detailed description of the religious worker's proposed daily duties;[25]
- The compensated position being offered to the religious worker requires an average of at least 35 hours per week of work;
- The specific location(s) of the proposed employment;
- The religious worker is qualified for the position offered and has worked as a religious worker for the 2 years immediately preceding the filing of the application;
- The religious worker's membership in the prospective employer's denomination for at least 2 years prior to admission to the United States;
- The religious worker will not be engaged in secular employment and any compensation for religious work will be paid to the religious worker by the attesting employer; and
- The prospective employer's ability and intention to compensate and otherwise support (through housing, for example) the religious worker at a level at which the religious worker and accompanying family members will not become public charges, and that funds to pay the alien's compensation do not include any monies obtained from the alien, excluding reasonable donations or tithing to the religious organization.

3. Verification of Evidence

USCIS may conduct on-site inspections either before or after USCIS makes a final decision on the petition.[26] The purpose of the inspection is to verify the evidence submitted in support of the petition, such as the petitioner's attestations and qualifications as a religious organization, the location(s) where the beneficiary will work, the organization's facilities (including places of worship, where applicable), and the nature of the beneficiary's proposed position.

USCIS randomly selects religious worker petitions for compliance review on-site inspections, which normally occur after the approval of the petition.[27] These site visits include inspections of the work locations to verify the religious worker's work hours, compensation, and duties.[28] USCIS may also conduct "for cause," inspections in cases where there is suspected non-compliance with the terms of the visa classification or fraud.[29] If applicable, USCIS may issue a request for evidence or notice of intent to deny based on the findings of a pre-adjudication inspection, or a notice of intent to revoke based on the findings of a post-adjudication inspection, and the petitioner will have an opportunity to respond.[30]

4. Documentation and Evidence

General Qualifying Religious Organization Evidence Required

There are three different ways to establish an organization's tax-exempt status to support a special immigrant religious worker filing on Form I-360.[31]

Individual Religious Organization Granted Individual Tax-Exempt Status[32]

If the religious organization has its own determination from the IRS as a tax-exempt organization, the petitioner must submit a copy of the currently valid 501(c)(3) determination letter. The letter must demonstrate that the religious organization was qualified to file the petition at the time of filing.[33]

Individual Religious Organization Covered Under a Group Tax-Exempt Ruling[34]

If the religious organization is recognized as tax-exempt under a group IRS tax-exempt determination, the petitioner must submit a copy of a currently valid 501(c)(3) determination letter for the group and evidence that the parent organization has authorized the religious organization to use its tax-exempt status. If the letter demonstrates that the group was granted tax-exempt status under IRC 501(c)(3) under a category other than religious organization, see the evidentiary requirements to show the religious nature and purpose of the organization under the following heading.

Individual Tax-Exempt Organization Affiliated with a Religious Denomination[35]

If the organization is an individual tax-exempt organization affiliated with a religious organization, in addition to a copy of its valid 501(c)(3) determination letter, the petitioner must also submit a Religious Denomination Certification signed by an authorized official of the religious denomination, certifying that the organization is affiliated with the religious denomination.[36]

If the affiliated organization was granted tax-exempt status under IRC 501(c)(3) under a category other than religious organization, in addition to the general requirements, the petitioner must also provide:

- Documentation that establishes the religious nature and purpose of the organization, such as a copy of the organizing instrument of the organization that specifies the purposes of the organization;[37] and
- Organizational literature, such as books, articles, brochures, calendars, flyers, and other literature describing the religious purpose and nature of the activities of the organization.[38]

Table Summarizing Evidentiary Requirements

The table below serves as a quick reference guide for the evidence required depending on the type of prospective employer.

Summary of Evidence Requirements Relating to Tax-Exempt Status

Type of Petitioner	Required Evidence
Tax-Exempt 501(c)(3) Religious Organization	• A currently valid determination letter from the IRS establishing that the organization is tax-exempt.
Group Tax-Exempt Religious Organization	• A currently valid determination letter from the IRS establishing that the group is tax-exempt. • Documentation that the organization is covered under the group tax exemption, including, for example, a letter from the parent organization authorizing the petitioner to use its group tax exemption, a directory for that organization listing the petitioner as a member of the group, a membership listing on the parent organization's website that confirms coverage under its exemption, or a letter from the IRS confirming the coverage. • If the submitted IRS determination letter does not identify the organization's tax exemption as a religious organization, then evidence establishing its religious nature and purpose. Such evidence may include, but is not limited to, the entity's articles of incorporation or bylaws, flyers, articles, brochures, or other literature that describes the religious purpose and nature of the organization.
Bona Fide Organization Affiliated with Religious Denomination	• A currently valid determination letter from the IRS establishing that the organization is tax-exempt. • If the organization was granted tax-exempt status under IRC 501(c)(3) as something other than a religious organization, then: ○ documentation that establishes the religious nature and purpose of the organization, including, but not limited to, a copy of the organizing instrument that specifies the purposes of the organization, organizational literature, such as books, articles, brochures, calendars, flyers, and other literature describing the religious purpose and nature of the activities of the organization. • A Religious Denomination Certification signed by the religious denominational entity (not the petitioner) that the petitioner is affiliated with, which is part of the Form I-360, certifying that the petitioning organization is affiliated with the religious denomination.

5. Compensation Requirement

A religious worker must receive salaried or non-salaried compensation.[39] Salaried means receiving a traditional form of compensation (that is, a paycheck). Non-salaried compensation includes support such as, but not limited to, room, board, medical care, or transportation. The petitioner is required to state how it intends to compensate the religious worker, and to submit the corresponding, verifiable evidence described below.[40] A self-petitioning religious worker must submit evidence establishing how the prospective employer intends to provide such compensation.[41]

The petitioner must submit IRS documentation of compensation, such as IRS Forms W-2 or tax returns, if available. If IRS documentation is unavailable, then the petitioner must explain why it is unavailable and submit comparable verifiable documentation.[42]

When the beneficiary will receive salaried or non-salaried compensation, the petitioner may also submit verifiable evidence such as:

- Documentation of past compensation for similar positions;
- Budgets showing monies set aside for salaries, leases, or similar;
- Documentary evidence demonstrating that room and board will be provided; or
- Other evidence acceptable to USCIS.[43]

While the regulation does not require audited financial reports, unaudited budgets or financial statements should be accompanied by supporting evidence that is verifiable. For example, budgets should be generally consistent with verifiable evidence of past revenue, such as but not limited to, bank statements showing cash balances and showing an availability of sufficient funds to cover the beneficiary's salaried compensation over a sufficient period of time.

Further, USCIS does not consider salaried or non-salaried support deriving from a third party as a portion of the beneficiary's required compensation. The regulation requires that the attesting employer provides the salaried or non-salaried compensation to the religious worker.[44] Room and board at a church member's home, or provided by any other church, is a form of third-party compensation.

Unless the church reimburses the other party for this room and board, such arrangements are not a qualifying form of non-salaried compensation. A petitioner may also submit evidence such as proof that it owns the property or a lease showing it pays for the living space to establish that it is the entity providing non-salaried compensation.

In situations where the attesting employer is not the entity that will directly compensate the religious worker, USCIS reviews the relationship between the attesting employer and the entity directly compensating the religious worker in the totality of the circumstances to confirm that the attesting employer is the employer of the beneficiary,[45] and that the attesting employer has the ability and intent to compensate the beneficiary.

In making this determination, USCIS considers whether there is a documented relationship between the attesting employer and the entity providing salaried or non-salaried compensation to show that the attesting employer, through this other entity, is still compensating the beneficiary. Factors that may demonstrate this relationship include, but are not limited to, the following:

- The attesting employer has the authority to dictate financial policy, remove clergy for cause, and veto acquisition of debt at the compensating entity;
- The attesting employer owns the compensating entity's assets or includes the compensating entity on its audited financial statements;
- According to established rules or practice in the relevant organization or denomination, the attesting employer makes personnel decisions for the compensating entity;
- Any other documentation showing the attesting employer has direct oversight or involvement in the financial and personnel matters of the compensating entity.

As an example, a diocese that has the authority to move clergy from one church to another and jointly owns assets with its subordinate churches that are part of the same group's tax-exempt status may properly file a petition for clergy at a subordinate church even if the subordinate church directly pays the salary. In this example, documentation showing how the subordinate church will directly compensate the religious worker may be used to satisfy the petitioner's obligation.[46]

Consistent with the required attestations, the prospective employer must have the ability and intention to compensate the religious worker at a level at which the religious worker and accompanying family members will not become public charges. In addition, the funds to pay the religious worker's compensation may not include any monies obtained from the religious

worker, excluding reasonable donations or tithing to the religious organization.[47] Unlike the regulations pertaining to nonimmigrant religious workers, there are no provisions allowing special immigrant religious workers to be self-supporting.[48]

Multiple Beneficiaries

A petitioner is required to attest to the number of special immigrant religious workers and R-1 nonimmigrants it currently employs, the number it has employed within the last 5 years, as well as the number of petitions and applications filed by or on behalf of any special immigrant religious worker and R-1 nonimmigrant for employment by the prospective employer within the last 5 years.[49]

Where the petitioner has filed for multiple beneficiaries, the petitioner may be required to demonstrate that it has the ability to compensate all of its religious workers, including R-1 nonimmigrants and special immigrant religious workers other than the beneficiary of the petition currently being submitted.[50]

C. Religious Worker Requirements

To qualify for an immigrant religious worker classification, the beneficiary must:

- Be a member of a religious denomination having a bona fide non-profit religious organization in the United States for at least the 2 years immediately preceding the filing of the petition;
- Be coming to the United States to work in a full-time position (at least 35 hours per week);
- Have been working as minister or in a religious occupation or vocation either abroad or in the United States after the age of 14 continuously for at least the 2-year period immediately preceding the filing of the petition; and
- Be coming solely as a minister or to perform a religious vocation or occupation for a qualifying religious organization.

Minister[51]

A minister position can take the form of various names or titles, depending on the religion, such as priest, minister, rabbi, and imam, among others, and is a person who:

- Is fully authorized by a religious denomination, and fully trained according to the denomination's standards, to conduct religious worship and perform other duties usually performed by authorized members of the clergy of that denomination;
- Is not a lay preacher or a person not authorized to perform duties usually performed by clergy;
- Performs activities with a rational relationship to the religious calling of the minister; and
- Works solely as a minister in the United States, which may include administrative duties incidental to the duties of a minister.

Religious Occupation[52]

A religious occupation is one that meets all of the following requirements:

- The duties must primarily relate to a traditional religious function and be recognized as a religious occupation within the denomination;
- The duties must be primarily related to, and must clearly involve, instilling or carrying out the religious creed and beliefs of the denomination;
- The duties do not include positions which are primarily administrative or support such as janitors, maintenance workers, clerical employees, fund raisers, persons solely involved in the solicitation of donations, or similar positions, although limited administrative duties that are only incidental to religious functions are permissible; and
- Religious study or training for religious work does not constitute a religious occupation, but a religious worker may pursue study or training incident to status.

Religious Vocation[53]

A religious vocation involves a formal lifetime commitment, through vows, investitures, ceremonies, or similar indicia, to a religious way of life. The religious denomination must have a class of persons whose lives are dedicated to religious practices and functions, as distinguished from the secular members of the religion. Examples of religious vocations include nuns, monks, and religious brothers and sisters.

Religious Worker[54]

A religious worker is a person engaged in and, according to the denomination's standards, qualified for a religious occupation or vocation, whether or not in a professional capacity, or as a minister.

1. Denominational Membership

The beneficiary must have at least 2 years, immediately preceding the filing of the petition, of membership in a religious denomination.[55] Such membership must be in the same type of religious denomination in which the beneficiary will work in the United States.[56]

A religious denomination is a religious group or community of believers that have a common type of ecclesiastical government that governs or administers and includes one or more of the following:

- A recognized common creed or statement of faith shared among the denomination's members;
- A common form of worship;
- A common formal code of doctrine and discipline;
- Common religious services and ceremonies;
- Common established places of religious worship or religious congregations; or
- Comparable indications of a bona fide religious denomination.[57]

2. Evidence of Religious Worker's Prior Employment

The religious worker's qualifying experience during the 2 years immediately preceding the petition (or preceding any acceptable break in the continuity of the religious work) must have occurred after the age of 14.[58] The religious worker must have been working in a full time, compensated position as a minister or in a religious occupation or vocation according to the regulatory definitions of those terms.[59]

If Religious Worker Received Salaried Compensation

If the religious worker was employed in the United States during the 2 years immediately preceding the filing of the petition and received salaried compensation, the petitioner must submit IRS documentation that the religious worker received a salary, such as an IRS Form W-2 or certified copies of income tax returns.[60]

If Religious Worker Received Non-salaried Compensation

If the religious worker was employed in the United States during the 2 years immediately preceding the filing of the petition and received non-salaried compensation, the petitioner must submit IRS documentation of the non-salaried compensation if available.[61]

If Religious Worker Received No Salary but Provided Their Own Support

If the religious worker was employed in the United States during the 2 years immediately preceding the filing of the petition and received no salary but provided for their own support, and provided support for any dependents, the petitioner must show how support was maintained by submitting with the petition additional documents such as audited financial statements, financial institution records, brokerage account statements, trust documents signed by an attorney, or other verifiable evidence acceptable to USCIS.[62]

If Religious Worker was Employed Outside the United States

If the religious worker was employed outside the United States during the 2 years immediately preceding the filing of the petition, the petitioner must submit comparable evidence of the religious work.[63]

If Religious Worker Had an Unacceptable Break During 2-year Period Preceding Petition

A break in the continuity of the work during the preceding 2 years will not affect eligibility so long as:

- The beneficiary was still employed as a religious worker;
- The break did not exceed 2 years; and
- The nature of the break was for further religious training or for sabbatical. However, the religious worker must have been a member of the petitioner's denomination throughout the 2 years of qualifying employment.[64]

Additionally, events such as sick leave, pregnancy leave, spousal care, and vacations are typical in the normal course of any employment; USCIS does not consider these events a break of the 2-year requirement as long as the religious worker is still considered employed during that time.

If the religious worker was employed in the United States and there was a break in the continuity of the work that affected eligibility during the 2 years immediately preceding the filing of Form I-360, the 2-year clock must restart. The subsequent 2-year period of qualifying employment may be completed in or outside the United States.

3. Evidence of Qualifying Prospective Employment

The religious worker must be coming to engage in a religious vocation or in a religious occupation, or to work solely as a minister of religion.[65]

Religious Vocations and Occupations

For a religious worker who will work in a religious vocation or occupation, the petitioner must submit evidence of the following:

- The religious worker is entering the United States to perform a religious vocation or occupation, defined above (in either a professional or nonprofessional capacity);[66]
- The religious worker is qualified for the religious occupation or vocation according to the denomination's standards.[67]

Ministers

If filing on behalf of a minister, in addition to demonstrating that the religious worker will serve as a minister per the regulatory definition of that term,[68] the petitioner must submit the following additional initial evidence:[69]

- A copy of the religious worker's certificate of ordination or similar documents reflecting acceptance of the religious worker's qualifications as a minister in the religious denomination;[70] and
- Documents reflecting the religious worker's completion of any course of prescribed theological education at an accredited theological institution normally required or recognized by that religious denomination, including transcripts, curriculum, and documentation that establishes that the theological institution is accredited by the denomination.[71]

For denominations that do not require a prescribed theological education, rather than document such education, the petitioner must instead submit evidence of:

- The denomination's requirements for ordination to minister;
- The duties allowed to be performed by virtue of ordination;
- The denomination's levels of ordination, if any; and
- Documentation to establish the religious worker's completion of the denomination's requirements for ordination.[72]

D. Derivative Beneficiaries

A spouse or child accompanying or following to join a principal immigrant who has requested benefits under this section may be accorded the same special immigrant classification as the principal beneficiary.[73]

Footnotes

[^ 1] See INA 101(a)(27)(C) and INA 101(a)(15)(R). See 8 CFR 204.5(m) and 8 CFR 214.2(r). Aliens working in the United States temporarily as a minister or in a religious vocation or occupation are eligible for the nonimmigrant religious worker (R-1) classification. For more information on nonimmigrant religious workers, see Volume 2, Nonimmigrants, Part O, Religious Workers (R) [2 USCIS-PM O].

[^ 2] See INA 101(a)(27)(C).

[^ 3] See Religious Worker Benefit Fraud Assessment Summary (July 2006).

[^ 4] See 73 FR 72276 (PDF)(Nov. 26, 2008).

[^ 5] See 8 CFR 204.5(m)(12) and 8 CFR 214.2(r)(16).

[^ 6] See 8 CFR 204.5(m)(3).

[^ 7] See 8 CFR 204.5(m)(1) and 8 CFR 204.5(m)(7)(x).

[^ 8] See 8 CFR 204.5(m)(2).

[^ 9] See 8 CFR 204.5(m)(4). See 73 FR 72276 (PDF) (Nov. 26, 2008) for a general and detailed explanation pertaining to adjudication of special immigrant ministers of religion and other religious worker petitions.

[^ 10] See 8 CFR 204.5(m)(6). For information on adjustment of status involving special immigration religious workers, see Volume 7, Adjustment of Status, Part F, Special Immigrant-Based Adjustment, Chapter 2, Religious Workers [7 USCIS-PM F.2].

[^ 11] See 8 CFR 204.5(m)(8)(iii)(D).

[^ 12] See INA 101(a)(27)(C)(ii). See 8 CFR 204.5(m)(6).

[^ 13] See INA 101(a)(27)(C)(ii). See 8 CFR 204.5(m)(6).

[^ 14] See Religious Freedom Restoration Act of 1993, Pub. L. 103-141 (PDF) (November 16, 1993).

[^ 15] See 8 CFR 103.2(b).

[^ 16] See 8 CFR 204.5(m)(3) and 8 CFR 204.5(m)(7)(i).

[^ 17] See 8 CFR 204.5(m)(5).

[^ 18] See 8 CFR 204.5(m)(8).

[^ 19] See 8 CFR 204.5(m)(5).

[^ 20] See additional discussion of evidentiary requirements for affiliated tax-exempt organizations within Section B, Petitioner Requirements, Subsection 4, Documentation and Evidence [6 USCIS-PM H.2(B)(4)]. See 8 CFR 204.5(m)(8)(iii).

[^ 21] See 8 CFR 204.5(m)(5).

[^ 22] See 8 CFR 204.5(m)(7) and 8 CFR 204.5(m)(8)(iii)(D).

[^ 23] See 8 CFR 204.5(m)(7).

[^ 24] See 8 CFR 204.5(m)(7).

[^ 25] This attestation is derived from 8 CFR 204.5(m)(7)(vi) and relates to all special immigrant religious worker petitions, including religious workers coming to perform a religious vocation. See 8 CFR 204.5(m)(7)(vi). Post-adjudication site visits focusing on religious workers cannot verify the work hours, compensation, and duties consistent with supporting the integrity of the special immigrant religious worker classification if the petition provides only a vague description of the religious worker's proposed duties.

[^ 26] See 8 CFR 204.5(m)(7) and 8 CFR 204.5(m)(12).

[^ 27] As a matter of policy, USCIS no longer conducts mandatory pre-approval on-site inspections of all petitioners for religious workers. However, USCIS may still conduct site visits at any point, including pre-approval, if USCIS determines it appropriate to verify information. USCIS provided this clarification in its policy guidance on March 2, 2023.

[^ 28] See 8 CFR 204.5(m)(12).

[^ 29] See 8 CFR 204.5(m)(12).

[^ 30] See 8 CFR 103.2(b)(8), 8 CFR 103.2(b)(16)(i), and 8 CFR 205.2.

[^ 31] See 8 CFR 204.5(m)(8).

[^ 32] See 8 CFR 204.5(m)(8)(i).

[^ 33] See 8 CFR 204.5(m)(5) (defining tax-exempt organization as one that has received a determination letter from the IRS) and 8 CFR 103.2(b)(1) (a petitioner must establish eligibility for the requested benefit at the time of filing the benefit request).

[^ 34] See 8 CFR 204.5(m)(8)(ii).

[^ 35] See 8 CFR 204.5(m)(8)(iii).

[^ 36] See 8 CFR 204.5(m)(8)(iii)(D).

[^ 37] See 8 CFR 204.5(m)(8)(iii)(B).

[^ 38] See 8 CFR 204.5(m)(8)(iii)(C).

[^ 39] See 8 CFR 204.5(m)(2) and 8 CFR 204.5(m)(10).

[^ 40] See 8 CFR 204.5(m)(7)(vi), 8 CFR 204.5(m)(7)(xi), 8 CFR 204.5(m)(7)(xii), and 8 CFR 204.5(m)(10).

[^ 41] See 8 CFR 204.5(m)(7)(vi), 8 CFR 204.5(m)(7)(xi), 8 CFR 204.5(m)(7)(xii), and 8 CFR 204.5(m)(10).

[^ 42] See 8 CFR 204.5(m)(10).

[^ 43] See 8 CFR 204.5(m)(10).

[^ 44] See 8 CFR 204.5(m)(7)(xi), 8 CFR 204.5(m)(7)(xii), and 8 CFR 204.5(m)(10).

[^ 45] See 8 CFR 204.5(m)(6).

[^ 46] See 8 CFR 204.5(m)(10).

[^ 47] See 8 CFR 204.5(m)(7)(xii).

[^ 48] Compare 8 CFR 204.5(m)(7)(xi) and 8 CFR 204.5(m)(10) with 8 CFR 214.2(r)(11)(ii).

[^ 49] See 8 CFR 204.5(m)(7)(iv), 8 CFR 204.5(m)(7)(v), 8 CFR 214.2(r)(8)(v), and 8 CFR 214.2(r)(8)(vi).

[^ 50] See 8 CFR 204.5(m)(7)(xi), 8 CFR 204.5(m)(7)(xii), 8 CFR 204.5(m)(10), 8 CFR 214.2(r)(8)(viii), and 8 CFR 214.2(r)(11) (requiring that a petitioning organization demonstrate through verifiable evidence its intent to compensate both immigrant and nonimmigrant religious workers, or how a nonimmigrant religious worker will be self-supporting).

[^ 51] See 8 CFR 204.5(m)(5).

[^ 52] See 8 CFR 204.5(m)(5).

[^ 53] See 8 CFR 204.5(m)(5).

[^ 54] See 8 CFR 204.5(m)(5).

[^ 55] See 8 CFR 204.5(m)(1).

[^ 56] See definition of denominational membership at 8 CFR 204.5(m)(5).

[^ 57] See 8 CFR 204.5(m)(5).

[^ 58] See 8 CFR 204.5(m)(11). The regulations at 8 CFR 204.5(m)(4) and 8 CFR 204.5(m)(11) specify that any qualifying employment an alien performs in the United States must have occurred while the alien was in a lawful immigration status. However, the United States Court of Appeals in *Shalom Pentecostal Church v. Acting Secretary DHS*, 783 F.3d 156 (3rd Cir. 2015), found this regulatory requirement to be inconsistent with the statute. As a result of this decision and a growing number of federal courts reaching the same conclusion, USCIS decided to apply the *Shalom Pentecostal* decision nationally. As of July 2015, USCIS does not deny special immigrant religious worker petitions based on the lawful status requirements at 8 CFR 204.5(m)(4) and 8 CFR 204.5(m)(11). Therefore, any employment in the United States can be used to qualify an alien under the special immigrant religious worker requirements, regardless of whether the alien was in a lawful or unlawful immigration status.

[^ 59] See 8 CFR 204.5(m)(4), which requires the religious worker to “have been working in one of the positions described in paragraph (m)(2).”

[^ 60] See 8 CFR 204.5(m)(11)(i).

[^ 61] See 8 CFR 204.5(m)(11)(ii).

[^ 62] See 8 CFR 204.5(m)(11)(iii). In elaborating on this issue in the final rule, USCIS determined that the sole instances where foreign nationals may be uncompensated are those who are “participating in an established, traditionally non-compensated, missionary program.” See 73 FR 72275, 72278 (PDF) (Nov. 26, 2008).

[^ 63] See 8 CFR 204.5(m)(11).

[^ 64] See 8 CFR 204.5(m)(4).

[^ 65] See 8 CFR 204.5(m)(2).

[^ 66] See 8 CFR 204.5(m)(2). See definitions of religious occupation and religious vocation in 8 CFR 204.5(m)(5).

[^ 67] See definition of religious worker in 8 CFR 204.5(m)(5).

[^ 68] See definition of minister in 8 CFR 204.5(m)(5).

[^ 69] See 8 CFR 204.5(m)(9).

[^ 70] See 8 CFR 204.5(m)(9)(i).

[^ 71] See 8 CFR 204.5(m)(9)(ii).

[^ 72] See 8 CFR 204.5(m)(9)(iii).

[^ 73] See INA 203(d).

Chapter 3 - Panama Canal Zone Employees

Certain former employees of the Panama Canal Zone and their spouses and children may receive special immigrant status.[1] Such employees include those employed for at least 1 year by the Zone or Zone government and who were employees on the date the treaty transferring the Canal to Panama took effect, June 16, 1978. Retired former employees who were

employed for 15 years, or 5 years in the case of an employee whose personal safety is endangered because of such employment, are also eligible.

Footnote

[^ 1] See INA 101(a)(27)(E).

Chapter 4 - Certain Physicians [Reserved]

Chapter 5 - Certain G-4 or NATO-6 Employees and their Family Members [Reserved]

Chapter 6 - Members of the U.S. Armed Forces

The Armed Forces Immigration Adjustment Act of 1991[1] provided special immigrant status to a limited number of aliens who have served honorably on active duty status in the U.S. armed forces.

A. Filing

An alien who is a U.S. armed forces enlistee or veteran may file a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) for U.S. armed forces special immigrant status on his or her own behalf. The petitioner must properly file the Form I-360, according to the form instructions.[2]

B. Eligibility

In order to be eligible for the U.S. armed forces enlistee or veteran classification,[3] the petitioner must establish that:

- He or she served honorably on active duty after October 15, 1978;
- He or she lawfully enlisted outside the United States under a treaty or agreement that was in effect on October 1, 1991;[4]
- The service period or periods of active duty amount to an aggregate of a minimum of 12 years or, in the case of a petitioner currently on active duty, a minimum of 6 years with proof of re-enlistment for the required number of years to incur a total active duty service obligation of 12 years;
- If now separated from service, he or she was never separated except under honorable conditions; and
- The executive department under which the petitioner served or serves has recommended the granting of special immigrant status.

C. Documentation and Evidence

The petitioner must submit the following documentation with the petition in order to establish eligibility for the benefit sought:

- His or her birth certificate which establishes that he or she is a national of an independent state that maintained a treaty or agreement that was in effect on October 1, 1991, and allowed nationals of that state to enlist in the U.S. armed forces;
- Certified proof of his or her re-enlistment (after 6 years of active duty service), or certification of his or her past active duty status of 12 years, from the appropriate military official (local command level or higher), which certifies that the applicant has the required honorable active duty service and commitment;[5] and
- A recommendation that the petitioner be granted special immigrant status from the appropriate military official (local command level or higher).[6]

D. Derivative Beneficiaries

A spouse or child accompanying or following to join a principal immigrant who has requested benefits under this section may be accorded the same special immigrant classification as the principal beneficiary.[7]

E. Revocation

If a petitioner ceases to be a qualified enlistee by failing to complete the required active duty service obligation for reasons other than an honorable discharge before being lawfully admitted as a permanent resident or adjusting status to permanent residence, the petition can be automatically revoked.[8] In order to do so, however, USCIS must obtain a current Certificate of Release or Discharge from Active Duty (Form DD-214) from the appropriate military office to verify that the petitioner is no longer eligible for special immigrant status.[9]

Footnotes

[^ 1] See Pub. L. 102-110 (PDF), 105 Stat. 555 (October 1, 1991).

[^ 2] For current information about filing locations and other information about how to file, see uscis.gov/i-360. See Fee Schedule (Form G-1055).

[^ 3] See INA 101(a)(27)(K). See 8 CFR 245.8.

[^ 4] See Volume 7, Adjustment of Status, Part F, Special Immigrant-Based Adjustment, Chapter 8, Members of the U.S. Armed Forces [7 USCIS-PM F.8]. Those eligible under treaties in effect on October 1, 1991, include nationals of the Philippines; the Federated States of Micronesia; the Republic of Palau; and the Republic of the Marshall Islands.

[^ 5] USCIS accepts letters issued by the command under which the petitioner is serving or has served as the certification and recommendation. Such a letter must include all required information: dates of service and place of enlistment, type of discharge (if applicable), and the recommendation of special immigrant status by the authorizing official.

[^ 6] USCIS accepts letters issued by the command under which the petitioner is serving or has served as the certification and recommendation. Such a letter must include all required information: dates of service and place of enlistment, type of discharge (if applicable), and the recommendation of special immigrant status by the authorizing official.

[^ 7] See INA 101(a)(27)(K)(ii)

[^ 8] See INA 205.

[^ 9] See 8 CFR 204.9(f).

Chapter 7 - Certain Broadcasters [Reserved]

Chapter 8 - Certain Iraqi Nationals

The National Defense Authorization Act for Fiscal Year 2008 (NDAA 2008),[1] which included the Refugee Crisis in Iraq Act of 2007 (RCIA),[2] was signed into law on January 28, 2008. Section 1244 of this legislation,[3] entitled "Special Immigrant Status for Certain Iraqis," created a new category of special immigrant visas for Iraqi nationals who have provided faithful and valuable service to the U.S. government, while employed by or on behalf of the U.S. government in Iraq, for not less than 1 year beginning on or after March 20, 2003, and who have experienced or are experiencing an ongoing serious threat as a consequence of that employment.

A. Number of Visas

In prior legislation, Congress established a numerical limitation of 5,000 principal aliens who may be provided special immigrant status under this program per year for Fiscal Years 2008 through 2012.[4] The unused number from Fiscal Year 2012 was allocated toward Fiscal Year 2013. Subsequent legislation extended this program until December 31, 2013.[5]

Subsequently, Congress allowed for an additional 2,500 visas to be approved after January 1, 2014, provided that the service occurred between March 20, 2003 and September 30, 2013, and that the alien submitted an application for Chief of Mission (COM), the principal officer in charge of a diplomatic mission, approval by September 30, 2014.[6] Since then, Congress has not modified the deadline or authorized additional visa numbers for Iraqis, effectively terminating the RCIA once all eligible applicants have been issued visas.

B. Filing

An Iraqi citizen or national who has worked for or on behalf of the U.S. government may file a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) on his or her own behalf. The petitioner must file Form I-360 according to the form instructions.[7]

C. Eligibility

To obtain approval of a petition for special immigrant status as an Iraqi who worked for or on behalf of the U.S. government under the RCIA,[8] the petitioner must establish that the petitioner:[9]

- Is a citizen or national of Iraq;
- Was employed by, or on behalf of, the U.S. government in Iraq on or after March 20, 2003, and before September 30, 2013, for a period of not less than 1 year;
- Provided faithful and valuable service to the U.S. government, as documented in a positive recommendation or evaluation by the petitioner's supervisor;
- Has experienced or is experiencing an ongoing serious threat as a consequence of the petitioner's employment by the U.S. government;
- Has cleared a background check and appropriate screening as determined by the Secretary of Homeland Security; and
- Is otherwise eligible to receive an immigrant visa and is otherwise admissible to the United States for permanent residence.[10]

D. Documentation and Evidence

The petitioner must submit the following evidence along with a completed Form I-360:

- A copy of the petitioner's passport, nationality or birth certificate, or national identification card showing that the petitioner is a citizen or national of Iraq, along with a certified English translation, if the document is in a foreign language;
- A positive recommendation from:
  - U.S. citizen or national who is the petitioner's senior supervisor;
  - U.S. citizen or national who occupies the supervisor's position;
  - U.S. citizen or national who is more senior if the senior supervisor has left the employer or has left Iraq; or
  - The petitioner's senior supervisor, provided the U.S. citizen or national responsible for the contract co-signs the letter, confirming employment of not less than 1 year beginning on or after March 20, 2003, and ending before September 30, 2013, if it is not possible to obtain a recommendation from a supervisor who is a U.S. citizen or national;
- Proof of COM approval based on an independent review of this recommendation conducted by the COM, Embassy Baghdad, or the petitioner's designee, of records maintained by the U.S. government or hiring organization or entity, to confirm employment and faithful and valuable service to the U.S. government;[11]
- Proof of risk assessment conducted by the COM, Embassy Baghdad, or the petitioner's designee, establishing that the petitioner has experienced or is experiencing an ongoing serious threat as a consequence of his or her employment by the U.S. government; and
- If the petition is filed by a petitioner in the United States, a copy of the front and back of the petitioner's Arrival/Departure Record (Form I-94).

E. Derivative Beneficiaries

The spouse and unmarried child(ren) younger than 21 years old accompanying or following to join a principal immigrant may be accorded the same special immigrant classification as the principal immigrant. Visas issued to derivative spouses and children do not count toward the numerical limitations on special immigrant visas for principal immigrants.

Deceased Principal Alien (No Pending or Approved Form I-360)

Family members of the principal immigrant may still be eligible for special immigrant classification even if the principal immigrant dies.

A surviving spouse and children may be eligible for special immigrant classification if the deceased principal alien had:

- Submitted a COM application[12] that included the surviving relative(s) as an accompanying spouse or child; and
- The COM or COM designee revoked or terminated (or otherwise rendered invalid) such application due to the death of the principal. If not for the death of the principal alien, the COM or COM designee would have approved such application.

In this case, as long as the deceased principal alien met the employment requirements for classification as a special immigrant[13] as of the date the principal alien filed the COM application for the first time, the COM or COM designee may continue to process the application.[14]

Even if the principal alien had not filed a COM application as described above, the surviving spouse and children may still be eligible for special immigrant classification by filing an application with the COM or COM designee themselves, so long as the principal alien completed the qualifying employment requirements as of the date of the principal alien's death.[15]

Following COM approval, the surviving spouse or children must then submit Form I-360 establishing that the deceased principal alien met the special immigrant eligibility requirements.[16]

When submitting the Form I-360, a surviving spouse or child must submit evidence of the qualifying relationship with the deceased principal alien and that such relationship existed at the time of the principal alien's death.

Deceased Principal Alien (Pending or Approved Form I-360)

Where the principal alien had a pending or an approved Form I-360 petition, the eligibility of the surviving spouse and children is also affected by INA 204(l),[17] since the surviving spouse and children are derivative beneficiaries of an employment-based immigrant visa petition.[18] In light of the interrelationship between Section 1244 of NDAA 2008 and INA 204(l):

- USCIS may approve a pending alien visa petition under Section 1244 despite the death of the principal immigrant while the petition is pending; or
- After the death of the principal alien, USCIS may favorably exercise discretion to reinstate the approval of a visa petition under Section 1244.

Footnotes

[^ 1] See Pub. L. 110-181 (PDF) (January 28, 2008).

[^ 2] See Subtitle C of Title XII, Division A of NDAA 2008, Pub. L. 110-181 (PDF), 122 Stat. 3, 395 (January 28, 2008).

[^ 3] See NDAA 2008, Pub. L. 110-181 (PDF), 122 Stat. 3, 396 (January 28, 2008) (Section 1244 was amended by Section 1 of Pub. L. 110-242 (PDF), 122 Stat. 1567, 1567 (June 3, 2008)).

[^ 4] See Pub. L. 110-181 (PDF), 122 Stat. 3 (Jan. 28, 2008).

[^ 5] See Section 1244(g) of the National Defense Authorization Act for FY 2008, as amended by Section 1 of Pub. L. 110-242 (PDF), 122 Stat. 1567 (June 3, 2008), and Section 1244 of the Defense Authorization Act for FY 2008, as amended by section 1 of Pub. L. 113-42 (PDF), 127 Stat. 552 (October 4, 2013).

[^ 6] See Section 1218 of the National Defense Authorization Act for FY 2014, Pub. L. 113-66 (PDF), 127 Stat. 672, 910 (December 26, 2013).

[^ 7] For current information about filing locations, fees, and other information about how to file, see uscis.gov/i-360. See Fee Schedule (Form G-1055).

[^ 8] See Section 1244 of Pub. L. 110-181 (PDF), 122 Stat. 3, 396 (January 28, 2008).

[^ 9] The surviving spouse and unmarried children under the age of 21 of a deceased principal alien may be classified as special immigrants. See Section E, Derivative Beneficiaries [6 USCIS-PM H.8(E)].

[^ 10] In the determination of such admissibility, the grounds for inadmissibility specified in INA 212(a)(4) relating to "public charge" do not apply.

[^ 11] See Section 1218 of the National Defense Authorization Act for FY 2014, Pub. L. 113-66 (PDF), 127 Stat. 672, 910 (December 26, 2013). Applicants must have applied for COM approval no later than September 30, 2014.

[^ 12] Section 403 of the Emergency Security Supplemental Appropriations Act of 2021, Pub. L. 117-31 (PDF), 135 Stat. 309, 318 (July 30, 2021) removed the requirement that, at the time of the principal alien's death, the deceased principal alien have a petition for special immigrant classification approved, in order for the surviving spouse and children of the principal alien to remain eligible to apply to obtain special immigrant classification. Instead, as of July 30, 2021, the principal alien is only required to have, at the time of the principal alien's death, submitted an application for COM approval under Section 1244 of Pub. L. 110-181 (PDF), 122 Stat. 3, 396 (January 28, 2008) or Section 1059 of the National Defense Authorization Act for FY 2006, Pub. L. 109–163 (PDF), 119 Stat. 3136, 3443 (January 6, 2006) that included the surviving relative as an accompanying spouse or child. Alternatively, the surviving spouse and children may submit a new application for COM approval if the principal alien completed the qualifying employment requirements at the time of the alien's death.

[^ 13] See Section 1244(b)(1) of Pub. L. 110-181 (PDF), 122 Stat. 3, 396 (January 28, 2008).

[^ 14] See 9 FAM 502.5-12(B), Certain Iraqi and Afghan Nationals Employed by or on Behalf of the U.S. Government in Iraq or Afghanistan, and Certain Afghan Nationals Employed by the International Security Assistance Force or a Successor Mission.

[^ 15] See 9 FAM 502.5-12(B).

[^ 16] See Section 1244(b)(3) of NDAA 2008, Pub. L. 110-181 (PDF), 122 Stat. 3, 397 (January 28, 2008).

[^ 17] As amended by Section 568(d) of the DHS Appropriation Act, 2010, Pub. L. 111-83 (PDF), 123 Stat. 2142, 2187 (October 28, 2009).

[^ 18] Filed under INA 203(b).

Chapter 9 - Certain Afghan Nationals

Section 602(b) of the Afghan Allies Protection Act of 2009 (AAPA),[1] created a new special immigrant category for Afghan nationals who worked for or on behalf of the U.S. government in Afghanistan. The President signed the AAPA into law on March 11, 2009.

A. Number of Visas

The AAPA for Afghans who worked for or on behalf of the U.S. government initially provided for a limit of 1,500 immigrant visas for principal aliens for each fiscal year from 2009 through 2013. However, for each fiscal year from 2010 through 2013, the total number was increased by the difference between 1,500 and the number of visas actually used during the immediately prior fiscal year. For example, if the numerical limitation for fiscal year 2013 is not reached, any unused numbers from that year may be used in fiscal year 2014.

Subsequently, the program has been extended multiple times and additional visas have been added.[2]

B. Filing

Effective July 20, 2022, USCIS transitioned to the U.S. Department of State (DOS) the responsibility to adjudicate special immigrant petitions filed by Afghan citizens or nationals who were employed by or on behalf of the U.S. government or the International Security Assistance Force (ISAF) in Afghanistan. Afghan citizens or nationals seeking special immigrant classification on the basis of such employment who apply on or after July 20, 2022, must file the Petition for Special Immigrant Classification for Afghan SIV Applicants (Form DS-157)[3] with DOS when applying for Chief of Mission (COM) approval.[4]

Certain Afghan citizens or nationals who already started the special immigrant visa application process and received COM approval as of July 20, 2022 must still file a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) with USCIS on their own behalf. In most cases, if the COM approval letter states that the signed Form DS-157 submitted with the application for COM approval by the principal applicant is approved as a petition and the principal applicant is classified as a special immigrant under INA 203(b)(4), the applicant need not file Form I-360.[5]

On or after July 20, 2022, Afghan citizens or nationals only file a Form I-360 with USCIS, according to the form instructions,[6] in the following circumstances:

- The Afghan citizen or national resides in the United States and received Chief of Mission (COM) approval from DOS before July 20, 2022;
- The Afghan citizen or national resides in the United States and received COM approval from DOS, but the Form DS-157 previously filed with DOS when the Afghan applied for COM approval was not signed; or
- The Afghan citizen or national resides inside or outside the United States and received COM approval from DOS but did not file a supplemental Form DS-157 when the Afghan applied for COM approval.

C. Eligibility

To obtain approval of a petition for special immigrant status under the AAPA, the petitioner must establish that the petitioner is a citizen or national of Afghanistan who was or is employed in Afghanistan:[7]

- By or on behalf of the U.S. government; or
- By the ISAF (or any successor name for the ISAF) while:
  - Traveling off-base with U.S. military personnel stationed at the ISAF (or any successor name for the ISAF), to serve as an interpreter or translator for such U.S. military personnel; or
  - To perform activities for the U.S. military personnel stationed at the ISAF (or any successor name for the ISAF); and
- Was employed on or after October 7, 2001, and before the date established by the most recent program extension,[8] for a period of not less than 1 year;[9]
- Provided faithful and valuable service to the U.S. government, as documented in a positive recommendation or evaluation by the petitioner's employer;
- Has experienced or is experiencing an ongoing serious threat as a consequence of the petitioner's employment by the U.S. government;
- Has cleared a background check and appropriate screening as determined by the Secretary of Homeland Security; and
- Is otherwise eligible to receive an immigrant visa and is otherwise admissible to the United States for permanent residence.[10]

D. Documentation and Evidence

The petitioner must submit the following evidence along with a completed Form I-360:

- A copy of the petitioner's passport, birth certificate, or national identification card showing that the petitioner is a citizen or national of Afghanistan, along with a certified English translation, if the document is in a foreign language;
- A positive recommendation from:
  - The U.S. citizen or national who is the petitioner's senior supervisor;
  - The U.S. citizen or national who occupies the supervisor's position; or
  - The U.S. citizen or national who is more senior if the senior supervisor has left the employer or has left Afghanistan, confirming employment of not less than 1 year beginning on or after October 7, 2001, if it is not possible to obtain a recommendation from a supervisor who is a U.S. citizen or national;[11]
- Proof of COM approval based on an independent review of this recommendation conducted by the COM or the COM's designee of records maintained by the U.S. government or hiring organization or entity, to confirm employment and faithful and valuable service to the U.S. government;
- Proof of risk assessment conducted by the COM, or the COM's designee, establishing that the petitioner has experienced or is experiencing an ongoing serious threat as a consequence of employment by the U.S. government;[12] and
- If the petition is filed by a petitioner in the United States, a copy of the front and back of the petitioner's Arrival/Departure Record (Form I-94).

E. Derivative Beneficiaries

The spouse and unmarried child(ren) younger than 21 years old accompanying or following to join a principal immigrant may be accorded the same special immigrant classification as the principal immigrant. Visas issued to derivative spouses and children do not count toward the numerical limitations on special immigrant visas for principal immigrants.

Deceased Principal Alien (No Pending or Approved Petition)

Family members of the principal immigrant may still be eligible for special immigrant classification even if the principal immigrant dies.

A surviving spouse and children continue to remain eligible for special immigrant classification if the principal alien had:

- Submitted a COM application[13] that included the surviving relative(s) as an accompanying spouse or child; and
- The COM or COM designee revoked or terminated (or otherwise rendered invalid) such application due to the death of the principal alien. If not for the death of the principal alien, the COM or COM designee would have approved such application.

In this case, as long as the deceased principal alien met the employment requirements for classification as a special immigrant[14] as of the date the principal alien filed the COM application for the first time, the COM or COM designee may continue to process the application.[15]

Even if the principal alien had not filed a COM application as described above on or after July 20, 2022, the surviving spouse and children may still be eligible for special immigrant classification by filing a COM application and Form DS-157 with DOS if the employment requirements were met as of the date of the principal alien's death.[16]

If the surviving spouse or children is required to file the Form I-360 after receiving COM approval,[17] they must submit evidence of the qualifying relationship[18] with the deceased principal alien and that such relationship existed at the time of the principal alien's death.

Deceased Principal Alien (Pending or Approved Petition)

Where the principal alien had a pending or an approved Form I-360 or an approved Form DS-157 the eligibility of the surviving spouse and children is also affected by INA 204(l),[19] since the surviving spouse and children are derivative beneficiaries of an employment-based immigrant visa petition.[20] In light of the interrelationship between Section 602(b)(2)(C) of the AAPA and INA 204(l):

- USCIS may approve a pending immigrant visa petition under Section 602(b)filed on a Form I-360, despite the death of the principal alien while the petition is pending; or
- After the death of the principal immigrant, USCIS may favorably exercise discretion to reinstate the approval of a visa petition under Section 602(b).

Footnotes

[^ 1] See Title VI of Pub. L. 111-8 (PDF), 123 Stat. 524, 807 (March 11, 2009).

[^ 2] For current program extensions and visa number information, see the Green Card for an Afghan Who Was Employed by or on Behalf of the U.S. Government webpage or the U.S. Department of State's (DOS) Special Immigrant Visas for Afghans – Who Were Employed by/on Behalf of the U.S. Government webpage. DOS updates its webpage periodically, but the webpage may not reflect the latest updates.

[^ 3] Before July 20, 2022, the Form DS-157 was formerly known as the Supplement SIV Chief of Mission Application that was filed at the same time as the application for COM approval. For certain Afghan citizens or nationals who properly filed and signed a prior version of the Form DS-157, DOS may deem these previously filed forms as satisfying the petition requirement for classification as a special immigrant under INA 203(b)(4), as provided under Section 602(b)(1)(A) of the Afghan Allies Protection Act of 2009, Title VI of Pub. L. 111-8 (PDF), 123 Stat. 524, 807 (March 11, 2009). For more information, see instructions on the DOS website on Special Immigrant Visas for Afghans – Who Were Employed by/on Behalf of the U.S. Government.

[^ 4] For more information, see DOS's Special Immigrant Visas for Afghans – Who Were Employed by/on Behalf of the U.S. Government webpage. This guidance only addresses USCIS processing and adjudication of the Form I-360.

[^ 5] Some applicants outside the United States, who have not yet filed the Form I-360 may still be determined as having an approved Form DS-157 by DOS. For more information, see instructions on the DOS website on Special Immigrant Visas for Afghans-Who Were Employed by/on Behalf of the U.S. Government.

[^ 6] Current information about filing locations, and other information about how to file can be found at the Form I-360 website.

[^ 7] The surviving spouse and unmarried children under the age of 21 of a deceased principal alien may be classified as special immigrants. See Section E, Derivative Beneficiaries [6 USCIS-PM H.9(E)].

[^ 8] For current program extensions and visa number information, see the Green Card for an Afghan Who Was Employed by or on Behalf of the U.S. Government webpage or DOS's Special Immigrant Visas for Afghans – Who Were Employed by/on Behalf of the U.S. Government webpage. DOS updates its webpage periodically, but the webpage may not reflect the latest updates.

[^ 9] The National Defense Authorization Act for Fiscal Year 2020 amended the definition of "principal alien" to be employed "by, or on behalf of, the United States Government[.]" See Section 1219(a) of Pub. L. 116-92 (PDF), 133 Stat. 1198, 1636 (December 20, 2019). Section 401 of the Emergency Security Supplemental Appropriations Act, 2021, Pub. L. 117-31 (PDF), 135 Stat. 309, 315 (July 30, 2021) amended the employment requirement for applicants employed by the ISAF (or any successor name for the ISAF) from 2 years to not less than 12 months.

[^ 10] In the determination of such admissibility, the grounds for inadmissibility specified in INA 212(a)(4) relating to "public charge" do not apply.

[^ 11] Under DOS policy, the COM may also accept recommendations from a non-U.S. citizen supervisor if the U.S. citizen or national supervisor is not available to provide a recommendation. See 9 FAM 502.5-12(B), Certain Iraqi and Afghan Nationals Employed by or on Behalf of the U.S. Government in Iraq or Afghanistan, and Certain Afghan Nationals Employed by the International Security Assistance Force or a Successor Mission.

[^ 12] Under DOS policy, Afghan special immigrant visa (SIV) applicants are inherently under threat (regardless of whether their employment has ended or if they have relocated). Therefore, holding qualifying service in Afghanistan is enough to satisfy the ongoing serious threat requirement. See 9 FAM 502.5-12(B), Certain Iraqi and Afghan Nationals Employed by or on Behalf of the U.S. Government in Iraq or Afghanistan, and Certain Afghan Nationals Employed by the International Security Assistance Force or a Successor Mission.

[^ 13] Section 403 of the Emergency Security Supplemental Appropriations Act of 2021, Pub. L. 117-31 (PDF), 135 Stat. 309, 318 (July 30, 2021) removed the requirement that, at the time of the principal alien's death, the deceased principal alien have a petition for special immigrant classification approved, in order for the surviving spouse and children of the principal alien to remain eligible to apply to obtain special immigrant classification. Instead, as of July 30, 2021, the principal alien is only required to have, at the time of the principal alien's death, submitted an application for COM approval under Section 602(b) of the Afghan Allies Protection Act of 2009, Title VI of Pub. L. 111-8 (PDF), 123 Stat. 524, 807 (March 11, 2009), or Section 1059 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109–163 (PDF), 119 Stat. 3136, 3443 (January 6, 2006) that included the alien as an accompanying spouse or child. Alternatively, the surviving spouse and children may submit a new application for COM approval if the principal alien completed the employment requirements at the time of the alien's death.

[^ 14] See Section 602(b) of the Afghan Allies Protection Act of 2009, Pub. L. 111-8 (PDF), 123 Stat. 524, 807 (March 11, 2009), as amended by the Emergency Security Supplemental Appropriations Act, 2021, Pub. L. 117-31 (PDF), 135 Stat. 309, 315, 318 (July 30, 2021).

[^ 15] See 9 FAM 502.5-12(B), Certain Iraqi and Afghan Nationals Employed by or on Behalf of the U.S. Government in Iraq or Afghanistan, and Certain Afghan Nationals Employed by the International Security Assistance Force or a Successor Mission.

[^ 16] See 9 FAM 502.5-12(B).

[^ 17] See Section B, Filing [6 USCIS-PM H.9(B)]

[^ 18] Evidence to support the relationship between the surviving spouse or child(ren) and the deceased principal alien includes primary evidence, such as marriage certificates (Nekah Khat), birth certificates, or tazkera (Afghan national identify document). If such primary evidence does not exist or is otherwise unavailable, the surviving spouse or child(ren) should explain the reasons for unavailability and submit secondary evidence of the qualifying relationship, such as school records or records of religious or medical records. If such secondary evidence is also not available, they may submit written testimony from a witness or witnesses with personal knowledge of the relevant facts. See 8 CFR 103.2(b)(2)(i). A full list of acceptable evidence to establish births, deaths, marriages, and divorces is on the Department of State Reciprocity and Civil Documents by Country for Afghanistan webpage.

[^ 19] As amended by Section 568(d) of the DHS Appropriations Act, 2010, Pub. L. 111-83 (PDF), 123 Stat. 2142, 2187 (October 28, 2009).

[^ 20] Filed under INA 203(b).

Chapter 10 - Certain Iraqi and Afghan Translators and Interpreters

A. Number of Visas

Section 1059 of the National Defense Authorization Act for Fiscal Year 2006 (NDAA 2006), entitled “Special Immigrant Status for Persons Serving as Translators with United States Armed Forces,” authorized the issuance of up to 50 special immigrant visas per fiscal year to Iraqi and Afghan translators and interpreters working for the U.S. government.[1] Congress increased the total number of special immigrant visas issued under the interpreter and translator program to a total of 500 principal applicants per year for Fiscal Years 2007 and 2008 only.[2]

B. Filing

Iraqi and Afghan nationals who worked directly with the U.S. armed forces or under Chief of Mission (COM) authority at the U.S. Embassy Baghdad or U.S. Embassy Kabul as translators or interpreters may file a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) on their own behalf. The petitioner must file Form I-360 according to the form instructions.[3]

C. Eligibility

To obtain approval of a petition for special immigrant status as an Iraqi or Afghan translator or interpreter under the NDAA 2006, the petitioner must establish that he or she:

- Is a national of Iraq or Afghanistan;
- Worked directly as a translator or interpreter with the U.S. armed forces, or under COM authority, for a period of at least 12 months;
- Has obtained a favorable written recommendation from the COM or a general or flag officer in the chain of command of the U.S. armed forces unit supported by the translator or interpreter;
- Has cleared a background check and appropriate screening as determined by the COM or a general or flag officer in the chain of command of the U.S. armed forces unit supported by the translator or interpreter; and
- Is otherwise eligible to receive an immigrant visa and is otherwise admissible to the United States for permanent residence.[4]

D. Automatic Conversion for Approved Translators and Interpreters

A petitioner with an approved petition for special immigrant status as an Afghan or Iraqi translator or interpreter under Section 1059 of NDAA 2006, for whom a visa under such section is not immediately available, is eligible for conversion of the approved petition to that of an Iraqi or Afghan employed by or on behalf of the U.S. government under Section 1244 of the National Defense Authorization Act for Fiscal Year 2008.[5] USCIS may complete such conversions until the numerical limitation specified under Section 1244 is reached.[6]

Despite the fact that approvals are counted against available Section 1244 visa numbers,[7] eligibility is still determined under Section 1059 rather than under the different eligibility requirements of Section 1244.[8]

E. Documentation and Evidence

The petitioner must submit the following evidence along with a completed Form I-360:

- A copy of the petitioner’s passport or nationality or birth certificate showing that the petitioner is a national of Iraq or Afghanistan, along with a certified English translation, if the document is in a foreign language;
- Proof, issued by the U.S. armed forces or the COM, of working as a translator or interpreter for at least 12 months;
- Proof of background check and screening by the U.S. armed forces or the COM;
- A letter of recommendation from the COM, or a general or flag officer in the chain of command of the U.S. armed forces unit supported by the translator or interpreter; and
- If the petition is filed by a petitioner in the United States, a copy of the front and back of the petitioner’s Arrival/Departure Record (Form I-94).

F. Derivative Beneficiaries

The spouse and unmarried child(ren) younger than 21 years old accompanying or following to join a principal immigrant may be accorded the same special immigrant classification as the principal immigrant. Visas issued to derivative spouses and children do not count toward the numerical limitations on special immigrant visas for principal immigrants.

Deceased Principal Alien (No Pending or Approved Form I-360)

Family members of the principal immigrant may still be eligible for special immigrant classification even if the principal immigrant dies.

A surviving spouse and children may be eligible for special immigrant classification[9] if the deceased principal alien had met the employment requirements as of the date of the principal alien's death.

The surviving spouse or children must submit Form I-360 establishing that the deceased principal alien met the special immigrant eligibility requirements.[10]

When submitting the Form I-360, a surviving spouse or child must submit evidence of the qualifying relationship with the deceased principal alien and that such relationship existed at the time of the principal alien’s death.

Deceased Principal Alien (Pending or Approved Form I-360)

Where the principal alien had a pending or an approved Form I-360 petition, the eligibility of the surviving spouse and children is also affected by INA 204(l),[11] since the surviving spouse and children are derivative beneficiaries of an employment-based immigrant visa petition.[12] In light of the interrelationship between Section 1059 of NDAA 2006 and INA 204(l):

- USCIS may approve a pending visa petition under Section 1059 of NDAA 2006 despite the death of the principal alien while the petition is pending; or
- After the death of the principal alien, USCIS may favorably exercise discretion to reinstate the approval of a visa petition under Section 1059 of NDAA 2006.

Footnotes

[^ 1] See Section 1059 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-163 (PDF), 119 Stat. 3136, 3443 (January 6, 2006).

[^ 2] See Pub. L. 110-36 (PDF) (June 15, 2007).

[^ 3] For current information about filing locations, fees, and other information about how to file, see uscis.gov/i-360. See Fee Schedule (Form G-1055).

[^ 4] In the determination of such admissibility, the grounds for inadmissibility specified in INA 212(a)(4) relating to “public charge” do not apply.

[^ 5] See Pub. L. 110-181 (PDF), 122 Stat. 3, 396 (January 28, 2008), as amended by Section 2 of Pub. L. 110-242 (PDF), 122 Stat. 1567, 1567 (June 3, 2008).

[^ 6] See Section 1059 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-163 (PDF), 119 Stat. 3136, 3443 (January 6, 2006). See Pub. L. 110-242 (PDF) (June 3, 2008), as amended by Section 404 of the Emergency Security Supplemental Appropriations Act of 2021, Pub. L. 117-31 (PDF), 135 Stat. 309, 319 (July 30, 2021).

[^ 7] As provided under Section 602(b)(9) of the Afghan Allies Protection Act of 2009, Title VI of Pub. L. 111-8 (PDF), 123 Stat. 524, 809 (March 11, 2009).

[^ 8] See Section 1059 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-163 (PDF), 119 Stat. 3136, 3443 (January 6, 2006). See Pub. L. 110-242 (PDF) (June 3, 2008), as amended by Section 404 of the Emergency Security Supplemental Appropriations Act of 2021, Pub. L. 117-31 (PDF), 135 Stat. 309, 319 (July 30, 2021).

[^ 9] Under Section 403 of the Emergency Security Supplemental Appropriations Act of 2021, Pub. L. 117-31 (PDF), 135 Stat. 309, 318 (July 30, 2021), a surviving spouse and children of a deceased alien who submitted an application for COM approval under Section 1059 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109–163 (PDF), 119 Stat. 3136, 3443 (January 6, 2006) may be eligible for special immigrant status under Section 1244 of Pub. L. 110-181 (PDF), 122 Stat. 3, 396 (January 28, 2008) or Section 602(b) of the Afghan Allies Protection Act of 2009, Pub. L. 111-8 (PDF), 123 Stat. 524, 807 (March 11, 2009).

[^ 10] See Section 1059 of the NDAA for Fiscal Year 2006, Pub. L. 109-163 (PDF), 119 Stat. 3136, 3443 (January 6, 2006).

[^ 11] As amended by Section 568(d) of the DHS Appropriation Act of 2010, Pub. L. 111-83 (PDF), 123 Stat. 2142, 2187 (October 28, 2009).

[^ 12] Filed under INA 203(b).

Chapter 11 - Decision and Post-Adjudication

During adjudication, USCIS may issue a Request for Evidence or Notice of Intent to Deny. USCIS considers any evidence timely submitted in accordance with the notice’s instructions prior to issuing a decision.

A. Approval

If the person meets the eligibility requirements set forth above, the officer approves the petition under the correct classification and USCIS notifies the petitioner of the approval.

B. Denial

If the petitioner fails to establish eligibility for the benefit sought, the officer denies the petition. If the petition is denied, USCIS informs the petitioner of the reasons for denial. The decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider.

C. Motions and Appeals

The petitioner may appeal the denial to the Administrative Appeals Office (AAO) or may file a motion to reopen or reconsider by filing a Notice of Appeal or Motion (Form I-290B).[1]

D. Validity of Approved Petitions

An approved petition is valid indefinitely, unless the approval is revoked under INA 203(g) or INA 205.[2]

E. Adjustment of Status

Adjustment of status based on classification as a special immigrant is addressed separately in this Policy Manual.[3]

Footnotes

[^ 1] Current information about filing locations, fees, and other information about how to file a motion or appeal can be found at uscis.gov/i-290b.

[^ 2] See 8 CFR 204.5(n)(3).

[^ 3] See Volume 7, Adjustment of Status, Part F, Special Immigrant-Based Adjustment [7 USCIS-PM F].

Part I - Family-Based Conditional Permanent Residents

Chapter 1 - Purpose and Background

A. Purpose

An alien who is admitted to the United States as a permanent resident, or who adjusts status to permanent residence, based on a qualifying marriage less than 2 years old is required to meet certain conditions after the alien's admission or adjustment of status.[1] This alien, known as a conditional permanent resident (CPR), receives permanent resident status on a conditional basis for 2 years. A CPR's child may also obtain CPR status.[2]

This part of the Policy Manual only discusses family-based CPRs.[3]

B. Background

Before 1986, the law did not place conditions on an alien who obtained permanent resident status through a qualifying marriage less than 2 years old. Instead, the alien immediately received lawful permanent resident status without conditions. However, Congress believed that a significant number of aliens might have entered into these marriages to evade the U.S. immigration laws.[4]

Therefore, Congress enacted the Immigration Marriage Fraud Amendments of 1986 (IMFA) to discourage the use of fraudulent marriages to obtain permanent residence in the United States.[5] Congress created conditions and a second review of the bona fides of the marriage to ensure that the alien entered into the marriage in good faith and not for the sole purpose of obtaining an immigration benefit.

C. Legal Authorities

- INA 216; 8 CFR 216.1-5 – Conditional permanent resident status for certain alien spouses and sons and daughters
- The Immigration Marriage Fraud Amendments of 1986[6]
- Section 384 of the Illegal Immigration Reform and Immigrant Responsibility Act – Penalties for disclosure of information[7]

Footnotes

[^ 1] See INA 216(h)(1). See 8 CFR 216.1.

[^ 2] See INA 101(b)(1), INA 201(f), INA 203(h), and INA 216(h)(2).

[^ 3] For more information on conditional residence for certain immigrant investors, see Part G, Investors, Chapter 7, Removal of Conditions [6 USCIS-PM G.7].

[^ 4] See H.R. Rep. 99-906, 1986 U.S.C.C.A.N. 5978 ("Surveys conducted by the Immigration and Naturalization Service have revealed that approximately 30 percent of all petitions for immigrant visas involve suspect martial relationships.").

[^ 5] See IMFA, Pub. L. 99-639 (PDF), 100 Stat. 3537 (November 10, 1986).

[^ 6] See IMFA, Pub. L. 99-639 (PDF), 100 Stat. 3537 (November 10, 1986).

[^ 7] See Omnibus Consolidated Appropriations Act of 1997, Pub. L. 104-208 (PDF), 110 Stat. 3009, 3009-652 (September 30, 1996).

Chapter 2 - Terms and Conditions of CPR Status

A. Conditional Permanent Residents Required to Remove Conditions on Residence

USCIS grants permanent residence on a conditional basis for 2 years to an alien who obtains permanent residence through a qualifying marriage to a U.S. citizen or lawful permanent resident (LPR).[1] A marriage is considered a qualifying marriage if the marriage was entered into less than 2 years before the date the alien obtains permanent residence.[2] These aliens are considered conditional permanent residents (CPRs). A CPR may be a spouse or child.

The petition that provides the basis for obtaining CPR status is a Petition for Alien Relative (Form I-130) or a Petition for Alien Fiancé(e) (Form I-129F).[3]

In order to avoid termination of status after 2 years, CPRs must seek to remove the conditions on permanent residence by filing a Petition to Remove Conditions on Residence (Form I-751). The statute requires the CPR and the petitioning spouse (if not deceased) to jointly file a Form I-751.[4] However, the statute also provides the ability to request a waiver, which allows the CPR to file a Form I-751 without the petitioning spouse in certain circumstances.[5]

1. Notification

USCIS notifies a CPR about the obligations associated with being a CPR,[6] either verbally or in writing. Specifically, USCIS notifies the CPR of the following:

- The conditional basis of the CPR's permanent resident status;
- The mandatory requirement to file a Form I-751 within the 90-day period immediately preceding the second anniversary of the CPR obtaining permanent resident status; and
- The result of the failure to file a Form I-751 being an automatic termination of the CPR's permanent resident status in the United States.[7]

Initial Notification

The initial notification to the CPR is provided either verbally or in writing by a:

- U.S. Customs and Border Protection (CBP) officer who inspects and admits the alien with an immigrant visa at the point of entry into the United States; or
- USCIS officer who adjudicates and approves the Application to Register Permanent Residence or Adjust Status (Form I-485).[8]

Subsequent Notification

USCIS issues a second notification to the CPR and petitioning spouse or stepparent[9] by mail approximately 90 days before the CPR's second anniversary of becoming a CPR. The notice reminds the CPR of the requirement to file a Form I-751.[10]

Effect of Failure to Provide Notification

USCIS' failure to provide notice to the CPR does not excuse the CPR from the obligation of timely filing the Form I-751.[11] Such failure may occur if, for example, the CPR fails to notify USCIS of an address change as USCIS mails the notification to the CPR's last known address.[12]

2. Dependent Children

Children Subject to INA 216 Conditions

Generally, both alien spouses and children are granted CPR status if their adjustment or admission is based on a qualifying marriage that is less than 2 years old at the time of adjustment or admission. If the child is admitted or adjusted at the same time as the CPR parent, the child is also granted CPR status.

Children Not Subject to INA 216 Conditions

There are certain circumstances under which children are not subject to the conditions at Immigration and Nationality Act (INA) 216.

If a child is admitted or adjusted on the basis of the child's alien parent's marriage to a U.S. citizen spouse and the marriage is less than 2 years old, the child should be admitted as an LPR, rather than a CPR, if the alien parent was admitted or adjusted on a basis other than marriage to the U.S. citizen spouse (employment, for example).[13]

In other words, if the alien parent obtained status through means other than marriage to the U.S. citizen or LPR spouse, the child should be admitted or adjusted as an LPR without conditions, even if the marriage between the U.S. citizen petitioner and alien parent is less than 2 years old.

Officers may encounter cases where a child was misclassified as a CPR. This generally occurs due to the inspecting or adjudicating officer's failure to realize that the child should not be subject to conditions at INA 216. Officers who encounter a Form I-751 filed by a child who was misclassified as a CPR should process the case according to local procedures for misclassified CPRs.[14]

Children Who May Be Included on Their Parent's Petition

A CPR child may be included on the parent's Form I-751 if the CPR child obtained CPR status on the same day as the CPR parent, or within 90 days thereafter.[15]

Children Who Must File a Separate Petition

A CPR child who is unable to be included in the parent's Form I-751 must file a separate Form I-751. Some examples of a CPR child needing to file a separate Form I-751 include but are not limited to:

- The child obtained CPR status more than 90 days after the CPR parent;
- The child's CPR parent died before filing Form I-751; or
- Any other circumstances preventing the child from being included in the Form I-751 of the parent or stepparent.[16]

CPR children who must file a separate Form I-751 may do so at any time, even before the 90-day period preceding the second anniversary of obtaining CPR status, as long as the child is not subject to a final order of removal.

B. Permanent Residents Not Classified as CPRs and Misclassified CPRs

1. Permanent Residents Not Classified as CPRs

The following permanent residents are not classified as CPRs and therefore are not subject to or required to remove conditions on residence:

- An alien spouse who obtains permanent residence through a marriage that is more than 2 years old at the time of admission or adjustment;
- An alien who obtains permanent residence on a basis other than marriage;[17] and
- An alien who, regardless of whether the alien's marriage to the principal beneficiary is less than 2 years old, obtains permanent residence as an accompanying or following to join dependent of an alien who obtains permanent residence under any provision of the INA, or any other law, that allows dependents to accompany or follow to join a principal beneficiary. Examples include but are not limited to:
  - Special immigrant classification;
  - Refugee or asylee classification;
  - Employment-based classification;
  - Diversity immigrant visa-based classification; and
  - Family-based preference classification, other than family-based second preference.[18]

2. Misclassified CPRs

Alien spouses or children who believe they were misclassified as CPRs because the marriage took place 2 or more years before they obtained conditional permanent residence or who otherwise believe they are not subject to conditions imposed by INA 216[19] should file an Application to Replace Permanent Resident Card (Form I-90) according to the form instructions.[20]

Officers may encounter cases where the CPR was misclassified when the CPR entered the United States or adjusted status. This generally occurs due to the inspecting or adjudicating officer's failure to notice that at least 2 years had passed since the marriage providing the basis for status occurred, at the time the alien was admitted to the United States as a permanent resident or adjusted to permanent resident status.

Officers who encounter a Form I-751 filed by an alien who was admitted or adjusted on the basis of a marriage less than 2 years old at the time of admission (as a CR1, CR6, C21, C26, CR2, CR7, C23, or C28), but should have been admitted or adjusted on the basis of a marriage that was more than 2 years old at the time of admission (as an IR1, IR6, F21, F26, IR2, IR7, F22, or F27), should update the alien's class of admission code accordingly.

The misclassification of the alien does not render the alien's admission or adjustment unlawful, and the alien remains eligible for naturalization, if otherwise qualified, even if a Form I-751 is not filed or approved.[21]

C. Evidence of CPR Status

In general, a CPR remains in lawful status until USCIS makes a decision on the CPR's Form I-751, so long as the Form I-751 was properly filed.[22] When a CPR properly files Form I-751, USCIS sends the CPR a receipt notice (Notice of Action (Form I-797)). This notice serves as evidence of USCIS' extension of the validity of CPR status for the time period specified in the notice. The notice, combined with the expiring or expired CPR card, serves as evidence of CPR status and may be used to prove employment authorization and authorization to return to the United States after temporary foreign travel.[23]

A CPR whose CPR card has expired and whose extension notice period has also expired, or a CPR who demonstrates a need for evidence of a longer extension than remains, may request documentation of status for travel, employment, or other purposes by calling the USCIS Contact Center to schedule an appointment with a USCIS field office. The USCIS field office may issue an Alien Documentation, Identification and Telecommunication (ADIT) stamp (also known as an I-551 stamp) to serve as temporary evidence of status at an in-person appointment or may issue an ADIT stamp through the mail. An officer may only place an ADIT stamp on a Arrival/Departure Record (Form I-94) (with photo) or unexpired passport.

D. Termination of Status

USCIS may terminate a CPR's status for different reasons depending on whether it is before or after the 2-year anniversary of the CPR obtaining CPR status.[24]

1. Before 2-year Anniversary as CPR

In general, if USCIS determines before the 2-year anniversary of the CPR obtaining CPR status that the marriage was improper,[25] USCIS notifies the CPR and the petitioning spouse and terminates the CPR's permanent resident status.[26]

USCIS considers the qualifying marriage to be improper if:

- The marriage was not entered into in accordance with the laws of the place where the marriage took place;[27]
- The marriage has been judicially annulled or terminated other than through the death of a spouse;[28]
- The marriage was entered into for the purpose of procuring the CPR's admission as an immigrant;[29] or
- The CPR or someone else gave a fee or other consideration for filing a petition for an immigrant visa with respect to the CPR or the CPR's son or daughter.[30]

2. After 2-year Anniversary as CPR

USCIS terminates a CPR's status after the 2-year anniversary of the CPR obtaining CPR status if:

- The CPR fails to properly file a Form I-751;[31]
- The CPR and petitioning spouse, if required, fail to appear at their interview;[32] or
- USCIS denies the Form I-751.[33]

Failure to File

If the CPR fails to file a Form I-751 by the second anniversary of the date the CPR obtained status, USCIS issues a notice of termination to the CPR. The termination of CPR status takes effect as of the second anniversary of the date the CPR obtained status. USCIS is required to issue a Notice to Appear (NTA), placing the CPR in removal proceedings.[34] Following the NTA, the CPR may request a review of the termination in removal proceedings.[35]

Petition Denied

When USCIS denies a Form I-751 filed as a joint petition, USCIS terminates the CPR's permanent resident status and provides the principal CPR with notification of the denial and termination of status.[36] The CPR must surrender any permanent resident cards to USCIS and USCIS is also required by statute to issue an NTA, placing the CPR in removal proceedings.[37] When USCIS denies a Form I-751 filed as a waiver or individual filing request, USCIS follows the same procedures.[38]

Following the denial of a Form I-751, the termination of permanent resident status takes effect as of the date of the denial, which is the written notice of termination. USCIS concurrently terminates CPR status for children included in the parent's petition and any inadmissibility waivers the CPR may have received to obtain CPR status.[39] Following the NTA, the CPR may request a review of the denial determination in removal proceedings.[40]

3. Temporary Evidence of Permanent Residence

A CPR with a terminated status is entitled to evidence of lawful permanent residence while awaiting review before an immigration judge.[41] When requested, USCIS issues evidence of such status unless the CPR has received a final order of removal.

4. Proceedings Upon Termination of CPR Status

The regulations require DHS to initiate removal proceedings following the termination of CPR status.[42] The charges alleged depend on the specific circumstances of the case. USCIS may base the charges solely on the termination of CPR status or may include other bases of removability.[43]

5. Adjustment After Termination of CPR Status

In general, CPRs are ineligible to adjust status on a new basis under the provisions of INA 245(a).[44] Instead, CPRs must generally comply with the requirements of INA 216 to remove the conditions on their LPR status. This bar to adjustment, however, only applies to an alien in the United States in lawful CPR status. In *Matter of Stockwell*,[45] the Board of Immigration Appeals adopted a narrow interpretation of the regulation implementing this adjustment bar,[46] stating that the bar no longer applies if USCIS terminates the alien's CPR status.[47]

For an alien whose CPR status was terminated for failure to timely file a Form I-751,[48] the alien may be eligible to adjust status on a new basis, if the alien filed an Application to Form I-485 after the second anniversary of initially obtaining CPR status, regardless of whether or not USCIS issued a notice of termination of CPR status before the alien filed an adjustment application under the new basis. Officers should verify, in USCIS systems, that the alien's CPR status is terminated before approving a new adjustment application.

Even though the regulations require that an applicant be eligible for the requested benefit at the time of filing, the INA provides that the CPR's status terminates as a matter of law as of the second anniversary of the alien's lawful admission for permanent residence.[49] The lack of notice in this instance generally does not create any undue harm to the person because the person is relying on the fact that the status has been terminated to be eligible for the benefit sought.

Footnotes

[^ 1] See INA 216(a)(1) and INA 216(h)(1).

[^ 2] See INA 216(h)(1).

[^ 3] An alien whose basis for adjustment is a Form I-129F and whose qualifying marriage is less than 2 years old at the time of adjustment receives CPR status.

[^ 4] See INA 216(c)(1)(A). A jointly-filed Form I-751 is often referred to as a joint petition. If the petitioning spouse is deceased, the CPR may file Form I-751 as an individual filing request.

[^ 5] See INA 216(c)(4). See Chapter 5, Waiver of Joint Filing Requirement [6 USCIS-PM I.5].

[^ 6] See INA 216(a)(2). See 8 CFR 216.2.

[^ 7] See 8 CFR 216.4(a)(6).

[^ 8] See INA 216(a)(2)(A). See 8 CFR 216.2(a).

[^ 9] See INA 101(b)(1)(B). To be eligible as the stepchild of a U.S. citizen or LPR for immigration purposes, the marriage between the CPR spouse and the U.S. citizen or LPR spouse must have taken place before the child turns 18.

[^ 10] See INA 216(a)(2)(B). See 8 CFR 216.2(b).

[^ 11] See INA 216(a)(2)(C). See 8 CFR 216.2(c).

[^ 12] See INA 216(a)(2)(B). See 8 CFR 216.2(b).

[^ 13] See Legacy INS General Counsel Opinion 90-3 (concluding that a stepchild adjusting as an immediate relative of a U.S. citizen was not subject to the INA 216 conditions since the alien parent adjusted on some basis other than the recent marriage to the U.S. citizen).

[^ 14] For additional information about misclassified CPRs, see Volume 12, Citizenship and Naturalization, Part D, General Naturalization Requirements, Chapter 2, Lawful Permanent Resident Admission for Naturalization, Section A, Lawful Permanent Resident at Time of Filing and Naturalization, Subsection 2, Conditional Permanent Residents [12 USCIS-PM D.2(A)(2)].

[^ 15] See 8 CFR 216.4(a)(2).

[^ 16] See 8 CFR 216.4(a)(2).

[^ 17] For example, an alien who adjusts status through an employment-based petition, even if the alien is married to a U.S. citizen at the time and the marriage is less than 2 years old.

[^ 18] Family-based second preference principal applicants and derivative applicants who are seeking LPR status based on a marriage to an LPR petitioner that is less than 2 years old at the time the alien is admitted or adjusted are classified as CPRs and required to remove conditions. See INA 216(h)(1)(C) and INA 203(d) (derivative applicants).

[^ 19] Certain children are not subject to the conditions imposed by INA 216. See Section A, Conditional Permanent Residents Required to Remove Conditions on Residence, Subsection 2, Dependent Children [6 USCIS-PM I.2(A)(2)].

[^ 20] CPRs who believe they were misclassified do not need to pay the filing fee and should follow the form instructions and special instructions on the USCIS webpage for Form I-90. See Fee Schedule (Form G-1055).

[^ 21] For more information on misclassification of CPRs and eligibility for naturalization, see Volume 12, Citizenship and Naturalization, Part D, General Naturalization Requirements, Chapter 2, Lawful Permanent Resident Admission for Naturalization, Section A, Lawful Permanent Resident at Time of Filing and Naturalization, Subsection 2, Conditional Permanent Residents [12 USCIS-PM D.2(A)(2)].

[^ 22] See 8 CFR 216.4(a)(1).

[^ 23] For more information on travel documents for CPRs, see CBP's Carrier Information Guide.

[^ 24] See INA 216(b) and INA 216(c). See 8 CFR 216.3(a) and 8 CFR 216.4(d)(2).

[^ 25] See INA 216(b)(1)(A)(ii).

[^ 26] See INA 216(b)(1).

[^ 27] See INA 216(d)(1)(A)(i)(I).

[^ 28] See INA 216(d)(1)(A)(i)(II). A CPR may seek a waiver if the CPR entered into the qualifying marriage in good faith, but the marriage was terminated other than by death of the petitioning spouse. See Chapter 5, Waiver of Joint Filing Requirement, Section B, Good Faith Marriage (Divorce) [6 USCIS-PM I.5(B)] for information about good faith marriage waivers for CPRs whose marriage was terminated.

[^ 29] See INA 216(d)(1)(A)(i)(III).

[^ 30] See INA 216(d)(1)(A)(ii). See 8 CFR 216.4(c)(4). The statutory provision on fee or consideration does not refer to fees paid to attorneys, notarios, or others who assisted with filing petitions, but rather refers to instances where a fee or other consideration was paid in connection with a fraudulent marriage. If a fee or other consideration was paid in order to enter into a fraudulent marriage or to obtain an immigration benefit through a fraudulent marriage, the CPR is ineligible for removal of conditions.

[^ 31] See INA 216(c)(2)(A)(i). See 8 CFR 216.4(a)(6).

[^ 32] See INA 216(c)(2)(A)(ii). See 8 CFR 216.4(b)(3).

[^ 33] See INA 216(c)(3)(C). See 8 CFR 216.4(d)(2) and 8 CFR 216.5(f). For information on joint petitions and individual filing requests, see Chapter 4, Joint Petitions and Individual Filing Requests [6 USCIS-PM I.4]. For information on waivers, see Chapter 5, Waiver of Joint Filing Requirement [6 USCIS-PM I.5].

[^ 34] See 8 CFR 216.4(a)(6) and 8 CFR 239.2. An NTA may be cancelled for specifically enumerated reasons, including when the beneficiary is not in the United States.

[^ 35] See INA 216(c)(2)(B). See 8 CFR 216.4(a)(6).

[^ 36] See 8 CFR 216.4(d)(2). USCIS lists any children added on the same Form I-751 in the denial notice but USCIS does not send the children individual notices.

[^ 37] See 8 CFR 216.4(d)(2).

[^ 38] See 8 CFR 216.5(f).

[^ 39] See INA 216(f).

[^ 40] See INA 216(c)(3)(D). See 8 CFR 216.4(d)(2).

[^ 41] For more information, see Volume 11, Travel and Identity Documents, Part B, Permanent Resident Cards, Chapter 2, Replacement of Permanent Resident Cards, Section F, Temporary Evidence of Permanent Resident Status [11 USCIS-PM B.2(F)].

[^ 42] See 8 CFR 216.4(d)(2) and 8 CFR 216.5(f).

[^ 43] See INA 237(a)(1)(D)(i).

[^ 44] See INA 245(d). See 8 CFR 245.1(c)(5).

[^ 45] See *Matter of Stockwell* (PDF), 20 I&N Dec. 309 (BIA 1991).

[^ 46] See 8 CFR 245.1(c)(5) (previously 8 CFR 254.1(b)(12), which *Matter of Stockwell* cites to).

[^ 47] For more information, see Volume 7, Adjustment of Status, Part B, 245(a) Adjustment, Chapter 7, Other Barred Adjustment Applicants, Section G, Conditional Permanent Residents [7 USCIS-PM B.7(G)].

[^ 48] See INA 216(c)(2)(A).

[^ 49] See INA 216(c)(2)(A). See 8 CFR 103.2(b)(1).

Chapter 3 - Petition to Remove Conditions on Residence

A conditional permanent resident (CPR) is required to meet certain criteria in order to remove the conditions on permanent residence.[1] In order to request removal of conditions, the CPR must file a Petition to Remove Conditions on Residence (Form I-751).

A. Establishing a Bona Fide Marriage

A qualifying marriage is the marriage upon which a CPR obtained permanent resident status. Generally, in order to remove conditions, the CPR must establish that a qualifying marriage is or was bona fide. A bona fide marriage is a marriage:

- That was entered into in accordance with the laws of the place where the marriage took place;[2]
- Absent a waiver,[3] that has not been judicially annulled or terminated, other than through the death of a spouse;[4]
- That was not entered into for the purpose of procuring admission as an immigrant;[5] and
- For which no fee or other consideration was given to the petitioning spouse, CPR spouse, or other interested party for filing the immigrant or fiancé(e) visa petition that formed the basis of the CPR's admission to the United States.[6]

The statutory provision on fee or consideration does not refer to fees paid to attorneys, notarios, or other persons who assisted with filing petitions, but rather refers to instances where a fee or other consideration was paid in exchange for the petitioner filing Form I-130 or Form I-129F in connection with a fraudulent marriage. This could include direct monetary payments from the beneficiary to the petitioner, or indirect forms of consideration made to induce the petitioner to file such as payments or gifts from the beneficiary's family or to the petitioner's family. If a fee or other consideration was paid in order to enter into a fraudulent marriage or to obtain an immigration benefit through a fraudulent marriage, the CPR is ineligible for removal of conditions.

To request removal of conditions on residence, the CPR must provide USCIS with evidence that the qualifying marriage is or was bona fide.

Evidence of a bona fide marriage may include, but is not limited to:

- Documentation showing joint ownership of property;[7]
- Lease showing joint tenancy of a common residence;[8]
- Documentation showing commingling of financial resources;[9]
- Birth certificates of child(ren) born to the marriage;[10]
- Affidavits of third parties having knowledge of the bona fides of the marital relationship;[11] and
- Other documentation establishing that the marriage was not entered into in order to evade the immigration laws of the United States.[12]

The CPR must also provide the following information on the petition:

- The actual residence(s) of the CPR and the petitioning spouse or stepparent from the time that the CPR obtained status;[13] and
- The CPR and the petitioning spouse or stepparent's places and names of employers from the date that the CPR obtained status.[14]

In some circumstances, when the CPR is unable to file jointly with the petitioning spouse or stepparent, the CPR may be able to file an individual filing request or request a waiver of the joint filing requirement.

B. Basis for Filing

The following table outlines the circumstances under which CPRs may file a Form I-751 and the corresponding filing type.

Basis for Filing Petition	Filing Type
The CPR spouse is still married to the same U.S. citizen or lawful permanent resident (petitioning spouse).[15]	Joint filing
The CPR is a child and cannot be included on the CPR parent's Form I-751 (and the CPR parent is still married to the petitioning spouse).[16]	Joint filing
The CPR spouse entered into the qualifying marriage in good faith but is now a widow or widower.[17] The CPR child's parent entered into the qualifying marriage in good faith, but the CPR child's stepparent has died.	Individual filing request
The CPR spouse entered into the qualifying marriage in good faith, but the marriage ended through divorce or annulment.[18] The CPR child's parent entered into a qualifying marriage in good faith, but the marriage ended through divorce or annulment.	Good faith (divorce) waiver
The CPR spouse entered into the qualifying marriage in good faith, but during the marriage the petitioning spouse battered or subjected the CPR spouse or the CPR spouse's child to extreme cruelty.[19] The CPR child cannot be included on the CPR parent's battery or extreme cruelty waiver request, and the CPR child's parent entered into the qualifying marriage in good faith, but during the marriage the petitioning spouse battered or subjected the CPR spouse to extreme cruelty. The CPR child's parent entered into the qualifying marriage in good faith, but during the marriage the petitioning stepparent or the CPR parent battered or subjected the CPR child to extreme cruelty.[20]	Battery or extreme cruelty (abuse) waiver
Termination of the CPR's permanent resident status and removal from the United States would cause extreme hardship.[21]	Extreme hardship waiver

When filing Form I-751 requesting a waiver, the CPR can select all bases for filing that apply. USCIS considers eligibility for all grounds requested. However, when there are multiple filing bases, USCIS only approves a waiver based on one category. For all bases for filing, a CPR child may also file separately if the child is not included on the CPR parent's petition.

C. Filing Requirements

1. Proper Filing and Initial Review

A CPR may file Form I-751 regardless of whether or not the CPR is physically present in the United States. However, if the CPR is outside the United States at the time of filing, the CPR must return to the United States with the CPR's petitioning spouse and dependent children to comply with the interview requirement, unless the interview requirement is waived by USCIS, and any biometrics collection requirements.[22]

The CPR must file a jointly-filed Form I-751 during the 90-day period immediately preceding the second anniversary of the CPR receiving permanent resident status. A CPR may file the joint petition after the expiration of the 90-day period if the CPR establishes that there was good cause and extenuating circumstances for failing to file a timely joint petition.[23]

CPRs may file individual filing requests and waiver requests at any time before they are subject to a final order of removal. CPR children who must file a separate Form I-751 may do so at any time before they are subject to a final order of removal.

In order for the Form I-751 to be considered properly filed, it must be properly signed, accompanied by the appropriate fee, and contain evidence that the marriage was not entered into for the purpose of evading immigration laws.[24]

CPRs must file the Form I-751 according to the form instructions. The Form I-751 must be:

- Timely filed;
- Submitted on the current edition of the form;
- Filed at the correct filing location;
- Accompanied by the correct filing fee; and
- Properly signed.[25]

When initially reviewing the Form I-751, USCIS first determines whether the Form I-751 has been properly filed according to the criteria above and in the form instructions. If the petition is not properly filed, USCIS may reject the Form I-751.

If the petition is properly filed according to the form instructions, the officer determines whether the CPR was properly classified as a CPR and whether the CPR submitted evidence of a bona fide qualifying marriage.[26] Then the officer proceeds with a full review of the record and examination of eligibility.

2. Late Joint Filing

The CPR must file a jointly-filed Form I-751 during the 90-day period immediately preceding the second anniversary of the CPR receiving CPR status. If the CPR and the petitioning spouse file a joint petition untimely, USCIS determines if the failure to file timely is based on good cause and extenuating circumstances.[27] The CPR and petitioning spouse should submit an explanation for the untimely filing and any supporting documentation at the time of the initial filing.

If there is no explanation included with the initial filing, the officer issues a Request for Evidence (RFE). If there is no response to the RFE, the officer denies the petition for abandonment (no response) for failing to comply with the filing requirements.[28]

If an explanation for the untimely filing is provided, the officer evaluates the explanation in relation to the time of eventual filing. The officer also reviews any accompanying documentary evidence submitted in support of the explanation for the late filing, if any, to determine whether there is good cause and extenuating circumstances for the late filing.[29] Supporting documentary evidence may not be necessary if the explanation for the late filing is acceptable on its face.

Good cause and extenuating circumstances for filing an untimely joint petition are not defined by the Immigration and Nationality Act (INA). Good cause and extenuating circumstances may include, but are not limited to:

- Hospitalization;
- Long-term illness;
- Death of a family member and bereavement;
- Recent birth of a child;
- Legal or financial problems;
- Providing care for someone;
- Serious family emergency;
- Work commitment; or
- A family member on active duty with the U.S. armed forces.

Forgetting to file, absent other factors, generally does not constitute good cause and extenuating circumstances.

If USCIS determines that the CPR and petitioning spouse have established good cause and extenuating circumstances, then USCIS proceeds with adjudication of the case. If USCIS determines that the CPR and petitioning spouse have failed to establish good cause and extenuating circumstances, then USCIS denies the case for failure to comply with the filing requirements.[30]

D. Overseas on Military or Government Orders

In general, the CPR spouse and petitioning spouse must jointly file the Form I-751 within the 90-day window before the 2-year anniversary of obtaining CPR status. However, if the CPR or petitioning spouse or stepparent is stationed or deployed overseas as a result of official military or government orders, the requisite filing period does not begin until the CPR or petitioning spouse or stepparent on military or government orders returns to the United States or is no longer on active duty. However, they may also file the Form I-751 during active duty service at any time after the commencement of the 90-day period.[31]

USCIS may waive the deadline or the requirement for an interview.[32] To make this determination, USCIS reviews the evidence submitted to determine the nature of the deployment and the bona fides of the marriage.

1. Eligible Military Members

For the purpose of Form I-751, a military member is any U.S. citizen or lawful permanent resident currently stationed or deployed on official orders as a member of the U.S. armed forces, including:

- Active duty;
- Selected Reserve of the Ready Reserve member; or
- Activated reservists and mobilized National Guardsmen.[33]

2. Evidence of Military Service

USCIS reviews every properly filed petition for the following:

- Evidence that the petition involves an active duty military member;
- Evidence establishing that the active duty military member is stationed or deployed overseas on official orders; and
- Evidence establishing a bona fide qualifying marriage exists.

USCIS considers military-specific evidence as strong evidence towards establishing the bona fides of the qualifying marriage. Such evidence may include, but is not limited to:

- All pages of the service member’s Application for Identification Card/DEERS Enrollment (Form DD-1172-2), naming dependents;

- Dependent's Military Identification and Privilege Card;
- Certificate of Overseas Assignment to Support Application to File Petition for Naturalization (Form DD-1278);
- Copy of Permanent Change of Station Orders issued to the service member for permanent tour of duty overseas that specifically name the spouse and children (if any);
- Designation of the beneficiary on the Service Member's Group Life Insurance policy;
- Evidence of a Family Service Members' Group Life Insurance policy;
- Evidence of the military member's health insurance policy on behalf of the dependent;
- Documentation showing that the spouse and child (if any) reside in military base or post housing;
- Powers-of-attorney of life insurance designation (general or specific);
- Military TRICARE medical ID card for use at military medical facilities;
- Leave and Earnings Statement showing Family Separation Allowance or allotments to dependents;
- Living will or last will and testament;
- Pre-authorization for emergency financial assistance; and
- Copy of the service member's Record of Emergency Data.

3. Adjudication of Military Cases

The following table displays the steps USCIS takes when adjudicating military cases:

Common Scenarios for Form I-751 Filed by Military Members

Scenario	USCIS Officer Action
Evidence to support Form I-751 is received and meets the burden of proof.	Approves Form I-751 and follows normal post-adjudication process.[34]
USCIS cannot approve the Form I-751 and the Form I-751 cannot be statutorily denied.[35]	Sends the military member an RFE to the address of record (physical or APO or FPO) for additional documentation to establish claimed relationship (or address other deficiencies).
USCIS receives the military member's response to the RFE.	Continues the adjudication and post-adjudication processes, including approving the Form I-751 if the evidence submitted was sufficient.[36]
RFE response is insufficient.	If military member is stationed abroad, the officer places the Form I-751 on an overseas hold until the military member returns to the United States.
There is no response to the RFE within the appropriate RFE response period, or the RFE is returned as undeliverable.[37]	Places the Form I-751 on hold for up to 18 months.
18 months have passed since USCIS placed the case on hold.	Checks for updated address information and: • Denies Form I-751 if the military member is no longer in the military; or • Administratively closes the Form I-751 if the military member is still in the military.
Form I-751 is denied.	Reopens or reactivates the Form I-751 upon the military member's request at any time at no charge.
Form I-751 is administratively closed.	Reopens or reactivates the Form I-751 upon the military member's request at any time at no charge.

4. U.S. Federal Government Workers

The same policies and procedures that apply to military members also apply to non-military U.S. federal government workers currently working abroad on official government orders. Evidence of government employment or orders may include:

- A copy of travel orders issued by the government;
- A copy of government identification (such as a PIV card or credential);
- Copies of pay stubs or W2s issued by the government;

- Copies of bank account statements showing pay from a U.S. government entity; and
- An APO, FPO, or DFO mailing address.

E. CPRs with Pending Naturalization Applications

Because of differences in processing times between the Form I-751 and the Application for Naturalization (Form N-400) and because CPRs are eligible to apply for naturalization (if otherwise eligible),[38] there may be instances when a CPR applies for naturalization while the CPR's Form I-751 is still pending. If the CPR has a pending Form N-400, USCIS adjudicates the Form I-751 before or at the same time as the Form N-400.

In most cases, CPRs must have an approved Form I-751 before USCIS may naturalize them. However, there are limited circumstances in which the CPR is not required to file a Form I-751 before naturalizing.[39]

F. Standard of Proof

The standard of proof in establishing eligibility for removal of conditions is preponderance of the evidence. If the initial filing does not contain sufficient evidence to demonstrate eligibility by a preponderance of the evidence, USCIS may issue an RFE or schedule an interview or both.[40] USCIS adjudicates the Form I-751 based on the information contained in the form, submitted documentation, other information in the record, and testimony provided at the interview (if any).[41]

G. Interview

CPRs who file a Form I-751 must appear for an interview at a USCIS field office, unless USCIS waives the interview requirement.[42] USCIS officers may consider waiving the interview in cases where:

- The officer considers they can make a decision on the petition based on the record because the record contains sufficient evidence about the bona fides of the marriage and that the marriage was not entered into for the purpose of evading the immigration laws of the United States;
- There is sufficient evidence in the record of the CPR's eligibility for waiver of the joint filing requirement, if applicable;
- There is no indication of fraud or misrepresentation on the Form I-751, in the supporting documentation, or elsewhere in the record;
- There are no complex facts or issues that require an interview or sworn statement to resolve questions or concerns; and
- There are no criminal bars rendering the CPR removable.

When determining whether to waive an interview, the considerations listed above apply regardless of whether the Form I-751 is filed as a joint petition, individual filing request, or a waiver. For a joint petition, the statute requires USCIS to interview both the CPR and petitioning spouse.[43] If the CPR is filing an individual filing request or waiver, only the CPR must appear for the interview.[44]

If the required party or parties fail to appear for the interview, USCIS denies the Form I-751, terminates the CPR's status, and initiates removal proceedings, unless the CPR establishes good cause for the failure to appear and USCIS reschedules the interview.[45] USCIS determines whether there is good cause on a case-by-case basis.

H. Rebuttal of Derogatory Information

If USCIS determines that there is derogatory information related to the bona fides of the qualifying marriage, then USCIS provides the CPR with an opportunity to rebut such information during the interview or in response to an RFE or Notice of Intent to Deny (NOID), or both.[46] If the CPR files a waiver or individual filing request, USCIS provides this opportunity only to the CPR.

If the CPR overcomes the derogatory information, and there are no other unresolved eligibility issues, USCIS approves the petition.[47] If the CPR fails to overcome the derogatory information, USCIS denies the petition.

I. Suspected Fraud

If USCIS determines that the marriage was designed to circumvent U.S. immigration laws, then USCIS issues an RFE or NOID and gives the CPR an opportunity to rebut the evidence of record.[48] If the CPR files a waiver or individual filing request, USCIS provides this opportunity only to the CPR.

USCIS examines the CPR's response to the RFE or NOID. If the response is insufficient to overcome the derogatory information in the record, and USCIS still finds that despite the rebuttal the marriage was designed to circumvent the immigration laws, then USCIS denies the case.

Footnotes

[^ 1] See INA 216. See 8 CFR 216.

[^ 2] See INA 216(d)(1)(A)(i)(I). See 8 CFR 216.4(c)(1). For purposes of evaluating a marriage that involved a minor, officers may consider the legality or validity of the qualifying marriage if new evidence is presented at the Form I-751 stage that explicitly raises these concerns.

[^ 3] A CPR may seek a waiver if the CPR entered into the qualifying marriage in good faith, but the marriage was terminated other than by death of the petitioning spouse. For information about good faith marriage waivers for CPRs whose marriage was terminated, see Chapter 5, Waiver of Joint Filing Requirement, Section B, Good Faith Marriage (Divorce) [6 USCIS-PM I.5(B)].

[^ 4] See INA 216(d)(1)(A)(i)(II). See 8 CFR 216.4(c)(2). See *Matter of Tee* (PDF), 20 I&N Dec 949 (BIA 1995). (An alien becomes statutorily ineligible for approval of a joint petition under INA 216(c)(1) where the marriage has been terminated before USCIS adjudicates the petition.)

[^ 5] See INA 216(d)(1)(A)(i)(III). See 8 CFR 216.4(c)(3).

[^ 6] See INA 216(d)(1). For additional information on USCIS' interpretation on bona fide marriages, see 8 CFR 245.1(c)(8)(iii)(F) (explaining that a bona fide marriage, in cases where the beneficiary is in deportation proceedings, means the parties entered into the marriage in good faith and not for the purpose of procuring immigration status for the beneficiary, and no fee or consideration was given, other than attorney fees). See the Immigration Act of 1990 (IMMACT 90), Pub. L. 101-649 (PDF) (November 29, 1990).

[^ 7] See 8 CFR 216.4(a)(5)(i).

[^ 8] See 8 CFR 216.4(a)(5)(ii).

[^ 9] See 8 CFR 216.4(a)(5)(iii).

[^ 10] See 8 CFR 216.4(a)(5)(iv).

[^ 11] See 8 CFR 216.4(a)(5)(v).

[^ 12] See 8 CFR 216.4(a)(5)(vi).

[^ 13] See INA 216(d)(1)(B)(i).

[^ 14] See INA 216(d)(1)(B)(ii).

[^ 15] See INA 216(c)(1)(A). See 8 CFR 216.4(a)(1).

[^ 16] See 8 CFR 216.4(a)(2).

[^ 17] See INA 216(c)(1)(A). See 8 CFR 216.4(a)(1).

[^ 18] See INA 216(c)(4)(B). See 8 CFR 216.5(a)(1)(ii).

[^ 19] See INA 216(c)(4)(C). See 8 CFR 216.5(a)(1)(iii).

[^ 20] See INA 216(c)(4)(C). See 8 CFR 216.5(a)(1)(iii).

[^ 21] See INA 216(c)(4)(A). See 8 CFR 216.5(a)(1)(i).

[^ 22] See 8 CFR 216.4(a)(4). See instructions for Form I-751.

[^ 23] See INA 216(d)(2)(B). See 8 CFR 216.4(a)(6).

[^ 24] See 8 CFR 216.4(a)(1). CPRs requesting a waiver based on extreme hardship are not required to submit evidence of a bona fide qualifying marriage.

[^ 25] Current information about filing locations, fees, and other information about how to file can be found at the Form I-751 and Fee Schedule (Form G-1055) webpages. For more filing information, see Volume 1, General Policies and Procedures, Part B, Submission of Benefit Requests [1 USCIS-PM B]. Note that, for U.S. citizen petitioners who are deployed in active duty status with the U.S. armed forces, USCIS accepts the Form I-751 without the petitioner's signature if it is accompanied by the required evidence listed in the form instructions, along with evidence of the military member's assignment abroad.

[^ 26] CPRs requesting a waiver based on extreme hardship are not required to submit evidence of a bona fide qualifying marriage.

[^ 27] See INA 216(c)(1)(A) and INA 216(d)(2). See 8 CFR 216.4(a)(6).

[^ 28] See INA 216(c)(1)(a) and INA 216(d)(2).

[^ 29] See INA 216(d)(2)(B).

[^ 30] See INA 216(c)(1)(A) and INA 216(d)(2)(B). See 8 CFR 216.4(a)(6).

[^ 31] See INA 216(g)(1).

[^ 32] See INA 216(g)(2).

[^ 33] This includes, but is not limited to, Permanent Change of Station Orders or Deployment Orders issued to the military member for a permanent tour of duty.

[^ 34] If no U.S. address is available, USCIS may hold the petition until the petitioning spouse or stepparent or CPR provides an appropriate address.

[^ 35] An example of a petition that could be statutorily denied is a case where the petition was based on a non-qualifying relationship, such as a joint petition submitted by a CPR child and the child's grandparent. An example of a petition that could not be statutorily denied is a case where the petitioner submitted some evidence but the petition does not contain sufficient evidence to establish eligibility.

[^ 36] If no U.S. address is available, USCIS may hold the petition until the petitioning spouse or stepparent or CPR provides an appropriate address.

[^ 37] For additional information about RFEs, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 38] See 8 CFR 216.1.

[^ 39] See Volume 12, Citizenship & Naturalization, Part G, Spouses of U.S. Citizens, Chapter 5, Conditional Permanent Resident Spouses and Naturalization [12 USCIS-PM G.5].

[^ 40] For additional information about RFEs, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 41] See INA 216(c)(3)(A)(ii). See 8 CFR 216.4(c) and 8 CFR 216.4(a)(5).

[^ 42] See INA 216(d)(3). See 8 CFR 216.4(b)(1).

[^ 43] If the petitioning spouse is not deceased. See INA 216(c)(1)(B).

[^ 44] See INA 216(c)(1)(B). See 8 CFR 216.5(d).

[^ 45] See 8 CFR 216.5(d). See 8 CFR 216.4(b)(3).

[^ 46] See 8 CFR 216.4(c)(4).

[^ 47] See 8 CFR 216.4(c)(4).

[^ 48] See 8 CFR 216.4(c)(4).

Chapter 4 - Joint Petitions and Individual Filing Requests

A. Joint Petitions

When the conditional permanent resident (CPR) spouse is still married to the same U.S. citizen or lawful permanent resident (petitioning spouse), the spouses file a Petition to Remove Conditions on Residence (Form I-751) jointly. A CPR child who cannot be included on the child's CPR parent's Form I-751 files a separate Form I-751 jointly with the petitioning stepparent.

A CPR and the petitioning spouse must jointly file Form I-751 within the 90-day period immediately preceding the second anniversary of the CPR receiving CPR status.[1] The one exception to this rule applies to CPRs and petitioning spouses overseas on military or government orders. The statute suspends the 90-day period during any period of time in which the CPR or the petitioning spouse is overseas on military or government orders.[2]

In a joint petition, the CPR and petitioning spouse or stepparent must establish that a qualifying, bona fide marriage exists and must submit evidence to show that the marriage was entered into in good faith and not to evade U.S. immigration laws.[3]

USCIS may not deny a joint petition solely because the spouses are separated or have initiated divorce or annulment proceedings. If all other eligibility requirements are met and both the CPR and petitioning spouse or stepparent appear for an interview (if requested by USCIS), USCIS approves the joint petition. However, if the divorce or annulment is finalized while the joint petition is pending, the CPR is no longer eligible to remove conditions using the joint petition. However, the CPR may request that USCIS amend the joint petition to a waiver based on divorce.[4]

If the joint petition does not contain sufficient evidence to establish eligibility, USCIS may issue a Request for Evidence (RFE) or schedule an interview or both.[5]

B. Deceased Petitioning Spouse

The death of a petitioning spouse after the CPR obtains permanent resident status excuses the general requirement that a Form I-751 must be a joint petition. If the petitioning spouse dies after the CPR obtained CPR status, the CPR may file the Form I-751 individually without having to qualify for a waiver of the joint filing requirement.[6] Such a filing is considered an individual filing request, not a waiver. A CPR child who cannot be included on the CPR parent's Form I-751 may file a separate Form I-751 as an individual filing request based on the death of the petitioning stepparent.

If the petitioning spouse dies before filing a joint petition with the CPR, the CPR must file Form I-751 and check the appropriate box on the form to indicate that the petitioning spouse is deceased. In addition, the CPR must provide proof of the petitioning spouse's death (for example, a death certificate).

If the petitioning spouse dies after filing a joint petition with the CPR and while the joint petition is still pending adjudication, the CPR must notify USCIS of the death and provide proof of death. USCIS then amends the joint petition and exempts the CPR from the requirement that the Form I-751 be jointly filed. There is no need for the CPR to file another Form I-751.

In both cases, the CPR must still establish that the qualifying marriage was bona fide and not entered into to evade U.S. immigration laws.[7] The officer should adjudicate an individual filing request in the same way as a joint petition and determine whether the qualifying marriage was bona fide and all other eligibility requirements are met.

If the CPR does not provide sufficient evidence to establish eligibility, USCIS may issue a Request for Evidence (RFE) or schedule an interview, if appropriate, or both.[8]

Footnotes

[^ 1] See INA 216(c)(1). See 8 CFR 216.4(a)(1). A CPR may file the joint petition after the expiration of the 90-day period if the CPR establishes that there was good cause and extenuating circumstances for failing to file a timely joint petition. See Chapter 3, Petition to Remove Conditions on Residence, Section C, Filing Requirements, Subsection 2, Late Joint Filing [6 USCIS-PM I.3(C)(2)].

[^ 2] See INA 216(g)(1). For more information about procedures in cases involving military or government orders, see Chapter 3, Petition to Remove Conditions on Residence, Section D, Overseas on Military or Government Orders [6 USCIS-PM I.3(D)].

[^ 3] See 8 CFR 216.4(a)(5). See Chapter 3, Petition to Remove Conditions on Residence, Section A, Establishing a Bona Fide Marriage [6 USCIS-PM I.3(A)].

[^ 4] For information about changing the filing status from a joint petition to a waiver based on divorce, see Chapter 5, Waiver of Joint Filing Requirement, Section B, Good Faith Marriage (Divorce), Subsection 2, Separated But Not Yet Divorced [6 USCIS-PM I.5(B)(2)].

[^ 5] For additional information about RFEs, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 6] See INA 216(c)(1). See *Matter of Rose* (PDF), 25 I&N Dec. 181 (BIA 2010). For more information on INA 216(c)(4) waivers, see Chapter 5, Waiver of Joint Filing Requirement [6 USCIS-PM I.5].

[^ 7] See Chapter 3, Petition to Remove Conditions on Residence, Section A, Establishing a Bona Fide Marriage [6 USCIS-PM I.3(A)].

[^ 8] For additional information about RFEs, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

Chapter 5 - Waiver of Joint Filing Requirement

If a conditional permanent resident (CPR) is unable to meet the joint filing requirements, the CPR may request a waiver of the joint filing requirement when filing the Petition to Remove Conditions on Residence (Form I-751).[1]

CPRs may file waiver requests at any time before, during, or after the 90-day period immediately preceding the second anniversary of the CPR receiving status as a permanent resident. A CPR does not have to wait until the 90-day period begins. Instead, the CPR may file a waiver as soon as the CPR is eligible for the waiver.[2] However, a CPR who is in exclusion, deportation, or removal proceedings may only apply for a waiver up until the time the immigration court issues the final order of exclusion, deportation, or removal.[3]

Basis for Waiver

A CPR may seek a waiver based on one or more of the following circumstances:

- The CPR's removal from the United States would result in extreme hardship.[4]
- The CPR entered into the qualifying marriage in good faith, but the marriage was terminated other than by death of the petitioning spouse.[5]
- The CPR spouse entered into the qualifying marriage in good faith, but during the marriage the petitioning spouse battered or subjected the CPR spouse or the CPR spouse's child to extreme cruelty.[6]
- The CPR child's parent entered into the qualifying marriage in good faith, but during the marriage the petitioning stepparent or the CPR parent battered or subjected the CPR child to extreme cruelty.[7]

The CPR should indicate all applicable reasons for requesting a waiver on the Form I-751.[8] Generally, a CPR who initially files a waiver under one waiver filing basis may change to or add another waiver filing basis by making the request in writing to the USCIS office that issued the receipt notice or most recent correspondence. The CPR may also make this request at the interview. However, in cases involving changes to or from a filing basis involving battery or extreme cruelty, certain procedures must be followed.[9] In certain cases described in this chapter, the CPR may not amend the filing basis but instead must file a new Form I-751.

Evidence

When filing Form I-751 as a waiver, the CPR must submit evidence:

- To establish the facts underlying the basis on which the CPR is seeking a waiver; and
- Evidence that the marriage was not entered into for the purpose of evading immigration laws (except in the case of a CPR filing a waiver solely based on extreme hardship).

USCIS considers any credible evidence relevant to a waiver. The determination of what evidence is credible and the weight given to the evidence is within the sole discretion of USCIS.[10]

A. Extreme Hardship

To establish eligibility for the extreme hardship waiver, a CPR must establish that the CPR's removal from the United States would result in extreme hardship.[11] In determining extreme hardship, USCIS only considers circumstances that occurred during the 2-year period following the CPR's admission to the United States for conditional permanent residence. USCIS does not consider factors arising or events occurring after that period.[12]

However, circumstances that arose before the 2-year period and continued into the 2-year period may be considered. USCIS may consider whether the continued circumstances amount to extreme hardship, regardless of whether the circumstances initially arose before the 2-year period.

For example, if there was a coup in the CPR's home country before the 2-year period, but the coup triggered other events occurring during the 2-year period, and the CPR's removal from the United States in light of these events would result in extreme hardship, the CPR may qualify for the waiver.

USCIS considers only extreme hardship that would result from the CPR's removal from the United States, presumably to the CPR's home country. Any removal from the United States is likely to result in a certain degree of hardship; however, only in those cases where the hardship is extreme does USCIS grant a waiver.[13]

In order to establish eligibility for the extreme hardship waiver, the CPR does not need to have a qualifying relative, as is the case in some other immigration contexts. The CPR must establish that extreme hardship would result from the CPR's removal, but there is no requirement that the extreme hardship must be to any specific person.[14]

Unlike all other bases for filing Form I-751, there is no requirement that the CPR establish that the marriage had been entered into in good faith in order to qualify for the extreme hardship waiver.[15] However, indications that the marriage had been in bad faith may be considered when weighing the discretionary factors.

Although the approval of an extreme hardship waiver is discretionary, only the most significant negative factors would justify denial of an extreme hardship waiver where the CPR has sufficiently established that extreme hardship would result if the CPR was removed from the United States. The burden of establishing extreme hardship rests solely with the CPR.[16]

A CPR who filed Form I-751 under another filing basis may change to or add extreme hardship as a basis for filing by notifying the USCIS office that issued the receipt notice or most recent correspondence in writing. This request may also be made at the interview. Similarly, a CPR who initially filed Form I-751 as an extreme hardship waiver may change to or add another waiver basis for filing by notifying USCIS in writing or in person at the interview.

However, a CPR seeking to change from an extreme hardship waiver to a joint filing must file a new Form I-751 jointly with the CPR's petitioning spouse or stepparent since the spouse or stepparent never signed the prior Form I-751.

B. Good Faith Marriage (Divorce)

1. Marriages Terminated by Divorce or Annulment

Bona fide marriages may dissolve in less than 2 years. The Immigration Marriage Fraud Amendments (IMFA) of 1986 were not meant to be used as a tool against bona fide yet brief marriages. Instead, Congress enacted the amendments to prevent immigration fraud based on marriages entered into in bad faith.[17]

Accordingly, the INA provides for a waiver if the CPR can establish that the qualifying marriage was entered into in good faith and that the CPR was not at fault in failing to meet the filing requirements for Form I-751.[18] CPRs whose marriages have been terminated by divorce or annulment may request this waiver, but CPRs whose marriages were terminated by death of the petitioning spouse should instead submit an individual filing request.[19]

Despite the termination of the marriage, the CPR is still responsible for submitting evidence that the marriage was entered into in good faith and not for the purpose of evading immigration laws.

USCIS looks at the evidence relating to the actions of the parties following immigration to the United States in evaluating the spouses' intentions at the time of marriage.[20] Evidence may include:

- The degree to which the parties combined financial assets and liabilities of the parties;[21]
- Length of time the parties cohabited after the marriage and after the CPR obtained conditional resident status;[22]
- Children born to the marriage;[23] and
- Any other evidence that USCIS considers relevant.[24]

In general, the Immigration and Nationality Act (INA) permits a CPR to file a Form I-751 waiver if the CPR is not at fault in failing to meet the joint filing requirement.[25] While there is no binding legal guidance on how to apply the "at fault" requirement, it has not been interpreted to mean that the CPR is at fault for the terminated marriage. Therefore, it does not matter if the CPR left the marriage or initiated divorce proceedings. The CPR does not need to establish that the CPR is not at fault for the terminated marriage.

2. Separated But Not Yet Divorced

A CPR is only eligible for a good faith (divorce) waiver if the parties have already terminated the qualifying marriage.[26] There is no basis for a waiver of the joint filing requirement based on a legal or informal separation.

Initially Filed Joint Petition

If USCIS receives a Form I-751 filed jointly by a CPR and the petitioning spouse and the spouses are still married but legally separated or in pending divorce or annulment proceedings, USCIS issues a Request for Evidence (RFE).[27] In the RFE, USCIS asks the CPR to provide a copy of the final divorce decree or annulment along with a written request stating that the CPR would like to have the joint petition amended to a waiver based on divorce.

This gives the CPR an opportunity to provide evidence that the divorce or annulment proceedings were finalized and request a waiver of the joint filing requirement without refiling. The legal termination of the qualifying marriage may occur during the response period to the RFE, giving the CPR the opportunity to establish eligibility for the waiver, even if the CPR did not qualify at the time of filing.

The CPR is also responsible for proactively notifying USCIS of a separation or pending or finalized divorce or annulment proceedings, even if no RFE is issued. In these instances, the CPR should contact the USCIS office that issued the receipt notice or most recent correspondence.

If the CPR provides evidence that the divorce or annulment is final and requests that USCIS amend the joint petition, then USCIS amends the petition to indicate that the CPR is applying for a waiver of the joint filing requirement based on termination of the qualifying marriage. USCIS then determines whether there is sufficient evidence that the CPR spouse entered the qualifying marriage in good faith.

If the CPR does not respond to the RFE, USCIS may issue a denial for failure to respond (abandonment denial).

If the CPR's response does not include evidence that the qualifying marriage was terminated, and the CPR does not provide such evidence, the CPR is not eligible to amend the joint petition to a waiver. However, USCIS may approve the joint petition if all other eligibility requirements are met or schedule an interview to determine whether the CPR may file a Form I-751 divorce waiver. USCIS may not deny a joint petition solely because the spouses are separated or have initiated divorce or annulment proceedings.

Initially Filed Waiver Request

If USCIS receives a Form I-751 filed by a CPR as a waiver request based on termination of marriage and the spouses are still married but legally separated or in pending divorce or annulment proceedings, USCIS issues an RFE. In many cases, the divorce takes place during the response period to the RFE, which gives the CPR the opportunity to establish eligibility for the waiver by submitting a copy of the final divorce decree or annulment.

If the CPR establishes eligibility for the waiver, then USCIS adjudicates the Form I-751 in accordance with established procedure.

If the CPR does not respond to the RFE or the CPR's response does not establish eligibility for the waiver, USCIS denies the Form I-751. In the denial notice, USCIS informs the CPR that the CPR is ineligible for a waiver of the joint filing requirement because the divorce or annulment is not final.

C. Battery or Extreme Cruelty

1. Battery or Extreme Cruelty Waiver

Background

The original IMFA did not contain a separate waiver provision for victims of battery or extreme cruelty.[28] The "battery or extreme cruelty waiver" was created with the passage of the Immigration Act of 1990, which amended the INA at section 216(c)(4).[29]

CPRs who are eligible for the battery or extreme cruelty waiver were then included in the INA definition of a "VAWA self-petitioner" when the term was created by section 811 of the Violence Against Women and Department of Justice Reauthorization Act of 2005.[30] VAWA self-petitioners are afforded certain protections and special considerations under the INA and other statutory provisions as victims of abuse.

Eligibility

CPR spouses who entered into a qualifying marriage in good faith and were battered or subjected to extreme cruelty by their petitioning spouse may request a waiver of the joint filing requirement.[31] Additionally, if the CPR spouse is a parent of a child battered or subjected to extreme cruelty by the petitioning spouse, the CPR spouse may also apply for the waiver

regardless of the child's citizenship or immigration status.[32]

A CPR child may request a waiver of the joint filing requirement if the CPR spouse (the child's parent) entered into a qualifying marriage in good faith, and the child was battered or subjected to extreme cruelty by either the CPR spouse (the child's parent) or the petitioning spouse (the child's stepparent).[33]

CPRs may request a battery or extreme cruelty waiver at any time after they are granted CPR status and may file the waiver at any time before they are subject to a final order of removal. The CPR's present marital status or living situation is also not relevant to the filing of the waiver. They may still be married to their abusive spouse, or CPR children may still be living with their abusive parent. The CPR may be divorced or separated or still residing with the petitioning spouse.[34]

The phrase "battered by or was the subject of extreme cruelty" includes, but is not limited to:

- Being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury;[35] and
- Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution, which USCIS considers acts of violence.[36]

Evidence of battery or extreme cruelty may include, but is not limited to, reports and affidavits from police, judges, medical personnel, school officials, counselors, or the CPR. CPRs seeking a waiver due to battery or extreme cruelty are not required to submit a recommendation from a mental health professional.[37]

If a CPR child's parent filed a waiver based on battery or extreme cruelty, and the CPR parent dies, the CPR child may continue to be eligible for the abuse waiver under INA 204(l).[38]

2. Any Credible Evidence Provision for VAWA

Congress created the "any credible evidence" provision in recognition of the evidentiary challenges faced by abused spouses and children. An abused CPR may not have access to necessary evidence because the abusive spouse may control access to documents, or the abused CPR may have had to flee the abusive situation without being able to take important documents.

In recognition of these evidentiary challenges, officers cannot deny a case because the CPR spouse or child was unable to provide a particular piece of evidence or could not demonstrate the unavailability of primary or secondary evidence. Officers must consider whatever evidence is available, use agency records, and consider all evidence in the totality of the circumstances in the case. Therefore, when adjudicating a waiver based on battery or extreme cruelty, officers consider any credible evidence relevant to the waiver request submitted by the CPR.[39]

USCIS has sole discretion to determine what evidence is credible and to determine what weight to give that evidence.[40] The determination of what evidence is credible must be made on a case-by-case basis.

The CPR bears the burden of proof to establish eligibility by a preponderance of the evidence.

3. Intended Spouse

The Violence Against Women Act of 2013 (VAWA 2013) provided protection to abused CPRs who believed that they entered into a valid marriage with a U.S. citizen, but the marriage was invalid due to bigamy on the part of the intended U.S. citizen spouse.[41] In such cases, the CPR may be eligible for a waiver based on battery or extreme cruelty perpetrated by the intended spouse. To qualify, the CPR must meet the following criteria:

- The CPR's petitioning spouse, through whom the CPR obtained conditional permanent residence, battered or subjected the CPR to extreme cruelty;
- The CPR believed that a legal marriage was created with the U.S. citizen spouse who was not already married and therefore free to enter into a valid marriage;
- A marriage ceremony was actually performed; and
- The CPR otherwise met all applicable requirements to establish the bona fides of a marriage.[42]

CPRs must submit evidence to demonstrate that they believed that they entered into a legally valid marriage in good faith with the U.S. citizen. USCIS focuses its inquiry on the intent of the CPR and not on that of the alleged abuser.

The intended spouse provision does not extend to CPR children who file separately from their CPR parent, but CPR parents who are applying under the intended spouse provision may include their CPR children who are eligible to be included on the CPR parent's own waiver filing.[43]

If USCIS grants a battery or extreme cruelty waiver for a CPR who unwittingly entered into a bigamous marriage as described above, the officer annotates the case accordingly.

4. Confidentiality Protections and Safe Address

In accordance with 8 U.S.C. 1367, USCIS protects the confidentiality of any information concerning an abused CPR spouse or child, including, but not limited to, information regarding the whereabouts of the spouse or child or whether the abused CPR spouse or child has filed a waiver based on battery or extreme cruelty.[44]

Officers are prohibited from making an adverse determination of admissibility, deportability, or removability on a protected person using information furnished solely by a prohibited source. The officer must not use information provided by the following prohibited sources to make an adverse determination:

- The abuser, or perpetrator of the offense;
- Family member of the abuser; or
- Someone acting at the request of the abuser.

If the officer can independently corroborate the information from a non-prohibited source, the officer may use the information from the non-prohibited source in the adjudication process.[45]

Once the CPR has submitted a waiver based on battery or extreme cruelty, officers must follow proper confidentiality protection procedures and update all applicable electronic systems to reflect a safe address for the CPR.[46]

5. Changing or Supplementing the Filing Basis

The CPR may make a request to change the filing basis in writing to the USCIS office that issued the receipt notice or most recent correspondence. The CPR may also make the request in person at an interview. In cases involving changes to or from a filing basis involving battery or extreme cruelty, however, certain additional procedures must be followed, as noted below. In certain cases, the CPR is not able to amend the filing basis but, instead, needs to file a new Form I-751.

Changing the Filing Basis from a Joint Petition to a Waiver Based on Battery or Extreme Cruelty

Upon receipt of a written or in-person request to change the filing basis from a joint petition to a waiver based on battery or extreme cruelty, USCIS assigns a new receipt number for the waiver and applies safe address handling procedures.

In addition to the above procedures, if the CPR requests to change the filing basis at an interview, the interviewing officer should conduct the interview and adjudicate the petition after providing the CPR an opportunity to submit evidence in support of the new filing basis.

Withdrawing a Waiver Based on Battery or Extreme Cruelty to File a Joint Petition

As noted above, USCIS provides confidentiality protections under 8 U.S.C. 1367 to CPRs who have filed a request for a waiver based on battery or extreme cruelty by their spouse or stepparent.[47] A CPR seeking to change the filing basis of a Form I-751 from a waiver based on battery or extreme cruelty to a joint petition must withdraw the waiver based on battery or extreme cruelty and file a new joint Form I-751. USCIS is unable to change the basis of the filing, as the CPR's petitioning spouse or stepparent must file and sign the joint petition with the CPR.

If the CPR chooses to pursue the removal of conditions on residence with the cooperation of the CPR's spouse or stepparent, then the provisions of 8 U.S.C. 1367 will terminate. This is required so that USCIS can communicate with both the CPR and the petitioning spouse or stepparent and allows USCIS to rely upon evidence and testimony provided by the petitioning spouse or stepparent in the adjudication of the joint petition.[48]

In order to withdraw the waiver based on battery or extreme cruelty and file a joint petition, the CPR must complete the following requirements:

- Request to withdraw the waiver based on battery or extreme cruelty in writing to the USCIS office that issued the receipt notice or most recent correspondence, or in person at an interview;
- Attend an in-person interview or appointment at a USCIS field office to withdraw the waiver based on battery or extreme cruelty in writing if a written request was not previously provided and to confirm withdrawal of the waiver in person; and
- File a new joint Form I-751 that includes both the CPR and petitioning spouse or stepparent's signatures with the correct fee or fee waiver request.[49]

To ensure efficient processing of the request, USCIS encourages the CPR to withdraw the waiver based on battery or extreme cruelty before filing a new joint Form I-751 with the appropriate fee or fee waiver request. If the waiver filing is at a USCIS service center, USCIS schedules the CPR for an in-person appointment to confirm the CPR's withdrawal of the waiver.

If the CPR completes the above requirements, USCIS processes the withdrawal of the waiver based on battery and extreme cruelty, sends notification to the CPR acknowledging the withdrawal, and adjudicates the newly filed joint petition. If the joint petition is filed late, USCIS excuses the late filing based on good cause and extenuating circumstances as long as the initial waiver was properly filed.[50] The CPR and petitioning spouse or stepparent may be required to attend an in-person interview together for the joint petition.[51]

If the CPR does not complete the above requirements or decides to continue with the waiver filing, USCIS holds the joint filing in abeyance until the waiver based on battery or extreme cruelty is adjudicated. USCIS generally does not adjudicate the joint filing until 8 U.S.C. 1367 no longer applies to the CPR. Withdrawing the waiver does not impact a CPR's ability to file a new waiver or change the filing basis of the joint petition to a waiver request based on battery or extreme cruelty in the future.

Changing the Filing Basis from a Waiver Based on Battery or Extreme Cruelty to Another Waiver

CPRs may change the basis of their filing from a waiver based on battery or extreme cruelty to another waiver by submitting a written request to the USCIS office that issued the receipt notice or most recent correspondence. The request may also be made in person at an interview. If the CPR requests to change the filing basis at an interview, the interviewing officer should conduct the interview and adjudicate the petition after providing the CPR an opportunity to submit evidence in support of the new filing basis. A new receipt number is not required.

Adding a Filing Basis in Cases Involving a Battery or Extreme Cruelty Waiver

A CPR who filed a Form I-751 waiver may add another basis to the waiver filing. There are no restrictions on the number of bases upon which a CPR may file. The request to add a filing basis may be made in writing to the USCIS office that issued the receipt notice or most recent correspondence. The request may also be made in person at an interview. The CPR may submit supplemental evidence at the time of the request or in response to an RFE.

When there are multiple filing bases, USCIS only approves a waiver based on one category. If the CPR establishes eligibility for the battery or extreme cruelty waiver, USCIS approves on this basis before any other bases the CPR may establish. Officers must adjudicate waivers using any credible evidence, and the confidentiality protections of 8 U.S.C. 1367 attach to the entire petition in any case involving a waiver based on battery or extreme cruelty.

Footnotes

[^ 1] See INA 216(c)(4). See 8 CFR 216.5(a)(1).

[^ 2] See *Matter of Stowers* (PDF), 22 I&N Dec. 605 (BIA 1999).

[^ 3] See 8 CFR 216.5(a)(2).

[^ 4] See INA 216(c)(4)(A). See 8 CFR 216.5(a)(1)(i).

[^ 5] See INA 216(c)(4)(B). See 8 CFR 216.5(a)(1)(ii). See *Matter of Rose* (PDF), 25 I&N Dec. 181 (BIA 2010) (If the petitioning spouse dies during the 2-year conditional period, the CPR may file the petition individually without qualifying for a INA 216(c)(4) waiver.).

[^ 6] See INA 216(c)(4)(C). See 8 CFR 216.5(a)(1)(iii).

[^ 7] See INA 216(c)(4)(C). See 8 CFR 216.5(a)(1)(iii).

[^ 8] See Form I-751.

[^ 9] For more information, see Section C, Battery or Extreme Cruelty, Subsection 5, Changing or Supplementing the Filing Basis [6 USCIS-PM I.5(C)(5)].

[^ 10] See INA 216(c)(4).

[^ 11] See 8 CFR 216.5(e)(1).

[^ 12] See INA 216(c)(4). See *Matter of Munroe* (PDF), 26 I&N Dec. 428 (BIA 2014). See *Matter of Balsillie* (PDF), 20 I&N Dec. 486 (BIA 1992) (An alien may file an application for a waiver of the requirement to file the joint petition under INA 216(c)(4), which provides three distinct grounds for a waiver.).

[^ 13] See 8 CFR 216.5(e)(1). See *Singh v. Holder*, 591 F.3d 1190 (9th Cir. 2010) (family separation, economic and cultural difficulty resulting from removal will not cause extreme hardship where a person spent most of his life in his home country and is young and healthy). See *Matter of Chumpitazi* (PDF), 16 I&N Dec. 629, 635 (BIA 1978) ("e[E]xtreme hardship … encompasses more than the mere economic deprivation that might result from [a person's] deportation from the United States…. [T]he readjustment of [a person] to life in his native country after having spent a number of years in the United States is not the type of hardship that we have characterized as extreme….").

[^ 14] For a comprehensive discussion of factors that can be considered in extreme hardship determinations, see Volume 9, Waivers, Part B, Extreme Hardship, Chapter 5, Extreme Hardship Considerations and Factors, Section D, Examples of Factors that May Support a Finding of Extreme Hardship [9 USCIS-PM B.5(D)]. This and other sections of that Policy Manual part may be useful when examining extreme hardship waivers for CPRs. However, while the factors to be considered may be applied in the CPR context, the discussion of qualifying relatives and other requirements specific to other waivers of inadmissibility do not apply to CPRs applying for an extreme hardship waiver.

[^ 15] See INA 216(c)(4).

[^ 16] See 8 CFR 216.5(e)(1).

[^ 17] See H.R. Rep. 99-906.

[^ 18] See 8 CFR 216.5(a)(1)(ii).

[^ 19] See Chapter 4, Joint Petitions and Individual Filing Requests, Section B, Deceased Petitioning Spouse [6 USCIS-PM I.4(B)].

[^ 20] See 8 CFR 216.5(e)(2).

[^ 21] See 8 CFR 216.5(e)(2)(i).

[^ 22] See 8 CFR 216.5(e)(2)(ii).

[^ 23] See 8 CFR 216.5(e)(2)(iii).

[^ 24] See 8 CFR 216.5(e)(2)(iv).

[^ 25] See INA 216(c)(4)(B).

[^ 26] See INA 216(c)(4)(B).

[^ 27] For additional information about RFEs, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 28] See Immigration Marriage Fraud Amendments of 1986, Pub. L. 99-639 (PDF) (November 10, 1986).

[^ 29] See Section 701 of Immigration Act of 1990, Pub. L. 101-649 (PDF), 104 Stat. 4978, 5085 (November 29, 1990), amending INA 216(c)(4).

[^ 30] See Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162 (PDF), 119 Stat. 2960, 3057 (January 5, 2006), adding the definition of a VAWA self-petitioner at INA 101(a)(51).

[^ 31] See INA 216(c)(4)(C). See 8 CFR 216.5(a)(1)(iii).

[^ 32] See 8 CFR 216.5(e)(3).

[^ 33] See INA 216(c)(4)(C).

[^ 34] See 8 CFR 216.5(e)(3)(ii).

[^ 35] See 8 CFR 216.5(e)(3)(i).

[^ 36] See 8 CFR 216.5(e)(3)(i).

[^ 37] See Section 40702 of the Violent Crime Control and Law Enforcement Act of 1994, Title IV of Pub. L. 103-322 (PDF), 108 Stat. 1796, 1955 (September 13, 1994). The regulations at 8 CFR 216.5(e)(3) were promulgated in March 1991 and have not been updated to include superseding statutory provisions. Although 8 CFR 216.5(e)(3)(iv)-(vii) requires CPRs filing waivers based on battery or extreme cruelty to submit evaluations by mental health professionals, section 40702 of the Violent Crime Control and Law Enforcement Act of 1994, Title IV of Pub. L. 103-322 (PDF), 108 Stat. 1796, 1955 (September 13, 1994) supersedes this part of the regulations.

[^ 38] For more information on INA 204(l) benefits, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 9, Death of Petitioner or Principal Beneficiary [7 USCIS-PM A.9].

[^ 39] For more information on evidentiary requirements, see Volume 3, Humanitarian Protection and Parole, Part D, Violence Against Women Act, Chapter 5, Adjudication, Section B, Review of Evidence, Subsection 2, Any Credible Evidence Provision [3 USCIS-PM D.5(B)(2)].

[^ 40] See INA 216(c)(4).

[^ 41] See Violence Against Women Reauthorization Act of 2013 (VAWA 2013), Pub. L. 113-4 (PDF), 127 Stat. 54 (March 7, 2013). See INA 204(a)(1)(A)(iii)(II)(aa)(BB) as amended by Section 1503(b)(1) of the Battered Immigrant Women Protection Act of 2000 (BIWPA), Pub. L. 106-386 (PDF), 114 Stat. 1464, 1518 (October 28, 2000). See INA 216(c)(4)(D) as amended by Section 806 of VAWA 2013, Pub. L. 113-4 (PDF), 127 Stat. 54, 112 (March 7, 2013).

[^ 42] See INA 204(a)(1)(A)(iii)(II)(aa)(BB). See INA 216(c)(4)(D).

[^ 43] See INA 216(c)(4)(D).

[^ 44] See 8 U.S.C. 1367(a)(2). See 8 CFR 216.5(e)(3)(viii). See Volume 1, General Policies and Procedures, Part A, Public Services, Chapter 7, Privacy and Confidentiality, Section E, VAWA, T, and U Cases [1 USCIS-PM A.7(E)].

[^ 45] See 8 U.S.C. 1367(a)(1). See Implementation of Section 1367 Information Provisions (PDF), DHS Instruction 002-02-001, Revision 00.1, issued November 7, 2013.

[^ 46] See Volume 1, General Policies and Procedures, Part A, Public Services, Chapter 7, Privacy and Confidentiality, Section E, VAWA, T, and U Cases [1 USCIS-PM A.7(E)].

[^ 47] For more information on confidentiality protections under 8 U.S.C. 1367, see Subsection 4, Confidentiality Protections and Safe Address [6 USCIS-PM I.5(C)(4)].

[^ 48] See Information for Conditional Permanent Residents Seeking to Change the Basis of Form I-751 From a Waiver Based on Battery or Extreme Cruelty to a Joint Petition.

[^ 49] See 8 CFR 216.4(a)(1). For information on filing a Form I-751 and where to file the form, see the Form I-751 webpage.

[^ 50] See INA 216(d)(2)(B). See 8 CFR 216.4(a)(6).

[^ 51] See INA 216(c)(1)(B). See 8 CFR 216.4(b).

Chapter 6 - Decision and Post-Adjudication

A. Discretion

1. Non-Discretionary Decision for Joint Filings and Individual Filing Requests

The decision to remove conditions on residence in a joint petition or individual filing request is not discretionary. The only issues that are resolved through the joint petition or individual filing request process are those relating to eligibility under section 216 of the Immigration and Nationality Act (INA) and the bona fides of the qualifying marriage.[1]

If derogatory information unrelated to INA 216 eligibility is discovered, the officer forwards the information to an investigations unit for appropriate action. However, unless the derogatory information relates to INA 216 eligibility, such information cannot serve as the basis for a denial.

If USCIS determines that the qualifying marriage is bona fide and all other INA 216 eligibility requirements are met, USCIS approves the joint petition or individual filing request and removes the conditions on residence.[2]

2. Discretionary Decision for Waivers

Unlike a joint petition, the approval of a Petition to Remove Conditions on Residence (Form I-751) filed as a waiver is solely within the discretion of USCIS.[3] Therefore, unlike the adjudication of a joint petition, the adjudication of a waiver may take into consideration factors not directly related to the bona fides of the qualifying marriage.[4]

B. Approvals

If USCIS determines that the facts and information provided in the Form I-751 demonstrate eligibility by a preponderance of the evidence, USCIS approves the Form I-751 and removes the conditions on residence.[5] The approval also applies to any Conditional Permanent Resident (CPR) children who are included in the Form I-751 and who are eligible for removal of conditions on residence.[6]

Upon approval, USCIS removes the conditions on the CPR's status effective as of the second anniversary of the CPR obtaining permanent resident status.[7] USCIS notifies the CPR of the approval and produces a new Permanent Resident Card (PRC). The CPR must surrender to USCIS any previously issued PRC upon receipt of the new card.[8]

C. Denials

If USCIS finds that the facts and information in the Form I-751 do not demonstrate eligibility by a preponderance of the evidence, then USCIS denies the Form I-751 and terminates the CPR's permanent resident status as of the date of the decision.[9] USCIS is also required by statute to issue a Notice to Appear (NTA), placing the CPR in removal proceedings. The following sections describe common reasons for denial.

1. Abandonment Denials

Insufficient Response or Failure to Respond

USCIS generally considers the Form I-751 abandoned and denies the Form I-751 if the CPR does not submit all of the requested evidence by the required date provided in the Request for Evidence (RFE) or Notice of Intent to Deny (NOID).[10]

Failure to Appear for Biometrics

If the CPR fails to appear for a scheduled biometrics appointment, USCIS generally considers the Form I-751 abandoned and denies the Form I-751. If the CPR submits a change of address or a rescheduling request, USCIS may reschedule the CPR's biometrics appointment.[11]

Failure to Appear for Interview

If the CPR (and petitioning spouse or stepparent if a joint petition) fails to appear for a scheduled interview, USCIS generally considers the Form I-751 abandoned and denies the Form I-751.[12] If the CPR submits a written request to reschedule the interview or requests an interview waiver, USCIS may reschedule or waive the interview based on good cause.

2. Qualifying Marriage is Improper

USCIS denies a joint petition or individual filing request if the qualifying marriage is improper because:

- The marriage was not entered into in accordance with the laws of the place where the marriage took place;[13]
- The marriage has been judicially annulled or terminated other than through the death of a spouse;[14]
- The marriage was entered into for the purpose of procuring the CPR's admission as an immigrant;[15] or
- The CPR or someone else gave a fee or other consideration for filing a petition for an immigrant visa with respect to the CPR or the CPR's son or daughter.[16]

3. Failure to Establish Eligibility by Preponderance of the Evidence

If the CPR fails to establish eligibility under the requested basis or bases for filing by a preponderance of the evidence, USCIS denies the Form I-751.

4. Discretionary Denial of Waivers

If in the adjudication of a waiver request, the officer finds that significant negative factors, such as a significant criminal record, outweigh the benefits of approving the waiver, the officer may deny the petition.[17]

D. Withdrawals

In general, USCIS considers the joint petition withdrawn if the CPR, petitioning spouse, or both withdraw(s) support from the joint petition before its adjudication.[18] If the CPR or both the CPR and the petitioning spouse withdraw(s), USCIS considers the joint petition withdrawn and terminates the CPR's status. USCIS then issues an NTA and places the CPR in removal proceedings. When the CPR is in removal proceedings, the CPR may file a new waiver application at any time unless and until the immigration court issues the final order of removal.[19]

However, if the petitioning spouse is the only one who withdraws, the officer sends an RFE to give the CPR an opportunity to amend the basis for filing from a joint petition to a waiver. The Board of Immigration Appeals (BIA) held that withdrawal of support for a joint petition by a petitioning spouse automatically withdraws the joint petition, and the joint petition is then "considered as if never filed" rather than being reviewed on its merits.[20] USCIS will provide a withdrawal notice to the CPR and the petitioning spouse.

While the petition can no longer be considered a joint petition if one party withdraws, the CPR is given an opportunity to amend the basis for filing to a waiver. For example, a petitioning spouse may withdraw support from the joint petition because the spouses have divorced or are in the process of divorcing. Therefore, USCIS gives the CPR the opportunity to amend the basis for filing from a joint petition to a waiver.

E. Notification of Decision

USCIS provides the CPR with written notice of the decision, whether an approval or denial.[21] If the decision is a denial, USCIS must advise the CPR of the reason(s) for denial, notify the CPR of the termination of permanent resident status, and instruct the CPR to surrender any permanent resident cards. USCIS also issues an NTA, beginning the process of placing the CPR in removal proceedings.

The CPR may not appeal the decision to USCIS but may seek review of the decision in removal proceedings.[22] Although the CPR may not appeal the decision to USCIS, the CPR may file a motion to reopen or reconsider with USCIS by submitting a Notice of Appeal or Motion (Form I-290B). The CPR may also choose to file a new Form I-751 if eligible.

F. Motion to Reopen or Reconsider

The denial notice should include instructions for filing a Form I-290B. If USCIS denies the Form I-751 and the CPR disagrees with the decision or has additional evidence that shows the decision was incorrect, the CPR may file a motion to reopen or reconsider the case by filing a Form I-290B.[23] The CPR may also choose to simply file a new Form I-751 with a new filing basis, rather than filing a motion to reopen or reconsider.

Amending the Basis for Filing on a Motion to Reopen

If the petition was denied under one basis for filing, but the CPR may qualify under another basis, when the CPR files a motion to reopen, the CPR may amend the Form I-751 for consideration under a new basis in limited circumstances. The CPR may request that USCIS amend the filing basis from a joint filing to a waiver or from one waiver basis to another.

For example, if the basis for the Form I-751 was a divorce waiver but the CPR may qualify for a waiver based on battery or extreme cruelty, the CPR may amend the basis for filing when filing a motion. However, if the CPR seeks to change the basis for filing from a waiver to a joint petition, the CPR cannot amend the filing basis using a motion. The CPR must file a new Form I-751 jointly with the petitioning spouse or stepparent because the petitioning spouse or stepparent never signed the prior Form I-751.

If either the original filing or the desired amended filing is based on battery or extreme cruelty, additional procedures must be followed.[24]

The CPR must file the Form I-290B with the appropriate fee[25] within 30 calendar days of the decision if the denial was delivered by personal service or within 33 calendar days of the decision if the denial was mailed. After the CPR files a motion to reopen or reconsider, USCIS decides whether there is sufficient justification for reopening the case. If so, USCIS renders a new decision on the merits of the reopened case.[26]

G. Multiple Filings

There are no regulatory limits on how many times a CPR may file Form I-751. For example, a CPR who initially files a joint petition may subsequently file another joint petition or a waiver request.[27] USCIS reviews all prior filings before making a final decision on the new filing. The following sections outline how USCIS handles common multiple filing scenarios.

1. Same Filing Basis

Prior Abandonment Denial

If USCIS receives a Form I-751 following the denial of a Form I-751 due to abandonment (resulting from, for example, a failure to appear for a biometrics or interview appointment or failure to respond to an RFE or NOID), USCIS adjudicates the new Form I-751 separately from the prior denial.

Prior Denial for Cause

If USCIS receives a Form I-751 following the denial for cause of a Form I-751 filed under the same basis, USCIS reviews the new Form I-751 to determine if the CPR has presented any new evidence. This evidence must be different from the evidence that the CPR presented with the previous Form I-751.

If there is no new evidence, USCIS denies the new Form I-751, referencing the grounds of the previous denial in the notification.

In cases where the subsequent Form I-751 contains new evidence but this new evidence does not establish the bona fides of the qualifying marriage or eligibility for the requested waiver, USCIS denies the Form I-751 and states the reasons for the denial in the notification.

If USCIS determines the new evidence is sufficient to overcome the reasons for the prior denial, USCIS approves the Form I-751.

2. Different Filing Basis

If USCIS receives a Form I-751 subsequent to the denial of a Form I-751 filed under a different basis, USCIS evaluates the new filing separately from the prior filing.

For example, if the initial Form I-751 was a joint petition and the subsequent Form I-751 is a waiver based on divorce, USCIS evaluates the new divorce waiver separately from the initial joint petition. Likewise, if the initial Form I-751 was a waiver based on divorce and the subsequent Form I-751 is a waiver based on extreme hardship, USCIS evaluates the new extreme hardship waiver separately. However, the officer considers all relevant evidence in the record, including in the prior Form I-751 filing, during adjudication.

3. Prior Form I-751 Still Pending

Same Filing Basis

If USCIS receives a Form I-751 after receiving another Form I-751 filed under the same basis, and the first Form I-751 remains pending, USCIS adjudicates the first Form I-751 and administratively closes the second.

Different Filing Basis

If USCIS receives a Form I-751 after receiving another Form I-751 filed under a different filing basis, USCIS adjudicates the forms separately. In certain circumstances, USCIS may administratively close or deny the first filing.

Footnotes

[^ 1] See 8 CFR 216.4(c)(4).

[^ 2] See 8 CFR 216.4(c)(4).

[^ 3] See INA 216(c)(4).

[^ 4] See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis [1 USCIS-PM E.8].

[^ 5] See 8 CFR 216.4(c)(4). See 8 CFR 216.5(f).

[^ 6] See 8 CFR 216.4(a)(2).

[^ 7] See INA 216(c)(3)(B).

[^ 8] See 8 CFR 216.4(d)(1) and 8 CFR 216.5(f).

[^ 9] See INA 216(c)(3)(C).

[^ 10] See 8 CFR 103.2(b)(13)(i).

[^ 11] See 8 CFR 103.2(b)(13)(ii). See Volume 1, General Policies and Procedures, Part C, Biometrics Collection and Security Checks, Chapter 2, Biometrics Collection [1 USCIS-PM C.2].

[^ 12] See INA 216(c)(2)(A)(ii). See 8 CFR 216.4(b)(3) and 8 CFR 216.5(d).

[^ 13] See INA 216(d)(1)(A)(i)(I).

[^ 14] See INA 216(d)(1)(A)(i)(II).

[^ 15] See INA 216(d)(1)(A)(i)(III).

[^ 16] See INA216(d), INA 204(a), INA 214(d), and INA 214(p). The statutory provision on fee or consideration does not refer to fees paid to attorneys, notarios, or others who assisted with filing petitions, but rather refers to instances where a fee or other consideration was paid in connection with a fraudulent marriage. If a fee or other consideration was paid in order to enter into a fraudulent marriage or to obtain an immigration benefit through a fraudulent marriage, the CPR is ineligible for removal of conditions.

See INA 216(d)(1)(A)(ii). See 8 CFR 216.4(c)(4).

[^ 17] See INA 216(c)(4).

[^ 18] See *Matter of Mendes* (PDF), 20 I&N Dec. 833 (BIA 1994).

[^ 19] See 8 CFR 216.5(a)(2).

[^ 20] See *Matter of Mendes* (PDF), 20 I&N Dec. 833 (BIA 1994).

[^ 21] See 8 CFR 103.2(b)(19).

[^ 22] See 8 CFR 216.4(d) and 8 CFR 216.5(f).

[^ 23] The CPR may file a motion to reopen, a motion to reconsider, or both. See Form I-290B and instructions for more information.

[^ 24] See Chapter 5, Waiver of Joint Filing Requirement, Section C, Battery or Extreme Cruelty, Subsection 5, Changing or Supplementing the Filing Basis [6 USCIS-PM I.5(C)(5)].

[^ 25] See Fee Schedule (Form G-1055).

[^ 26] See 8 CFR 103.5(a).

[^ 27] CPRs who file untimely joint petitions after previously filing timely joint petitions must still establish good cause and extenuating circumstances for the untimely filing.

Chapter 7 - Effect of Removal Proceedings

A. CPRs in Removal Proceedings

USCIS has original jurisdiction over all pending Forms I-751, whether they are joint petitions, individual filing request, or waiver request.[1] The conditional permanent resident (CPR) must file the Form I-751 with USCIS, even if the CPR is in removal proceedings. If a CPR is in removal proceedings and has filed the Form I-751, USCIS must adjudicate the petition before an immigration judge (IJ) can review it.[2]

Additionally, the CPR cannot request a change in filing basis for a petition denied by USCIS that is being reviewed by the IJ. For example, if the CPR filed a joint petition with USCIS, the IJ has no jurisdiction to review a battery or extreme cruelty waiver in immigration court. However, a CPR may file a waiver for the first time while in removal proceedings if the CPR becomes eligible for a waiver at that time; however, the waiver must be filed with USCIS.[3] Additional evidence may be introduced by either the CPR or DHS during a review of a waiver petition denial.[4]

USCIS does not deny or hold a Form I-751 in abeyance solely because the CPR is in removal proceedings. The IJ may continue, administratively close, or terminate removal proceedings to allow USCIS to adjudicate the petition.

USCIS adjudicates a Form I-751 filed by a CPR who is in removal proceedings on its merits. USCIS confirms that there is a Notice to Appear (NTA) in the CPR's records by checking the appropriate electronic systems. If the IJ has administratively closed the proceedings to await a decision by USCIS, USCIS expedites adjudication. After USCIS makes a decision, USCIS routes the file through appropriate channels to the U.S. Immigration and Customs Enforcement office that has jurisdiction over the proceedings.[5]

B. Review in Removal Proceedings

1. Joint Petition or Individual Filing Request

The CPR may seek review of the denial of a joint petition or individual filing request while in removal proceedings before an IJ.[6] Any person whose CPR status was terminated by USCIS under INA 216 is removable.[7] If the IJ orders the CPR removed from the United States, the CPR may appeal the IJ's decision by properly filing an appeal with the Board of Immigration Appeals (BIA).

DHS's Burden of Proof in Removal Proceedings

If USCIS denies the joint petition based on a finding that the qualifying marriage was improper, DHS must establish, by a preponderance of the evidence, that:[8]

- The marriage was entered into for the purpose of procuring the person's admission as an immigrant;
- The marriage was not entered into in accordance with the laws of the place where the marriage took place;
- The marriage was judicially annulled or terminated, other than through death of a spouse; or
- The CPR or someone else gave a fee or other consideration (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for filing a petition for an immigrant visa with respect to the CPR or the CPR's son or daughter.[9]

CPR's Burden of Proof in Removal Proceedings

The CPR must establish, by a preponderance of the evidence, that the CPR complied with the filing and interview requirements if:[10]

- USCIS denied the joint petition for failure to appear at a required biometrics appointment;
- USCIS denied the joint petition for failure to appear for a scheduled interview; or
- The CPR lost status due to a failure to file Form I-751.

2. Waiver

A CPR may seek review of USCIS' decision to deny the CPR's waiver in removal proceedings before an IJ.[11] If the IJ decides to order the CPR removed from the United States, the CPR may appeal the IJ's decision by properly filing an appeal with the BIA.

C. CPRs Subject to Final Order of Removal

If an alien who was admitted or adjusted as a CPR is the subject of a final order of removal, the CPR status no longer exists and the alien no longer has a status for which to seek removal of conditions. Therefore, USCIS denies any Form I-751 filed by an alien with a final order of removal regardless of whether it is a joint petition, individual filing request, or waiver request. The denial notice clearly indicates that the denial is based on a final order of removal.

Footnotes

[^ 1] See *Matter of Lemhammad* (PDF), 20 I&N Dec. 316 (BIA 1991).

[^ 2] See *Matter of Anderson* (PDF), 20 I&N Dec. 888 (BIA 1994).

[^ 3] See *Matter of Mendes* (PDF), 20 I&N Dec. 833 (BIA 1994).

[^ 4] See *Matter of Herrera del Orden* (PDF), 25 I&N Dec. 589 (BIA 2011).

[^ 5] See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 3, Jurisdiction, Section A, Coordination in Cases Involving Removal Proceedings [1 USCIS-PM E.3(A)].

[^ 6] See INA 216(c)(3)(D). See *Matter of Gawaran* (PDF), 20 I&N Dec. 938, 942 (BIA 1995), affirmed, 91 F.3d 1332 (9th Cir. 1996).

[^ 7] See INA 237(a)(1)(D)(i).

[^ 8] See INA 216(c)(3)(D). See 8 CFR 216.4(d)(2).

[^ 9] The statutory provision on fee or consideration does not refer to fees paid to attorneys, notarios, or others who assisted with filing petitions, but rather refers to instances where a fee or other consideration was paid in connection with a fraudulent marriage. If a fee or other consideration was paid in order to enter into a fraudulent marriage or to obtain an immigration benefit through a fraudulent marriage, the CPR is ineligible for removal of conditions.

[^ 10] See INA 216(c)(2)(B). See 8 CFR 216.4(a)(6) and 8 CFR 216.4(b)(3).

[^ 11] See 8 CFR 216.5(f).

Part J - Special Immigrant Juveniles

Chapter 1 - Purpose and Background

A. Purpose

Congress initially created the special immigrant juvenile (SIJ) classification to provide humanitarian protection for abused, neglected, or abandoned alien children eligible for long-term foster care. This protection evolved to include children who cannot reunify with one or both parents because of abuse, neglect, abandonment, or a similar basis under state law. While there is no longer a requirement that a child be found eligible for long-term foster care, a juvenile court determination[1] that reunification with one or both parents is not viable is still required for SIJ classification.[2]

Children in a variety of different circumstances who are residing in the United States may be eligible for SIJ classification, including but not limited to:

- Children in the care or custody of a family member or other caregiver who have been abused, neglected, abandoned or subjected to similar maltreatment by a parent prior to their arrival in the United States, or while in the United States;
- Children in federal custody with the U.S. Department of Health and Human Services, Office of Refugee Resettlement, Unaccompanied Children's Services Program;[3] or
- Children in the state child welfare system in the custody of a state agency (for example, foster care), or in the custody of a person or entity appointed by a state or juvenile court.

B. Background

Congress first established the SIJ immigrant visa classification in 1990. Since then, Congress has enacted several amendments. The table below provides an overview of major legislation related to SIJ classification.

Special Immigrant Juvenile Classification: Acts and Amendments

Acts and Amendments	Key Changes
The Immigration Act of 1990[4]	• Established an SIJ classification for children declared dependent on a juvenile court in the United States, eligible for long-term foster care, and for whom it would not be in their best interest to return to their country of origin
Miscellaneous and Technical Immigration and Nationality Amendments of 1991[5]	• Provided that children with SIJ classification were considered paroled for the purpose of adjustment of status to lawful permanent residence • Provided that alien children cannot apply for admission or be admitted to the United States in order to obtain SIJ classification
The Immigration and Nationality Technical Corrections Act of 1994[6]	• Expanded eligibility from those declared dependent on a juvenile court to children whom such a court has legally committed to, or placed under the custody of, a state agency or department
The 1998 Appropriations Act[7]	• Limited eligibility to children declared dependent on the court because of abuse, neglect, or abandonment • Provided that children are eligible only if the Attorney General (later changed to the Secretary of the Department of Homeland Security) expressly consents to the juvenile court order serving as a precondition to the grant of classification • Prohibited juvenile courts from determining the custody status or placement of a child who is in the custody of the federal government, unless the Attorney General (later changed to the Secretary of the Department of Health and Human Services) specifically consents to the court's jurisdiction
Violence Against Women Act of 2005[8]	• Prohibited compelling an SIJ petitioner to contact the alleged abuser (or family member of the alleged abuser) at any stage of applying for SIJ classification
The Trafficking Victims Protection and Reauthorization Act (TVPRA 2008)[9]	• Removed the need for a juvenile court to deem a child eligible for long-term foster care and replaced it with a requirement that the juvenile court find that reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law • Expanded eligibility to include children whom a juvenile court has placed under the custody of a person or entity appointed by a state or juvenile court

Acts and Amendments	Key Changes
	• Provided age-out protections so that SIJ classification may not be denied to anyone, based solely on age, who was under 21 years of age on the date that he or she properly filed the SIJ petition, regardless of the petitioner's age at the time of adjudication • Simplified the consent requirement: The Secretary of Homeland Security now consents to the grant of SIJ classification instead of expressly consenting to the juvenile court order • Altered the "specific consent" function for those children in federal custody by vesting this authority with the Secretary of Health and Human Services, rather than the Secretary of the Department of Homeland Security • Added a timeframe for adjudication: USCIS shall adjudicate SIJ petitions within 180 days of filing

C. Legal Authorities

- INA 101(a)(27)(J); 8 CFR 204.11– Special immigrant juvenile classification
- INA 203(b)(4) – Certain special immigrants
- INA 204(a)(1)(G)(i) – Petitioning procedure
- INA 245(h); 8 CFR 245.1(e)(3) – Special immigrant juveniles, eligibility for adjustment of status
- INA 287(h) – Protecting abused juveniles
- 8 CFR 205.1(a)(3)(iv) – Automatic revocation
- 8 CFR 205.2 – Revocation on notice

Footnotes

[^ 1] The term "determination" refers to a conclusion of law. See 8 CFR 204.11(a) (defining "judicial determination" as a conclusion of law made by a juvenile court).

[^ 2] There is nothing in the Immigration and Nationality Act (INA) that allows or directs juvenile courts to rely upon provisions of the INA or otherwise deviate from reliance upon state law and procedure in issuing state court orders.

[^ 3] See Section 462 of the Homeland Security Act of 2002, Pub. L. 107-296 (PDF), 116 Stat. 2135, 2202 (November 25, 2002).

[^ 4] See Pub. L. 101-649 (PDF) (November 29, 1990).

[^ 5] See Pub. L. 102-232 (PDF) (December 12, 1991).

[^ 6] See Pub. L. 103-416 (PDF) (October 25, 1994).

[^ 7] See Pub. L. 105-119 (PDF) (November 26, 1997).

[^ 8] See Pub. L. 109-162 (PDF) (January 5, 2006).

[^ 9] See Pub. L. 110-457 (PDF) (December 23, 2008).

Chapter 2 - Eligibility Requirements

Special immigrant juvenile (SIJ) classification is available to children who have been subject to state juvenile court proceedings related to abuse, neglect, abandonment, or a similar basis under state law. If a juvenile court has made certain judicial determinations and issued orders under state law on dependency or custody, parental reunification, and the best interests of the child, then the child may be eligible for SIJ classification.

USCIS determines if the petitioner meets the requirements for SIJ classification by adjudicating a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360).[1] USCIS' adjudication of the SIJ petition includes review of the petition, the juvenile court order(s), and supporting evidence to determine if the petitioner is eligible for SIJ classification. USCIS generally defers to the court on matters of state law and does not go behind the juvenile court order to reweigh evidence and make independent determinations about the best interest of the juvenile and abuse, neglect, abandonment, or a similar basis under state law.

A. General

A petitioner must satisfy the following requirements to qualify for SIJ classification:

General Eligibility Requirements for SIJ Classification
Physically present in the United States at the time of filing and adjudication of the Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360)
Unmarried at the time of filing and adjudication of Form I-360
Under the age of 21 at the time of filing Form I-360
Subject to juvenile court determinations issued in the United States that meet the specified requirements
Obtain U.S. Department of Homeland Security consent
Obtain U.S. Department of Health and Human Services (HHS) consent, if applicable

B. Age-out Protections for Filing with USCIS

In general, a juvenile may seek SIJ classification if he or she is under 21 years of age and unmarried at the time of filing the petition with USCIS.[2] However, state law is controlling as to whether a petitioner is considered a "child" or any other equivalent term for a juvenile subject to the jurisdiction of a state juvenile court for custody or dependency proceedings.[3]

If a petitioner was under 21 years of age on the date of the proper filing of the Form I-360, and all other eligibility requirements under the statute are met, USCIS cannot deny SIJ classification solely because the petitioner is older than 21 years of age at the time of adjudication.[4]

In-Person Filing by the Petitioner's 21st Birthday

Although petitioners can file their Form I-360 by mail, sometimes circumstances such as mailing delays or juvenile court delays in issuing the required judicial determinations might prevent petitioners from timely filing Form I-360 by mail by their 21st birthday. To help petitioners meet the filing deadline, petitioners may file the Form I-360 in person with an appointment at a USCIS field office within the 2-week period before they turn 21 years of age.

The petitioner (or their representative) may contact the USCIS Contact Center to request an expedited appointment with a USCIS field office to file Form I-360 in person within the 2-week period before the petitioner turns 21 years of age. The field office does not examine the petition for completeness. Upon receipt, the field office sends the petition to the USCIS Lockbox, which follows standard receipting procedures, including ensuring that the petition is properly signed.[5] If the Form I-360 is properly filed, USCIS issues a Notice of Action (Form I-797) using the date the field office physically received the Form I-360 as the receipt date.

C. Juvenile Court Order

For purposes of SIJ classification, a juvenile court is defined as a U.S. court having jurisdiction under state law to make judicial determinations on the dependency and/or custody and care of juveniles.[6] This means the court must have the authority to make determinations about dependency and/or custody and care of the petitioner as a juvenile under state law at the time the order was issued.[7] Depending on the circumstances, such a determination generally would be expected to remain in place until the juvenile reached the age of majority, or until the goal of a child welfare permanency plan, such as adoption, or other protective relief ordered by the juvenile court has been reached.[8]

The title and the type of court that may meet the definition of a juvenile court varies from state to state. Examples of state courts that may meet this definition include: juvenile, family, dependency, orphans, guardianship, probate, and youthful offender courts.

Not all courts having jurisdiction over juveniles under state law may be acting as juvenile courts for the purposes of SIJ classification. For example, a court of general jurisdiction that issues an order with SIJ-related findings outside of any juvenile custody or dependency proceeding would generally not be acting as a juvenile court for SIJ purposes. The burden is on the petitioner to establish that the court is acting as a juvenile court at the time that the order is issued.[9]

To be eligible for SIJ classification, the petitioner must submit a juvenile court order(s) with the following determinations, and the record must provide evidence that there is a reasonable factual basis[10] for each of the determinations:

- Dependency or Custody – Declares the petitioner dependent on the court, or legally commits or places the petitioner under the custody of either a state agency or department, or a person or entity appointed by a state or juvenile court;
- Parental Reunification – Declares, under state law, that the petitioner cannot reunify with one or both of the petitioner's parents due to abuse, neglect, abandonment, or a similar basis under state law; and
- Best Interests – Determines that it would not be in the petitioner's best interest to be returned to the petitioner's, or the petitioner's parents', country of nationality or last habitual residence. The best interest determination may be made by the juvenile court or in administrative proceedings authorized or recognized by the juvenile court.

1. Dependency or Custody

The petitioner must be the subject of a juvenile court order that declares the petitioner dependent on a juvenile court, or legally commits to or places the petitioner under the custody of either an agency or department of a state, or a person or entity appointed by a state or juvenile court.

Dependency[11]

A determination of dependency requires that the petitioner be declared dependent upon a juvenile court located in the United States in accordance with state law governing such declarations of dependency.[12] The petitioner must be in the United States and under the jurisdiction of the court. The term dependent child, as used in state child welfare laws, generally means a child subject to the jurisdiction of a juvenile court because the court has determined that allegations of parental abuse, neglect, abandonment, or similar maltreatment concerning the child are sustained by the evidence and are legally sufficient to support state intervention on behalf of the child.[13] Dependency proceedings may include abuse, neglect, dependency, termination of parental rights, or other matters in which the court intervenes to provide relief from abuse, neglect, abandonment, or a similar basis under state law.[14]

Custody[15]

Placing the petitioner "under the custody of" a natural person or entity may encompass legal or physical custody.[16] Commitment to, or placement under the custody of a person may include certain types of guardianship, conservatorship, or adoption.[17] When the court places the petitioner under the custody of a specific person, the court order should identify that person by name. A qualifying court-appointed custodial placement could be with one parent, if reunification with the other parent is found to be not viable due to that parent's abuse, neglect, abandonment, or similar maltreatment of the petitioner.

2. Parental Reunification[18]

The juvenile court must determine that reunification with one or both parents[19] is not viable due to abuse, neglect, abandonment, or a similar basis under the relevant state laws.[20] This generally means that the court intends for its determination that the child cannot reunify with his or her parent(s) to remain in effect until the child ages out of the juvenile court's jurisdiction.[21] However, actual termination of parental rights is not required.[22]

The record should contain the factual basis for this determination, and must establish that the court made a determination regarding the petitioner's parentage. If the juvenile court order names the petitioner's parents, or the record is supported by other evidence of parentage that was considered by the court, such as the birth certificate, USCIS generally considers this requirement to have been met. If a parent is unknown, the record should reflect that the parent is unknown. If the record does not establish that the court made a determination regarding the petitioner's parentage, USCIS may request additional evidence.

3. Best Interests

While juvenile courts do not have the authority to make decisions on the removal or deportation of a child to another country, it must be determined by the juvenile court (or in administrative proceedings recognized by the juvenile court) that it would not be in the best interest of the petitioner to be returned to the country of nationality or last habitual residence of the petitioner or the petitioner's parents.[23] This requires the juvenile court to make an individualized assessment and consider the factors that it normally takes into account when making best interest determinations, and the record should reflect the factual basis for the juvenile court's determination.

The standards for making best interest determinations may vary between states, and the court may consider a number of factors related to the circumstances of the child and the circumstances and capacity of the child's potential caregiver(s).[24] The child's safety and well-being are typically the paramount concern. For example, if the court places the child with a person in the United States under state law governing the juvenile court dependency or custody proceedings, and the order includes facts reflecting that the caregiver has provided a loving home, bonded with the child, and is the best person available to provide for the child, this would likely constitute a sufficient factual basis in support of a qualifying best interest determination to warrant DHS consent. The analysis would not change even if the chosen caregiver is a parent. USCIS defers to the juvenile court in making this determination and as such does not require the court to conduct any analysis other than what is required under state law.[25]

The juvenile court may make the required determination that it is not in the petitioner's best interest to be returned to the petitioner's or the petitioner's parents' country of nationality or last habitual residence. However, other judicial or administrative bodies authorized or recognized by a juvenile court, such as a state child welfare agency, may also make this required determination. If a particular juvenile court establishes or endorses an alternate process for a best interest determination, a determination from that process may satisfy this requirement.[26]

4. Validity of Order

Jurisdiction under State Law

All determinations in the juvenile court order must have been properly issued under state law to establish eligibility for SIJ classification. This includes the need for the juvenile court[27] to have jurisdiction under state law to make the required judicial determinations about the custody and care and/or dependency of the juvenile.[28] For example, a state juvenile court may not be able to take jurisdiction and issue a qualifying dependency or custody order for a person who is no longer a juvenile under the state's dependency or custody laws even though the federal statute allows a petitioner to file for SIJ classification until the age of 21. The state law definition of juvenile controls jurisdiction to determine dependency or custody proceedings before the juvenile court. There is nothing in USCIS guidance that should be construed as instructing juvenile courts on how to apply their own state law.

Continuing Jurisdiction

In general, the petitioner must remain under the jurisdiction of the juvenile court at the time of the filing and adjudication of the SIJ petition, subject to some exceptions discussed below. If the petitioner is no longer under the jurisdiction of the juvenile court for a reason related to their underlying eligibility for SIJ classification, the petitioner is not eligible for SIJ classification. This may include cases in which the petitioner is no longer under the jurisdiction of the court because:

- The court vacated or terminated its determinations that made the petitioner eligible because of subsequent evidence or information that invalidated the determinations; or
- The court reunified the petitioner with the parent with whom the court previously deemed reunification was not viable because of abuse, neglect, abandonment, or a similar basis under state law.

However, this requirement does not apply if the juvenile court jurisdiction ended solely because:

- The petitioner was adopted, placed in a permanent guardianship, or another child welfare permanency goal was reached;[29] or
- The petitioner was the subject of a qualifying juvenile court order that was terminated based on age before or after filing the SIJ petition (provided the petitioner was under 21 years of age at the time of filing the SIJ petition).[30]
- A juvenile court order does not necessarily terminate because of a petitioner's move to another court's jurisdiction, and a juvenile leaving the court-ordered placement without permission or authorization does not by itself affect SIJ eligibility. In general, a court maintains jurisdiction when it orders the juvenile placed in a different state or makes a custody determination and the juvenile and the legal custodian relocate to a new jurisdiction.[31]

If the original order is terminated due to the relocation of the child but another order is issued in a new jurisdiction, USCIS considers the dependency or custody to have continued through the time of adjudication of the SIJ petition, even if there is a lapse between court orders.

D. DHS Consent

The Trafficking Victims Protection and Reauthorization Act (TVPRA 2008) simplified but did not remove the DHS consent requirement.[32] In order to consent to the grant of SIJ classification, USCIS must review the juvenile court order(s) and any supporting evidence submitted to conclude that the request for SIJ classification is bona fide, which requires the petitioner to establish that a primary reason the required juvenile court determinations were sought was to obtain relief from parental abuse, neglect, abandonment, or a similar basis under state law.[33]

In exercising this consent function, USCIS therefore looks to the juvenile court's determinations, the factual bases supporting those determinations, and the relief provided or recognized by the juvenile court.[34] Such relief may include custodial placement, dependency on the court for the provision of child welfare services, and/or other court-ordered or recognized protective or remedial relief.[35] USCIS relies on the expertise of the juvenile court in making child welfare decisions and does not reweigh the evidence to determine if the child was subjected to abuse, neglect, abandonment, or a similar basis under state law.

Under the *Saravia* Settlement Agreement, USCIS does not withhold consent based in whole or in part on the fact that the state court did not consider or sufficiently consider evidence of the petitioner's gang affiliation when deciding whether to issue a predicate order or in making its determination that it was not in the best interest of the child to return to his or her home country. USCIS does not use its consent authority to reweigh the evidence that the juvenile court considered when it issued the predicate order.[36]

USCIS recognizes that there may be some immigration motive for seeking the juvenile court order. For example, the court may make determinations in separate hearings and the petitioner may request an order that compiles the determinations of several orders into one order to establish eligibility for SIJ classification. A special order issued to help clarify the determinations that were made so that USCIS can determine the petitioner's eligibility for SIJ classification does not mean that the order is not bona fide. USCIS may, however, withhold consent if evidence materially conflicts with the eligibility requirements for SIJ classification.[37]

E. U.S. Department of Health and Human Services Consent

If a petitioner is or was previously in the custody of HHS, and obtained a juvenile court order that also altered the petitioner's custody status or placement while the petitioner is or was in HHS custody, the petitioner must provide documentation of HHS' consent to the juvenile court's jurisdiction.[38] HHS consent is not required if the order simply restates the juvenile's placement in HHS custody.[39]

F. Inadmissibility and Waivers

Grounds of inadmissibility do not apply to the adjudication of the SIJ petition.[40] Therefore, a petitioner does not need to apply for a waiver of any applicable grounds of inadmissibility in order to be eligible for SIJ classification.

G. Family Members

Unlike some other immigrant visa petitions, SIJ classification does not allow the petitioner's family members to be included on the petition as derivative beneficiaries. SIJ petitioners that have adjusted status to that of a lawful permanent resident may petition for qualifying family members through the family-based immigration process. However, a petitioner who adjusts status as a result of an SIJ classification may not confer an immigration benefit to the petitioner's natural or prior adoptive parents, even after naturalization.[41] This prohibition applies to a custodial parent when the juvenile court has found reunification is not viable with the other parent.[42]

Footnotes

[^ 1] USCIS also adjudicates the Application to Register Permanent Residence or Adjust Status (Form I-485), which determines eligibility for adjustment of status to lawful permanent residence. See Volume 7, Adjustment of Status, Part F, Special Immigrant-Based Adjustment, Chapter 7, Special Immigrant Juveniles [7 USCIS-PM F.7].

[^ 2] USCIS interprets the use of the term "child" in Section 235(d)(6) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), Pub. L. 110-457 (PDF), 122 Stat. 5044, 5080 (December 23, 2008), to refer to the definition of child in INA 101(b)(1), which states that a child is an unmarried person under 21 years of age.

[^ 3] See INA 101(a)(27)(J)(i). See 8 CFR 204.11(a) (defining "juvenile court" as a court located in the United States having jurisdiction under state law to make judicial determinations about the dependency and/or custody and care of juveniles). See 8 CFR 204.11(c)(1)(i). See 8 CFR 204.11(c)(3).

[^ 4] Section 235(d)(6) of the TVPRA 2008, Pub. L. 110-457 (PDF), 122 Stat. 5044, 5080 (December 23, 2008), provides age-out protection to SIJ petitioners.

[^ 5] See 8 CFR 103.2(a)(2) and 8 CFR 103.2(a)(7).

[^ 6] See INA 101(a)(27)(J)(i). See 8 CFR 204.11(a).

[^ 7] See INA 101(a)(27)(J)(i). See 8 CFR 204.11(c)(3).

[^ 8] See 8 CFR 204.11(c)(3)(ii)(A) and (B).

[^ 9] For more information on what evidence is sufficient to establish that the court is acting as a juvenile court for SIJ purposes, see Chapter 3, Documentation and Evidence, Section A, Juvenile Court Order(s) and Administrative Documents, Subsection 1, Qualifying Juvenile Court Determinations [6 USCIS-PM J.3(A)(1)].

[^ 10] For information on what evidence may suffice to establish a reasonable factual basis, see Chapter 3, Documentation and Evidence, Section A, Juvenile Court Order(s) and Administrative Documents, Subsection 2, Evidentiary Requirements for DHS Consent [6 USCIS-PM J.3(A)(2)].

[^ 11] See 8 CFR 204.11(c)(1)(i)(A).

[^ 12] See 8 CFR 204.11(c)(1)(i)(A). For an example of state law governing declarations of dependency, see California Welfare and Institutions Code Section 300, et seq.

[^ 13] Intervention by a juvenile court on behalf of a dependent child generally involves a determination regarding the care and custody of the child or the provision of child welfare services or both. If a custodial placement is being made, the order should state where or with whom the child is being placed. If the court is providing relief through child welfare services, the order or supplemental evidence should reference what type of services or supervision the child is receiving from the court. For example, court-ordered child welfare services may include psychiatric, psychological, educational, occupational, medical or social services, services providing protection against trafficking or domestic violence, or other supervision by the court or a court appointed entity. See, for example, U.S. Department of Health and Human Services, Child Welfare Information Gateway, How the Child Welfare System Works (PDF). See *Budhathoki v. Nielsen (PDF)*, 898 F.3d 504, 513 (5th Cir. 2018) (concluding "that before a state court ruling constitutes a dependency order, it must in some way address custody or at least supervision").

[^ 14] USCIS draws on guidance from family law treatises, national clearinghouses on juvenile court practice, and state laws on the definition of dependency. See, for example, Ann M. Haralambie, Handling Child Custody, Abuse and Adoption Cases, Section 12.1 (Thompson Reuters 3rd ed. 2018); and National Council of Juvenile and Family Court Judges, *Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases (PDF)* (2016).

[^ 15] See 8 CFR 204.11(c)(1)(i)(B).

[^ 16] However, a department or agency of a state, or a person or entity appointed by a state court or juvenile court located in the United States, acting in loco parentis, is not considered a legal guardian for purposes of a qualifying custody determination. See Section 235(d)(5) of the Trafficking Victims Protection and Reauthorization Act (TVPRA 2008), Pub. L. 110-457 (PDF), 122 Stat. 5044, 5080 (December 23, 2008).

[^ 17] SIJ is generally not an appropriate option for those children who come to the United States for the primary purpose of adoption. Although it does not apply to all SIJ cases involving adoption, SIJ classification is not meant to provide a way to circumvent the Hague Adoption Convention or other requirements for receiving legal status via adoption. See Hague Conference on Private International Law, Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, Art. 2, 28. See 8 CFR 204.300 (regulations governing the intercountry adoption of a Hague Adoption Convention adoptee).

[^ 18] The TVPRA 2008 replaced the need for a juvenile court to deem a juvenile eligible for long-term foster care with a requirement that the juvenile court find reunification with one or both parents not viable. USCIS interprets the TVPRA changes as a clarification that petitioners do not need to be eligible for or placed in foster care and that they may be reunified with one parent or other family members. However, USCIS requires that the reunification no longer be a viable option with at least one parent. USCIS maintains that the court's determination generally should be in place on the date the petitioner files the Form I-360 and continue through the time of adjudication, unless the juvenile court's jurisdiction over the petitioner terminated solely because a child welfare permanency goal was reached or due to age, provided the petitioner was under 21 at the time of filing the petition. See 8 CFR 204.11(c)(3)(ii)(A) and (B). See Section 235(d)(1)(A) of TVPRA 2008, Pub. L. 110-457 (PDF), 122 Stat. 5044, 5079 (December 23, 2008).

[^ 19] The term "parent" does not encompass a stepparent unless the stepparent is recognized as the petitioner's legal parent under state law, such as when a stepparent has adopted the petitioner.

[^ 20] See INA 101(a)(27)(J)(i). See 8 CFR 204.11(c)(1)(ii).

[^ 21] For example, when parental reunification is no longer the goal of the child welfare authority's plan for a permanent living situation for the child (known as a "permanency plan"). See U.S. Department of Health and Human Services, Child Welfare Information Gateway, How the Child Welfare System Works (PDF).

[^ 22] See 8 CFR 204.11(c)(1)(ii). USCIS does not require that the juvenile court had jurisdiction to place the juvenile in the custody of the unfit parent(s) in order to make a qualifying determination regarding the viability of parental reunification. See *R.F.M. v Nielsen*, 365 F.Supp.3d 350, 382 (S.D. NY Mar. 15, 2019). See *J.L., et al v. Cissna*, 341 F.Supp.3d 1048 (N.D. CA 2018), *Moreno-Galvez v. Cissna*, No. 19-321 (W.D. WA July 17, 2019). See *W.A.O. v. Cissna*, No. 19-11696 (D. NJ July 3, 2019).

[^ 23] See INA 101(a)(27)(J)(ii). See 8 CFR 204.11(c)(2).

[^ 24] See U.S. Department of Health and Human Services, Child Welfare Information Gateway, Determining the Best Interests of the Child.

[^ 25] See 8 CFR 204.11(c)(2)(ii).

[^ 26] See 8 CFR 204.11(c)(2). The burden is on the petitioner to prove that the other judicial or administrative body is authorized or recognized by a juvenile court to make best interest determinations. Evidence to support this may include, but is not limited to, copies of the relevant state law(s) or court documents indicating that the judicial or administrative body is authorized to make such determinations.

[^ 27] As defined in this Section C, Juvenile Court Order [6 USCIS-PM J.2(C)].

[^ 28] For an order to be considered an eligible juvenile court order, the court must have jurisdiction under state law to make judicial determinations about the dependency and/or custody and care of juveniles. See 8 CFR 204.11(a).

[^ 29] See 8 CFR 204.11(c)(3)(ii)(A).

[^ 30] See 8 CFR 204.11(c)(3)(ii)(B).

[^ 31] Nearly all states have adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and the Interstate Compact for the Placement of Children (ICPC). The UCCJEA is a Uniform Act drafted by the National Conference of Commissioners on Uniform State Laws. The UCCJEA is effective only upon adoption by state legislatures. See Sections 201-204 of UCCJEA available at the Uniform Law Commission website on UCCJEA. ICPC is a binding contract between member jurisdictions. The ICPC establishes uniform legal and administrative procedures governing the interstate placement of children. Each state and the District of Columbia have enacted the provisions of the ICPC under state law.

[^ 32] See Pub. L. 110-457 (PDF) (December 23, 2008).

[^ 33] See INA 101(a)(27)(J)(iii). See 8 CFR 204.11(b)(5). See 8 CFR 204.11(d)(5). See H.R. Rep. 105-405 (PDF), p. 130 (1997).

[^ 34] See 8 CFR 204.11(d)(5).

[^ 35] See 8 CFR 204.11(d)(5)(i)(A) and (B).

[^ 36] See *Saravia v. Barr (PDF)*, 3:17-cv-03615 (N.D. Cal. January 14, 2021).

[^ 37] See 8 CFR 204.11(b)(5).

[^ 38] See 8 CFR 204.11(d)(6)(ii).

[^ 39] For more information on juvenile court orders for youth in HHS custody that do not alter their custodial placement, see Chapter 3, Documentation and Evidence, Section A, Juvenile Court Order(s) and Administrative Documents, Subsection 2, Evidentiary Requirements for DHS Consent [6 USCIS-PM J.3(A)(2)].

[^ 40] For discussion on the applicability of inadmissibility grounds to SIJ-based applicants for adjustment of status, see Volume 7, Adjustment of Status, Part F, Special Immigrant-Based Adjustment, Chapter 7, Special Immigrant Juveniles [7 USCIS-PM F.7]. See 8 CFR 245.1(e)(3)(iii) and (iv).

[^ 41] See INA 101(a)(27)(J)(iii)(II). See 8 CFR 204.11(i).

[^ 42] See 8 CFR 204.11(i).

Chapter 3 - Documentation and Evidence

A petitioner seeking special immigrant juvenile (SIJ) classification must submit all of the following documentation to USCIS:

- Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360);[1]
- A copy of the petitioner's birth certificate or other evidence of the petitioner's age;[2]
- Copies of the juvenile court order(s) and administrative document(s), as applicable, that establish eligibility;
- Evidence of the factual basis for the juvenile court's determinations; and
- A copy of U.S. Department of Health and Human Services (HHS) consent, if applicable.

The petitioner may file Form I-360 alone or concurrently with the Application to Register Permanent Residence or Adjust Status (Form I-485), if there is an immigrant visa currently available for the SIJ immigrant classification and the petitioner is otherwise eligible.[3]

Documentation of Age

An SIJ petitioner should submit documentation of age in the form of a valid birth certificate, official government-issued identification document, or other document that in USCIS' discretion establishes the petitioner's age.[4] If primary documentation of birth is not available to the petitioner, USCIS may consider affidavits or secondary evidence of age, which may include baptismal certificates, school records, hospital records, or immunization records, in order to evaluate whether the petitioner has met the petitioner's burden of proof by the preponderance of the evidence.

Affidavits must be sworn to by persons who have personal knowledge of the event to which they attest. Any affidavit must contain the affiant's full name and address, date and place of birth, relationship to the petitioner, if any, and complete details concerning how the affiant acquired knowledge of the event.

A. Juvenile Court Order(s) and Administrative Documents

1. Qualifying Juvenile Court Determinations

The juvenile court order(s) must provide the required judicial determinations regarding dependency or custody, parental reunification, and best interests. These determinations may be made in a single juvenile court order or in separate juvenile court orders. The order(s) should use language establishing that the specific judicial determinations were made under state law.[5] This requirement may be met if the order(s) cite those state law(s), or if the petitioner submits supplemental evidence which could include, for example, a copy of the petition with state law citations, excerpts from relevant state statutes considered by the state court prior to issuing the order, or briefs or legal arguments submitted to the court.

USCIS looks at the documents submitted in order to ascertain the role and actions of the court and to determine whether the proceedings provided relief to the child under the relevant state law(s). The juvenile court order may use different legal terms than those found in the Immigration and Nationality Act (INA) as long as the determinations have the same meaning as the requirements for SIJ classification (for example, “guardianship” or “conservatorship” may be equivalent to custody).[6] Orders that just mirror or cite to federal immigration law and regulations are not sufficient.

There is nothing in USCIS guidance that should be construed as instructing juvenile courts on how to apply their own state law. Juvenile courts should follow their state laws on issues such as when to exercise their authority, evidentiary standards, and due process.

Similar Basis under State Law

The language of the order may vary based on individual state child welfare law due to variations in terminology and local state practice in making child welfare decisions. If a juvenile court makes the determinations based upon a state law similar to abuse, neglect, or abandonment, the petitioner must provide evidence of how the basis is legally similar to abuse, neglect, or abandonment under state law.[7]

Such evidence must include the juvenile court’s determination as to how the basis is legally similar to abuse, neglect, or abandonment under state law, or other evidence that establishes that the juvenile court made a judicial determination that the legal basis is similar to abuse, neglect, or abandonment under state law.[8] Such evidence may include the petition for dependency, complaint for custody, or other documents that initiated the juvenile court proceedings. USCIS does not re-adjudicate whether the juvenile court determinations regarding similar basis comply with that state’s law, only whether they comply with the federal immigration law requirements for SIJ classification.[9]

The fact that one or both parents is deceased is not itself a similar basis to abuse, neglect, or abandonment under state law. A legal conclusion from the juvenile court is required to establish that parental death constitutes abuse, neglect, abandonment, or is legally equivalent to a similar basis under state law.

2. Evidentiary Requirements for DHS Consent

For DHS to consent to the grant of SIJ classification, the juvenile court order(s) and any supplemental evidence submitted by the petitioner must include the factual basis for the required determinations, as well as the relief from parental abuse, neglect, abandonment or a similar basis under state law granted or recognized by the court.[10] Relief from parental maltreatment may include the court-ordered custodial placement, or the court ordered dependency on the court for the provision of child welfare services and/or other court-ordered or court-recognized protective or remedial relief.[11]

Factual Basis

Where the factual basis for the court’s determinations demonstrates that the juvenile court order was sought to protect the child and the record shows the juvenile court actually provided relief from abuse, neglect, abandonment, or a similar basis under state law, DHS generally consents to the grant of SIJ classification.[12] If a petitioner does not provide a court order that includes facts that establish a factual basis for all of the required determinations, USCIS may request evidence of the factual basis for the court’s determinations. USCIS does not require specific documents to establish the factual basis or the entire record considered by the court. However, the burden is on the petitioner to provide the factual basis for the court’s determinations. Examples of documents that a petitioner may submit to USCIS that may support the factual basis for the court order include:

- Any supporting documents submitted to the juvenile court, if available;
- The petition for dependency or complaint for custody or other documents which initiated the juvenile court proceedings;
- Court transcripts;
- Affidavits summarizing the evidence presented to the court and records from the judicial proceedings; and
- Affidavits or records that are consistent with the determinations made by the court.[13]

Youth in HHS Custody

Youth in HHS Office of Refugee Resettlement (ORR) custody seeking SIJ classification may not be able to alter their custodial placement via a juvenile court and instead may seek a dependency determination from a juvenile court. In circumstances in which a youth in ORR custody receives a qualifying dependency determination under state law, USCIS may consider evidence of the court’s recognition of the ORR placement to be the protective remedial relief provided in conjunction with the dependency determination.[14] USCIS recognizes that, generally, placement in federal custody with ORR affords protection as an unaccompanied child under federal law and removes a state juvenile court’s need to provide a petitioner with additional relief from parental maltreatment under state law.[15]

Declaratory Judgments

A declaratory judgment generally determines the rights of parties without ordering anything to be done.[16] In the context of juvenile court determinations, a declaratory judgment may state facts but not order custody, dependency, or make legal reunification or best interest determinations. However, a declaratory judgment may be sufficient to merit DHS consent if accompanied by or includes a qualifying court-ordered custodial placement or a declaration of dependency on the court for the provision of child welfare services and/or other court-ordered or recognized protective remedial relief.

3. Supporting Evidence

The order or supporting evidence should specifically indicate:

- What type of relief the court is providing, such as child welfare services or custodial placement;
- With whom the child is placed, if the court has appointed a specific custodian or guardian, (for example, the name of the person, or entity, or agency) and the factual basis for this finding;
- Which of the specific grounds (abuse, neglect, abandonment, or similar basis under state law) apply to which of the parent(s) and the factual basis for the court's determinations on non-viability of parental reunification; and
- The factual basis for the determination that it is not in the petitioner's best interest to return to the petitioner's or the petitioner's parents' country of nationality or last habitual residence (for example, addressing family reunification with family that remains in the child's country of nationality or last habitual residence).

B. Limitations on Additional Evidence

USCIS is mindful that there are often confidentiality rules that govern disclosure of records from juvenile-related proceedings. For this reason, officers generally do not request information or documents from sources other than the SIJ petitioner or his or her legal representative.[17]

Children often do not share personal accounts of their family life with an unknown adult until they have had the opportunity to form a trusting relationship with that adult. Therefore, officers should exercise careful judgment when considering statements made by children at the time of initial apprehension by immigration or law enforcement officers to question the determinations made by the juvenile court.

Additionally, the juvenile court may make child welfare placement, custody, and best interest decisions that differ from the child's stated intentions at the time of apprehension. However, if there is significant contradictory information in the file that the juvenile court was likely not aware of or that may impact whether a reasonable factual basis exists for the court's determinations, officers may request additional evidence from the petitioner or his or her legal representative.

However, officers may not require or request an SIJ petitioner to contact the person or family members of the person who allegedly abused, neglected, or abandoned the SIJ petitioner.[18]

Footnotes

[^ 1] See Instructions for Form I-360. There is no fee to file Form I-360 to seek SIJ classification.

[^ 2] See 8 CFR 204.11(d)(2).

[^ 3] For information on SIJ-based adjustment of status, see Volume 7, Adjustment of Status, Part F, Special Immigrant-Based Adjustment, Chapter 7, Special Immigrant Juveniles [7 USCIS-PM F.7].

[^ 4] See 8 CFR 204.11(d)(2). SIJ petitioners are not subject to the general presumption of ineligibility at 8 CFR 103.2(b)(2)(i), since that general rule is superseded by the specific provisions in 8 CFR 204.11(d)(2).

[^ 5] See 8 CFR 204.11(c)(3).

[^ 6] See INA 101(a)(27)(J).

[^ 7] See 8 CFR 204.11(d)(4).

[^ 8] See 8 CFR 204.11(d)(4)(i) and (ii).

[^ 9] See 87 FR 13066, 13084 (PDF)(Mar. 8, 2022).

[^ 10] See 8 CFR 204.11(d)(5)(i) and (ii).

[^ 11] See 8 CFR 204.11(d)(5)(ii)(A) and (B).

[^ 12] See INA 101(a)(27)(J)(iii). See 8 CFR 204.11(d)(5).

[^ 13] Such affidavits or records will be assigned low evidentiary value unless they are accompanied by evidence that the court considered the information contained therein in the course of issuing its judicial determinations.

[^ 14] For example, if the juvenile court order states that the petitioner is in ORR custody, or the underlying documents submitted to the juvenile court establish the juvenile's placement in ORR custody, that would generally be sufficient evidence to demonstrate that the court was aware that the petitioner was residing in ORR custody. See 8 CFR 204.11(d)(5)(ii)(B).

[^ 15] See Section 462(b)(1) of the Homeland Security Act of 2002, Pub. L. 107-296 (PDF), 116 Stat. 2135, 2203 (2002).

[^ 16] See definition of "judgment" and "declaratory judgment," Black's Law Dictionary (11th ed. 2019).

[^ 17] USCIS Fraud Detection and National Security (FDNS) officers conducting fraud investigations follow separate FDNS procedures on documentation requests.

[^ 18] See Violence Against Women Act of 2005, Pub. L. 109-162 (PDF) (January 5, 2006), codified at INA 287(h). See 8 CFR 204.11(e).

Chapter 4 - Adjudication

A. Jurisdiction

USCIS has sole jurisdiction over petitions for special immigrant juvenile (SIJ) classification.[1] Provided the petitioner is otherwise eligible, classification as an SIJ establishes eligibility to apply for adjustment of status.[2]

B. Expeditious Adjudication

In general, USCIS issues a decision on a properly filed petition for SIJ classification within 180 days.[3] The 180-day timeframe begins on the Notice of Action (Form I-797) receipt date.[4]

The 180-day timeframe applies only to the initial adjudication of the SIJ petition. The requirement does not extend to the adjudication of any motion or appeal filed after a denial of an SIJ petition.

C. Interview

1. Determining Necessity of Interview

USCIS has discretion to interview SIJ petitioners for the purposes of adjudicating the SIJ petition.[5] USCIS recognizes the vulnerable nature of SIJ petitioners and generally conducts interviews of SIJ petitioners only when an interview is deemed necessary. USCIS conducts a full review of the petition and supporting evidence to determine whether an interview may be warranted. USCIS generally does not require an interview if the record contains sufficient information and evidence to approve the petition without an in-person assessment. However, USCIS retains the discretion to interview SIJ petitioners for the purposes of adjudicating the SIJ petition, as appropriate.

2. Conducting the Interview

Given the vulnerable nature of SIJ petitioners and the hardships they may face because of the loss of parental support, USCIS strives to establish a child-friendly interview environment if an interview is scheduled. During an interview, officers avoid questioning the petitioner about the details of the abuse, neglect, or abandonment suffered, because these issues are handled by the juvenile court. Officers generally focus the interview on resolving issues related to the eligibility requirements, including age.

The petitioner may bring a trusted adult to the interview in addition to an attorney or representative.[6] The trusted adult may serve as a familiar source of comfort to the petitioner, but should not interfere with the interview process or coach the petitioner during the interview. Given potential human trafficking and other concerns, officers assess the appropriateness of the adult's attendance in the interview and observe the adult's interaction with the child. When appropriate, the officer may interview the child without that adult present. Although USCIS may limit the number of persons present at the interview, such limitations do not extend to the petitioner's attorney or accredited representative of record.[7]

D. Requests for Evidence

Additional evidence may be requested at the discretion of the officer if needed to determine eligibility.[8] To provide petitioners an opportunity to address concerns before issuing a denial, officers generally issue a Request for Evidence (RFE) or a Notice of Intent to Deny (NOID), where the evidence is insufficient to adjudicate the petition.[9] The officer may request additional evidence for reasons such as, but not limited to:

- The record lacks the required dependency or custody, parental reunification, or best interest determinations;
- It is unclear if the order was made by a juvenile court or in accordance with state law;
- The evidence provided does not establish a reasonable factual basis for the determinations or indicate what protective relief was granted by the court;
- The record contains evidence or information that materially conflicts with the evidence or information that was the basis for the court order; or
- Additional evidence is needed to determine eligibility.

E. Fraud

There may be cases where the officer suspects or determines that a petitioner has committed fraud in attempting to establish eligibility for SIJ classification. In these cases, officers follow current procedures when referring a case to Fraud Detection and National Security (FDNS).[10]

F. Decision

1. Approval

SIJ classification may not be granted absent the consent of the Secretary of Homeland Security. DHS delegates this authority to USCIS. Therefore, USCIS approval of the SIJ petition is evidence of DHS consent. USCIS notifies petitioners in writing upon approval of the petition.[11]

2. Denial

If the petitioner does not provide necessary evidence or does not meet the eligibility requirements, USCIS denies the Form I-360 petition. If USCIS denies the SIJ petition, USCIS provides the petitioner with a written denial notice which includes a detailed basis for the denial.[12] An SIJ petitioner may appeal an adverse decision or request that USCIS reopen or reconsider a USCIS decision.[13] The denial notice includes instructions for filing a Notice of Appeal or Motion (Form I-290B).

3. Revocation

Automatic Revocation

An approved SIJ petition is automatically revoked as of the date of approval if any one of the circumstances below occurs before USCIS issues a decision on the SIJ's application for adjustment of status:[14]

- Reunification of the SIJ with one or both parents by virtue of a juvenile court order,[15] where a juvenile court previously deemed reunification with that parent, or both parents, not viable due to abuse, neglect, abandonment, or a similar basis under state law; or
- Reversal by the juvenile court of the determination that it would not be in the petitioner's best interest to be returned to the petitioner's, or the petitioner's parents', country of nationality or last habitual residence.

USCIS issues a notice to the petitioner of such revocation of the SIJ petition.[16]

Revocation on Notice

In addition, USCIS, with notice, may revoke an approved petition for SIJ classification for good and sufficient cause such as fraud, or if USCIS determines the petition was approved in error.[17] In these instances, USCIS issues a Notice of Intent to Revoke (NOIR) and provides the petitioner an opportunity to offer evidence in support of the petition and in opposition to the grounds alleged for revocation of the approval.[18]

Under the *Saravia* Settlement Agreement, USCIS does not revoke a petition for SIJ classification based in whole or in part on the fact that the state court's best interest determination was not made with consideration of the petitioner's gang affiliation.[19]

G. Deferred Action

1. Prior Grants of SIJ Deferred Action

If USCIS previously granted deferred action to an alien with SIJ classification in the exercise of discretion, the alien's deferred action remains valid for the authorized period, unless terminated by USCIS, on a case-by-case basis, as a matter of discretion. USCIS will not consider requests for renewal of deferred action for aliens with SIJ classification who remain ineligible to apply for adjustment of status because an immigrant visa number is not immediately available.

2. Termination

USCIS reserves the right to terminate prior grants of deferred action and revoke the related employment authorization as a matter of discretion. Examples may include, but are not limited to, cases where:

- USCIS determines the favorable exercise of discretion is no longer warranted;
- The Form I-360 petition for SIJ classification was approved in error and the petition is revoked; or
- The prior deferred action and related employment authorization were granted in error.

This termination and revocation may occur at any time, including prior to the end of the current validity period(s).

Footnotes

[^ 1] See Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360). See 8 CFR 204.11(h).

[^ 2] See Application to Register Permanent Residence or Adjust Status (Form I-485). Generally, an applicant may only apply to USCIS for adjustment of status if there is a visa number available for the special immigrant classification (EB-4), and the applicant is not in removal proceedings. If an SIJ is in removal proceedings, the immigration court must terminate the proceedings before USCIS can adjudicate the adjustment application. Conversely, the applicant may seek adjustment of status with the immigration court based on USCIS' approval of the SIJ petition. For more information, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures [7 USCIS-PM A], Part B, 245(a) Adjustment [7 USCIS-PM B], and Part F, Special Immigrant-Based Adjustment, Chapter 7, Special Immigrant Juveniles [7 USCIS-PM F.7].

[^ 3] See Section 235(d)(2) of the Trafficking Victims Protection and Reauthorization Act of 2008, Pub. L. 110-457 (PDF), 122 Stat. 5044, 5080 (December 23, 2008).

[^ 4] In *Casa Libre/Freedom House v. Mayorkas,* the court issued a Declaratory Judgment that the tolling provisions in 8 CFR 204.11(g)(1) are not in accordance with the 180-day timeframe in 8 U.S.C. 1232(d)(2) to the extent that they allow adjudication beyond the 180-day timeframe. See *Casa Libre/Freedom House v. Mayorkas*, No: 2:22-cv-01510-ODW, 2023 WL 4872892 (C.D. Cal. July 31, 2023).

[^ 5] See 8 CFR 103.2(b)(9).

[^ 6] See 8 CFR 204.11(f).

[^ 7] See 8 CFR 204.11(f).

[^ 8] See 8 CFR 103.2(b)(8).

[^ 9] For more information on timeframes and responses to Requests for Evidence and Notices of Intent to Deny, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 10] A referral to FDNS does not change the 180-day timeframe for adjudication. However, the timeframe for processing will stop or be suspended for delays caused by the petitioner. See 8 CFR 103.2(b)(10). See 8 CFR 204.11(g)(1).

[^ 11] See 8 CFR 204.11(h).

[^ 12] See 8 CFR 204.11(h).

[^ 13] See 8 CFR 103.3. See 8 CFR 103.5. See 8 CFR 204.11(h).

[^ 14] See 8 CFR 204.11(j)(1).

[^ 15] Revocation does not occur, however, where the juvenile court places the petitioner with the parent who was not the subject of the nonviable reunification determination.

[^ 16] See 8 CFR 205.1(b).

[^ 17] See INA 205. See 8 CFR 204.11(j)(2). See 8 CFR 205.2.

[^ 18] See 8 CFR 205.2(b).

[^ 19] See *Saravia v. Barr (PDF)*, 3:17-cv-03615 (N.D. Cal. January 14, 2021).

Chapter 5 - Appeals, Motions to Reopen, and Motions to Reconsider

A petitioner may submit a Notice of Appeal or Motion (Form I-290B) to file:[1]

- An appeal with the Administrative Appeals Office (AAO);
- A motion to reconsider a USCIS decision (made by the AAO, a field office, or the National Benefits Center); or
- A motion to reopen a USCIS decision (made by the AAO, a field office, or the National Benefits Center).

The petitioner must file the appeal or motion within 30 days of the denial or dismissal, or 33 days if the denial or dismissal decision was sent by mail.[2] If the appeal relates to a revocation of an approved special immigrant juvenile (SIJ) petition, the appeal must be filed within 15 calendar days after service of the decision, or 18 days if the decision was sent by mail.[3] There is no exception to the filing period for appeals and motions to reconsider.

For a motion to reopen, USCIS may excuse the petitioner's failure to file before this period expires where the petitioner demonstrates that the delay was reasonable and beyond his or her control.[4]

Footnotes

[^ 1] See 8 CFR 103.3. See 8 CFR 103.5.

[^ 2] See 8 CFR 103.3(a)(2)(i). See 8 CFR 103.5(a)(1)(i). See 8 CFR 103.8(b).

[^ 3] See 8 CFR 205.2(d) (revocation appeals) and 8 CFR 103.8(b) (effect of service by mail).

[^ 4] See 8 CFR 103.5(a)(1)(i).

Chapter 6 - Data

USCIS compiles, and makes available to the public, annual reports disclosing the number of special immigrant juvenile (SIJ) petitions received, approved, and denied.[1] The number is limited to properly filed SIJ petitions. To ensure accuracy of information, officers must promptly enter all decisions on all petitions and motions related to SIJ into the relevant systems.

Footnote

[^ 1] See the USCIS website for Data Set: Form I-360 Petition for Special Immigrant Juveniles.

Part K - CNMI Resident Status

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures.

See more

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures. We are working quickly to update and incorporate all of the AFM content into the USCIS Policy Manual, the agency's centralized online repository for immigration policies. Until then, we have moved any remaining AFM content to its corresponding Policy Manual Part. To the extent that a provision in the Policy Manual conflicts with remaining AFM content or Policy Memoranda, the updated information in the Policy Manual prevails. If you have questions or concerns about any discrepancies among these resources, contact PolicyFeedback@uscis.dhs.gov.

AFM Chapter 36 - Commonwealth of the Northern Mariana Islands (External)

Volume 7 - Adjustment of Status

Part A - Adjustment of Status Policies and Procedures

Chapter 1 - Purpose and Background

A. Purpose

Lawful permanent resident (LPR) status confers several significant privileges, rights, and responsibilities[1] that invoke a commitment to greater assimilation in the United States and offers a pathway to U.S. citizenship. These privileges, rights, and responsibilities include:

- Living permanently in the United States, provided the LPR does not commit any actions that would make the LPR removable under immigration law;
- Working in the United States in any legal capacity of the LPR's qualification and choosing;
- Being protected by all laws of the United States, including state of residence and local jurisdictions;
- Obeying all laws of the United States and localities;
- Filing income tax returns and reporting income to the U.S. Internal Revenue Service and state tax authorities;
- Supporting the democratic form of government of the United States;[2]
- Registering with the Selective Service, if male and age 18 through 25;
- Petitioning for a spouse, unmarried children, and unmarried son(s) or daughter(s) to receive permanent residence; and
- Applying for U.S. citizenship once eligible.

There are two general paths to LPR status. Aliens who are outside of the United States and who are beneficiaries of approved immigrant petitions can apply for an immigrant visa at an overseas consular office of the U.S. Department of State. Once issued an immigrant visa, if an alien is found admissible, he or she may be admitted into the United States as an LPR.

Aliens who are present in the United States and who are beneficiaries of approved immigrant petitions may generally file an application with USCIS to adjust their status to that of an LPR, or they may depart the United States and apply for an immigrant visa abroad. One reason Congress created the adjustment of status provision was to enable certain aliens physically present in the United States to become LPRs without incurring the expense and inconvenience of traveling abroad to obtain an immigrant visa. Congress has added additional adjustment of status provisions to:

- Ensure national security and public safety;

- Advance economic growth and a robust immigrant labor force;
- Promote family unity; and
- Accommodate humanitarian resettlement.

B. Background

Adjustment of status to lawful permanent residence describes the process by which an alien obtains U.S. LPR status while physically present in the United States. USCIS issues a permanent resident card (Form I-551) (commonly called a green card) to the successful adjustment applicant as proof of such immigrant status.

Most adjustment of status approvals are granted based on family or employment relationships. Unlike immigrant visa petition processing where the focus is on the relationship between the petitioner and beneficiary, the focus on an adjustment application is on the applicant's eligibility and admissibility.

The following overview provides a brief history of permanent immigration and adjustment of status, along with a summary of major developments in U.S. immigration law over the years.

1. Early Immigration Laws

Prior to the late 19th century, immigration was essentially unregulated. At that time, Congress imposed the first qualitative restrictions, which barred certain undesirable immigrants such as criminals and those with infectious diseases from entering the country.

During the 1920s, Congress established annual quotas that imposed the first numerical restrictions on immigration. This was known as the National Origins Quota System. The system limited immigration from each country to a designated percentage of foreign-born persons of that nationality who resided in the United States according to the 1910 census. These quotas did not apply to spouses and children (unmarried and under 21 years old) of U.S. citizens.[3]

These immigration laws required all intending immigrants to obtain an immigrant visa at a U.S. embassy or consulate abroad and then travel to the United States and seek admission as LPRs.[4] As such, these laws provided no legal procedure by which an alien already physically present in the United States could become a permanent resident without first leaving the country to obtain the required immigrant visa.

By 1935, the administrative process of pre-examination was developed so that an alien already temporarily in the United States could obtain permanent resident status more quickly and easily.[5] In general, the pre-examination process consisted of an official determination in the United States of the alien's immigrant visa eligibility, followed by a trip to Canada or another country for an arranged immigrant visa appointment at a U.S. consulate, and a prompt return and admission to the United States as a permanent resident. The government processed over 45,000 pre-examination cases from 1935 to 1950.[6]

Near the onset of World War II, the U.S. government became increasingly concerned about the possibility of hostile foreign enemies living in the United States. In response, Congress enacted the Alien Registration Act of 1940, which required foreign-born persons 14 years of age and older to report to a U.S. post office, and later to an immigration office, to be fingerprinted and register their presence in the United States.[7] Those found to have no legal basis to remain in the United States were required to leave or were removed. Those with a valid claim to permanent residency received an Alien Registration Card.

2. Immigration and Nationality Act of 1952

The passage of the Immigration and Nationality Act (INA) of 1952 organized all existing immigration laws into one consolidated source.[8] The INA retained a modified system of both qualitative and numerical restrictions on permanent immigration. The INA established a revised version of the controversial National Origins Quota System, limiting immigration from the eastern hemisphere while leaving immigration from the western hemisphere unrestricted.

The INA also introduced a system of numerically limited immigrant preference categories, some based on desirable job skills and others based on family reunification. Spouses and children (unmarried and under 21 years old) of U.S. citizens remained exempt from any quota restrictions.

In addition, the INA established a formal system of temporary (or nonimmigrant) categories under which aliens could come to the United States for various temporary purposes such as to visit, study, or work. For the first time, the INA also provided a procedure for aliens temporarily in the United States to adjust status to permanent resident status without having to travel abroad and undergo consular processing.

Although it has since been amended many times, the INA remains the foundation of current immigration law in the United States.

3. Post-1952 Developments

Congress amended the INA in 1965 to abolish the National Origins Quota System, creating in its place separate quotas for immigration from the eastern and western hemispheres.[9] These amendments also established a revised preference system of six categories for family-based and employment-based categories, and added a seventh preference category for refugees. Finally, the law introduced an initial version of what has evolved into today's permanent labor certification program.

Further amendments in 1976 and 1978 ultimately combined the eastern and western hemisphere quotas into a single worldwide quota system which limited annual immigration from any single country to 20,000 and established an overall limit of 290,000 immigrants per year.[10]

The Refugee Act of 1980 established a separate immigration program for refugees, eliminating the existing seventh preference category, and formally adopted the legal definition of "refugee" used by the United Nations.[11]

The Immigration Reform and Control Act (IRCA) of 1986 provided a pathway for obtaining permanent resident status to certain agricultural workers and aliens who had been continuously present in the United States since before January 1, 1982.[12] IRCA also increased immigration enforcement at U.S. borders and established a program which, for the first time in history, required U.S. employers to verify all newly hired employees' work authorization in the United States. This is sometimes called the employer sanctions program or the I-9 program.

Congress next enacted the Immigration Marriage Fraud Amendments of 1986 (IMFA) with the goal of deterring immigration-related marriage fraud.[13] IMFA's key provision stipulated that aliens who obtain immigrant status based on a marriage existing for less than 2 years be granted lawful permanent residence initially on a conditional basis. This conditional status may be converted to full permanent resident status after 2 years, generally upon a showing that the conditional resident and his or her U.S. citizen spouse entered into the marriage in good faith and continued to share a life together.

4. Immigration Act of 1990

Congress made the most sweeping changes to the original INA by passing the Immigration Act of 1990 (IMMACT 90).[14] Key provisions adopted by IMMACT 90 include:

- Significantly increased the worldwide quota limits on permanent immigration from 290,000 to 675,000 per year (plus up to another 125,000 for refugees);
- Established separate preference categories for family-based and employment-based immigration, including moving several special immigrant categories into the employment-based preferences and adding a new category for immigrant investors;
- Established the Diversity Visa Program, making immigrant visas available to randomly selected aliens coming from countries with historically low rates of immigration;
- Created several new nonimmigrant work visa categories: O, P, Q, and R; and
- Reorganized and expanded the types of qualitative bars to U.S. entry, known as inadmissibility or exclusion grounds.

Congress continued to refine the U.S. immigration system by enacting two laws in 1996, the Antiterrorism and Effective Death Penalty Act[15] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[16] which in part were intended to improve border control, expand worksite enforcement of the employer sanctions program, and enhance removal of criminal and other deportable aliens. These laws also introduced the concept of unlawful presence as an exclusion ground, expanded the definition of aggravated felon, and eliminated or greatly restricted the scope of judicial review involving certain administrative actions and decisions by U.S. immigration authorities.

5. Other Adjustment of Status Provisions

Over the years, Congress has created several adjustment programs otherwise different from general adjustment that apply to relatively small numbers of aliens who meet highly particularized criteria. Most of these programs are found in laws that are not part of the INA.

C. Legal Authorities[17]

- INA 245; 8 CFR 245 – Adjustment of status of nonimmigrant to that of person admitted for permanent residence
- INA 209; 8 CFR 209 – Adjustment of status of refugees

Footnotes

[^ 1] See the Rights and Responsibilities of a Green Card Holder (Permanent Resident) webpage and Your Rights and Responsibilities, Welcome to the United States: A Guide for New Immigrants, pages 14-15.

[^ 2] LPRs cannot vote in federal elections. LPRs cannot vote in state or local elections unless otherwise permitted by state and local authorities.

[^ 3] See 1921 Emergency Quota Law, Pub. L. 67-5 (May 19, 1921). See Immigration Act of 1924, also known as the National Origins Act or the Johnson–Reed Act, Pub. L. 68-139 (May 26, 1924).

[^ 4] This process is known as “consular processing.”

[^ 5] See 2 C. Gordon & H. Rosenfield, Immigration Law and Procedure, Section 7.3a. See *Jain v. INS*, 612 F.2d 683 (2nd Cir. 1979).

[^ 6] See Abraham D. Sofaer, The Change of Status Adjudication: A Case Study of the Informal Agency Process, 1 J. Legal Studies 349, 351 (1971).

[^ 7] Also known as the Smith Act, Pub. L. 76-670 (June 28, 1940).

[^ 8] This Act is also referred to as the McCarran-Walter Act, Pub. L. 82-414 (PDF) (June 27, 1952).

[^ 9] See Pub. L. 89-236 (PDF) (October 3, 1965).

[^ 10] See Pub. L. 95-412 (PDF) (October 5, 1978).

[^ 11] See Pub. L. 96-212 (PDF) (March 17, 1980).

[^ 12] See Pub. L. 99-603 (PDF) (November 5, 1986).

[^ 13] See Pub. L. 99-639 (PDF) (November 10, 1986).

[^ 14] See Pub. L. 101-649 (PDF) (November 29, 1990).

[^ 15] See Pub. L. 104-132 (PDF) (April 24, 1996).

[^ 16] See Pub. L. 104-208 (PDF) (September 30, 1996).

[^ 17] This is not an exhaustive list of the legal foundations of adjustment of status. Each part of this volume contains extensive lists of legal authorities relevant to the specific adjustment of status provisions discussed.

Chapter 2 - Eligibility Requirements

A. Who Is Eligible to Adjust Status

The Immigration and Nationality Act (INA) and certain other federal laws provide over forty different ways for aliens to adjust status to lawful permanent residence. Aliens may only adjust under a particular basis if they meet the eligibility requirements for that basis at the time of filing the Application to Register Permanent Residence or Adjust Status (Form I-485). Eligibility requirements vary, depending on the specific basis for adjustment.[1]

Immigrant Categories

Aliens eligible for adjustment of status generally may apply based on one of the following immigrant categories or basis for adjustment:

- Immediate relative of a U.S. citizen;[2]
- Other relative of a U.S. citizen or relative of a lawful permanent resident under a family-based preference category;[3]

- Person admitted to the United States as a fiancé(e) of a U.S. citizen;
- Widow(er) of a U.S. citizen;
- Violence Against Women Act (VAWA) self-petitioner;
- Alien worker under an employment-based preference category;[4]
- Alien investor;
- Special immigrant;[5]
- Human trafficking victim;
- Crime victim;
- Alien granted asylum status;
- Alien granted refugee status;
- Person qualifying under certain special programs based on certain public laws;[6]
- Diversity Visa program;
- Private immigration bill signed into law;
- Other eligibility under a special program not listed above (for example, Nicaraguan Adjustment and Central American Relief Act (NACARA)[7] Section 202);
- Adjustment of status under INA 245(i); or
- Derivative applicant (filing based on a principal applicant).

Specific eligibility requirements for each immigrant category are discussed in the program-specific parts of this volume.

B. Who is Not Eligible to Adjust Status

Aliens are generally not eligible for adjustment of status if one or more of the following bars to adjustment or grounds of inadmissibility apply. However, adjustment bars do not apply to every type of adjustment pathway. Furthermore, different inadmissibility grounds may apply to different adjustment pathways.

Therefore, applicants may still be able to adjust under certain immigrant categories due to special exceptions or exemptions from the adjustment bars, inadmissibility grounds, or access to program-specific waivers of inadmissibility or other forms of relief.

1. Bars to Adjustment

Depending on how an alien entered the United States or if an alien committed a particular act or violation of immigration law, he or she may be barred from adjusting status. With certain exceptions, some aliens ineligible for adjustment of status under INA 245 include any alien who:[8]

- Last entered the United States without being admitted or paroled after inspection by an immigration officer;[9]
- Last entered the United States as a nonimmigrant crewman;[10]
- Is now employed or has ever been employed in the United States without authorization;[11]
- Is not in lawful immigration status on the date of filing his or her application;[12]
- Has ever failed to continuously maintain a lawful status since entry into the United States, unless his or her failure to maintain status was through no fault of his or her own or for technical reasons;[13]
- Was last admitted to the United States in transit without a visa;[14]
- Was last admitted to Guam or the Commonwealth of the Northern Mariana Islands (CNMI) as a visitor under the Guam or CNMI Visa Waiver Program and who is not a Canadian citizen;[15]
- Was last admitted to the United States as a nonimmigrant visitor without a visa under the Visa Waiver Program;[16]
- Is deportable due to involvement in a terrorist activity or group;[17]
- Is seeking employment-based adjustment of status and who is not maintaining a lawful nonimmigrant status on the date of filing this application;[18]
- Has ever violated the terms of his or her nonimmigrant status;[19]
- Is a conditional permanent resident;[20] and
- Was admitted as a nonimmigrant fiancé(e), but did not marry the U.S. citizen who filed the petition or any alien who was admitted as the nonimmigrant child of a fiancé(e) whose parent did not marry the U.S. citizen who filed the petition.[21]

2. Grounds of Inadmissibility

Generally, an adjustment applicant is inadmissible to the United States and ineligible for adjustment of status if one or more of the grounds of inadmissibility apply to him or her.[22] However, if the adjustment applicant is eligible for and is granted a waiver of the ground of inadmissibility or another form of relief, the applicant may remain eligible for adjustment.[23]

3. Other Eligibility Requirements

Government Officials and Specialty Workers

Foreign government officials, representatives to international organizations, treaty traders and treaty investors (A, E, and G nonimmigrants) may have certain rights, privileges, immunities and exemptions not granted to other nonimmigrants. If such a nonimmigrant seeks adjustment of status, he or she must waive those rights, privileges, immunities and exemptions by filing a waiver application (Request for Waiver of Certain Rights, Privileges, Exemptions and Immunities (Form I-508).

An Australian specialty occupation worker (E-3 nonimmigrant) has no special rights, privileges, immunities or exemptions to waive and therefore is not required to submit the waiver. Although these workers can be classified as a treaty trader,[24] the waiver requirement was established prior to the creation of the Australian specialty occupation worker classification.

In addition, any applicant admitted in an A, G, or NATO nonimmigrant status must file an Interagency Record of Request – A, G or NATO Dependent Employment Authorization or Change/Adjustment to/from A, G or NATO Status (Form I-566) with the Department of State.

Forms I-508 and I-566 may be concurrently filed with the adjustment application.

Certain Exchange Visitors[25]

Certain exchange visitors (J-1 and J-2 nonimmigrants)[26] admitted to the United States are subject to a 2-year foreign residence requirement.[27] These exchange visitors generally must reside and be physically present in the country of their last residence or the country of their nationality for a cumulative total period (in the aggregate) of at least 2 years after the end of their exchange program and after leaving the United States before they can apply for permanent residence. If such exchange visitors do not return to the country of their last residence or country of nationality for at least 2 years, in the aggregate, after the end of their exchange program, they may be ineligible for adjustment of status. However, certain exchange visitors may be eligible for a waiver of the requirement through an Application for Waiver of the Foreign Residence Requirement (Form I-612).[28]

Officers should first adjudicate the waiver request, as denial of the waiver necessarily renders the applicant ineligible for adjustment of status. Officers should not hold adjustment cases while waiting for either the applicant to submit a waiver application or the Department of State to make a recommendation on a waiver application and instead should deny the adjustment application for ineligibility based on the evidence of record.

Footnotes

[^ 1] For more information, see Chapter 6, Adjudicative Review [7 USCIS-PM A.6]. See Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 2] Spouses, unmarried children under 21 years of age, and parents (if the U.S. citizen is 21 years of age or older). See INA 201(b)(2).

[^ 3] This category includes the following family-based preference immigrant classifications: unmarried sons and daughters, 21 years of age and older, of U.S. citizens; spouses and unmarried children, under 21 years of age, of lawful permanent residents; unmarried sons and daughters, 21 years of age and older, of lawful permanent residents; married sons and daughters of U.S. citizens; and brothers and sisters of U.S. citizens (if the U.S. citizen is 21 years of age or older). See INA 203(a).

[^ 4] This includes priority workers (including aliens with extraordinary ability, outstanding professors and researchers, and certain multinational executives and managers); members of the professions holding advanced degrees or aliens of exceptional ability; or skilled workers, professionals, and other workers. See INA 203(b).

[^ 5] This includes religious workers, special immigrant juveniles, certain Afghans and Iraqis, certain international broadcasters, certain G-4 international organization employee or family member or NATO-6 employee or family member, certain U.S. armed forces members, Panama Canal Zone employees, certain employees or former employees of the U.S. government abroad, and certain physicians. See INA 101(a)(27).

[^ 6] Some adjustment programs that are otherwise different from general adjustment include: the Cuban Adjustment Act, Pub. L. 89-732 (PDF) (November 2, 1966); the Cuban Adjustment Act for Battered Spouses and Children, Section 1509 of the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. 106-386 (PDF), 114 Stat. 1464, 1530 (October 28, 2000) and Sections 811, 814, and 823 of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), Pub. L. 109-162 (PDF), 119 Stat. 2960, 3057-58 and 3063 (January 5, 2006); dependent status under the Haitian Refugee Immigrant Fairness Act (HRIFA), Division A, Section 902 of Pub. L. 105-277 (PDF), 112 Stat. 2681, 2681-538 (October 21, 1998); dependent status under HRIFA for Battered Spouses and Children, Section 1511 of VTVPA, Pub. L. 106-386 (PDF), 114 Stat. 1464, 1532 (October 28, 2000), Section 1505 of the LIFE Act Amendments, Pub. L. 106-554 (PDF), 114 Stat. 2763, 2753A-326 (December 21, 2000), Sections 811, 814, and 824 of VAWA 2005, Pub. L. 109-162 (PDF), 119 Stat. 2960, 3057-58 and 3063 (January 5, 2005), and 8 CFR 245.15; former Soviet Union, Indochinese or Iranian parolees (Lautenberg Parolees), Section 599E of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Pub. L. 101-167 (PDF), 103 Stat. 1195, 1263 (November 21, 1989), as amended; and diplomats or high-ranking officials unable to return home, Section 13 of the Act of September 11, 1957, Pub. L. 85-316 (PDF), as amended, 8 CFR 245.3, INA 101(a)(15)(A)(i)-(ii) and INA 101(a)(15)(G)(i)-(ii).

[^ 7] See Title II of Pub. L. 105-100 (PDF), 111 Stat. 2160, 2193 (November 19, 1997).

[^ 8] See INA 245(a)-(k) for a full list. Some of the adjustment bars listed may not apply to all applicants. For example, certain adjustment bars do not apply to immediate relatives, VAWA-based applicants, certain special immigrants, or employment-based immigrants.

[^ 9] See 8 CFR 245.1(b)(3).

[^ 10] See INA 245(c)(1). See 8 CFR 245.1(b)(2).

[^ 11] See INA 245(c)(2) and 8 CFR 245.1(b)(4). See INA 245(c)(8) and 8 CFR 245.1(b)(10). Immediate relatives, as defined in INA 201(b), and certain special immigrants are exempt from these bars.

[^ 12] See INA 245(c)(2). See 8 CFR 245.1(b)(5). Immediate relatives, as defined in INA 201(b), and certain special immigrants are exempt from this bar.

[^ 13] See INA 245(c)(2). See 8 CFR 245.1(b)(6). Immediate relatives, as defined in INA 201(b), and certain special immigrants are exempt from this bar. For information on fault of the applicant or technical reasons, see 8 CFR 245.1(d)(2).

[^ 14] See 8 CFR 245.1(b)(1).

[^ 15] See INA 245(c)(4). See 8 CFR 245.1(b)(7). Immediate relatives, as defined in INA 201(b), are exempt from this bar.

[^ 16] See INA 245(c)(4). See 8 CFR 245.1(b)(8). Immediate relatives, as defined in INA 201(b), are exempt from this bar.

[^ 17] See INA 245(c)(6).

[^ 18] See INA 245(c)(7). See 8 CFR 245.1(b)(9).

[^ 19] See INA 245(c)(8). See 8 CFR 245.1(b)(10). Immediate relatives, as defined in INA 201(b), and certain special immigrants are exempt from this bar.

[^ 20]See 8 CFR 245.1(c)(5).

[^ 21] See INA 245(d). See 8 CFR 245.1(c)(6).

[^ 22] See INA 212. See Volume 8, Admissibility [8 USCIS-PM].

[^ 23] See Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM].

[^ 24] See INA 101(a)(15)(E).

[^ 25] See INA 212(e). See 8 CFR 245.1(c)(2).

[^ 26] See INA 101(a)(15)(J).

[^ 27] See INA 212(e). See 8 CFR 245.1(c)(2). Even when the J-1 nonimmigrant visa is obtained through fraud, the alien may still be subject to the foreign residency requirement. See *Espejo v. INS*, 311 F.3d 976 (9th Cir. 2002), and *Matter of Park (PDF)*, 15 I&N 472 (BIA 1975). The foreign residence requirement does not apply to a J-2 spouse or child of a J-1 nonimmigrant who naturalized under the Military Accessions Vital to the National Interest (MAVNI) program. See Volume 12, Citizenship and Naturalization, Part I, Military Members and their Families, Chapter 3, Military Service during Hostilities (INA 329), Section H, Military Accessions Vital to National Interest Program, Subsection 3, Other Factors to Consider [12 USCIS-PM I.3(H)(3)].

[^ 28] Some waivers do not involve the filing of a form or fee, such as waivers based on requests by a U.S. government agency or state department of public health, or based on an official statement by the alien's country that it does not object to waiving the 2-year foreign residence requirement.

Chapter 3 - Filing Instructions

A. Form Instructions

An alien typically applies for adjustment of status using the Application to Register Permanent Residence or Adjust Status (Form I-485). An applicant must file the adjustment application according to the instructions and regulations in existence at the time of filing. The form instructions have the same force as a regulation and provide detailed information an applicant must follow.[1] Therefore, an applicant should access the most recent version of the form on USCIS.gov prior to filing.

B. Definition of Properly Filed

An applicant must properly file the adjustment application. Properly filed refers to an adjustment application filed:

- At the correct filing location with the correct filing fees, unless granted a waiver;[2]
- With the proper signature of the applicant; and
- When an immigrant visa is immediately available.[3]

If the application is filed without meeting these requirements, USCIS rejects and returns the application. The application is not considered properly filed until it has been given a receipt date (stamped to show the actual date of receipt) by the proper location with jurisdiction over the application, including a USCIS Lockbox. Applications that are rejected and returned to the applicant do not retain a filing date.[4]

1. Filing Location

The filing location for an adjustment application is based on the filing category of the applicant. An applicant must verify the filing location by accessing current instructions on USCIS.gov prior to filing. USCIS may relocate an application filed at the wrong location at its discretion or reject the application for improper filing.

2. Signature Requirements

All applications must be properly signed by the applicant.[5]

Acceptable and Unacceptable Signatures

Acceptable	Unacceptable
• Original signature • Handwritten "X," or similar mark, in ink (including a fingerprint, if unable to write) • Abbreviated signature, if that is the normal signature • Signature of parent or legal guardian of benefit requestor if requestor is under 14 years of age • Signature by the benefit requestor's legal guardian, surrogate, or person with a valid durable power of attorney or similar legally binding document[6] • An original signature on the benefit request that is later photocopied, scanned, faxed, or similarly reproduced, unless otherwise required by form instructions • Electronic signature[7]	• Typed name on signature line • Signature by an attorney or representative signing for the requestor or requestor's child • Signature created by a typewriter, word processor, stamp, auto-pen, or similar device[8]

3. Visa Availability Requirement

Generally, aliens seeking adjustment under INA 245(a) may only file an adjustment application when an immigrant visa number is available in the classification under which they qualify.[9]

Immediate relatives of U.S. citizens are not subject to numerical limitations. Therefore, an immigrant visa is always immediately available to immediate relatives at the time they file an adjustment application.

In contrast, applicants seeking adjustment under an employment-based or family-based preference category must generally wait until a visa is immediately available before they may file their adjustment application.[10] These applicants can determine if a visa is available and when to file their adjustment application by referring to the U.S. Department of State (DOS) Visa Bulletin.

A new Visa Bulletin is published on a monthly basis. DOS posts two charts per visa preference category in each month's DOS Visa Bulletin:

- Application Final Action Dates chart, which provides dates when visas may finally be issued; and
- Dates for Filing Applications chart, which provides the earliest dates when applicants may be able to apply.

In general, adjustment applicants must use the Application Final Action Dates chart to determine whether a visa is available. However, if USCIS determines there are immigrant visas available for the filing of additional adjustment applications, the Dates for Filing Applications chart may be used to determine when to file an adjustment of status application with USCIS.[11] USCIS and DOS provide information on which chart should be used in a particular month on the Adjustment of Status Filing Charts from the Visa Bulletin webpage and DOS Visa Bulletin.

C. Concurrent Filings[12]

In general, the beneficiary of an immigrant visa petition may file for adjustment of status only after USCIS has approved the petition and a visa is available. In certain instances, the beneficiary may file an adjustment application together or concurrently with the underlying immigrant petition.

Concurrent filing of the adjustment application is possible only where approval of the underlying immigrant petition would make a visa number immediately available. Concurrent filing of the adjustment application is permitted in the following immigrant categories:

- Family-based immigrants, including immediate relatives, and widow(er)s of a U.S. citizen;
- Violence Against Women Act (VAWA) self-petitioner;
- Employment-based immigrants in the 1st, 2nd, 3rd, or 5th preference categories;
- Special immigrant Amerasians;
- Special immigrant juveniles;
- G-4 international organization employees, NATO-6 employees, and certain family members; and
- Certain members of the U.S. armed forces.

D. Jurisdiction

USCIS has the legal authority to adjudicate most adjustment of status cases, including applications by aliens who have been placed in deportation or removal proceedings as “arriving aliens.”[13] An immigration judge (IJ) of the Executive Office for Immigration Review (EOIR) has jurisdiction in all other cases where an applicant is in removal proceedings, even if the proceedings have been administratively closed or if there is a final order of deportation or removal which has not yet been executed.[14] As an exception to the general rule regarding “arriving aliens,” the IJ also has jurisdiction over an application filed by an alien who has been placed in deportation or removal proceedings as an “arriving alien” when all of the following conditions apply:

- The adjustment application was properly filed with USCIS while the applicant was in the United States;
- The applicant departed from and returned to the United States based on a grant of an advance parole document to pursue the previously filed adjustment application;
- USCIS denied the adjustment application;
- DHS placed the applicant in removal proceedings as an “arriving alien” either upon return to the United States on the advance parole document or after USCIS denied the adjustment application; and
- The applicant is seeking to renew the previously denied application for adjustment of status in proceedings.[15]

The IJ has jurisdiction only with respect to the application filed before the applicant left with the advance parole document. If the applicant is pursuing a new application for adjustment of status based on a new ground such as a new petition, the IJ does not have jurisdiction over the new claim. USCIS has jurisdiction over the application, even if the applicant was placed in proceedings after having been paroled into the United States to pursue a previously filed application for adjustment of status that was ultimately denied by USCIS.

USCIS has jurisdiction to adjudicate an adjustment application when the IJ does not have jurisdiction, including when an alien placed in removal proceedings as an “arriving alien” does not meet all of the above criteria.[16] USCIS continues to retain jurisdiction over such an alien’s adjustment application even if the alien has an unexecuted final order of removal.[17] A removal order is considered executed once immigration authorities remove the alien from the United States or the alien departs from the United States.[18]

Effect of Departure

In general, adjustment applicants who depart the United States abandon their applications unless USCIS previously granted them advance parole for such absences.[19] However, USCIS does not consider a TPS beneficiary to have abandoned the adjustment application if the beneficiary travels with authorization under INA 244(f)(3) and, upon returning to the United States, is admitted into TPS under the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991.[20]

Footnotes

[^ 1] See 8 CFR 103.2(a)(1).

[^ 2] See 8 CFR 103.2(a)(1). See Volume 1, General Policies and Procedures, Part B, Submission of Benefits Requests, Chapter 3, Fees [1 USCIS-PM B.3] and Chapter 4, Fee Waivers [1 USCIS-PM B.4]. See Fee Schedule (Form G-1055).

[^ 3] See INA 245(a)(3) and 8 CFR 245.2(a)(2).

[^ 4] See 8 CFR 103.2(a)(7).

[^ 5] For more information on signature requirements, see Volume 1, General Policies and Procedures, Part B, Submission of Benefit Requests, Chapter 2, Signatures [1 USCIS-PM B.2].

[^ 6] Must contain evidence (such as a physician's statement) indicating that the durable POA is in effect as a result of the person's disability.

[^ 7] For benefit requests filed electronically as permitted by form instructions, USCIS accepts signatures in an electronic format. Benefit requestors must follow the instructions provided to properly sign electronically, see 8 CFR 103.2(a)(2).

[^ 8] In certain instances, a stamped signature may be allowed as provided by the form instructions.

[^ 9] For more information, see Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].

[^ 10] USCIS rejects adjustment applications filed before a visa number is available. See 8 CFR 245.2(a)(2).

[^ 11] USCIS considers several factors to determine if there is a greater supply of visas than the demand for those visas. To determine visa availability, USCIS compares the number of visas available for the remainder of the fiscal year with documentarily qualified visa applications reported by DOS; pending adjustment of status applications reported by USCIS; and historical drop-off rate of applicants for adjustment of status (for example, denials, withdrawals, and abandonments).

[^ 12] See 8 CFR 245.2(a)(2)(i)(B) and 8 CFR 245.2(a)(2)(i)(C).

[^ 13] See 8 CFR 245.2(a)(1). See 8 CFR 1245.2(a)(1). See 8 CFR 1.2 for definition of an “arriving alien.”

[^ 14] A temporary protected status (TPS) beneficiary who obtains USCIS’ authorization to travel abroad temporarily (as evidenced by a travel authorization document issued under 8 CFR 244.15(a)) must be admitted into TPS upon return to the United States in accordance with such authorization, unless DHS determines the beneficiary is inadmissible based on certain criminal and security bars (TPS bars) listed in INA 244(c)(2)(A)(iii). See Section 304(c)(1)(A)(ii) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Pub. L. 102-232 (PDF), 105 Stat. 1733, 1749 (December 12, 1991), as amended. A TPS beneficiary in pending removal proceedings at the time of departure remains a TPS beneficiary in removal proceedings upon authorized reentry into the United States under MTINA, unless those proceedings have been otherwise terminated. See Section 304(c)(1)(A)(ii) of MTINA, Pub. L. 102-232 (PDF), 105 Stat. 1733, 1749 (December 12, 1991), as amended. See *Duarte v. Mayorkas*, 27 F.4th 1044 (5th Cir. 2022). The TPS-authorized travel does not, itself, change whether or not the beneficiary has been placed in proceedings “as an arriving alien,” and therefore does not affect jurisdiction over the adjustment application. However, a TPS beneficiary who met the definition of an “arriving alien” at the time of departure on authorized travel would no longer be an arriving alien if DHS admits the TPS beneficiary into TPS under MTINA upon return. See 8 CFR 1.2. See *Duarte v. Mayorkas*, 27 F.4th 1044 (5th Cir. 2022). Consequently, if DHS places the beneficiary into removal proceedings after returning from authorized travel, USCIS would not have jurisdiction over the adjustment application.

[^ 15] See 8 CFR 1245.2(a)(1)(ii).

[^ 16] See 8 CFR 245.2(a)(1).

[^ 17] See *Matter of Yauri (PDF)*, 25 I&N Dec. 103 (BIA 2009).

[^ 18] See INA 101(g). However, in the case of a TPS beneficiary with an outstanding final removal order, travel abroad does not execute the removal order if the beneficiary received prior authorization to travel under INA 244(f)(3) and DHS admitted the beneficiary into TPS under MTINA upon return to the United States. See *Duarte v. Mayorkas*, 27 F.4th 1044 (5th Cir. 2022).

[^ 19] See 8 CFR 245.2(a)(4)(ii). In certain circumstances, a departure does not cause abandonment of the adjustment application. See 8 CFR 245.2(a)(4)(ii)(B)-(D).

[^ 20] See Section 304(c)(1)(A)(ii) of MTINA, Pub. L. 102-232 (PDF), 105 Stat. 1733, 1749 (December 12, 1991).

Chapter 4 - Documentation

A Record of Proceeding (ROP) is created when an adjustment application is received. While not every ROP contains the same exact information or documents, all ROPs are created in the same format and documents are placed in the file from top to bottom.

A. Initial Evidence

When reviewing an adjustment of status application, the officer must verify that the following evidence is contained in the A-file and is placed in ROP order on the left side of the file.

1. Photographs

Two passport-style photographs must be included. The photographs must be:

- 2” x 2” in color with full face, frontal view;
- On a white to off-white background, printed on thin paper with a glossy finish; and
- Be un-mounted and un-retouched.

The photographs must have been taken within 30 days of filing.[1]

2. Application to Register Permanent Residence or Adjust Status (Form I-485)

Aliens apply for permanent resident status by filing Form I-485 at the appropriate time with the correct fee and necessary documentation to establish eligibility.

3. Birth Certificate

A copy of the applicant’s foreign birth certificate or sufficient secondary evidence of birth must be submitted to establish the applicant’s country of citizenship for visa chargeability, identity, and existence of derivative relationships.[2]Each foreign birth certificate must include a certified English translation.[3]

Officers should check the Department of State's Country Reciprocity Schedule to determine availability of birth certificates as well as acceptable secondary evidence of birth for specific countries.

4. Evidence of Admission or Parole

In most cases, an adjustment applicant is required to provide evidence of inspection and admission or parole.[4]Typical documents that prove inspection and admission or parole include:

- Copy of the entry or parole stamps in the applicant’s passport issued by U.S. Customs and Border Protection (CBP);
- Arrival/Departure Record (Form I-94);
- Form I-94 issued by USCIS at the bottom of a Notice of Action (Form I-797); or
- Authorization for Parole of an Alien into the United States (Form I-512 or I-512L).

If an applicant appears at an interview with none of the above evidence but claims to have been “waved in” at the port of entry (POE), the applicant may still be considered to have been inspected and admitted in some cases.[5]The burden of proof is on the applicant to provide sufficient evidence to establish eligibility.[6]

5. Affidavit of Support and Related Forms (Form I-864, I-864A, and I-864EZ)

An affidavit of support is required for most immediate relative and family-based immigrants. The affidavit of support is also required for any employment-based immigrant whose petitioner is the applicant's spouse, parent, child, adult son or daughter, or sibling and in which the applicant's family has 5% or more ownership in the business. The purpose of this form is to show the applicant has adequate means of financial support and is unlikely to become a public charge.[7]

6. Report of Immigration Medical Examination and Vaccination Record (Form I-693)

Form I-693 is required for adjustment of status applicants who either did not receive a medical examination prior to their admission to the United States or who do not have evidence of an overseas medical examination in their file. A medical examination and vaccination record must be documented for most adjustment of status applications and completed as closely as possible to submission of the adjustment application.[8]If not completed overseas, the medical examination must be completed by a designated civil surgeon in the United States and documented on this form.[9]

7. Certified Copies of Arrest Records and Court Dispositions

All applicants that have previously been arrested are required to submit original or court-certified copies of the arrest records, court dispositions or both. If an applicant's fingerprints reveal an arrest record, the applicant's A-file should contain a Record of Arrest and Prosecution (RAP) sheet.

If there is an arrest record, the applicant must submit an original or certified copy of the official arrest report or other statement by the arresting agency and official court records showing the disposition of all arrests, detentions, or convictions regardless of where in the world the arrest occurred. Applicants are not required to submit records for minor traffic violations, records that are not drug or alcohol-related, did not result in an arrest, or in which the only penalty was a fine of less than $500 or points on a driver's license.

8. Evidence of Underlying Basis to Adjust Status[10]

An officer should verify the immigrant category indicated on Form I-485 as the basis for adjustment. The applicant can attach:

- A copy of the Form I-797 Approval Notice for an approved underlying immigrant visa petition;
- The underlying immigrant visa petition together with the Form I-485, if concurrently filing; or
- A copy of the Form I-797 Receipt Notice for an underlying immigrant visa petition that remains pending.

Certain adjustment applicants, however, are not required to have an underlying petition. These applicants include:

- Asylees;
- Refugees;
- Applicants eligible for certain adjustment of status programs based on certain public laws;[11]
- Persons born under diplomatic status in the United States;[12]
- Persons applying for Creation of Record; and
- Applicants who obtain relief through a private immigration bill signed into law.

In these cases, the officer should review any specific eligibility and evidentiary requirements that apply to the program or law to ensure the applicant is eligible to adjust on that basis.

9. Additional Evidence for Eligibility

Additional evidence is required for certain applicants in order to meet specific eligibility requirements. For instance, an applicant may need to submit marriage certificates or divorce decrees to establish the required relationship for the classification. Additionally, applicants under most preference categories may need to submit evidence that they are not subject to any bars to adjustment as a result of failing to maintain their nonimmigrant status, working without authorization, or otherwise violating the terms of their nonimmigrant status.

B. Unavailability of Records and the Use of Affidavits

There are certain situations where an applicant may not be able to provide the required primary evidence but may be able to submit secondary evidence. When submitting secondary evidence, an applicant must establish that the required primary document is unavailable or does not exist.[13]

1. Establishing Required Primary Document Is Unavailable or Does Not Exist[14]

To establish that a required primary document is unavailable or does not exist, an applicant must submit letters of certification of non-existence issued by the appropriate civil authority. These letters must:

- Be an original written statement from a civil authority on official government letterhead;
- Establish the nonexistence or unavailability of the document;
- Indicate the reason the record does not exist; and
- Indicate whether similar records for the time and place are available.

Certification of non-existence from a civil authority is not required where the Department of State's Reciprocity Schedule indicates this type of document generally does not exist. An officer should consult the Reciprocity Schedule before issuing a Request for Evidence (RFE) for a missing document that is required.

If an applicant is unable to obtain a letter of certification of non-existence issued by the appropriate civil authority, the applicant or petitioner may submit evidence that repeated good faith attempts were made to obtain the required documentation.

2. Secondary Evidence

Once an applicant has demonstrated that a required primary document is unavailable, the applicant may submit appropriate secondary evidence, such as church or school records pertaining to the facts at issue.

3. Affidavits

If an applicant has demonstrated unavailability of both a required primary and secondary document, the applicant must submit at least two affidavits, or sworn written statements, pertaining to the facts at issue. Such affidavits must be given by:

- Persons who are not parties to the underlying petition; and
- Persons who have direct personal knowledge of the events and circumstances in question.[15]

In order for an applicant to meet his or her burden of proof, the officer must examine the evidence for its probative value and credibility. For these reasons, an affidavit should include:

- The full name, address, and contact information of the affiant (person giving the sworn statement), including his or her own date and place of birth, and relationship (if any) to the applicant;
- A copy of the affiant's government-issued identification, if available;
- Full information concerning the facts at issue; and
- An explanation of how the affiant has direct personal knowledge of the relevant events and circumstances.

Affidavits that cannot be verified carry no weight in proving the facts at issue.

Persons submitting affidavits may be relatives of the applicant and do not necessarily have to be U.S. citizens.[16]

C. Requests for Evidence (RFE)

An officer must review all documents submitted and contained within the applicant's A-file to:

- Determine acceptability;
- Ensure all required documents are present; and
- Avoid issuing an RFE requesting information already available in the A-file.

Requests for Evidence (RFE)

Scenario	Officer Action
Any required initial evidence is incomplete, missing, or raises eligibility concerns	• Prepare and issue an RFE to provide the applicant an opportunity to establish his or her eligibility; or • Deny the application.[17]
All required initial evidence is submitted, but the evidence submitted does not establish eligibility	• Prepare and issue an RFE for additional information; • Prepare and issue a Notice of Intent to Deny (NOID) with the basis for the proposed denial and require the applicant to submit a response; or • Deny the application for ineligibility.[18]
A family member's A-file contains a document required to establish eligibility	• Make a copy of the required document; • Place the copy in the applicant's A-file in the proper ROP order; and • Return the original document to the family member's A-file, in proper ROP order.

Originals of applications and petitions must be submitted unless previously filed with USCIS. Documents typically submitted as originals with the adjustment application may include a concurrently filed petition, the medical examination report, and affidavits.

An applicant only needs to submit original documents required by regulation or form instructions and necessary to support the application. An official original document issued by USCIS or by legacy INS does not need to be submitted, unless requested. Unless otherwise required by applicable regulations or form instructions, a legible photocopy of any other supporting document may be submitted.

An officer, however, may request an original document if there is reason to question the authenticity of the document for which a photocopy has been submitted. If originals are requested to validate a photocopy, they should be returned to the applicant after review and verification unless regulations require the originals to be submitted and retained. Failure to submit a requested original document may result in denial or revocation of the underlying application or benefit.[19]An officer may check available systems to validate evidence submitted by the applicant, as well as to verify claimed entries, prior deportations, visa issuance, and criminal history.

Footnotes

[^ 1] See Instructions to Form I-485. See examples at the U.S. Department of State website.

[^ 2] See 8 CFR 103.2(b)(2).

[^ 3] See 8 CFR 103.2(b)(3).

[^ 4] See INA 245(a).

[^ 5] See *Matter of Quilantan (PDF)*, 25 I&N Dec. 285 (BIA 2010). For more information, see Part B, 245(a) Adjustment, Chapter 2, Eligibility Requirements, Section A, "Inspected and Admitted" or "Inspected and Paroled", Subsection 7, Waived Through at Port-of-Entry [7 USCIS-PM B.2(A)(7)].

[^ 6] See 8 CFR 103.2(b).

[^ 7] See INA 213A. For detailed information on the requirements of the Affidavit of Support, see Chapter 6, Adjudicative Review, Section D, Determine Admissibility, Subsection 2, Affidavit of Support Under Section 213A of the Act (Form I-864) [7 USCIS-PM A.6(D)(2)].

[^ 8] For more information, see Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility, Chapter 3, Applicability of Medical Examination and Vaccination Requirement [8 USCIS-PM B.3].

[^ 9] For more information, see Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility [8 USCIS-PM B].

[^ 10] For more information, see Chapter 6, Adjudicative Review, Section A, Verify Underlying Basis to Adjust Status [7 USCIS-PM A.6(A)].

[^ 11] Some adjustment programs that are otherwise different from general adjustment include: the Cuban Adjustment Act, Pub. L. 89-732 (PDF) (November 2, 1966); the Cuban Adjustment Act for Battered Spouses and Children, Section 1509 of the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. 106-386 (PDF), 114 Stat. 1464, 1530 (October 28, 2000) and Sections 811, 814, and 823 of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), Pub. L. 109-162 (PDF), 119 Stat. 2960, 3057-58 and 3063 (January 5, 2006); dependent status under the Haitian Refugee Immigrant Fairness Act (HRIFA), Division A, Section 902 of Pub. L. 105-277 (PDF), 112 Stat. 2681, 2681-538 (October 21, 1998); dependent status under HRIFA for Battered Spouses and Children, Section 1511 of VTVPA, Pub. L. 106-386 (PDF), 114 Stat. 1464, 1532 (October 28, 2000), Section 1505 of the LIFE Act Amendments, Pub. L. 106-554 (PDF), 114 Stat. 2763, 2753A-326 (December 21, 2000), Sections 811, 814, and 824 of VAWA 2005, Pub. L. 109-162 (PDF), 119 Stat. 2960, 3057-58 and 3063 (January 5, 2005), and 8 CFR 245.15; former Soviet Union, Indochinese or Iranian parolees (Lautenberg Parolees), Section 599E of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Pub. L. 101-167 (PDF), 103 Stat. 1195, 1263 (November 21, 1989), as amended; and diplomats or high-ranking officials unable to return home, Section 13 of the Act of September 11, 1957, Pub. L. 85-316 (PDF), as amended, 8 CFR 245.3, INA 101(a)(15)(A)(i)-(ii), and INA 101(a)(15)(G)(i)-(ii).

[^ 12] See 8 CFR 101.3 and 8 CFR 264.2.

[^ 13] See 8 CFR 103.2(b)(2).

[^ 14] See 8 CFR 103.2(b)(2)(ii).

[^ 15] See 8 CFR 103.2(b)(2)(i).

[^ 16] See 8 CFR 103.2(b)(2) for more information on submitting secondary evidence and affidavits.

[^ 17] See 8 CFR 103.2(b)(8)(ii).

[^ 18] See 8 CFR 103.2(b)(8)(iii).

[^ 19] See 8 CFR 103.2(b)(5).

Chapter 5 - Interview Guidelines

All adjustment of status applicants must be interviewed by an officer unless the interview is waived by USCIS.[1] The decision to waive the interview should be made on a case-by-case basis. The interview enables USCIS to verify important information about the applicant to determine eligibility for adjustment. For family-based applications, USCIS generally requires the Form I-130 petitioner to appear for the interview with the principal adjustment of status applicant. In addition, derivatives are also required to appear regardless of the filing category.

During the interview, the officer verifies that the applicant understood the questions on the application and provides the applicant with an opportunity to revise any answers completed incorrectly or that have changed since filing the application. Any unanswered questions or incomplete answers on the application are resolved at the interview. If information is added or revised, the applicant should re-sign and date the application at the conclusion of the interview.[2]

A. Waiving the Interview

1. General Waiver Categories

USCIS officers may determine, on a case-by case-basis, that it is unnecessary to interview certain adjustment of status applicants. When determining whether to waive an interview, an officer must consider all relevant evidence in the applicant's record.

The following list includes, but is not limited to, categories of cases where officers may decide to waive an interview:[3]

- Applicants who are clearly ineligible;[4]
- Unmarried children (under 21 years of age) of U.S. citizens if they filed a Form I-485 on their own (or filed a Form I-485 together with their family's adjustment applications and every applicant in that family is eligible for an interview waiver);
- Parents of U.S. citizens; and
- Unmarried children (under 14 years of age) of lawful permanent residents if they filed a Form I-485 on their own (or filed a Form I-485 together with their family's adjustment applications and every applicant in that family is eligible for an interview waiver).

If USCIS determines, however, that an interview for an applicant in any of the above categories is necessary, an officer conducts the interview. Likewise, if USCIS determines that an interview of an applicant in any other category not listed above is unnecessary, then USCIS may waive the interview.[5]

2. Military Personnel Petitioners

USCIS may waive the personal appearance of the military spouse petitioner; however, the adjustment applicant must appear for an interview. USCIS makes every effort to reschedule these cases so that both the petitioner and adjustment applicant can attend the interview before deployment. The adjustment applicant may choose to proceed while the petitioner is abroad.

3. Incarcerated Petitioners

USCIS may waive the personal appearance of a U.S. citizen spouse petitioner who is incarcerated and unable to attend the adjustment of status interview. In these situations, the adjustment applicant must appear for an interview. An officer must take all the facts and evidence surrounding each case into consideration on a case-by-case basis when deciding whether to waive the U.S. citizen spouse petitioner's appearance.

4. Illness or Incapacitation

An officer may encounter instances in which it may be appropriate to waive the personal appearance of an applicant or petitioner due to illness or incapacitation. In all such instances, an officer must obtain supervisory approval to waive the interview.

B. Relocating Cases for Adjustment of Status Interviews

Unless USCIS determines that an interview is unnecessary, the case should be relocated to the field office with jurisdiction over the applicant's place of residence once the case is ready for interview.

The reasons for requiring an interview may include:

- Need to confirm the identity of the applicant;
- Need to validate the applicant's immigration status;
- The applicant entered the United States without inspection, or there are other unresolved issues regarding the applicant's manner of entry;
- There are known criminal inadmissibility or national security concerns that cannot be resolved at a service center;
- There are fraud concerns and the service center recommends an interview;
- The applicant's fingerprints have been rejected twice;
- The applicant has a Class A medical condition that the service center cannot resolve through a Request for Evidence (RFE);
- The applicant answered "Yes" to any eligibility question on the adjustment application, and the service center cannot determine eligibility through an RFE; or
- The service center has not been able to obtain an applicant's A-File, T-File, or receipt file (when the applicant has multiple files).

C. Interpreters

An applicant may not be fluent in English and may require use of an interpreter for the adjustment interview. At the adjustment interview, the interpreter should:

- Present his or her valid government-issued identity document and complete an interpreter's oath and privacy release statement; and
- Translate what the officer and the applicant say word-for-word to the best of his or her ability without adding the interpreter's own opinion, commentary, or answer.

In general, a disinterested party should be used as the interpreter. An officer may exercise discretion, however, to allow a friend or relative of the applicant to act as interpreter. If the officer is fluent in the applicant's preferred language, the officer may conduct the examination in that language without use of an interpreter.

USCIS reserves the right to disqualify an interpreter provided by the applicant if the officer believes the integrity of the examination is compromised by the interpreter's participation or the officer determines the interpreter is not competent to translate.

Footnotes

[^ 1] See 8 CFR 209.1(d), 8 CFR 209.2(e), and 8 CFR 245.6.

[^ 2] See 8 CFR 103.2(b)(7).

[^ 3] See 8 CFR 245.6. USCIS is not required to waive the interview, even if an applicant falls within one of the categories listed in 8 CFR 245.6 or in this section.

[^ 4] See 8 CFR 245.6 (refers to adjustment applicants clearly ineligible for adjustment of status based on INA 245(c) and 8 CFR 245.1).

[^ 5] Before waiving an interview for any adjustment applicant, officers should ensure that the record does not meet any of the criteria for requiring an interview. See Section B, Relocating Cases for Adjustment of Status Interviews [7 USCIS-PM A.5(B)].

Chapter 6 - Adjudicative Review

This chapter provides steps that should be used as a general guideline for file review when determining if an applicant is eligible for adjustment of status:

General Guidelines for Adjudication of Adjustment of Status Application
• Verify underlying basis
• Determine ongoing eligibility
• Verify visa availability (if applicable)
• Determine admissibility
• Determine if favorable discretion is warranted (if applicable)

A. Verify Underlying Basis to Adjust Status

To adjust status to a lawful permanent resident, an applicant must first be eligible for one of the immigrant visa categories established by the Immigration and Nationality Act (INA) or another provision of law. The officer must verify the status of any underlying immigrant visa petition or other basis for immigrating prior to adjudicating the adjustment application.

In many cases, an underlying petition is used to form the basis for adjustment. Petitions are often already adjudicated and approved by the time the officer adjudicates the adjustment application.[1] If the underlying immigrant visa petition is still pending, the officer is responsible for determining if the beneficiary of the petition is eligible for the classification sought and adjudicating the petition prior to considering the adjustment application.

While an applicant may have only submitted a Notice of Action (Form I-797) with his or her adjustment application that referenced the underlying petition, the petition itself should be contained within the A-file and must be reviewed prior to adjudicating the adjustment application. As a matter of procedure, any underlying petition is typically ordered prior to any interview and before final adjudication of Form I-485.

There may be instances in which an adjustment applicant's file is sent forward to the adjudicating officer prior to locating the petition. In this case, the officer should hold the final adjudication of the adjustment application in abeyance in order to locate the underlying petition and then verify that the petition is still valid and the applicant remains eligible for the classification.

There may be instances where a petition is lost. For example, there may be proof the petition was filed but USCIS cannot locate the petition, and the petition was not forwarded to the National Visa Center. If a petition is lost, the applicant must recreate the petition at no additional fee. The officer then verifies the underlying basis of adjustment or adjudicates the replacement petition if the original was still pending. A recreated petition retains the same priority date as the original lost petition.

Security Checks and National Security Concerns

USCIS conducts background checks on all applicants for adjustment of status to enhance national security and protect the integrity of the immigration process by ensuring that USCIS grants lawful permanent resident status only to those applicants eligible for the requested benefit. The officer must ensure that all security checks are completed, unexpired, and resolved as necessary prior to adjudicating an adjustment application.

In general, a national security concern exists when a person or organization has been determined to have a link to past, current, or planned involvement in an activity or organization involved in terrorism, espionage, sabotage, or the illegal transfer of goods, technology, or sensitive information.[2]

B. Determine Ongoing Eligibility

After determining the classification requested, the officer should review all the eligibility requirements for that particular classification to ensure the applicant remains eligible. As with all applications, an applicant must remain eligible for adjustment of status from the time of filing through final adjudication.[3]

If an underlying immigrant visa petition provides the basis for adjustment and has already been approved, the officer should confirm that a valid qualifying relationship continues to exist in a family-based case or that a qualifying job offer still exists in an employment-based case. While specific family-based, employment-based, and special immigrant considerations are covered in detail in other parts of this volume, the officer should note that changes to marital status or age-out issues may impact family-based or derivative cases just as changes in employment, withdrawal of a job offer, or the failure of a petitioner's business may affect employment-based cases.

The officer should also confirm that the applicant continues to meet all eligibility requirements through the date of final adjudication, including reviewing the following:

1. Violations of Status and Other Bars to Adjustment

If applying under INA 245(a), an applicant must have been either inspected and admitted, or inspected and paroled, and must not be subject to any of the bars to adjustment specified in INA 245(c). These bars preclude certain applicants from adjusting status, including those who have violated their status, failed to maintain valid status, or worked without authorization. Most applicants must maintain their status up until the date of filing for adjustment of status, with the exception of those adjusting as immediate relatives and certain special immigrants.[4]

Some employment-based adjustment applicants may overcome adjustment bars under the provisions of INA 245(k). In addition, some applicants who entered without inspection or are otherwise subject to adjustment bars may still be eligible to adjust status under the provisions of INA 245(i).

2. Qualifying Family Relationship Continues to Exist

If the applicant claims a family relationship on the immigrant visa petition, that relationship must remain intact until a decision on the adjustment application, in most circumstances.[5] The officer must confirm that the applicant remains eligible to adjust status based on the relationship claimed on the underlying immigrant visa petition. Failure to maintain the relationship disqualifies the applicant in most cases or, if not disqualifying, may be a negative discretionary factor in certain types of cases.

The officer should review documentation to establish that the relationship continues. This review may include Child Status Protection Act (CSPA)[6] age calculations to confirm that the applicant remains a child by definition.[7]

In cases of derivatives following-to-join, the derivative's qualifying relationship to the principal applicant must have existed when the principal beneficiary obtained lawful permanent resident status and continue to exist through final adjudication of the derivative's adjustment application for the derivative applicant to remain eligible.[8]

If the principal beneficiary becomes a permanent resident and loses his or her permanent resident status or naturalizes prior to the derivative's adjustment, the derivative is no longer eligible for the classification as an accompanying or following-to-join family member.[9] Furthermore, a derivative may not be granted permanent resident status prior to the principal beneficiary's obtaining permanent resident status, because the derivative has no right or eligibility for the classification apart from the eligibility of the principal beneficiary's status, with the exception of U nonimmigrants, asylees, and refugees.[10]

3. Continuing Validity of the Employment-based Petition

The officer should verify that the employment-based adjustment applicant's Immigrant Petition for Alien Worker (Form I-140) remains valid. The officer should determine that the applicant is either employed by the petitioner or the job offer still exists, that the employer continues to have the financial means to employ the applicant. In addition, the officer should determine that the employer continues to be a viable business, including possessing a valid business license in the county, state or jurisdiction within which it is operating.

If the adjustment application has been pending for 180 days or more, the applicant may be eligible for adjustment portability.[11] Portability allows the applicant to accept an offer of employment with either the petitioner or a different employer in the same or similar occupational classification as the position for which the petition was approved.

C. Verify Visa Availability

The Immigration and Nationality Act (INA) limits the number of immigrant visas that may be issued to aliens seeking to become U.S. permanent residents each year. U.S. Department of State (DOS) is the agency that allocates immigrant visa numbers. In most cases, an immigrant visa must be available at the time of filing the adjustment application and at the time of final adjudication, if approved.

1. Immediate Visa Availability

Congress gave immigration priority to immediate relative immigrants, defined as:

- The spouses of U.S. citizens;
- The children (unmarried and under 21 years of age) of U.S. citizens;
- The parents of U.S. citizens at least 21 years old; and
- Widows or widowers of U.S. citizens if the spouse files a petition within 2 years of the citizen's death.[12]

Immigrant visas for immediate relatives of U.S. citizens are unlimited, so the visas are always available. In other words, immediate relatives are exempt from the numerical restrictions of other immigrant categories; an immigrant visa is always immediately available at the time they file an adjustment application and at the time of final adjudication, if approved.

Below are additional categories of aliens who are exempt from numerical restrictions and may file an adjustment of status application at any time or during the time period allowed by the applicable provision of law, provided they are otherwise eligible:[13]

- Aliens adjusting status based on refugee or asylee status;[14]
- Aliens adjusting status based on T nonimmigrant (human trafficking victim) status;[15]
- Aliens adjusting status based on U nonimmigrant (crime victims) status;
- Aliens adjusting status based on Special Agricultural Worker or Legalization provisions;[16]
- Aliens adjusting status based on public laws with certain adjustment of status programs;[17] and
- Aliens who obtain relief through a private immigration bill signed into law.

Except for human trafficking victims and Section 13 adjustment based applicants, an officer does not need to review visa availability for applicants filing in the above categories at the time of final adjudication. This includes applicants who are immediate relatives.

2. Numerically Limited Visa Availability

Immigrant visa numbers for family-based and employment-based immigrant preference categories as well as the Diversity Visa program are limited, so they are not always immediately available.

Family-sponsored preference visas are limited to a minimum of 226,000 visas per year and employment-based preference visas are limited to a minimum of 140,000 visas per year.[18] By statute, these annual visa limits can be exceeded where certain immigrant visa numbers from the previous fiscal year's allocation were not fully used. Both categories are further divided into several sub-categories, each of which receives a certain percentage of the overall visa numbers as prescribed by law. In addition, there are limits to the percentage of visas that can be allotted based on an immigrant's country of birth.[19]

A visa queue (waiting list or backlog) forms when the demand is higher than the supply of visas for a given year in any category or country. To distribute the visas among all preference categories, DOS allocates the visas by providing visa numbers according to the prospective immigrant's:

- Preference category;
- Country to which the visa will be charged (usually the country of birth);[20] and
- Priority date.

Therefore, the length of time an applicant must wait in line before being eligible to file an adjustment application depends on:

- The demand for and supply of immigrant visa numbers;
- The per-country visa limitations; and
- The number of visas allocated for the immigrant's preference category.[21]

3. Priority Dates

The priority date is used to determine an immigrant's place in the visa queue. The priority date is generally the date when the applicant's relative or employer properly filed the immigrant visa petition on the applicant's behalf with USCIS. A prospective immigrant's priority date can be found on Notice of Action (Form I-797) for the petition filed on his or her behalf.[22] The officer should verify the priority date by reviewing the actual immigrant petition or permanent labor certification application.

Priority Dates for Family-Sponsored Preference Cases

For family-sponsored immigrants, the priority date is the date that the Petition for Alien Relative (Form I-130), or in certain instances the Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360), is properly filed with USCIS.

Priority Dates for Employment-Based Preference Cases

For employment-based immigrants, the priority date is established on the earliest of:

- The date the petition was properly filed with USCIS;[23] or
- The date the permanent labor certification application[24] was accepted for processing by the Department of Labor (DOL), when a labor certification is required.[25]

Classification Conversion

If applicable, an officer must take special priority date and visa classification rules into consideration when determining visa availability. There are some instances in which a petition filed and approved under one classification automatically converts to a new category due to circumstances that occurred since filing.[26] Although this does not affect the applicant's priority date, it can affect visa availability. In addition, for certain family-based cases, the applicant can elect to opt-out of the classification conversion when it is advantageous to do so and when eligible.

Using Earlier Priority Dates

An applicant may intend to use an earlier priority date than the one indicated on his or her latest petition. This situation may occur when the same petitioner in a family-based category has filed more than one petition on behalf of an applicant for the same classification.[27] It may also occur in certain employment-based categories. Specifically, in the event that an applicant is the beneficiary of multiple approved employment-based petitions filed under 1st, 2nd, or 3rd preference, the applicant is entitled to the earliest priority date.[28] In certain situations, an immigrant investor who is the beneficiary of an employment-based petition filed under the 5th preference may also rely on the priority date of an earlier petition when filing an amendment of that petition.[29]

The applicant typically alerts the officer of the intention to use the benefit of an earlier priority date by including an approval notice for the previous petition in the adjustment application packet.

When Earlier Priority Dates May Not Be Used

In general, an adjustment of status applicant may not be able to use an earlier priority date from a previous petition if any of the following occurs:

- The petition was denied, terminated, or revoked for fraud, willful misrepresentation, or material error;
- The beneficiary is no longer eligible for the classification for which the petition was filed and does not qualify for automatic conversion;
- DOS terminated the registration of an applicant who failed to timely file for an immigrant visa, thereby automatically revoking the petition;[30] or
- The beneficiary has already used the petition to immigrate.

Applicants in the employment-based 1st, 2nd, and 3rd preference categories may not retain a priority date from an earlier approved petition to support a subsequent petition, if USCIS revoked the approval of the earlier petition because: the petition was approved in error, DOL revoked the labor certification associated with the petition, USCIS or DOS invalidated the labor certification associated with the petition, or due to fraud or the willful misrepresentation of a material fact.[31]

4. Department of State Visa Bulletin

DOS publishes a monthly report of visa availability referred to as the Visa Bulletin. The monthly Visa Bulletin serves as a guide for issuing visas at U.S. consulates and embassies. USCIS also uses this guide to determine whether an Application to Register Permanent Residence or Adjust Status (Form I-485) may be accepted for filing and receive final adjudication. A visa must be available both at the time an applicant files Form I-485 and at the time USCIS approves the application.[32]

DOS, in coordination with USCIS, revises the Visa Bulletin each month to estimate immigrant visa availability for prospective immigrants.[33]

The officer should consult the Department of State's Visa Bulletin to determine whether a visa was available at time of filing and at time of final adjudication and approval. The following table provides more information on how the officer should use the Visa Bulletin.

Using DOS Visa Bulletin to Determine Visa Availability

Numerically Limited Visa Preference Category	Relevant Visa Bulletin Chart at Time of Filing	Relevant Visa Bulletin Chart at Time of Final Adjudication
Family-Based Preference Categories	See Visa Bulletin in effect at the time the adjustment application was filed to determine which chart controls *(Dates for Filing Family-Sponsored Visa Applications OR Application Final Action Dates for Family-Sponsored Preference Cases chart)*	***Application Final Action Dates for Family-Sponsored Preference Cases*** chart that is current at the time the application is approved
Employment-Based Preference Categories (including Special Immigrant-Based Categories)	See Visa Bulletin in effect at the time the adjustment application was filed to determine which chart controls *(Dates for Filing Employment-Based Visa Applications OR Application Final Action Dates for Employment-Based Preference Cases chart)*	***Application Final Action Dates for Employment-Based Preference Cases*** chart that is current at the time the application is approved

Understanding the Visa Bulletin Charts

If the demand for immigrant visas is more than the supply for a particular immigrant visa preference category and country of chargeability, DOS considers the category and country oversubscribed and must impose a cut-off date to keep the allocation of visas within the statutory limits.

Visas are available for a prospective immigrant when the immigrant's priority date is earlier than the cut-off date shown in the relevant Visa Bulletin chart for his or her preference category and country of birth (and chargeability).

For example, if the Visa Bulletin shows a date of 15DEC07 for China in the family-based 1st preference category (F1), visas are currently available for those immigrants who have a priority date earlier than Dec. 15, 2007. Sometimes the demand for immigrant visas is less than the supply in a particular immigrant visa preference category and country of birth (or country of chargeability). In this situation, the Visa Bulletin shows that category as "C." This means that immigrant visa numbers are currently (or immediately) available to all qualified adjustment applicants and overseas immigrant visa applicants in that particular preference category and country of birth (and chargeability).

If the Visa Bulletin shows “U” in a category, this means that immigrant visa numbers are temporarily unavailable to all applicants in that particular preference category and country of birth (or country of chargeability).

5. Visa Retrogression

Sometimes a priority date that is current one month will not be current the next month, or the cut-off date will move backwards to an earlier date. This is called visa retrogression, which occurs when more people apply for a visa in a particular category than there are visas available for that month. Visa retrogression generally occurs when the annual limit for a category or country has been used up or is expected to be used up soon. When the new fiscal year begins on October 1, a new supply of visa numbers is available for allocation. Usually, but not always, the new supply returns the cut-off dates to where they were before retrogression.

In the past, DOS has notified USCIS that several visa preference categories have become fully subscribed within days of publication of the monthly Visa Bulletin. Despite this fact, applicable regulations[34] prevent USCIS from rejecting applications within that particular month, regardless of the actual availability of visa numbers.

If an officer encounters a case in which a visa was available at time of filing but is not available at time of final adjudication, the case should be retained, pre-processed, and adjudicated up to the point of final approval. If a particular applicant is ineligible for adjustment due to an issue not related to visa availability, the case may be denied accordingly because visa availability is not relevant.

All otherwise approvable employment-based and family-based cases located at a USCIS field office that do not have a visa available at the time of adjudication must be transferred to the appropriate USCIS office or Service Center once the case has been adjudicated up to the point of final adjudication. The officer should ensure that the interview and all other processing requirements, including resolution of security checks, have been completed prior to shipping the otherwise approvable case.

Final adjudication cannot be completed until a visa has been requested and DOS approves the visa request. Once a visa number becomes available, a USCIS officer will complete a final review of the adjustment application to ensure the applicant continues to meet eligibility requirements at time of final adjudication. This includes updating any expired security checks and may also include issuing a Request for Evidence (RFE) if it is unclear whether the applicant is still eligible for the particular classification or may be subject to a bar to adjustment or an inadmissibility ground, particularly in those cases that have had a long-delayed final adjudication.

6. Derivatives

In order to prevent the separation of families, the spouse or children of a preference immigrant can accompany or follow to join the principal beneficiary of an immigrant visa petition.[35] Because the spouse and children do not independently have a basis to adjust status outside of their relationship to the principal immigrant, they derive their status from the principal and are therefore known as derivatives of the principal.

“Accompany” and “follow to join” are terms of art and not defined within the INA. DOS generally considers the derivative spouse or child to be accompanying the principal when issued an immigrant visa or adjusting status within six months of the date DOS issues a visa to the principal or the date the principal adjusts status in the United States.[36] In contrast, there is no specific time period during which a derivative must follow to join the principal.[37]

Derivative Spouse

In general, the derivative spouse of a principal beneficiary may be accorded the same priority date and classification as the principal provided that:

- The marriage between the principal and the derivative spouse existed at the time the principal either adjusted status or was admitted to the United States as a lawful permanent resident (LPR);[38]
- The marriage continues to exist at the time of the derivative’s adjustment of status; and
- The principal remains in LPR status at the time the derivative adjusts status.[39]

Derivative Child

The derivative child of a principal beneficiary may be accorded the same priority date and classification as the principal provided that:

- The derivative child was acquired prior to the time the principal either adjusted status or was admitted to the United States as an LPR;
- The child continues to qualify as a child under the statutory definition (unmarried and under 21 years old)[40] or otherwise under the provisions of the CSPA, if applicable;[41] and
- The principal remains in LPR status at the time the derivative adjusts status.[42]

A principal’s natural child born after the principal’s LPR admission or adjustment may accompany or follow to join the principal as a derivative if born of a marriage that existed at the time of the principal’s admission or adjustment to LPR status.[43] For purposes of this rule, such a child is considered to have been acquired prior to the principal’s obtaining LPR status and is entitled to the principal’s priority date.[44]

An adopted child who was not able to accompany the principal because the two-year legal custody and joint residence requirements had not yet been met when the principal immigrated may become eligible to follow to join the principal. This may apply in cases where the child still qualifies as a “child” once the legal custody and joint residence requirements are met. Residing with either adoptive parent will meet the joint residence requirement with respect to each adoptive parent.[45]

Derivative Spouse and Child

Other than exceptions for U nonimmigrants, asylee derivatives, and refugee derivatives adjusting status, USCIS cannot approve the Form I-485 for a derivative applicant until the principal applicant has been granted lawful permanent resident status.[46]

In addition, there are a few special categories where certain additional family members qualify as derivative applicants and may adjust status. These include:

- Adjustment applicants in T or U nonimmigrant status;
- Applicants under Section 13 or the Act of September 11, 1957 (Public Law 85-316); and
- Those applying as dependents under HRIFA.

More information is provided in the program-specific parts of this volume.

7. Cross-Chargeability

In certain situations, an applicant may benefit from the charging of their visa to their spouse's or parent's country of birth rather than their own. This is known as cross-chargeability.

In practice, cross-chargeability is used where the preference quota category is backlogged for one spouse's country of chargeability but is current for the other spouse's country of chargeability. The principal applicant may cross-charge to the derivative spouse's country, and the derivative spouse may cross-charge to the principal's country.[47]

Derivative children may cross-charge to either parent's country as necessary.[48] Parents may not cross-charge to a child's country. In other words, the principal applicant or derivative spouse may never use their child's country of birth for cross-chargeability.

Whenever possible, cross-chargeability should be applied to preserve family unity and allow family members to immigrate together.[49]

Eligibility

In order to benefit from cross-chargeability, both applicants must be eligible to adjust status. A derivative using the principal's country of chargeability may adjust status with the principal or at any time thereafter. When a principal uses the derivative spouse's country of chargeability, both applicants are considered principal applicants: one for the purpose of conferring immigrant status and the other for the purpose of conferring a more favorable chargeability.[50] As such, the officer should approve both adjustment applications at the same time.

The following situations are examples of when applicants are eligible for cross-chargeability:

Examples of Eligibility for Cross-Chargeability

If a Visa is …	And a Visa is …	Then Charge the …
Available for principal applicant	Not available for derivative spouse	Derivative spouse's visa to the principal applicant's country of chargeability
Not available for principal applicant	Available for derivative spouse	Principal applicant's visa to the derivative spouse's country of chargeability
Available for principal applicant and derivative spouse	Not available for derivative child	Derivative child's visa to either parent's more favorable country of chargeability

Processing Requests for Cross-Chargeability

If a principal applicant is filing along with a derivative spouse or child and a visa appears unavailable at first glance, the officer should check the A-files for possible cross-chargeability eligibility. Often, an applicant will affirmatively request use of cross-chargeability when filing the application. In all cases where cross-chargeability provisions apply, the files should be forwarded to the adjudicating officer with a notation that indicates possible cross-chargeability. The files should be kept together in a family pack.

D. Determine Admissibility

Immigration laws specify acts, conditions, and conduct that can make aliens ineligible for adjustment of status. These acts, conditions, and conduct are outlined in INA 212 and are called "grounds of inadmissibility."

Admissibility requirements may vary based on the adjustment of status category sought. If the officer determines that the applicant is not inadmissible under any applicable grounds, then the officer may move on to other aspects of the adjudication. If the officer determines the applicant is inadmissible, the applicant may need a waiver or other form of relief to address the inadmissibility. The officer must confirm that the applicant is admissible to the United States or that any inadmissibilities are waived before making a final determination on an adjustment application.[51]

1. Report of Immigration Medical Examination and Vaccination Record (Form I-693)

Adjustment applicants who must show they are not inadmissible on health-related grounds are typically required to undergo an immigration medical examination performed by a USCIS-designated civil surgeon in the United States.[52] The civil surgeon records the results of the medical exam on the Report of Immigration Medical Examination and Vaccination Record (Form I-693), which is then reviewed by the officer upon adjudication of the adjustment application. Some adjustment applicants may have already undergone a medical exam overseas. In this case, the adjustment applicant may not need to repeat the medical exam in the United States or may only need to undergo the vaccination assessment.

If Form I-693 is required, the officer should carefully review the form to ensure it is properly completed and that the results of the immigration medical examination documented on the form are still valid for adjustment purposes.[53]

If Form I-693 is properly completed and the medical results still valid, the officer should review the form to assess whether the applicant is inadmissible based on any health-related ground.[54]

2. Affidavit of Support Under Section 213A of the INA (Form I-864)[55]

Most immediate relative and family-based immigrants, and some employment-based immigrants, are inadmissible as likely to become a public charge unless they submit an Affidavit of Support (Form I-864) with their adjustment application. The instructions for Form I-864 provide detailed information about who is required to submit an Affidavit of Support.

The officer must review the Affidavit of Support documentation to ensure the applicant and his or her sponsor meets the Affidavit of Support requirements, including that:

- The sponsor(s) signed the Affidavit of Support;
- The sponsor's income meets or exceeds 125% of the Federal Poverty Guidelines;[56]
- The sponsor submitted his or her most recent year's tax returns (Note: Older years are not acceptable in lieu of the most recent year's tax return. If a copy of a tax return is submitted, then copies of W-2s or 1099s must also be submitted. If an IRS transcript is submitted, then W-2s or 1099s are not needed.);
- There is an affidavit of support from both sponsors, if there is a joint sponsor;
- Sponsor and joint sponsor provided proof of citizenship or permanent resident status; and
- Sponsor and joint sponsor must be domiciled in the United States or a U.S. territory or possession.

In addition, if a sponsor is using assets to meet the requirements, the assets must total:

- For a spouse: Three times the difference in the sponsor's income and the 125% needed according to the poverty guidelines.
- For any other relative: Five times the difference in the sponsor's income and the 125% needed according to the poverty guidelines.

If the officer determines that required documentation is missing or that the petitioner fails to execute a sufficient Form I-864 or Form I-864EZ that meets the requirements of INA 213A, the officer may issue an RFE requesting the missing evidence, including the need for a joint sponsor to execute a Form I-864 when applicable.

An applicant is exempt from the Affidavit of Support requirement and need not submit Form I-864 if:

- The applicant has earned or can be credited with 40 qualifying quarters (credits) of work in the United States under the Social Security Act (Note: For this purpose: A spouse can be credited with quarters of coverage earned by the other spouse during the marriage. A child can be credited with any quarters of coverage earned by each parent before the child's 18th birthday.);
- The applicant is an intending immigrant child who will become a U.S. citizen immediately upon entry under the Child Citizenship Act of 2000 (CCA);[57]
- The applicant is the widow(er) of a U.S. citizen; or
- The applicant is a Violence Against Women Act (VAWA) self-petitioner or derivative child.

Other applicants are also exempt from filing an Affidavit of Support if they filed a Form I-485 prior to December 19, 1997[58] or if they qualify:

- Diversity Visa immigrants;[59]
- Special immigrant juveniles;[60]
- Refugees and asylees at time of adjustment of status;[61]
- Employment-based immigrants (other than those for whom a relative either filed an Immigrant Petition for Alien Worker (Form I-140) or owns 5% or more of the firm that filed the Form I-140);[62]
- Aliens granted T nonimmigrant status (human trafficking victims);
- Aliens granted U nonimmigrant status (crime victim);[63] and
- Certain qualified aliens as described under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).[64]

Applicants in these categories need not file Form I-864.

E. Security Checks and National Security Concerns

USCIS conducts background checks on all applicants for adjustment of status to enhance national security and protect the integrity of the immigration process by ensuring that USCIS grants lawful permanent resident status only to those applicants eligible for the requested benefit. The officer must ensure that all security checks are completed, unexpired, and resolved as necessary prior to adjudicating an adjustment application.

A national security concern exists when a person or organization has been determined to have a link to past, current, or planned involvement in an activity or organization involved in terrorism, espionage, sabotage, or the illegal transfer of goods, technology, or sensitive information, among others.[65]

An officer must consider activities, aliens, and organizations described in statute, to determine if a national security concern exists.[66]These include but are not limited to:

- Espionage activity;[67]
- Illegal transfer of goods, technology, or sensitive information;[68]
- Activity intended to oppose, control, or overthrow the U.S. Government by force, violence, or other unlawful means;[69]
- Terrorist activity;[70] and
- Association with terrorist organizations.[71]

The officer should consider the totality of the circumstances to determine whether an articulable link exists between the applicant (or organization) and prior, current, or planned involvement in, or association with an activity, any applicant (or organization) described in any of these sections.

Applications with national security concerns require specific handling in accordance with USCIS policy and procedures.

Footnotes

[^ 1] The approval of a visa petition provides no rights to the beneficiary of the petition, as approval of a visa petition is a preliminary step in the adjustment of status process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa and adjustment of his or her status. See *Matter of Ho (PDF)*, 19 I&N Dec. 582 (BIA 1988).

[^ 2] See INA 212(a)(3)(A), INA 212(a)(3)(B), or INA 212(a)(3)(F). See INA 237(a)(4)(A) or INA 237(a)(4)(B).

[^ 3] See INA 245(a). See 8 CFR 245.1(a). See 8 CFR 103.2(b)(1), 8 CFR 103.2(b)(2), and 8 CFR 103.2(b)(12).

[^ 4] See INA 245(c)(2).

[^ 5] See INA 204(l) for exceptions due to death of the petitioner or principal beneficiary.

[^ 6] See Pub. L. 107-208 (PDF) (August 6, 2002). See Chapter 7, Child Status Protection Act [7 USCIS-PM A.7].

[^ 7] See INA 101(b)(1).

[^ 8] For more information, see Section C, Verify Visa Availability, Subsection 6, Derivatives [7 USCIS-PM A.6(C)(6)].

[^ 9] See INA 203(d) and *Matter of Naulu (PDF)*, 19 I&N Dec. 351 (BIA 1986).

[^ 10] See 22 CFR 40.1(a)(2). See INA 245(m) and 8 CFR 245.24. See Part L, Refugee Adjustment [7 USCIS-PM L] and Part M, Asylee Adjustment [7 USCIS-PM M] for more information on the exception for asylee and refugee derivatives adjusting status.

[^ 11] See INA 204(j).

[^ 12] See INA 201(b)(2)(A)(i).

[^ 13] See INA 201(b) for a complete listing.

[^ 14] See INA 209.

[^ 15] Although a visa is immediately available to T nonimmigrant-based adjustment applicants at the time of filing, there is an annual cap on the number of adjustments allowed each year. Up to 5,000 T nonimmigrants are allowed to adjust status each year. This does not include immediate family members. See INA 245(l).

[^ 16] See INA 210 and 245A.

[^ 17] Some adjustment programs that are otherwise different from general adjustment include: the Cuban Adjustment Act, Pub. L. 89-732 (PDF) (November 2, 1966); the Cuban Adjustment Act for Battered Spouses and Children, Section 1509 of the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. 106-386 (PDF), 114 Stat. 1464, 1530 (October 28, 2000) and Sections 811, 814, and 823 of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), Pub. L. 109-162 (PDF), 119 Stat. 2960, 3057-58 and 3063 (January 5, 2006); dependent status under the Haitian Refugee Immigrant Fairness Act (HRIFA), Division A, Section 902 of Pub. L. 105-277 (PDF), 112 Stat. 2681, 2681-538 (October 21, 1998); dependent status under HRIFA for Battered Spouses and Children, Section 1511 of VTVPA, Pub. L. 106-386 (PDF), 114 Stat. 1464, 1532 (October 28, 2000), Section 1505 of the LIFE Act Amendments, Pub. L. 106-554 (PDF), 114 Stat. 2763, 2753A-326 (December 21, 2000), Sections 811, 814, and 824 of VAWA 2005, Pub. L. 109-162 (PDF), 119 Stat. 2960, 3057-58 and 3063 (January 5, 2005), and 8 CFR 245.15; former Soviet Union, Indochinese or Iranian parolees (Lautenberg Parolees), Section 599E of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Pub. L. 101-167 (PDF), 103 Stat. 1195, 1263 (November 21, 1989), as amended; and diplomats or high-ranking officials unable to return home, Section 13 of the Act of September 11, 1957, Pub. L. 85-316 (PDF), as amended, 8 CFR 245.3, INA 101(a)(15)(A)(i)-(ii) and INA 101(a)(15)(G)(i)-(ii). Although a visa is immediately available to Section 13-based adjustment applicants at the time of filing, there is an annual cap on the number of adjustments allowed each year. Only 50 visas per year, including both principal applicants and their immediate family members, are allotted each year.

[^ 18] See INA 201(c) and INA 201(d).

[^ 19] See INA 202(a)(2).

[^ 20] For exceptions to this general rule, see 22 CFR 42.12.

[^ 21] For more information, see the Visa Availability and Priority Dates webpage.

[^ 22] Form I-797 is contained in the A-file.

[^ 23] Immigrant Petition for Alien Worker (Form I-140); Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360); or Immigrant Petition by Alien Investor (Form I-526).

[^ 24] See the Department of Labor's website to access this form. The previous version of this form was ETA Form 750.

[^ 25] See 8 CFR 204.5(d).

[^ 26] See INA 204(k). See 8 CFR 204.2(a)(4) and 8 CFR 204.2(i).

[^ 27] See 8 CFR 204.2(h).

[^ 28] See 8 CFR 204.5(e).

[^ 29] See INA 203(b)(5)(M)(v)(I). For more information on priority date retention for immigrant investors, see Volume 6, Immigrants, Part G, Investors, Chapter 2, Eligibility Requirements, Section F, Priority Dates [6 USCIS-PM G.2(F)]. The EB-5 Modernization Rule, effective November 21, 2019, included priority date preservation for certain aliens applying for adjustment of status in the EB-5 category with a previously approved 5th preference immigrant investor petition. See 84 FR 35750, 35808 (PDF) (July 24, 2019). That rule, however, was vacated on June 22, 2021. See *Behring Regional Center LLC v. Wolf*, 544 F. Supp. 3d (N.D. Cal. 2021).

[^ 30] See INA 203(g). See 8 CFR 205.1(a)(1).

[^ 31] See 8 CFR 204.5(e)(2).

[^ 32] See INA 245(a)(3) and 8 CFR 245.2(a)(2)(i)(A). See 8 CFR 103.2(b)(1). For more information on determining whether a visa was available at time of filing, see Chapter 3, Filing Instructions, Section B, Definition of Properly Filed, Subsection 4, Visa Availability Requirement [7 USCIS-PM A.3(B)(4)].

[^ 33] USCIS also provides information about the current Visa Bulletin on the Adjustment of Status Filing Charts from the Visa Bulletin webpage.

[^ 34] See 8 CFR 245.1(g)(1).

[^ 35] See INA 203(d).

[^ 36] See 22 CFR 40.1(a)(1).

[^ 37] See 9 FAM 502.1-1(C)(2), Derivative Applicants/Beneficiaries. The distinction between "accompany" and "follow to join" is relevant for certain visa classifications that may allow for one but not the other. For instance, derivatives of certain special immigrants under INA 101(a)(27)(D)-(H) may accompany but not follow to join the principal applicant.

[^ 38] See 22 CFR 42.53(c). See 9 FAM 503.3-2(D), Priority Date for Derivative Spouse/Child.

[^ 39] See 9 FAM 502.1-1(C)(2), Derivative Applicants/Beneficiaries.

[^ 40] See INA 201(b).

[^ 41] See 9 FAM 503.3-2(D), Priority Date for Derivative Spouse/Child. See Chapter 7, Child Status Protection Act [7 USCIS-PM A.7].

[^ 42] For instance, the principal beneficiary did not lose LPR status or did not naturalize, thereby removing the principal's ability to confer LPR status to the derivative. See 9 FAM 502.1-1(C)(2), Derivative Applicants/Beneficiaries.

[^ 43] See 22 CFR 42.53(c).

[^ 44] See 9 FAM 502.1-1(C)(2), Derivative Applicants/Beneficiaries.

[^ 45] See *Matter of Y- K- W- (PDF)*, 9 I&N Dec. 176 (A.G. 1961).

[^ 46] See 22 CFR 40.1(a)(2). See INA 245(m) and 8 CFR 245.24. See Part L, Refugee Adjustment [7 USCIS-PM L] and Part M, Asylee Adjustment [7 USCIS-PM M] for more information on the exception for asylee and refugee derivatives adjusting status.

[^ 47] See INA 202(b)(2).

[^ 48] See INA 202(b)(1).

[^ 49] See 9 FAM 503.2-4(A), Derivative Chargeability.

[^ 50] See 9 FAM 503.2-4(A), Derivative Chargeability.

[^ 51] For more information, see Volume 8, Admissibility [8 USCIS-PM] and Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM].

[^ 52] For more information, see Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility, Chapter 3, Applicability of Medical Examination and Vaccination Requirement [8 USCIS-PM B.3].

[^ 53] For detailed information on reviewing Form I-693, see Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility, Chapter 4, Review of Medical Documentation, Section C, Documentation Completed by Civil Surgeon [8 USCIS-PM B.4(C)].

[^ 54] For more information, see Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility [8 USCIS-PM B].

[^ 55] See 8 CFR 213a.

[^ 56] If the sponsor is on active duty with the U.S. armed forces and is petitioning for a spouse or child, only 100% of the Federal Poverty Guidelines must be met. See Poverty Guidelines (Form I-864P).

[^ 57] See INA 320. An Affidavit of Support under Section 213A of the INA is not required for children who will automatically acquire citizenship under section 320 of the INA.

[^ 58] See 8 CFR 213a.2(a)(2)(i) and 8 CFR 213a.2(a)(2)(ii)(B). See Illegal Immigration Reform and Immigrant Responsibility Act, Division C of Pub. L. 104-208 (PDF) (September 30, 1996).

[^ 59] A winner of the Diversity Visa Program lottery has no petition or petitioner. Consequently, a Diversity Visa Program adjustment applicant does not need to file an Affidavit of Support. However, the applicant is still subject to the public charge ground of inadmissibility.

[^ 60] See INA 245(h).

[^ 61] See INA 209(c).

[^ 62] See INA 212(a)(4).

[^ 63] See INA 101(a)(15)(U) and INA 212(a)(4)(E)(ii). See Section 804 of the Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4 (PDF), 127 Stat. 54, 111 (March 7, 2013).

[^ 64] See INA 212(a)(4)(E)(iii). See Section 804 of the Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4 (PDF), 127 Stat. 54, 111 (March 7, 2013). See Section 431(b) of PRWORA, Pub. L. 104-193 (PDF), 110 Stat. 2105, 2274 (August 22, 1996) as amended by Title V, Subtitle A, Section 501 of the Omnibus Consolidated Appropriates Act of 1997, Pub. L. 104-208 (PDF), 110 Stat. 3009, 3009-670 (September 30, 1996) and codified at 8 U.S.C. 1641.

[^ 65] See INA 212(a)(3)(A), INA 212(a)(3)(B), and INA 212(a)(3)(F). See INA 237(a)(4)(A) or INA 237(a)(4)(B).

[^ 66] See INA 212(a)(3)(A), INA 212(a)(3)(B), and INA 212(a)(3)(F). See INA 237(a)(4)(A) and INA 237(A)(4)(B).

[^ 67] See INA 212(a)(3)(A)(i)(I) and INA 237(a)(4)(A).

[^ 68] See INA 212(a)(3)(A)(i)(II) and INA 237(a)(4)(A).

[^ 69] See INA 212(a)(3)(A)(iii) and INA 237(a)(4)(A).

[^ 70] See INA 212(a)(3)(B) and INA 237(a)(4)(B).

[^ 71] See INA 212(a)(3)(F) and INA 237(a)(4)(B).

Chapter 7 - Child Status Protection Act

A. Purpose of the Child Status Protection Act

The core purpose of the Child Status Protection Act (CSPA)[1] is to address the hardships faced by certain aliens who were previously classified as children for immigrant visa purposes, but who, due to the time required to adjudicate petitions, had turned 21 years old and consequently became ineligible to receive such immigrant visas.[2]

Section 101(b)(1) of the Immigration and Nationality Act (INA) defines a child as a person who is unmarried and under 21 years old.[3] CSPA does not alter this definition. Instead, CSPA provides methods for calculating an alien's age for immigrant visa purposes. The resulting age is known as the alien's "CSPA age."

CSPA does not change the requirement that the alien must be unmarried in order to remain classified as a child for immigration purposes.

B. Child Status Protection Act Applicability

CSPA applies only to those aliens specified in the statute:

- Immediate relatives (IRs);
- Family-sponsored preference principals and derivatives;
- Violence Against Women Act (VAWA) self-petitioners and derivatives;[4]
- Employment-based preference derivatives;[5]
- Diversity immigrant visa (DV) derivatives;
- Derivative refugees;[6] and
- Derivative asylees.

CSPA provisions vary based on the immigrant category of the alien. Certain provisions of the CSPA apply to some categories of aliens but not others. Such provisions and details regarding eligibility are described in the following sections.[7] CSPA only covers those aliens explicitly listed in the statute; it does not apply to an alien who is in another immigrant category or who is a nonimmigrant.

CSPA applies to both aliens abroad who are applying for an immigrant visa through the Department of State (DOS) and aliens physically present in the United States who are applying for adjustment of status through USCIS. This chapter primarily focuses on the impact of CSPA on aliens applying for adjustment of status, though the same principles generally apply to aliens seeking an immigrant visa through DOS.[8]

Effective Date

CSPA went into effect on August 6, 2002. Aliens who are applying for adjustment of status may be considered a child for immigration purpose under CSPA if either the qualifying application (Application to Register Permanent Residence or Adjust Status (Form I-485)) or one of the following underlying forms was filed or pending on or after the effective date:

- Petition for Alien Relative (Form I-130);
- Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360);
- Immigrant Petition for Alien Workers (Form I-140);
- Immigrant Petition by Standalone Investor (Form I-526);
- Immigrant Petition by Regional Center Investor (Form I-526E);
- Application for Asylum and for Withholding of Removal (Form I-589);
- Registration for Classification as a Refugee (Form I-590); or
- Refugee/Asylee Relative Petition (Form I-730).[9]

CSPA does not apply to adjustment of status applications that were subject to a final determination prior to the effective date. However, if the qualifying underlying form was approved prior to the effective date, an alien who applies for adjustment of status after the effective date may still qualify for CSPA coverage.[10]

Impact of USA Patriot Act

Special rules apply in cases where an alien who is applying for adjustment of status would otherwise age out on or after August 6, 2002. Under Section 424 of the USA PATRIOT Act, if a qualifying form was filed before September 11, 2001, then the alien is afforded an additional 45 days of eligibility.[11]

C. Immediate Relatives

1. Applicability

In order to qualify for CSPA:

- The alien who is applying for adjustment of status must have had one of the following approved or pending on or after the CSPA's effective date: a qualifying Petition for Alien Relative (Form I-130), Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360), or Application to Register Permanent Residence or Adjust Status (Form I-485);
- The alien must have been under the age of 21 and unmarried at the time the qualifying Form I-130 or Form I-360 was filed; and
- The alien must remain unmarried.

If the petitioner of a pending or approved IR spousal petition dies, the spousal Form I-130 automatically converts to a widow or widower Form I-360.[12] A child of an alien widow or widower must be under the age of 21 and unmarried at the time of the petitioner's death to be classified as a derivative beneficiary on the automatically converted Form I-360, regardless of whether the child had a separate pending or approved Form I-130 at the time of the petitioner's death.[13]

Similarly, the alien beneficiary of a pending or approved spousal Form I-130 may subsequently file a VAWA-based Form I-360. In order to include his or her child on the self-petition as a derivative beneficiary, the child must be under the age of 21 and unmarried when the Form I-360 is filed, regardless of whether the child had a separate or approved Form I-130 when the Form I-360 was filed.[14]

2. Determining Child Status Protection Act Age

For aliens who are IRs and IR self-petitioners or derivative beneficiaries under VAWA, an alien's age is frozen on the date the Form I-130 or Form I-360 is filed, respectively. For derivative beneficiaries of an alien widow or widower, an alien's age is frozen on the date the Form I-360 is filed or the spousal Form I-130 is automatically converted to a widow's or widower's Form I-360 (in other words, the date of the petitioner's death). If the alien who is applying for adjustment was under the age of 21 at the time the petition was filed or automatically converted, the alien is considered a child for CSPA purposes and will not age out.

D. Derivative Asylees

CSPA allows aliens who turn 21 years old after an asylum application is filed but prior to adjudication to continue to be classified as children and remain eligible for derivative asylum status and adjustment of status.

1. Applicability

In order to qualify for CSPA:

- The alien who is applying for adjustment of status must have had one of the following pending on or after the CSPA's effective date: a qualifying Refugee/Asylee Relative Petition (Form I-730), principal applicant's Application for Asylum and for Withholding of Removal (Form I-589), or Application to Register Permanent Residence or Adjust Status (Form I-485);
- The alien must have been under the age of 21 and unmarried at the time the principal asylum applicant's Form I-589 was filed; and
- The alien must be unmarried at the time he or she seeks adjustment of status.

2. Determining Child Status Protection Act Age

The CSPA age for an alien who is a derivative asylee is his or her age on the date the principal applicant's Form I-589 is filed. In other words, the alien's age is frozen on the date the Form I-589 is filed. If the alien was under the age of 21 at the time of filing, the alien is considered a child for CSPA and will not age out.

Generally, in order to establish eligibility, an alien who is a derivative asylee must have been listed on the principal applicant's Form I-589 prior to a final decision on the principal's asylum application. However, the alien may overcome their parent's failure to list them on the Form I-589 by providing evidence establishing the parent-child relationship, including evidence of the child's age, and a reasonable explanation as to why the alien was not included on the principal asylum applicant's Form I-589.[15]

E. Derivative Refugees

CSPA allows aliens who turn 21 years old after a refugee application is filed but prior to adjudication to continue to be classified as children and remain eligible for derivative refugee status. For purposes of adjustment of status of a derivative refugee, CSPA protection is not needed because an alien who is a derivative refugee does not need to remain the child of the principal refugee in order to adjust status under INA 209.[16]

1. Applicability

In order to qualify for CSPA:

- The alien must have had a qualifying Registration for Classification as a Refugee (Form I-590) or Refugee/Asylee Relative Petition (Form I-730) pending on or after the CSPA effective date; and
- The alien must have been under the age of 21 and unmarried at the time the qualifying Form I-590 was filed.[17]

The alien must have been unmarried at the time the alien receives derivative refugee status either when USCIS approves the Form I-730 if the alien is in the United States or at the time the alien is admitted into the United States as a derivative refugee.[18] However, the alien does not need to remain unmarried after receiving derivative refugee status in order to adjust status under INA 209.[19]

2. Determining Child Status Protection Act Age

The CSPA age for an alien who is a derivative refugee is his or her age on the date the principal applicant's Form I-590 is filed. The date a Form I-590 is considered filed is the date of the principal refugee's interview with a USCIS officer. The alien's age is frozen on the date of the principal refugee's interview. So long as the alien was under 21 on the date of the interview, he or she will not age out of eligibility for derivative refugee status or adjustment of status.

Generally, in order to qualify, an alien who is a derivative refugee must be listed as a child on the principal refugee's Form I-590 prior to a final decision. However, the alien may overcome this by providing evidence establishing the parent-child relationship, including evidence of the alien's age, and a reasonable explanation as to why the alien was not included on the principal refugee's Form I-590.[20]

F. Family-Sponsored and Employment-Based Preference and Diversity Immigrants

1. Applicability

CSPA applies differently to aliens who are applying for adjustment of status under the family-sponsored and employment-based preference and under the DV categories than it does to aliens who are applying for adjustment of status as a refugee, asylee, and IR.[21] Instead of an alien locking in his or her age on the filing date, as is the case with IRs, CSPA provides a formula for aliens applying for adjustment of status under a preference category that calculates an alien's CSPA age using the amount of time the qualifying petition was pending.[22] Furthermore, an alien's eligibility to be considered a child under CSPA depends not only on the CSPA age calculation but also on whether the alien sought to acquire lawful permanent residence within 1 year of visa availability.[23]

In order for an alien applying for adjustment of status under the family-sponsored or employment-based preference or DV category to qualify as a child under CSPA, the alien must meet the following requirements:

- The alien must have had a qualifying petition[24] or adjustment application pending on or after the CSPA effective date;[25]
- The alien's calculated CSPA age must be under 21 years old;
- The alien must remain unmarried; and
- The alien must have sought to acquire lawful permanent residence within 1 year of visa availability, absent extraordinary circumstances.[26]

2. Child Status Protection Act Age Calculation

For family-sponsored (including VAWA)[27] and employment-based preference and DV categories, an alien's CSPA age is calculated by subtracting the number of days the petition on which the alien seeks to adjust status was pending (pending time) from the alien's age on the date the immigrant visa becomes available to the alien (age at time of visa availability).[28] The formula for calculating CSPA age is as follows:

Age at time of visa availability - Pending time = CSPA Age

While an alien must file an adjustment application or otherwise seek lawful permanent resident (LPR) status in order to be considered a child for CSPA purposes, the date the alien files an adjustment of status application is not relevant for the CSPA age calculation.[29]

Example

The alien is 21 years and 4 months old when USCIS considers an immigrant visa available. The alien's underlying petition was pending for 6 months. The alien's CSPA age is calculated as follows:

21 years and 4 months - 6 months = 20 years and 10 months

Therefore, the alien's CSPA age is under 21.

If an alien has multiple approved petitions, the alien's CSPA age is calculated using the petition that forms the underlying basis for the adjustment of status application. This also applies to circumstances when USCIS approves a request to transfer the underlying basis of a pending adjustment of status application to a different immigrant category based on another approved petition. The alien's CSPA age is calculated using the approved petition that forms the new basis of the adjustment of status application.[30]

Example

An alien is listed as a derivative beneficiary on an approved Form I-140 filed by the principal beneficiary's employer. The employer rescinds the principal beneficiary's job offer, but he or she receives a job offer from a second employer. The second employer files a new Form I-140 for the principal beneficiary , and the alien is listed as a derivative beneficiary on this second approved Form I-140. The principal beneficiary files an adjustment of status application based on the second Form I-140 and is approved. The alien also files an adjustment of status application based on the second Form I-140.

The alien's CSPA age is calculated using the petition underlying the principal beneficiary's adjustment of status application, in other words, the second Form I-140. The alien may be eligible to retain the priority date from the first Form I-140, but the CSPA calculation uses the second petition, because this is the petition through which the principal beneficiary obtained adjustment of status and that forms the basis for the alien's adjustment of status application.

3. Determining Length of Time Petition Was Pending

For aliens applying for adjustment of status under the family and employment-based preference categories, the length of time a petition was pending (pending time) is the number of days between the date that it is properly filed (filing date)[31] and the approval date. The formula for determining the length of time the petition was pending is as follows:

Approval Date - Filing Date = Pending Time

Example

The alien's mother filed a petition on the alien's behalf on February 1, 2016. USCIS approved the petition on August 1, 2016.

August 1, 2016 - February 1, 2016 = 6 months (or 182 days)

Therefore, the alien's petition pending time is 6 months (or 182 days).

Pending time includes administrative review, such as motions and appeals, but does not include consular returns.

For aliens applying for adjustment of status under the DV category, the number of days the petition was pending is the period of time between the first day of the DV application period for the program year in which the principal applicant qualified and the date on which notifications that aliens have been selected become available.[32] In other words, the pending time is the period of time between the start of the DV Program registration period to the date of the DV Selection Letter.

Example

The DV Program registration period began on October 1, 2012, and the DV Selection Letter is dated May 1, 2013.

May 1, 2013 - October 1, 2012 = 7 months

Therefore, the alien's pending time is 7 months.

4. Determining Age at Time of Visa Availability

In order to calculate an alien's CSPA age according to the formula above, the officer must first determine the age at time of visa availability.

In order for the immigrant visa to be considered available for CSPA purposes, two conditions must be met:

- The petition must be approved; and
- The visa must be available based on an alien's immigrant preference category, priority date, and country of chargeability.

Therefore, the date USCIS considers the visa available for an alien who is applying for adjustment of status under a family or employment-based preference category is the later of these two dates:

- The date of petition approval; or
- The first day of the month of the DOS Visa Bulletin that indicates availability for that immigrant preference category, priority date, and country of chargeability in the Final Action Dates chart.[33]

For DVs, the date USCIS considers a visa available is the first day on which the principal alien's rank number is current for visa processing.[34]

Determining When a Visa is Available to File an Adjustment Application

Aliens can determine when they may file for adjustment of status by referring first to the USCIS Adjustment of Status Filing Charts from the Visa Bulletin webpage and then to the DOS Visa Bulletin.[35]

In September 2015, DOS and USCIS announced a revision to the Visa Bulletin, which created two charts of dates.[36] DOS publishes a new Visa Bulletin on a monthly basis. Since October 2015, the Visa Bulletin has featured two charts per immigrant preference category:

- Dates for Filing chart; and

- Final Action Dates chart.

USCIS designates one of the two charts for use by aliens each month.[37] Aliens must check the USCIS Adjustment of Status Filing Charts from the Visa Bulletin webpage to see which chart to use in determining when they may file adjustment of status applications.

Aliens cannot rely on the DOS Visa Bulletin alone because the Visa Bulletin merely publishes both charts; it does not state which chart can be used to determine when to file an adjustment of status application. The DOS Visa Bulletin contains a clear warning to aliens to consult with the USCIS website for guidance on whether to use the Dates for Filing chart or Final Action Dates chart to determine when they may file an adjustment of status application.

It is important to note that while USCIS designates one of the charts for use by aliens each month for accepting and processing adjustment of status applications, the Final Action Dates chart always governs when a visa is authorized for issuance to an alien who filed an adjustment of status application.

Final Action Dates Chart Used for Child Status Protection Act Age Determination

An alien may choose to file an adjustment application based on the cutoff dates in the Dates for Filing chart of the DOS Visa Bulletin during a month when USCIS designates that chart for use. However, USCIS uses the Final Action Dates chart to determine the alien's age at the time of visa availability for CSPA age calculation purposes. Age at the time of visa availability is the alien's age on the first day of the month of the DOS Visa Bulletin that indicates availability according to the Final Action Dates chart.

An alien who chooses to file an adjustment application based on the Dates for Filing chart may ultimately not be considered a child for immigration purposes if his or her calculated CSPA age is 21 or older at the time his or her visa becomes available according to the Final Action Dates chart.[38]

Determining When a Visa is Available for the CSPA Age Calculations for Adjustment Applications Filed Before August 15, 2025

On February 14, 2023, USCIS issued policy guidance to update when an immigrant visa becomes available for the purpose of calculating an alien's CSPA age for adjustment of status applications adjudicated by USCIS.[39] Under this former policy guidance, USCIS calculated an alien's CSPA age based on his or her age on the first day of the month when USCIS considered a visa available for accepting and processing an adjustment application.

For adjustment of status applications filed before August 15, 2025, USCIS calculates an alien's CSPA age using the later of one of these two dates:

- The date of petition approval; or
- The first day of the month of when USCIS considers a visa available for accepting and processing an adjustment of status application for that immigrant preference category, priority date, and country of chargeability.

5. Impact of Visa Unavailability on the Child Status Protection Act Age Determination

The impact of visa retrogression depends on whether:

- The adjustment of status application is filed based on the Dates for Filing or the Final Action Dates chart; and
- The visa retrogression occurs before or after a visa becomes available for the CSPA age calculation according to the Final Action Dates chart.

Visa Unavailable After the Filing of an Adjustment of Status Application

If an alien filed an adjustment application when a visa became available according to the Final Action Dates chart and his or her CSPA age at the time of filing the application was under 21, then the alien's CSPA age is locked in through final adjudication of the application.[40] If the visa later becomes unavailable, USCIS holds the application until the visa next becomes available and USCIS can adjudicate the application.

However, if the alien filed based on the Dates for Filing chart, then his or her age is not immediately locked in at the time of filing the adjustment of status application.[41] Rather, the alien's CSPA age is calculated and locked in when his or her visa becomes available according to the Final Action Dates chart.

Example: Application Filed Based on Dates for Filing Chart

The alien files an adjustment of status application in March using the Dates for Filing chart based on his or her immigrant preference category, priority date, and country of chargeability. On May 1, the Final Action Dates chart indicates that the alien's visa has become available. However, on July 1, the alien's visa retrogresses based on the Final Action Dates chart and the visa becomes unavailable.

For this case, USCIS calculates the alien's CSPA age using May 1 as the visa availability date. If the alien's calculated CSPA age is under 21, his or her CSPA age is locked in through final adjudication and USCIS holds the application until the visa next becomes available based on the Final Action Dates chart.

Example: Application Filed Based on Final Action Dates Chart

On May 1, the Final Action Dates chart indicates a visa is available for the alien's immigrant preference category, priority date, and country of chargeability. The alien files an adjustment of status application in June, and then the visa becomes unavailable on July 1, based on the Final Action Dates chart. For this case, USCIS calculates the alien's CSPA age using May 1 as the visa availability date. If the alien's calculated CSPA age is under 21, his or her CSPA age is locked in through final adjudication and USCIS holds the application until the visa next becomes available.

For both examples, if the alien's calculated CSPA age is 21 or older using the May 1 visa availability date, the alien has aged out and is not eligible to be considered a child when the visa next becomes available. In these cases, USCIS denies the adjustment of status application if the alien is not eligible to adjust status under another immigrant category.[42]

Visa Was Available but Becomes Unavailable Before an Application is Filed

If a visa initially becomes available based on the Final Action Dates chart and then becomes unavailable[43] before the alien files an adjustment application, his or her CSPA age is not locked in. When the visa next becomes available based on the Final Action Dates chart and the alien files an adjustment application, his or her CSPA age is calculated based on the new visa availability date. If the alien's CSPA age is over 21 at the time the visa next becomes available, the alien is no longer considered a child for immigration purposes under CSPA.

Example: Visa Becomes Unavailable Before Filing

On May 1, the Final Action Dates chart indicates a visa is available for the alien's immigrant preference category, priority date, and country of chargeability. On July 1, the visa becomes unavailable before the alien files an adjustment of status application. Because the alien has not yet filed an adjustment of status application, his or her CSPA age is not locked and will be calculated using the next visa availability date based on the Final Action Dates chart if the alien timely files an adjustment of status application.

G. Sought to Acquire Requirement

In order for an alien who is applying for adjustment of status under a family-sponsored or employment-based preference category, or the DV program, to benefit from the CSPA age calculation, they must seek to acquire lawful permanent residence within 1 year of when a visa becomes available.[44] This requirement does not apply to refugee derivatives, asylee derivatives, and IRs.[45]

1. Satisfying the Sought to Acquire Requirement

An alien may satisfy the sought to acquire requirement by any one of the following:

- Properly filing an Application to Register Permanent Residence or Adjust Status (Form I-485);[46]
- Submitting a completed Immigrant Visa Electronic Application (Form DS-260), Part I to the DOS;[47]
- Paying the immigrant visa fee to DOS;[48]
- Paying the Affidavit of Support Under Section 213A of the INA (Form I-864) review fee to DOS (provided the alien is listed on the Affidavit of Support);[49] or
- Having a properly filed Application for Action on an Approved Application or Petition (Form I-824) filed on the alien's behalf.[50]

USCIS also considers a written request to transfer the underlying basis of the adjustment of status application to satisfy the "sought to acquire" requirement if the request is received within 1 year of an immigrant visa becoming available in the new preference category.[51]

Actions an alien might take prior to filing an adjustment application, such as contacting an attorney or organization about initiating the process for obtaining a visa that has become available or applying for permanent residence, are not equivalent to filing an application and do not fulfill the sought to acquire requirement. However, USCIS may exercise discretion and consider this requirement satisfied if the alien is able to establish that the failure to seek to acquire within 1 year of visa availability was the result of extraordinary circumstances.[52]

From the date of visa availability, and provided that the visa remains available for a continuous 1-year period, the alien has 1 year to fulfill the sought to acquire requirement. If the alien does not seek to acquire within 1 year of visa availability although the visa was available for a continuous 1-year period, the alien cannot benefit from the age-out protections of the CSPA.

Officers should review the comprehensive list of final action dates listed by year on the DOS Visa Bulletin website to determine whether the alien had a prior 1-year period of visa availability.[53] Officers may use the comprehensive list to track movement of dates over time but should confirm consequential dates in the relevant monthly bulletin and Final Action Dates chart.

2. Visa Availability and the Sought to Acquire 1-Year Period

The date of visa availability is the date of petition approval or the first day of the month of the DOS Visa Bulletin that indicates availability for that immigrant preference category, priority date, and country of chargeability according to the Final Action Dates chart, whichever is later.[54] From the date of visa availability, aliens in the family-sponsored or employment-based preference categories, or those applying based on the DV program, have 1 year in which to seek to acquire permanent resident status in order to qualify for CSPA coverage.[55]

While the Final Action Dates chart determines the date of visa availability for purposes of the CSPA age calculation and the 1-year sought to acquire period, an alien may choose to file an adjustment of status application based on the Dates for Filing chart if eligible. In this case, the alien files prior to the date of visa availability according to the Final Action Dates chart.

If an alien files an adjustment application based on the Dates for Filing chart before the visa is available according to the Final Action Dates chart, the alien still meets the sought to acquire requirement. However, his or her CSPA age calculation is still dependent on visa availability according to the Final Action Dates chart.[56] Aliens who file based on the Dates for Filing chart may ultimately not be considered a child for immigration purposes under CSPA once the visa becomes available if the CSPA age calculation is 21 or older based on the Final Action Dates chart.

Impact of Visa Unavailability on the 1-Year Sought to Acquire Requirement

When a visa becomes unavailable to the alien before a continuous 1-year period has elapsed, the alien has another 1-year period to seek to acquire when the visa next becomes available. The alien has 1 year from the next time the visa becomes available according to the Final Action Dates chart to seek to acquire LPR status.

A visa is continuously available for a 1-year period if, during each month of that year, the alien has a priority date for an approved petition that is earlier than the date for his or her country of chargeability and immigrant preference category on the Final Action Dates chart in the DOS Visa Bulletin.

If a continuous 1-year period of visa availability elapsed and the alien did not seek to acquire during the 1-year period, the alien cannot benefit from the age-out protections of CSPA. The alien already had a continuous 1-year period in which to seek to acquire.

Example 1

A visa initially becomes available to the alien according to the Final Action Dates chart on October 1, 2020. The visa remains available to the alien for 4 months, that is, through the end of January 2021. The alien decides not to apply for adjustment of status between October 1, 2020, and the end of January 2021.

On February 1, 2021, a visa is no longer available to the alien under the Final Action Dates chart and the alien is no longer eligible to file an adjustment of status application. A visa next becomes available on October 1, 2021, based on the Final Action Dates chart. Since the alien only had 4 months of time in which to seek to acquire during the initial period of availability, the alien has a full 1-year period beginning October 1, 2021, in which the alien may seek to acquire.

USCIS calculates the CSPA age based on the new visa availability on October 1, 2021 (not October 1, 2020), and the CSPA age is locked in as of that date provided that the visa remains available and the alien seeks to acquire during that 1-year period. If the visa does not remain continuously available and becomes unavailable again before a full 1-year period has elapsed, the period starts anew once the visa becomes available again.

Example 2

A visa initially becomes available to the alien according to the Final Action Dates chart on March 1, 2020. The visa remains available to the alien through March 2021, that is, for a continuous 1-year period of visa availability. The alien decides not to file for adjustment of status between March 1, 2020, and March 31, 2021. On April 1, 2021, a visa is no longer available to the alien. On June 1, 2021, the visa becomes available again to the alien.

Under these facts, the alien failed to seek to acquire permanent residence within 1 year of visa availability because the alien failed to apply for adjustment of status during the 1-year period between March 1, 2020, and March 1, 2021, when a visa was continuously available to file an adjustment of status application. The alien cannot benefit from the age-out protections of CSPA.

H. Extraordinary Circumstances for Sought to Acquire Requirement

An alien who fails to seek to acquire within 1 year of visa availability may still be able to benefit from CSPA if he or she can establish that his or her failure to seek to acquire was the result of extraordinary circumstances.[57]

In order to establish extraordinary circumstances, the alien must demonstrate that:

- The circumstances were not created by the alien's action or inaction;
- The circumstances directly affected the alien's failure to seek to acquire within the 1-year period; and
- The delay was reasonable under the circumstances.

Examples of extraordinary circumstances[58] that may warrant a favorable exercise of discretion include, but are not limited to:

- Serious illness or mental or physical disability of the alien during the 1-year period;
- Legal disability, such as instances where the alien suffered from a mental impairment, during the 1-year period;
- Instances where a timely adjustment application was rejected by USCIS as improperly filed and was returned to the alien for corrections where the deficiency was corrected and the alien re-filed within a reasonable period thereafter;
- Death or serious illness or incapacity of the alien's attorney or legal representative or a member of the alien's immediate family; and
- Ineffective assistance of counsel, when certain requirements are met.

1. Extraordinary Circumstances Due to Ineffective Assistance of Counsel

An alien may only establish extraordinary circumstances due to ineffective assistance of counsel (the alien's legal representative or attorney) if the alien completes the following:

- The alien must submit an affidavit explaining, in detail, the agreement that was entered into with counsel regarding the actions to be taken and what information, if any, counsel provided to the alien regarding such actions;
- The alien must demonstrate that the alien has made a good faith effort to inform counsel whose integrity or competence is being questioned of the allegations brought against counsel and that counsel has been given an opportunity to respond; and
- The alien must indicate whether a complaint has been filed with the appropriate disciplinary authorities about any violations of counsel's legal or ethical responsibilities, or explain why a complaint has not been filed.

2. Evaluating Extraordinary Circumstances

When considering a claim of extraordinary circumstances, the officer should weigh the totality of the circumstances and the connection between the circumstances presented and the failure to meet the sought to acquire requirement within the 1-year period, as well as the reasonableness of the delay. In order to warrant a favorable exercise of discretion, the circumstances must truly be extraordinary and beyond the alien's control.

USCIS does not consider commonplace circumstances, such as financial difficulty, minor medical conditions, and circumstances within the alien's control (such as when to seek counsel or begin preparing the application package), to be extraordinary. Furthermore, the fact of being or having been a child is common to all aliens seeking protection under the CSPA and does not constitute extraordinary circumstances.

When an alien seeks to acquire after the 1-year period of visa availability has elapsed and does not provide an explanation or evidence of extraordinary circumstances, the officer issues a Notice of Intent to Deny (NOID) to give the alien an opportunity to rebut the apparent ineligibility.

3. Age Calculation for Aliens with Extraordinary Circumstances

If an alien successfully establishes extraordinary circumstances to satisfy the sought to acquire requirement, then USCIS calculates his or her CSPA age as follows:

Aliens with Extraordinary Circumstances and No Periods of Visa Unavailability

If the visa was continuously available for 1 year without any intervening visa unavailability for an alien who demonstrated extraordinary circumstances, then USCIS calculates his or her CSPA age using the date when that visa first became available.

The date USCIS considers the visa available is the later of these two dates:

- The date of petition approval; or
- The first day of the month of the DOS Visa Bulletin that indicates availability for that immigrant preference category, priority date, and country of chargeability in the Final Action Dates chart.[59]

Aliens with Extraordinary Circumstances and Periods of Visa Unavailability

When a visa is available for a continuous 1-year period and then becomes unavailable before the alien files his or her adjustment application, then the alien generally is not considered a child for CSPA purposes. However, if the alien files for adjustment of status when the visa next becomes available, he or she may establish that his or her failure to seek to acquire LPR status within the initial 1-year period was based on extraordinary circumstances.[60] If the alien establishes extraordinary circumstances, USCIS calculates his or her CSPA age using the date when that visa first became available.

By contrast, when a visa became unavailable before a continuous 1-year period elapsed and the alien did not file for adjustment of status or otherwise seek to acquire LPR status while the visa was available,[61] USCIS provides the alien another 1-year period to seek to acquire LPR status starting when the visa next becomes available. If the alien timely files for

adjustment of status when the visa next becomes available,[62] USCIS calculates his or her CSPA age based on the date the visa became available again.[63] However, USCIS may calculate his or her CSPA age using the date a visa first became available if the alien demonstrates extraordinary circumstances for not seeking to acquire LPR status before the visa first became unavailable.[64]

In some cases, when a visa became unavailable before a continuous 1-year period elapsed, the alien may not have sought to acquire LPR status before the visa first became unavailable and may not have sought to acquire LPR status within the 1-year period when a visa next became available. If the alien establishes extraordinary circumstances for not seeking to acquire during the next period that dates back to the period that the visa first became available, then USCIS uses the date that a visa first became available to calculate his or her CSPA age.[65]

If an alien only establishes extraordinary circumstances to satisfy the sought to acquire requirement within the 1-year period that the visa was next available, USCIS calculates the alien's CSPA age using the date the visa became available the next time. If an alien cannot establish extraordinary circumstances to satisfy the sought to acquire requirement within the 1-year period the visa was next available, the alien is not considered a child for CSPA purposes, regardless of whether the alien established extraordinary circumstances for the initial period of visa availability of less than a year.

Example: Extraordinary Circumstances When the First Visa Availability Period is Less Than 1 Year and the Alien Seeks to Acquire LPR Status Within 1 Year of the Next Period of Visa Availability

A visa first becomes available under the Final Action Dates chart to the alien on October 1, 2020, and the visa remains available to the alien until December 31, 2020. The visa was only available for 3 months and was therefore not available for a continuous 1-year period. As of January 1, 2021, the alien cannot apply for adjustment of status because a visa is no longer available.

A visa becomes available again under the Final Action Dates chart to the alien on July 1, 2021. The alien applies for adjustment of status within 1 year, on June 15, 2022. Although USCIS provides the alien with another 1-year period to seek to acquire because the visa was first available for less than a year, the alien includes an explanation and evidence demonstrating extraordinary circumstances for not applying for adjustment of status during the first visa availability period between October 1 and December 31, 2020. USCIS determines, as a matter of discretion, that the alien established extraordinary circumstances and calculates the alien's CSPA age using the date the visa first became available, which was October 1, 2020.

Example: Extraordinary Circumstances When the First Visa Available is Less Than 1 Year and the Alien Seeks to Acquire LPR Status After 1 Year of Visa's Next Availability

A visa first becomes available under the Final Action Dates chart to the alien on October 1, 2020. The visa becomes unavailable to the alien on January 1, 2021.

A visa becomes available again under the Final Action Dates chart to the alien on July 1, 2021, and remains available through July 1, 2022, for a continuous 1-year period. The alien does not apply for adjustment of status within the 1-year period of visa availability between July 1, 2021, and July 1, 2022. As a result, the alien failed to meet the sought to acquire requirement.

The alien applies for adjustment of status on February 14, 2023, and demonstrates extraordinary circumstances, including that the delay was reasonable, for not applying for adjustment of status both the first time the immigrant visa was available (October 1, 2020 to December 31, 2020) and the second time the visa became available (July 1, 2021 to July 1, 2022). USCIS calculates the his or her CSPA age using the alien's age on October 1, 2020, the date when the visa first became available.

Example: First Visa Available for Less Than 1 Year and Extraordinary Circumstances When the Alien Seeks to Acquire LPR Status After 1 Year of Visa's Next Availability

A visa first becomes available under the Final Action Dates chart to the alien on October 1, 2020. The visa becomes unavailable to the alien on January 1, 2021.

A visa becomes available again under the Final Action Dates chart to the alien on July 1, 2021, and remains available through July 1, 2022, for a continuous 1-year period. The alien does not apply for adjustment of status within the 1-year period of visa availability between July 1, 2021, and July 1, 2022. The visa becomes unavailable from October 1, 2022 to January 31, 2023 and becomes available again on February 1, 2023.

The alien applies for adjustment of status on February 14, 2023, and includes an explanation and evidence demonstrating extraordinary circumstances for failing to meet the sought to acquire requirement during the second visa availability period (July 1, 2021 to July 1, 2022). The alien does not provide any evidence demonstrating extraordinary circumstances for failing to seek to acquire when the visa first became available, between October 1, 2020, and December 31, 2020.

USCIS determines, in its discretion, that the alien satisfies the sought to acquire requirement, including that the delay was reasonable and calculates the alien's CSPA age using the alien's age on July 1, 2021, the date when the visa became available the second time. USCIS does not calculate the alien's CSPA age based on the first date of visa availability (October 1, 2020) because the alien did not demonstrate extraordinary circumstances for not applying for adjustment of status within the period the visa was available for less than 1 year (the period covered between October 1, 2020 and December 31, 2020).

Examples of CSPA Calculation with Periods of Visa Unavailability

The following situations are examples of how to calculate CSPA age of an alien with periods of visa unavailability:

The visa was first available for…	And the alien files for adjustment of status…	Then the date used to calculate CSPA age is…
Less than 1 year before becoming unavailable	Within 1 year of when the visa next became available	• The day when the visa next became available; or • The day when the visa first became available if the alien demonstrates extraordinary circumstances for not seeking to acquire LPR status within the period the visa was first available.
Less than 1 year before becoming unavailable	After the visa was next continuously available for 1 year	• The day when the visa next became continuously available for 1 year if the alien demonstrates extraordinary circumstances for not seeking to acquire LPR status within the 1-year period the visa was next available. The alien who does not establish extraordinary circumstances, as described above, is not considered a child for CSPA purposes if the alien seeks to acquire LPR status after the visa was next continuously available for 1 year; or • The day when the visa first became available if the alien:

The visa was first available for…	And the alien files for adjustment of status…	Then the date used to calculate CSPA age is…
		◦ Demonstrates extraordinary circumstances for not seeking to acquire LPR status within the 1-year period the visa was next continuously available; and ◦ Demonstrates extraordinary circumstances for not seeking to acquire LPR status within the period the visa was first available.
More than 1 year before becoming unavailable	After the visa next becomes available	The day when the visa first became available if the alien demonstrates extraordinary circumstances for not seeking to acquire LPR status within the 1-year period the visa was first available. Otherwise, the alien who does not establish extraordinary circumstances for not seeking to acquire LPR status within the 1-year period the visa was first available is not considered a child for CSPA purposes.

4. Other Remedies for Certain Aliens Who Failed to Seek to Acquire

Motions to Reopen Following Matter of O. Vazquez

Denials that were based on the failure to seek to acquire and issued prior to the decision in *Matter of O. Vazquez*[66] were proper based on the law in effect at the time of the decision. However, USCIS considers untimely motions to reopen for denials issued after the *Matter of O. Vazquez* precedent (June 8, 2012), but only if the denial was based solely on the alien's failure to seek to acquire LPR status within 1 year.

Aliens must file the Notice of Appeal or Motion (Form I-290B) with the proper fee and should present his or her claim that the finding in *Matter of O. Vazquez* constitutes changed circumstances justifying the reopening of the adjustment application. Officers consider new evidence of extraordinary circumstances submitted with the motion to reopen, consistent with the guidance in this section.

Certain Aliens Who Did Not Have an Adjustment Application Pending on the Effective Date

CSPA may still apply to aliens who did not have an adjustment application pending under a preference category on August 6, 2002, and who did not timely seek to acquire. If these aliens had a visa available on or after August 7, 2001, did not seek to acquire within 1 year of such visa availability, and would have qualified for CSPA coverage had he or she applied, but did not apply for adjustment of status because of prior policy guidance concerning the CSPA effective date, may still apply for adjustment of status.

I. Summary of Child Status Protection Act Applicability

The following table outlines immigrant categories covered by CSPA, methods by which CSPA age is calculated, whether the sought to acquire requirement applies, and references to legal authorities and additional guidance.

Summary of CSPA Applicability

Immigrant Category	CSPA Age Determination	Does Sought to Acquire Requirement Apply?	Legal Authorities and Additional Guidance
Derivative Refugees[67]	CSPA age is frozen on the date the Form I-590 of the alien who is the principal applicant is filed (the date of the principal refugee's interview with USCIS)	No	See INA 207(c)(2)(B) and INA 209(a)(1). See Part L, Refugee Adjustment, Chapter 2, Eligibility Requirements, Section F, Special Considerations for Refugee Adjustment of Status Applicants, Subsection 2, Child Status Protection Act Provisions [7 USCIS-PM L.2(F)(2)].
Derivative Asylees	CSPA age is frozen on the date the Form I-589 of the alien who is the principal applicant is filed.	No	See INA 208(b)(3)(B). See Part M, Asylee Adjustment, Chapter 2, Eligibility Requirements, Section C, Derivative Asylee Continues to be the Spouse of Child of the Principal Asylee, Subsection 2, Derivative Asylees Ineligible for Adjustment of Status [7 USCIS-PM M.2 (C)(2)].
Immediate Relatives (including VAWA)[68]	CSPA age is frozen on the date the Form I-130 is filed (or the Form I-360 is filed for VAWA self-petitioners and derivative beneficiaries).	No	See INA 201(f).
Derivative Beneficiaries of Widows or Widowers	CSPA age is frozen on the date the Form I-360 is filed or the date the Form I-130 is automatically converted to a widow's or widower's Form I-360.	No	See INA 201(f).
Family-Sponsored Preference Principals and Derivative Beneficiaries (including VAWA)[69]	CSPA age is calculated by subtracting the number of days the Form I-130 (or Form I-360 for aliens who are VAWA self-petitioners and derivative beneficiaries) was pending from the alien's age on the date an immigrant visa becomes available to the alien.	Yes. To benefit from the CSPA age determination, the alien must seek to acquire lawful permanent residence within 1 year of the visa becoming available.	See INA 203(h).
Employment-Based Preference Derivative Beneficiaries	CSPA age is calculated by subtracting the number of days the petition was pending from the alien's age on the date an immigrant visa becomes available to the alien.	Yes. To benefit from the CSPA age determination, the alien must seek to acquire lawful permanent residence	See INA 203(h).

Immigrant Category	CSPA Age Determination	Does Sought to Acquire Requirement Apply?	Legal Authorities and Additional Guidance
		within 1 year of the visa becoming available.	
Diversity Immigrant Visa Derivative Beneficiaries	CSPA age is calculated by subtracting the number of days the petition was pending from the alien's age on the date an immigrant visa becomes available to the alien.	Yes. To benefit from the CSPA age determination, the alien must seek to acquire lawful permanent residence within 1 year of the visa becoming available.	See INA 203(h).

Footnotes

[^ 1] See Pub. L. 107-208 (PDF) (August 6, 2002).

[^ 2] The situation in which USCIS can no longer classify aliens as children for immigrant visa purposes due to turning 21 is commonly referred to as aging out.

[^ 3] See INA 101(b)(1).

[^ 4] In addition to CSPA protections, aliens who are VAWA self-petitioners and derivative beneficiaries who turn 21 prior to adjusting status may be eligible for age-out protections provided in the Victims of Trafficking and Violence Protection Act (VTPVA) of 2000, Pub. L. 106-386 (October 28, 2000). These aliens who are not considered a child under for CSPA purposes may qualify for age-out relief under VTPVA. See INA 204(a)(1)(D)(i)(I) and INA 204(a)(1)(D)(i)(III). Officers should follow guidance in Age-Out Protections Afforded Battered Children Pursuant to The Child Status Protection Act and the Victims of Trafficking and Violence Protection Act (PDF, 104.96 KB), issued August 17, 2004.

[^ 5] Eligible derivative beneficiaries of aliens who are special immigrants are covered by CSPA as their immigrant visas fall under the employment-based fourth preference visa category. For more information, see Part F, Special Immigrant-Based Adjustment [7 USCIS-PM F].

[^ 6] The CSPA protects a derivative refugee from aging out prior to his or her refugee admission, but such protection is not needed at the adjustment stage because a derivative refugee does not need to remain the spouse or child of the principal refugee in order to adjust status under INA 209. See INA 209(a)(1).

[^ 7] See Section I, Summary of Child Status Protection Act Applicability [7 USCIS-PM A.7(I)] for a condensed guide to basic provisions for each category of CSPA-eligible immigrants.

[^ 8] For information about the impact of CSPA on aliens applying for an immigrant visa, see 9 FAM 502.1-1(D), Child Status Protection Act.

[^ 9] Pending time may also include administrative review, such as motions and appeals, but does not include consular returns.

[^ 10] See *Matter of Avila-Perez* (PDF), 24 I&N Dec. 78 (BIA 2007).

[^ 11] See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. 107-56 (PDF), 115 Stat. 272, 362 (October 26, 2001).

[^ 12] See 8 CFR 204.2(i)(1)(iv).

[^ 13] A child of an alien widow or widower who is ineligible to be included as a derivative beneficiary may be eligible for consideration under INA 204(l) or humanitarian reinstatement under 8 CFR 205.1(a)(3)(i)(C)(2). See Chapter 9, Death of Petitioner or Principal Beneficiary [7 USCIS-PM A.9] for more information.

[^ 14] See 8 CFR 204.2(c)(4).

[^ 15] See Part M, Asylee Adjustment, Chapter 2, Eligibility Requirements, Section C, Derivative Asylee Continues to be the Spouse or Child of the Principal Asylee [7 USCIS-PM M.2(C)].

[^ 16] See INA 209(a)(1).

[^ 17] The date a Form I-590 is considered filed is the date of the principal refugee's interview with a USCIS officer.

[^ 18] See INA 101(b)(1)(D). See 8 CFR 207.7(c).

[^ 19] See INA 209(a)(1).

[^ 20] See Part L, Refugee Adjustment, Chapter 2, Eligibility Requirements, Section F, Special Considerations for Refugee Adjustment of Status Applicants, Subsection 2, Child Status Protection Act Provisions [7 USCIS-PM L.2(F)(2)].

[^ 21] See Section C, Immediate Relatives [7 USCIS-PM A.7(C)], Section D, Derivative Asylees [7 USCIS-PM A.7(D)], and Section E, Derivative Refugees [7 USCIS-PM A.7(E)].

[^ 22] See INA 203(h)(1).

[^ 23] See INA 203(h)(1)(A). See Section G, Sought to Acquire Requirement [7 USCIS-PM A.7(G)] for detailed information.

[^ 24] Qualifying underlying forms include Petition for Alien Relative (Form I-130); Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360); Immigrant Petition for Alien Workers (Form I-140); Immigrant Petition by Standalone Investor (Form I-526); and Immigrant Petition by Regional Center Investor (Form I-526E). For DVs, the qualifying petition is the DV Program electronic entry form. See 9 FAM 502.6-4, Diversity Visa Processing.

[^ 25] See Section B, Child Status Protection Act Applicability [7 USCIS-PM A.7(B)] for more information on effective date.

[^ 26] See INA 203(h) and INA 204(k).

[^ 27] In addition to CSPA protections, aliens who are VAWA self-petitioners and derivative beneficiaries who turn 21 prior to adjusting status may be eligible for age-out protections provided in the Victims of Trafficking and Violence Protection Act (VTPVA) of 2000, Pub. L. 106-386 (PDF) (October 28, 2000). These aliens who are not considered a child for CSPA

purposes may qualify for age-out relief under VTPVA. See INA 204(a)(1)(D)(i)(I) and INA 204(a)(1)(D)(i)(III). Officers should follow guidance in Age-Out Protections Afforded Battered Children Pursuant to The Child Status Protection Act and the Victims of Trafficking and Violence Protection Act (PDF, 104.96 KB), issued August 17, 2004.

[^ 28] For CSPA purposes, the age at time of visa availability is the alien's age when USCIS considers the alien's visa available. See Subsection 4, Determining Age at Time of Visa Availability [7 USCIS-PM A.7(F)(4)]. Aliens who are VAWA self-petitioners and derivative beneficiaries are considered self-petitioners for preference status, and derivative beneficiaries who age out before adjusting status retain the priority date of the principal beneficiary's Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) VAWA self-petition. See INA 204(a)(1)(D)(i)(III). If an alien who is a VAWA self-petitioner was the principal beneficiary of a previously filed Petition for Alien Relative (Form I-130), the CSPA age is calculated using the date the Form I-360 was filed because this is the petition through which the alien is seeking adjustment of status.

[^ 29] See Section G, Sought to Acquire Requirement [7 USCIS-PM A.7(G)] for detailed information.

[^ 30] A transfer request potentially affects the CSPA age calculation for the derivative beneficiaries. Transferring to a new basis will result in a new calculated CSPA age, as the amount of time the petition was pending will change as will the alien's age at the time of visa availability. Depending on the facts of the particular case, an alien may become ineligible to adjust status as a derivative beneficiary as a result of a transfer request because his or her new calculated CSPA age is no longer under 21 years of age. However, a transfer of underlying basis request can also result in the alien becoming eligible to adjust status as a derivative beneficiary because his or her calculated CSPA age based on the petition is under 21 years of age.

[^ 31] While the priority date is often the same as the filing date (also referred to as the receipt date), there are instances in which the priority date is not the same, such as in employment-based cases based on the filing of a labor certification. The priority date should not be used for purposes of determining CSPA eligibility. Instead, the filing date (receipt date) is the appropriate date.

[^ 32] For DVs, the qualifying petition is the DV Program electronic entry form. See 9 FAM 502.6-4, Diversity Visa Processing.

[^ 33] In addition to providing the individual monthly visa bulletins, the DOS Visa Bulletin website also provides a comprehensive list of final action dates broken out by fiscal year. Officers may use the comprehensive list to track movement of dates over time but should confirm consequential dates in the relevant monthly bulletin.

[^ 34] The rank number is the number following the two-letter region code and should correspond with cut-off numbers available in the DOS Visa Bulletin.

[^ 35] For more information, see Chapter 3, Filing Instructions, Section B, Definition of Properly Filed, Subsection 3, Visa Availability Requirement [7 USCIS-PM A.3(B)(3)] and Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)]. Aliens who are apply for adjustment of status under the DV category also use the DOS Visa Bulletin to determine visa availability.

[^ 36] See USCIS News Release, USCIS Announces Revised Procedures for Determining Visa Availability for Applicants Waiting to File for Adjustment of Status, issued September 9, 2015.

[^ 37] USCIS typically designates one of the two charts within 1 week of the publication of the DOS Visa Bulletin.

[^ 38] An alien in the F2A preference category who is ineligible for CSPA according to the Final Action Dates chart may continue to pursue his or her adjustment of status applications based on the immigrant petition automatically converting to the F2B or F1 preference category. See INA 203(h)(3).

[^ 39] See Age Calculation under Child Status Protection Act (PDF, 345 KB), PA-2023-02, issued February 14, 2023.

[^ 40] In order to qualify under CSPA, the alien must also remain unmarried through final adjudication and must seek to acquire lawful permanent residence within 1 year of availability. See Section G, Sought to Acquire Requirement [7 USCIS-PM A.7(G)].

[^ 41] For aliens who filed for adjustment of status before August 15, 2025, USCIS considers a visa to be available for purposes of CSPA age calculations based on the Dates for Filing chart in accordance with the former policy guidance, and the CSPA age established at filing is locked in through the final adjudication, regardless of when a visa is authorized for issuance based on the Final Action Dates chart. The child must also remain unmarried through final adjudication and must have sought to acquire lawful permanent residence within 1 year of visa availability. See Section G, Sought to Acquire Requirement [7 USCIS-PM A.7(G)].

[^ 42] For example, an alien in the F2A preference category whose calculated CSPA age is 21 years or older according to the Final Action Dates chart may continue to pursue his or her adjustment of status application based on the immigrant petition automatically converting to the F2B or F1 preference category. See INA 203(h)(3). See 8 CFR 204.2(i). If an alien has multiple underlying bases to adjust status, the alien may request to transfer his or her underlying basis to another immigrant category if eligible. For more information, see Chapter 8, Transfer of Underlying Basis [7 USCIS-PM A.8].

[^ 43] A visa becomes unavailable when the date in the DOS Visa Bulletin based on the Final Action Dates chart for the alien's country of chargeability and preference category "retrogresses," or moves backwards.

[^ 44] See INA 203(h)(1)(A). Seek or sought to acquire is used as shorthand in this chapter to refer to this requirement.

[^ 45] VAWA preference cases are subject to the sought to acquire requirement, but VAWA IRs are not.

[^ 46] See Chapter 3, Filing Instructions, Section B, Definition of Properly Filed [7 USCIS-PM A.3(B)].

[^ 47] Submitting a Form DS-260 that covers only the alien who is the principal beneficiary does not meet the sought to acquire requirement for an alien who is the derivative beneficiary.

[^ 48] For more information on the Sought to Acquire LPR Status provision, see 9 FAM 502.1-1.

[^ 49] For more information on the Sought to Acquire LPR Status provision, see 9 FAM 502.1-1.

[^ 50] Aliens may file the Form I-824 concurrently with the adjustment application. A previously filed Form I-824 that was denied because the principal applicant's adjustment application had not yet been approved may serve as evidence of having "sought to acquire." For more information regarding how overseas aliens may satisfy the sought to acquire requirement in the consular processing context, see 9 FAM 502.1-1.

[^ 51] If the alien is a derivative applicant with a pending adjustment application and USCIS approves the principal applicant's request to transfer the underlying basis of his or her adjustment application to a different immigrant category based on another approved petition, then the date that USCIS receives the transfer request is the date USCIS uses to determine whether the alien met the sought to acquire requirement.

[^ 52] For more information, see Section H, Extraordinary Circumstances for Sought to Acquire Requirement [7 USCIS-PM A.7(H)].

[^ 53] If the alien files an adjustment of status application before August 15, 2025, officers should apply the guidance in effect at the time and review the USCIS Adjustment of Status Filing Charts from the Visa Bulletin webpage to determine whether the alien had a prior 1-year period of visa availability to file for adjustment of status. For more information on applying the guidance in effect before August 15, 2025, see Section F, Family and Employment-Based Preference and Diversity Immigrants, Subsection 4, Determining Age at Time of Visa Availability [7 USCIS-PM A.7(F)(4)].

[^ 54] For DVs, the date USCIS considers a visa available is the first day on which the principal applicant's rank number is current for visa processing.

[^ 55] Though the CSPA technically requires DV derivatives to seek to acquire within 1 year, this requirement does not generally affect aliens who are DV derivative beneficiaries, as they are only eligible to receive a visa through the end of the specific fiscal year in which the principal applicant was selected under INA 203(c). See INA 204(a)(1)(I).

[^ 56] For more information, see Section F, Family and Employment-Based Preference and Diversity Immigrants, Subsection 4, Determining Age at Time of Visa Availability [7 USCIS-PM A.7(F)(4)].

[^ 57] In *Matter of O. Vazquez* (PDF), the Board of Immigration Appeals (BIA) ruled that extraordinary circumstances could warrant the exercise of discretion for an alien to satisfy the sought to acquire requirement. See *Matter of O. Vazquez* (PDF), 25 I&N Dec. 817 (BIA 2012).

[^ 58] Following the February 14, 2023 policy guidance, USCIS later clarified that USCIS considered the February 14, 2023, policy change to be an extraordinary circumstance that may excuse an alien's failure to meet the "sought to acquire" requirement provided that the delay in filing the adjustment of status application is reasonable under the circumstances. See Sought to Acquire Requirement Under the Child Status Protection Act (PDF, 331.87 KB), PA-2023-24, issued on August 24, 2023. If USCIS determines that an alien demonstrates extraordinary circumstances due to the February 14, 2023 policy change during a period before August 15, 2025, including that the delay is reasonable under the circumstances, USCIS considers the alien to have satisfied the sought to acquire requirement.

[^ 59] See Section F, Family and Employment-Based Preference and Diversity Immigrants, Subsection 4, Determining Age at Time of Visa Availability [7 USCIS-PM A.7(F)(4)].

[^ 60] For a discussion on *Matter of O. Vazquez* (PDF), 25 I&N Dec. 817, 820 (BIA 2012) and extraordinary circumstances where the visa is available for less than 1 year, see Appendix: Update on Interpretation of Sought to Acquire [7 USCIS-PM A.7, Appendices Tab].

[^ 61] An immigrant visa may become unavailable after being available for a period of less than 1 year due to visa retrogression of the Final Action Dates chart. See the DOS Visa Bulletin webpage.

[^ 62] The alien files for adjustment of status within the 1-year period of when the visa next becomes available.

[^ 63] See Section G, Sought to Acquire Requirement, Subsection 2, Visa Availability and the Sought to Acquire 1-Year Period [7 USCIS-PM A.7(G)(2)].

[^ 64] USCIS may calculate an alien's CSPA age based on the Dates for Filing chart under the former policy guidance if the alien demonstrates extraordinary circumstances during a period before August 15, 2025, and USCIS considered a visa available for accepting and processing an adjustment of status application based on the Dates for Filing chart. See Section F, Family and Employment-Based Preference and Diversity Immigrants, Subsection 4, Determining Age at Time of Visa Availability [7 USCIS-PM A.7(F)(4)].

[^ 65] Aliens who claim that the same extraordinary circumstances prevented them from filing an adjustment of status application during all periods a visa was first and later available must present evidence to show that the extraordinary circumstances occurred during the first period when the visa was available and continued into the second period when the visa was continuously available for 1 year. Similarly, if an alien has different extraordinary circumstances for each period of visa availability, he or she must present evidence to show the extraordinary circumstance for each period of when the visa was available.

[^ 66] In *Matter of O. Vazquez*, the BIA ruled that extraordinary circumstances could warrant the exercise of discretion for an alien to satisfy the sought to acquire requirement during the 1-year period. See *Matter of O. Vazquez* (PDF), 25 I&N Dec. 817 (BIA 2012).

[^ 67] This includes Form I-730 beneficiaries.

[^ 68] For more detailed guidance on CSPA applicability and VAWA, see INA 204(a)(1)(D)(i) and Age-Out Protections Afforded Battered Children Pursuant to The Child Status Protection Act and the Victims of Trafficking and Violence Protection Act (PDF, 104.96 KB), issued August 17, 2004.

[^ 69] For more detailed guidance on CSPA applicability and VAWA, see INA 204(a)(1)(D)(i) and Age-Out Protections Afforded Battered Children Pursuant to The Child Status Protection Act and the Victims of Trafficking and Violence Protection Act (PDF, 104.96 KB), issued August 17, 2004.

Chapter 8 - Transfer of Underlying Basis

An adjustment of status applicant whose application is based on a particular immigrant category occasionally prefers to have the pending application considered under another category. Examples include:

- An applicant who originally applied for adjustment based on a pending or approved employment-based petition and later married a U.S. citizen now prefers to adjust based on a family-based petition filed by the new U.S. citizen spouse.
- An applicant who originally applied for adjustment as the spouse of a U.S. citizen, but now prefers to adjust under an employment-based category in order to avoid the conditional residence requirements.[1]
- An applicant who applied for adjustment concurrently with a pending employment-based petition in one preference category and subsequently had another employment-based petition filed by a different (future) employer in a different preference category.
- An applicant who applied for adjustment based on a pending or approved special immigrant petition and now wishes to adjust based on a subsequently filed family or employment-based petition.
- An applicant who applied for adjustment based on an approved or pending immigrant petition, but is now a Diversity Visa Program lottery winner.

The decision to grant or deny a transfer request is always discretionary. There are several factors to consider when determining whether to grant a transfer request.

A. Eligibility Requirements

When considering a request to transfer the basis of an adjustment application, the officer should consider the following guidance.

1. Continuing Eligibility to Adjust Status

In order to transfer an adjustment application from one basis to another, there must be no break in the continuity of the applicant's underlying eligibility to adjust prior to submitting the transfer request. If an applicant does not maintain eligibility up until the transfer is requested, a transfer cannot be granted. The date the transfer request is received is the controlling date for determining whether the eligibility continued, not the date the actual transfer request is reviewed or granted.

Example: Transfer Request Involving Break in Continuity of Underlying Eligibility

Date	Event
May 16, 2010	An applicant has a family-based petition approved based on marriage to a lawful permanent resident.
June 16, 2010	The applicant applies for adjustment of status based on the approved petition.
August 4, 2010	The applicant divorces his permanent resident spouse.
September 23, 2010	The applicant marries a U.S. citizen.
October 1, 2010	The applicant's new spouse files a petition for the applicant based on the new marriage.
November 10, 2010	The applicant appears for an adjustment of status interview with a divorce decree from the first marriage, a marriage certificate from the current marriage, and receipt notice of the petition filed October 1, 2010. The applicant requests a transfer.

In this case, the applicant failed to maintain continuity of eligibility because the first petition approval was automatically revoked at the moment the first marriage was dissolved. Accordingly, the adjustment application cannot be transferred and the applicant must file a new adjustment application for the new petition.

Adjustment Application Supported by Petition or Basis At All Times

The replacement petition must be properly filed and designated as the new basis for the pending adjustment application before the initial petition supporting the adjustment application is withdrawn, denied, or revoked. Additionally, if the new basis requires that the underlying petition first be approved prior to filing an adjustment application, a transfer request will be denied unless the replacement petition was approved prior to the request.[2]

If the petition upon which the pending adjustment application was initially based has been revoked[3] before the applicant makes a proper request for a transfer, then the applicant cannot meet the continuing eligibility requirement. In some cases, revocation of a petition is automatic and takes effect as soon as a triggering event occurs[4]

In other cases, USCIS must follow a formal revocation process before the revocation takes effect.[5] Continuing eligibility ends upon revocation. If the new basis of eligibility is not sought (in other words, the transfer request has not been received and approved by USCIS) before the revocation takes effect, the adjustment application cannot be transferred.

Fraud

If the original adjustment application was based on a petition determined to have been filed fraudulently or with willful misrepresentation, the principal adjustment applicant or the beneficiary of that petition is considered to have never been eligible for adjustment of status and therefore cannot meet the continuing eligibility requirement.

Likewise, anyone whose adjustment application is dependent upon that principal adjustment applicant's eligibility is also ineligible. If a principal's adjustment application is denied based on a determination of fraud, any accompanying derivative's application must also be denied.

2. Continuing Pendency of the Adjustment Application

An adjustment application cannot be transferred from one basis to another if there are any breaks in the continuity of the application, including if the applicant chooses to withdraw the application or the application is denied because the applicant failed to appear for a scheduled interview without sufficient justification.

A transfer cannot be granted once a final decision has been made on an adjustment application, whether granted, denied, or withdrawn, even if USCIS reopens or reconsiders the final decision.

3. Eligibility for Substituted Category

The applicant must provide evidence of eligibility for the new immigrant category in support of the request to transfer to a new eligibility basis. Evidence required can be found on the adjustment application's filing instructions. The transfer request should be treated as if it were a new filing and the applicant should provide the necessary documentation to establish eligibility for the new adjustment category.

The burden of proof for establishing eligibility under the new immigrant category is on the applicant. An officer does not need to make a full eligibility determination or pre-adjudicate the adjustment application prior to making a decision on the request, even though establishing eligibility may positively impact the decision as to whether to grant the request.

Inadmissibility and INA 245(c) Bars to Adjustment

The officer should consider that an applicant seeking to transfer the basis of a pending adjustment application may become subject to inadmissibility grounds or adjustment bars under that new basis. This could arise when the applicant is transferring from a basis that is exempt from certain inadmissibility grounds or adjustment bars to a basis that is not exempt from the same inadmissibility grounds or bars to adjustment. As a matter of discretion, the officer may deny a transfer request in these circumstances.

Example: Transfer Subjecting Applicant to Inadmissibility Grounds or Adjustment Bars

Date	Event
May 18, 2011	An applicant applies for adjustment of status as the spouse of a U.S. citizen after recently getting married.
July 23, 2011	An employer petitions for the applicant.
September 3, 2011	The employer's employment-based petition is approved.
October 21, 2011	The applicant requests a transfer to adjust status based on the employment-based petition instead of as the spouse of a U.S. citizen.

In this case, the applicant requested the transfer to avoid the conditional residence requirements. Because the applicant is no longer seeking to adjust as the spouse of a U.S. citizen (immediate relative), the applicant would no longer qualify for the special exemptions from adjustment bars applicable to immediate relatives. As a result, the applicant

may become subject to any applicable bars, unless an INA 245(k) exemption applies. An officer may exercise discretion to deny the transfer request in such cases.

4. Visa Immediately Available

When an applicant requests a transfer of the adjustment application from one basis to another, the priority date must be current for the category the applicant wishes to use. In order to transfer an adjustment application to a new basis involving a preference classification, the applicant must be the beneficiary of a pending or approved visa petition which has a visa available.

The date on which the transfer request is filed controls for purposes of determining whether an immigrant visa number is available, not the date on which the initial petition supporting the adjustment application was filed. For example, in order for an applicant who concurrently files an adjustment application with a preference petition filed by Employer A on March 3, 2013 to transfer the pending adjustment application to another preference petition on August 25, 2014, an immigrant visa number must be immediately available on August 25, 2014, under the new basis.

Priority Date

With limited exceptions, a priority date is not transferable from one petition to another.[6]

In general, the priority date of the replacement petition attaches to the pending adjustment application. This is done regardless of whether the priority date is earlier or later than the priority date of the initial petition supporting the adjustment application, except where applicable regulations permit retention of priority dates (allowing for use of the earliest priority date) in certain employment-based 1st, 2nd, and 3rd preference cases.[7]

Choosing Between Numerically Limited Category and Non-Numerically Limited Category

In general, an officer should adjust the applicant under the non-numerically limited category in order to leave a visa preference number available for other immigrants in cases where an applicant is eligible to adjust status under both a numerically limited category and a non-numerically limited category.

5. Exercise of Discretion

Whether to grant or deny a transfer request is a matter of discretion. Except for simple transfers between the first three employment-based categories, the adjustment applicant should not assume that transfer requests will be automatically granted. Other than the general eligibility requirements listed above, an officer may consider the effects of additional processing time required to gather evidence to support the applicant's new claim. The officer may look more favorably on those requests that include submission of all required initial evidence that supports the new basis for adjustment.

In addition, the officer may consider the following:

- The reason(s) for the request;
- The availability or unavailability of documentation to support the new claim;
- The degree of difficulty in obtaining needed receipt files from other USCIS offices;
- The degree of difficulty in determining the applicant's continued eligibility from the first underlying petition or basis; and
- The extent of processing steps already taken on the adjustment application.

All of these factors may result in processing delays which may be unacceptable to USCIS or the applicant. Requests that involve jurisdiction constraints or difficulties, or that are projected to greatly lengthen the processing time of the adjustment application, may result in the request being denied.

6. Other Eligibility Consideration

Transfer to INA 245(i) as New Underlying Basis for Adjustment

If an applicant initially filed for adjustment under INA 245(i) and paid the required additional $1000 fee, then the applicant need not pay again when requesting a transfer as long as continuity of eligibility is maintained during the transfer. However, if the applicant's initial adjustment application was not under the provisions of INA 245(i), and the applicant is now seeking a transfer to a basis which qualifies under INA 245(i), then the applicant must pay the additional $1,000 and file Supplement A to Form I-485, Adjustment of Status Under Section 245(i) (Form I-485, Supplement A).

Special Programs Containing Filing Deadlines

Certain programs[8] require that an applicant apply for adjustment of status by a given statutory deadline. In order to transfer the basis of an adjustment application to one of these special programs, the applicant would have to make the request no later than the filing deadline of the special program.

B. Filing Requirements

1. New Application or Fee Not Required[9]

Generally, no new adjustment application or filing fee is required when requesting a transfer of the underlying basis. As noted above, however, a request to convert to an INA 245(i) adjustment would require payment of the additional $1,000 fee and filing of Form I-485, Supplement A.[10]

2. Request Must Be Made in Writing

The adjustment applicant must request in writing that USCIS transfer the applicant's pending adjustment application from one basis to another.[11]

If an applicant verbally requests transfer of the basis of a pending adjustment application, for instance, during the adjustment interview, the applicant should sign and date a written statement to that effect and the officer should place the signed statement into the record of proceeding. The interview could then proceed without further delay provided the applicant remains eligible to immediately adjust under the new classification.

C. Petition Considerations

Prior to adjudication of an adjustment application, USCIS may allow the applicant to transfer a pending adjustment application to a different petition or basis regardless of whether the petition that forms the new basis for the pending adjustment application has already been approved or is pending, if allowable by law or regulation and provided certain requirements are met.[12]

Only one petition may form the basis of an adjustment application at any given time. The applicant must clearly designate in writing which petition serves as the new basis of the adjustment application. Several steps are required to ensure that the petition that forms the new basis for the pending adjustment application is properly matched with a pending adjustment application.

If concurrent filing is allowed, then transfer applicants are generally instructed to:

- Submit the new petition (with proper filing fee and signature) with a signed letter requesting that his or her pending adjustment application be transferred to the new petition. Include a cover sheet (preferably highlighted with colored paper) stating, "REQUEST FOR TRANSFER OF PENDING FORM I-485 (CASE #) TO ENCLOSED PETITION."
- Include a copy of the adjustment application's receipt notice with the new petition filing.
- Include evidence of eligibility for the new immigrant category in support of the transfer request to transfer to a new eligibility basis. A new adjustment application and fee are not required (see INA 245(i) exception above).

If concurrent filing is not allowed, then transfer applicants are generally instructed to wait until the new petition is approved before submitting a signed letter requesting the pending adjustment application be transferred, with the other documentation mentioned above.

Once an applicant makes a request to transfer a pending adjustment application from one basis to another and if the transfer request is granted, the original petition no longer supports the adjustment application. This rule applies even if the original petition is approved. The transfer request must be made sufficiently ahead of the time of adjudication of the adjustment application in order to give USCIS reasonable time to match up the replacement petition with the pending adjustment application. An officer must deny transfer requests received on or after the date the adjustment application is finally adjudicated.

1. Approved Petition to an Approved Petition

The beneficiary of an approved petition with a pending adjustment application may replace the approved petition with a different approved petition as the basis for the pending adjustment application.

2. Approved Petition to a Pending Petition

The beneficiary of an approved petition with a pending adjustment application may replace the approved petition with a pending petition as the new basis for the pending adjustment application in certain categories. The new basis must allow for filing of an adjustment application prior to approval of the petition (concurrent filing), or the transfer cannot occur and should be denied.

3. Pending Petition to an Approved Petition

An adjustment applicant with a concurrently filed and pending immigrant visa petition may replace the pending petition with an already approved petition as the basis for the pending adjustment application.

4. Pending Petition to a Pending Petition

An adjustment applicant with a concurrently filed and pending petition may request to transfer the adjustment application to another pending petition, provided that the new basis allows for the filing of the adjustment application prior to approval of the underlying petition.

D. Portability Provisions

The portability provisions of the American Competitiveness in the Twenty-First Century Act (AC21)[13] allow certain adjustment applicants with approved employment-based immigrant visa petitions in the 1st, 2nd, and 3rd preference categories to change jobs and employers if the adjustment application has been pending for 180 days or more, provided that the applicant's new job offer is in the same or similar occupational classification as the job for which the petition was initially filed. Adjustment applicants are not eligible for portability if their approved immigrant visa petitions are based on classification as an alien with extraordinary ability or alien for whom USCIS has waived the job offer and labor certification requirements in the national interest.[14]

If an employment-based applicant requests to transfer the adjustment application to a different employment-based category based on a new Form I-140, the applicant may not utilize the portability provisions, if applicable, until 180 days or more after making the transfer request. The applicant's new job offer must be in the same or similar occupational classification as the job for which the petition was initially filed. In essence, transferring the basis of the adjustment application resets the adjudication clock for purposes of portability eligibility.[15]

National Interest Waiver Physicians

Physicians, including specialty care physicians who work in a Physician Scarcity Area, with an approved immigrant petition based on a national interest waiver (NIW) may be employed by a petitioning employer or self-employed. These physicians agree to work full-time in clinical practice in either a Veterans Affairs (VA) health care facility or in a geographical area or areas designated by the Secretary of Health and Human Services as a Medically Underserved Area, a Primary Medical Health Professional Shortage Area, or a Mental Health Professional Shortage Area.[16] NIW physicians are not eligible for portability under the provisions of AC21.

NIW physicians may change employers or become self-employed while retaining the priority date of the initial approved immigrant petition. To do this, NIW physicians with an approved immigrant petition and a pending application for adjustment of status may either self-petition based on an intent to establish their own medical practice or become the beneficiary of a second petition from a different employer.[17] In order to continue to be eligible for the NIW, the new employment must take place in a VA health care facility or in a geographical area or areas designated by the Secretary of Health and Human Services as a Medically Underserved Area, a Primary Medical Health Professional Shortage Area, or a Mental Health Professional Shortage Area.[18] If USCIS approves the new petition (including a self-petition), USCIS matches the new petition with the pending adjustment of status application, and the NIW physician retains the priority date from the initial immigrant petition.[19]

Some physicians with an approved immigrant petition based on an NIW may be subject to the 2-year home residence requirement of INA 212(e). Due to this 2-year home residence requirement and its related waiver, there are additional restrictions on the eligibility of such a physician to transfer his or her adjustment application to a new NIW immigrant petition. Such physicians may seek a waiver of the 2-year home residence requirement under INA 214(l) by agreeing to practice medicine full-time for not less than 3 years in a medically underserved

area or a VA health care facility (or engage in medical research or training with a federal agency).[20] This agreement is a contract with a specific health facility or health care organization; if the physician fails to fulfill the terms of that contract, then he or she would again be subject to the 2-year home residence requirement.[21]

An NIW physician may satisfy the requirements to waive the 2-year home residence requirement and the 5 years of service for the NIW at the same time, if the physician's employment meets the criteria for each. USCIS only allows the transfer of the adjustment application to a new NIW immigrant petition[22] if the NIW physician has already fulfilled the required service for the waiver of INA 212(e) or has obtained a waiver in some other way.

E. Decision on Transfer Request

If the transfer request is granted, the applicant is not permitted to withdraw the request or request transfer of the adjustment application to a third basis at a later time except for possible transfers between the first three employment-based categories.

F. Derivative Beneficiaries' Adjustment Applications

In order to transfer a derivative beneficiary's adjustment application, the principal adjustment applicant must maintain eligibility up until the time of the transfer request and the relationship between the principal and dependent must continue to exist. If there is a break in either the principal's eligibility or in the relationship, the derivative's application cannot be transferred to a new basis. In addition, if the principal transfers his or her adjustment application to another basis that does not allow for derivatives, the derivative loses eligibility for adjustment of status at the time of the transfer and the derivative's adjustment application must be denied.

In the case of a derivative whose principal continues to maintain eligibility for adjustment and in which the relationship between the principal and derivative continues to exist, the derivative may request a transfer of the adjustment application from one basis to another and is not limited to transferring to another derivative category. For example, an applicant who meets all the other considerations could transfer from applying for adjustment as the dependent spouse of the sibling of a U.S. citizen to applying for adjustment as a principal applicant under an employment-based category.

Footnotes

[^ 1] See INA 216.

[^ 2] See Section C, Petition Considerations, Subsection 2, Approved Petition to a Pending Petition [7 USCIS-PM A.8(C)(2)] and Subsection 4, Pending Petition to a Pending Petition [7 USCIS-PM A.8(C)(4)].

[^ 3] See INA 205.

[^ 4] See 8 CFR 205.1.

[^ 5] See 8 CFR 205.2.

[^ 6] See 8 CFR 204.2(h)(2) and 8 CFR 204.5(e) for exceptions.

[^ 7] See 8 CFR 204.5(e).

[^ 8] For example, adjustment under Division A, Section 902 of the Haitian Refugee Immigration Fairness Act (HRIFA), Pub. L. 105-277 (PDF), 112 Stat. 2681, 2681-538 (October 21, 1998), or the Nicaraguan Adjustment and Central American Relief Act (NACARA), Title II of Pub. L. 105-100 (PDF), 111 Stat. 2160, 2193 (November 19, 1997).

[^ 9] If, instead of making a transfer request, an applicant files a second adjustment application under a new basis, any fee paid by the applicant should not be refunded. However, if the applicant or the applicant's legal representative was advised by USCIS or legacy INS that a new application and fee were required in order to transfer from one adjustment basis to another, the applicant may request and USCIS may in its discretion approve a refund of any fees paid for the second adjustment application. See 8 CFR 103.2(a)(1). See Volume 1, General Policies and Procedures, Part B, Submission of Benefit Requests, Chapter 3, Fees, Section C, Refunds [1 USCIS-PM B.3(C)].

[^ 10] See Part C, 245(i) Adjustment, Chapter 4, Documentation and Evidence [7 USCIS-PM C.4].

[^ 11] See "Transfer of Underlying Basis" on USCIS' Green Card Processes and Procedures webpage.

[^ 12] See Section A, Eligibility Requirements [7 USCIS-PM A.8(A)] and Section B, Filing Requirements [7 USCIS-PM A.8(B)].

[^ 13] See Pub. L. 106-313 (PDF) (October 17, 2000).

[^ 14] See 8 CFR 204.5(e)(5). See INA 204(j). Although these applicants are not eligible for AC21 portability, they are permitted to change employers, including becoming self-employed. Aliens of extraordinary ability do not require a job offer, but must show clear evidence that they intend to work in the area of their expertise. See 8 CFR 204.5(h)(5). Aliens for whom USCIS has waived the job offer and labor certification requirements in the national interest must file a new Form I-140 if they desire to change employers or establish their own practice. See 8 CFR 204.12(f).

[^ 15] Portability of an underlying employment-based petition should not be confused with the transfer of the adjustment application to a new petition or basis. Applicants who wish to avail themselves of AC21 portability need not request transfer of the adjustment application.

[^ 16] See INA 203(b)(2)(B). See *Matter of H-V-P- (PDF)*, Adopted Decision 2016-01 (AAO Feb. 9, 2016).

[^ 17] See 8 CFR 204.12(f)(1)-(2).

[^ 18] See 8 CFR 204.12(f)(1)-(2).

[^ 19] See 8 CFR 204.12(f)(1)-(2).

[^ 20] See INA 214(l)(1)(D).

[^ 21] See INA 214(l)(2)(B).

[^ 22] A self-petition or a petition filed by a new employer.

Chapter 9 - Death of Petitioner or Principal Beneficiary

A. General

In the past, a petition could not be approved if the petitioner died while the petition remained pending.[1] In 2009, Congress addressed this scenario with a new statutory provision, INA 204(l).[2] This provision gave aliens the ability to seek an immigration benefit through a deceased qualifying relative in certain circumstances.

An officer may approve an adjustment application, certain petitions, and related applications adjudicated on or after October 28, 2009,[3] if:

- The applicant resided in the United States when the qualifying relative died;
- The applicant continues to reside in the United States on the date of the decision on the pending application; and
- The applicant is at least one of the following:
  - A beneficiary of a pending or approved immediate relative immigrant visa petition;
  - A beneficiary of a pending or approved family-based immigrant visa petition, including both the principal beneficiary and any derivative beneficiaries;
  - Any derivative beneficiary of a pending or approved employment-based immigrant visa petition;
  - The beneficiary of a pending or approved Refugee/Asylee Relative Petition (Form I-730);
  - An alien admitted as a derivative T or U nonimmigrant; or
  - A derivative asylee.[4]

This applies to an adjustment of status application adjudicated on or after October 28, 2009, even if the qualifying relative died before October 28, 2009. If a petition or application was denied on or after October 28, 2009, without considering the effect of INA 204(l), and INA 204(l) could have permitted approval, USCIS must, on its own motion, reopen the case for a new decision in light of this new law.

1. Qualifying Relatives

An alien's deceased relative must meet the definition of qualifying relative in order for the alien to be eligible to continue to seek an immigration benefit through that person.

Although Congress did not expressly define "qualifying relative" in this situation, it did provide a list of those who may continue to seek an immigration benefit through the qualifying relative.[5] Therefore, for purposes of seeking adjustment of status, USCIS infers that qualifying relative means a person who immediately before death was:

- The petitioner of an immediate relative immigrant visa petition;[6]
- The petitioner or principal beneficiary of a family-sponsored immigrant visa petition;
- The principal beneficiary of a widow(er)'s self-petition;
- The principal beneficiary of an employment-based immigrant visa petition;
- The petitioner of a Refugee/Asylee Relative Petition (Form I-730);[7]
- The principal person admitted as a T nonimmigrant;
- A VAWA self-petitioner;[8] or
- The principal asylee granted asylum.

2. Residency Requirement

An applicant must have resided in the United States when the qualifying relative died, and continues to reside in the United States to adjust status based on the deceased qualifying relative.[9]

INA 204(l) defines an applicant's residence as his or her "principal, actual dwelling place in fact, without regard to intent."[10] If the applicant's residence was in the United States at the required times, the applicant meets the residency requirement.

An applicant who was temporarily abroad when the qualifying relative died does not need to prove that he or she still resides in the United States. Further, the statutory definition of residence does not require the applicant to show that his or her presence in the United States is lawful. Execution of a removal order, however, terminates an alien's residence in the United States.

3. Derivatives

For purposes of derivative beneficiaries,[11] as long as any one surviving beneficiary of a covered petition meets the residence requirement, then the petition may be approved despite the death of the qualifying relative. All the beneficiaries may immigrate to the same extent that would have been permitted if the qualifying relative had not died.[12] It is not necessary for each beneficiary to meet the residence requirements in order to remain eligible to adjust.

B. Effect on Adjustment Application

The officer may approve an adjustment application that was pending when the qualifying relative died if:

- The applicant meets the residency requirement;[13]
- The underlying petition is approved before the death of the qualifying relative, the underlying petition is approved under INA 204(l), the pre-death approval of the underlying petition is reinstated,[14] or the alien was admitted as a derivative T nonimmigrant or as a derivative asylee under INA 208(b)(3); and
- The applicant meets all other adjustment requirements.

If a beneficiary was eligible to adjust at the time of filing, that eligibility remains despite the subsequent death of a qualifying relative.

Applicants who seek adjustment based on a derivative asylum grant or as a derivative T nonimmigrant may also still be eligible to apply for adjustment in light of INA 204(l), despite the death of the qualifying relative. However, the applicant must establish eligibility for adjustment apart from the qualifying relative's death.

INA 204(l) does not limit or waive any other eligibility requirements or adjustment bars that apply, other than the requirement for a petitioner or principal beneficiary. Therefore, the applicant must have been eligible to apply for adjustment at the time of filing and at final adjudication, including admissibility and visa availability, if applicable.[15] In addition, the applicant must not be barred from adjusting status.[16]

For example, the death of the qualifying relative does not relieve an applicant seeking adjustment under INA 245(a) of the need to establish a lawful inspection and admission or inspection and parole, among other requirements for 245(a) adjustment.[17]

The applicant may request the approval or reinstatement of a petition, or adjustment of status notwithstanding the death of a qualifying relative under the following circumstances:

- If the applicant had not yet filed for adjustment at the time the qualifying relative died, the beneficiary may either apply for adjustment once USCIS approves or reinstates approval of the underlying petition,[18] if applicable, or the applicant may include a request for INA 204(l) relief with the adjustment application;[19] or
- If there was a properly filed adjustment application pending at the time the qualifying relative died, the applicant should notify USCIS of the death before USCIS adjudicates the adjustment application.

1. Admissibility and Waivers

INA 204(l) does not automatically waive any ground of inadmissibility that may apply to an adjustment applicant.[20] The applicant must be admissible, or must obtain a waiver of inadmissibility or other form of relief available, before adjustment may be granted.

Affidavit of Support and Public Charge Considerations[21]

The death of the qualifying relative does not relieve the applicant of the need to have a valid and enforceable Affidavit of Support (Form I-864), if required.[22] The Affidavit of Support establishes that the sponsored applicant is not likely to become a public charge and therefore is not inadmissible on such ground.[23]

If the petitioner dies, the applicant typically must obtain a substitute sponsor to continue to be eligible for adjustment of status. A substitute sponsor is needed even if the deceased petitioner has completed the Affidavit of Support.

However, the death of the principal beneficiary has no bearing, by itself, on the sufficiency of the Affidavit of Support. In these cases, if the Affidavit of Support has not been filed but is required, then the original petitioner must still file an Affidavit of Support for the derivative applicants to be able to adjust.

Effect of Death of Qualifying Relative on Waiver Adjudication

Even though INA 204(l) does not impact adjustment requirements related to admissibility and waivers, the provision does “remove ineligibility based solely on the lack of a qualifying family relationship.” Since INA 204(l) affects not only the visa petition and adjustment application but also any related application, USCIS has determined that INA 204(l) provides the discretion to grant a waiver or other form of relief from inadmissibility to a qualifying applicant, even if the qualifying relationship that would have supported the waiver has ended through death. It is not necessary for the waiver or other relief application to have been pending when the qualifying relative died.

A waiver or other relief application may be approved despite the death of the qualifying relative if:

- A petition or adjustment application was pending or approved when the qualifying relative died; and
- The applicant meets the residency requirement.[24]

If a pending petition or application to which INA 204(l) applies is denied despite INA 204(l), the applicant may not obtain approval of a waiver or other relief under INA 204(l).

Some waivers require a showing of extreme hardship to a qualifying relative, who must be either a U.S. citizen or lawful permanent resident (LPR). Since the legislation intends to have INA 204(l) extend not only to the approval of the pending petition, but also to any related applications, the fact that the qualifying relative has died should be noted in the waiver decision. If the qualifying relative who died is the same qualifying relative to whom extreme hardship must be established in order to grant a waiver, USCIS treats the qualifying relative’s death as the functional equivalent of a finding of extreme hardship. However, for this to apply, the deceased relative must have been a U.S. citizen or LPR at the time of death.[25]

A finding of extreme hardship permits, but does not compel, a favorable exercise of discretion.[26] As with any other discretionary waiver application, the officer should weigh the favorable factors against any adverse factors. Extreme hardship is just one positive factor to be weighed in the discretionary determination.[27] The conduct that made the applicant inadmissible is itself an adverse factor.[28] For example, if the applicant is inadmissible based on criminal grounds, the officer considers the nature, seriousness, and underlying circumstances of the crime to determine the weight given to this adverse factor.

2. Conditional Residency

If an adjustment applicant would have received permanent residence on a conditional basis due to the recent nature of the marriage to the petitioning spouse, but the petitioning spouse dies before adjustment is granted, then the adjustment applicant should receive permanent residence without condition.

Even if the adjustment applicant obtained conditional permanent residence, the fact that the marriage was terminated due to death would make the applicant eligible to apply for a waiver of certain requirements associated with conditional permanent resident (CPR) status.[29] The officer may grant an eligible applicant permanent residence without conditions if the officer determines the marriage was bona fide and entered into in good faith while the qualifying relative was alive.[30]

3. Discretionary Denials

INA 204(l) gives USCIS discretion to deny a petition or application that may be approved despite the qualifying relative’s death if USCIS finds, as a matter of discretion, that approval would not be in the public interest.[31] This exercise of discretion is unreviewable.[32]

Before denying a visa petition or adjustment application as a matter of discretion on the ground that approval would not be in the public interest, an officer must consult with the appropriate USCIS headquarters office or directorate through appropriate channels.

Consultation is not required if the officer will deny the case solely on the traditional discretionary factors that would have applied to the particular case, even if the qualifying relative were still alive. For example, fraud or criminal grounds of inadmissibility that have not or cannot be waived, or security grounds, may warrant denial as a matter of discretion under ordinary circumstances. Consultation is not required in such a case.

C. Motions to Reopen

INA 204(l) does not require USCIS to reopen or reconsider any decision denying a petition or application, if the denial had already become final before October 28, 2009. For a case denied before that date, an applicant may file (with proper fee) an untimely motion to reopen the petition, adjustment application, or waiver application that was denied if INA 204(l) allows approval of a still-pending petition or application.

The applicant should present new evidence, including:

- Proof of the relative's death;
- Proof that the applicant was residing in the United States when the relative died; and
- Proof that the applicant continues to reside in the United States.

If the applicant establishes the proof required, an officer may favorably exercise discretion to reopen the petition or application, and make a new decision in light of the law.

An alien present in the United States unlawfully does not accrue unlawful presence while a properly filed adjustment application is pending. If USCIS grants a motion to reopen a denied adjustment application under this section, the application will be pending again and is deemed to be pending from the original date of filing. Therefore, reopening an adjustment application under INA 204(l) will cure any unlawful presence that may have accrued between the original denial and the new decision. The result is that the applicant will not have accrued any unlawful presence from the original filing of the adjustment application until there is a final decision.

If the applicant is otherwise inadmissible because of unlawful presence accrued before applying for adjustment, the applicant must seek a waiver or other form of relief to address the inadmissibility.[33]

Footnotes

[^ 1] See *Matter of Sano (PDF)*, 19 I&N Dec. 299 (BIA 1985). See *Matter of Varela (PDF)*, 13 I&N Dec. 453 (BIA 1970).

[^ 2] See Section 568(d) of Pub. L. 111-83 (PDF), 123 Stat. 2142, 2187 (October 28, 2009). See INA 204(l). The law does not expressly define the "qualifying relative." From the list of aliens to whom the new INA 204(l) applies, however, USCIS infers that "qualifying relative" means a person who, immediately before death was: (1) the petitioner in an immediate relative or family-based immigrant visa petition under INA 201(b)(2)(A)(i) or INA 203(a); or (2) the principal beneficiary in a widow(er)'s immediate relative or family-based visa petition case under INA 201(b)(2)(A)(i) or INA 203(a).

[^ 3] INA 204(l) applies to cases filed before October 28, 2009, and cases in which the qualifying relative died before October 28, 2009, as long as the case is adjudicated on or after October 28, 2009.

[^ 4] See INA 208(b)(3).

[^ 5] See INA 204(l). See Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act, PM-602-0017, issued December 16, 2010.

[^ 6] Immediate relatives includes widow(er)s, who may also seek relief as self-petitioners. See INA 201(b)(2)(A)(i).

[^ 7] For Form I-730 petitions, the qualifying relationship ceases to exist upon the death of the petitioner if the follow-to-join beneficiary has not been approved and traveled to the United States. See 8 CFR 207.7(c) and 8 CFR 208.21(c). An approved beneficiary present in the United States acquires refugee or asylee status and may be eligible to adjust status, notwithstanding the death of the petitioner. See 8 CFR 207.7(a) and 8 CFR 208.21(a). A beneficiary of a pending Form I-730 petition who resides in the United States when the petitioner dies may remain eligible for follow-to-join status under INA 204(l).

[^ 8] See INA 101(a)(51).

[^ 9] See INA 204(l).

[^ 10] See INA 101(a)(33).

[^ 11] See INA 203(d). See INA 207(c)(2)(A). See INA 208(b)(3)(A).

[^ 12] The surviving derivative beneficiaries may retain the classification and priority date from the underlying petition and adjust status despite the principal beneficiary's death.

[^ 13] See INA 204(l). See Section A, General, Subsection 2, Residency Requirement [7 USCIS-PM A.9(A)(2)].

[^ 14] If the qualifying relative is the principal beneficiary, the officer should also ensure the underlying petition has not been withdrawn by the petitioner. Although INA 204(l) allows a derivative beneficiary the ability to continue to seek adjustment despite the death of the principal beneficiary, INA 204(l) does not require the petitioner to continue to sponsor the applicant. An immigrant visa petitioner may withdraw a pending petition at any time before the admission or adjustment of the beneficiary. See 8 CFR 103.2(b)(6).

[^ 15] See INA 245(a). See 8 CFR 103.2(b)(1).

[^ 16] See INA 245(c).

[^ 17] Unless the applicant qualifies under INA 245(i) adjustment.

[^ 18] For information on how to request humanitarian reinstatement, see the Humanitarian Reinstatement webpage.

[^ 19] For information on how to request INA 204(l) relief, see the Basic Eligibility for Section 204(l) Relief for Surviving Relatives webpage.

[^ 20] See Section 568(d)(2) of Pub. L. 111-83 (PDF), 123 Stat. 2142, 2187 (October 28, 2009).

[^ 21] For more information, see the USCIS website.

[^ 22] See INA 212(a)(4)(C). See INA 213A. See 8 CFR 213a.2.

[^ 23] See INA 212(a)(4).

[^ 24] See INA 204(l). See Section A, General, Subsection 2, Residency Requirement [7 USCIS-PM A.9(A)(2)].

[^ 25] If an applicant was not eligible to receive a waiver because the applicant did not have the requisite U.S. citizen or LPR qualifying relative, INA 204(l) would not make the applicant eligible.

[^ 26] See *Matter of Mendez-Moralez (PDF)*, 21 I&N Dec. 296 (BIA 1996).

[^ 27] See *Matter of Mendez-Moralez (PDF)*, 21 I&N Dec. 296 (BIA 1996).

[^ 28] See *INS v. Yang (PDF)*, 519 U.S. 26 (1996).

[^ 29] See 8 CFR 216.4(a)(1). See 8 CFR 216.5.

[^ 30] The analysis of the marriage should be the same as the analysis conducted when determining whether to remove conditions to permanent residence under INA 216.

[^ 31] See INA 204(l)(1).

[^ 32] See INA 204(l)(1).

[^ 33] See Section B, Effect on Adjustment Application, Subsection 1, Admissibility and Waivers [7 USCIS-PM A.9(B)(1)].

Chapter 10 - Legal Analysis and Use of Discretion

A. Burden of Proof and Standard of Proof

In matters involving immigration benefits, the applicant always has the burden of proving that he or she is eligible to receive the immigration benefit sought.[1]

The standard of proof applied in adjustment of status proceedings should not be confused with the burden of proof.[2] The standard of proof relates to the persuasiveness of the evidence necessary to meet the eligibility requirements for a particular benefit. If the applicant is unable to prove his or her eligibility for the immigration benefit by a preponderance of the evidence, the officer may request additional evidence or deny the application.[3]

In the adjustment of status context, the standard of proof is generally a preponderance of the evidence, proving a claimed fact is more likely than not to be true.[4] However, in cases in which admissibility is required, if the officer determines that the applicant may be inadmissible, the applicant must demonstrate that he or she is clearly and beyond doubt entitled to be admitted and is not inadmissible.[5]

Certain adjustment of status provisions are non-discretionary. That is, if the applicant satisfies all statutory and regulatory eligibility requirements, USCIS must approve the application without considering whether the applicant warrants a favorable exercise of discretion. The following table is a non-exhaustive list of non-discretionary adjustment provisions.

Non-Discretionary Adjustment of Status Provisions
Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA)[6]
Refugee adjustment[7]
Haitian Refugee Immigration Fairness Act of 1998 (HRIFA)[8]
Liberian Refugee Immigration Fairness (LRIF)[9]

B. Adjustment of Status Applications Involving Discretion[10]

Most adjustment of status applicants may only be granted lawful permanent resident (LPR) status in the discretion of USCIS.[11] That is, even if the applicant meets all of the other statutory and regulatory requirements, USCIS only approves the application if the applicant demonstrates that he or she warrants a favorable exercise of discretion. The following table is a non-exhaustive list of discretionary adjustment case types.

Adjustment of Status Provisions Involving Discretion
Family-based, employment-based, and diversity visa adjustment
Special immigrant-based adjustment (EB-4)
Trafficking victim-based adjustment[12]
Crime victim-based adjustment[13]
Asylee adjustment[14]
Cuban Adjustment Act[15]
Former Soviet Union, Indochinese, or Iranian parolees (Lautenberg parolees)
Diplomats or high-ranking officials unable to return home (Section 13 of the Act of September 11, 1957)[16]

1. Determining Whether Favorable Exercise of Discretion is Warranted

The favorable exercise of discretion and the approval of a discretionary adjustment of status application is a matter of administrative grace, which means that the application is worthy of favorable consideration.[17]

An alien who meets the other eligibility requirements contained in the law is not automatically entitled to adjustment of status. The alien still has the burden of proving that he or she warrants a favorable exercise of discretion.[18] To determine whether adjustment is warranted, an alien should supply information that is relevant and material.[19]

An officer must first determine whether the alien otherwise meets the statutory and regulatory eligibility requirements. For example, in adjudicating an application for adjustment of status under INA 245(a), the officer first determines if the alien is barred from applying for adjustment, is eligible to receive an immigrant visa, is admissible to the United States, and if a visa number (if required) is immediately available. Even where an immigration violation does not result in a bar to adjustment, an officer may still consider the violation as a negative factor in the exercise of discretion.

If the officer finds that the alien otherwise meets the eligibility requirements, the officer then determines whether the application should be approved as a matter of discretion. Given the significant privileges, rights, and responsibilities granted to LPRs, an officer must consider and weigh all relevant evidence in the record, taking into account the totality of the circumstances to determine whether the alien is suitable for permanent residence and approval of an alien's adjustment of status application is in the best interest of the United States.[20]

If there is no evidence that the alien has negative factors present in his or her case, or if the officer finds that the alien's positive factors outweigh the negative factors such that the alien's adjustment is warranted and in the interest of the United States, the officer generally may exercise favorable discretion and approve the application.[21] If the officer finds that the alien's negative factors outweigh the positive factors, such that a favorable exercise of discretion is not warranted in the alien's case, the officer must deny the application.[22]

USCIS considers factors involving circumstances where an alien has endorsed, promoted, supported, or otherwise espoused the views of an anti-American or terrorist organization or group, including those who support or promote antisemitic terrorism, antisemitic terrorist organizations, and antisemitic ideologies, to be an overwhelmingly negative factor in any applicable case involving USCIS discretionary analysis. Accordingly, USCIS enforces all relevant immigration laws to the maximum degree, including the use of discretion, to deny the benefit request involving such cases.[23]

2. Issues and Factors to Consider in the Totality of the Circumstances

The following table provides a non-exhaustive list of factors or factual circumstances that officers generally should consider in exercising discretion with respect to an application for adjustment of status to that of LPR.

Non-Exhaustive List of Issues and Factors to Consider Related to the Exercise of Discretion in Adjustment Applications

Issue	Positive Factors	Negative Factors
Eligibility Requirements	• Meeting the eligibility requirements for adjustment of status.[24]	• Not meeting the eligibility requirements may still be considered as part of a discretionary analysis.[25]
Family and Community Ties	• Family ties to the United States and the closeness of the underlying relationships.[26] • Hardship to the applicant or close relatives if the adjustment application is denied.[27] • Length of lawful residence in the United States, status held and conduct during that residence, particularly if the applicant began his or her residency at a young age.[28]	• Absence of close family, community, and residence ties.[29]
Immigration Status and History	• Compliance with immigration laws and the conditions of any immigration status held. • Approved humanitarian-based immigrant or nonimmigrant petition, waiver of inadmissibility, or other form of relief and the underlying humanitarian, hardship, or other factors that resulted in the approval.[30]	• Violations of immigration laws and the conditions of any immigration status held.[31] • Current or previous instances of fraud or false testimony in dealings with USCIS or any government agency.[32] • Unexecuted exclusion, deportation, or removal orders.[33]
Business, Employment, and Skills	• Property, investment, or business ties in the United States.[34] • Employment history, including type, length, and stability of the employment.[35] • Education, specialized skills, and training obtained from an educational institution in the United States relevant to current or prospective employment and earning potential in the United States.	• History of unemployment or underemployment.[36] • Unauthorized employment in the United States.[37] • Employment or income from illegal activity or sources, including, but not limited to, income gained illegally from drug sales, illegal gambling, prostitution, or alien smuggling.[38]
Community Standing and Moral Character	• Respect for law and order, and good moral character (in the United States and abroad) demonstrated by a lack of a criminal record and evidence of good standing in the community. • Honorable service in the U.S. armed forces or other evidence of value and service to the community.[39] • Compliance with tax laws. • Current or past cooperation with law enforcement authorities. • Demonstration of reformed or rehabilitated criminal conduct, where applicable.[40] • Community service beyond any imposed by the courts.	• Moral depravity or criminal tendencies (in the United States and abroad) reflected by a single serious crime or an active or long criminal record, including the nature, seriousness, and recent occurrence of criminal violations.[41] • Lack of reformation of character or rehabilitation.[42] • Public safety or national security concerns.[43] • Failure to meet tax obligations. • Failure to pay child support. • Failure to comply with any applicable civil court orders.

Issue	Positive Factors	Negative Factors
Other	• Absence of significant undesirable or negative factors and other indicators of good moral character in the United States and abroad.[44]	• Other indicators adversely reflecting the applicant's character and undesirability as an LPR of this country.[45]

3. Proper Use of Discretion Relative to Adjustment of Status

The exercise of discretion does not mean the decision can be arbitrary, inconsistent, or dependent on intangible or imagined circumstances. At the same time, the exercise of discretion does not involve a calculation or bright line test that is outcome determinative.[46]

The officer should review the entire record and give appropriate weight to the negative and positive factors relative to the privileges, rights, and responsibilities of LPR status. Once the officer has weighed each factor, the officer should consider all of the factors cumulatively to determine whether the positive factors outweigh the negative ones. If the officer determines that the positive factors outweigh the negative factors, the officer may find that the applicant warrants a favorable exercise of discretion. As negative factors grow more serious though, a favorable exercise of discretion may not be warranted without additional offsetting favorable factors, which in some cases may have to involve the existence of unusual or outstanding equities.[47]

Officers should discuss discretionary decisions that involve complex or unusual facts with their supervisors, as needed, particularly those involving criminality or national security issues, regardless of whether the outcome is favorable or unfavorable to the applicant.[48] As appropriate, supervisors may raise issues and consult USCIS counsel.

C. Summary of Adjudication Involving Discretion

The following tables provide a general guideline for how eligibility requirements and discretion play a role in the decision on an adjustment application.[49]

Summary of Adjudication Involving Discretion

Has Applicant Otherwise Met Eligibility Requirements?	Does Applicant Warrant a Favorable Exercise of Discretion?	Decision
Yes	Yes, the positive factors outweigh the negative factors.	**Approve** the application. Eligibility requirements are met, including that a favorable exercise of discretion is warranted.
Yes	No, the negative factors outweigh the positive factors.	**Deny** the application. Eligibility requirements are otherwise met but a favorable exercise of discretion is not warranted. The officer should explain the reasons why USCIS is not exercising discretion in the applicant's favor. The officer should clearly set forth the positive and negative factors considered and why the negative factors outweigh the positive factors.
No	No, even if the positive factors outweigh the negative factors.	**Deny** the application. Eligibility requirements are not met. The officer should explain the reasons why the applicant has not met the eligibility requirements. Even if the positive factors outweigh the negative factors, discretion cannot be used to approve an application if the applicant does not meet the other statutory or regulatory requirements.
No	No, the negative factors outweigh the positive factors.	**Deny** the application. Eligibility requirements are not met and a favorable exercise of discretion is not warranted. It is generally preferable to describe both the statutory and discretionary reasons for the denial, but an officer is not required to discuss the discretionary grounds where the other statutory or regulatory that are the basis for the denial grounds are clear. If the determination on other statutory or regulatory eligibility requirements might be overturned (for example, where there is an unsettled area of law), an officer should also explain the discretionary basis for denying the case. (Officers may consult with USCIS counsel for additional guidance in a specific case.) The officer should explain the reasons why USCIS is not exercising discretion in favor of the applicant. The officer should clearly describe the positive and negative factors considered and why the negative factors outweigh the positive factors.

Footnotes

[^ 1] See INA 291. See *Matter of Arthur (PDF)*, 16 I&N Dec. 558 (BIA 1978). See *Matter of Rivero-Diaz (PDF)*, 12 I&N Dec. 475 (BIA 1967).

[^ 2] The person who bears the burden of proof must submit evidence to satisfy the applicable standard of proof.

[^ 3] See 8 CFR 103.2(b)(8)(ii). See 8 CFR 103.2(b)(8)(iii).

[^ 4] See *Matter of Chawathe (PDF)*, 25 I&N Dec. 369, 375 (AAO 2010).

[^ 5] See *Matter of Bett (PDF)*, 26 I&N Dec. 437, 440 (BIA 2014).

[^ 6] See Title II of Pub. L. 105-100 (PDF), 111 Stat. 2160, 2193 (November 19, 1997).

[^ 7] See INA 209(a)(2).

[^ 8] See Division A, Section 902 of Pub. L. 105-277 (PDF), 112 Stat. 2681, 2681-538 (October 21, 1998).

[^ 9] See Section 7611 of the National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116-92 (PDF), 113 Stat. 1198, 2309 (December 20, 2019).

[^ 10] The exercise of discretion in individual cases is described as a balancing of negative factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations present on his or her behalf to determine whether relief appears in the best interest of this country. See *Matter of Marin (PDF)*, 16 I&N Dec. 581, 584 (BIA 1978). See *Matter of Buscemi (PDF)*, 19 I&N Dec. 628, 633 (BIA 1988). See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 195 (BIA 1990). See *Matter of Mendez-Moralez (PDF)*, 21 I&N Dec. 296, 300 (BIA 1996). For general guidance on discretion, see Volume 1, General Policies and Procedures, Part E, Adjudication, Chapter 8, Discretionary Analysis [1 USCIS-PM E.8].

[^ 11] See INA 245(a).

[^ 12] See INA 245(l). See 8 CFR 245.23(e)(3).

[^ 13] See INA 245(m). See 8 CFR 245.24(d)(10)-(11).

[^ 14] See INA 209(b).

[^ 15] See Pub. L. 89-732 (PDF) (November 2, 1966).

[^ 16] See Pub. L. 85-316 (PDF) (September 11, 1957).

[^ 17] See *Von Pervieux v. INS*, 572 F.2d 114, 118 (3rd Cir. 1978). See *Ameeriar v. INS*, 438 F.2d 1028, 1030 (3rd Cir. 1971). See *Matter of Marques (PDF)*, 16 I&N Dec. 314 (BIA 1977).

[^ 18] See *Matter of Arai (PDF)*, 13 I&N Dec. 494 (BIA 1970). See *Matter of Ortiz-Prieto (PDF)*, 11 I&N Dec. 317 (BIA 1965).

[^ 19] See *Matter of Marques (PDF)*, 16 I&N Dec. 314 (BIA 1977). See *Matter of Mariani (PDF)*, 11 I&N Dec. 210 (BIA 1965). See *Matter of De Lucia (PDF)*, 11 I&N Dec. 565 (BIA 1966). See *Matter of Francois (PDF)*, 10 I&N Dec. 168 (BIA 1963). See *Matter of Pires Da Silva (PDF)*, 10 I&N Dec. 191 (BIA 1963).

[^ 20] See *Matter of Buscemi (PDF)*, 19 I&N Dec. 628, 633 (BIA 1988). See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 195 (BIA 1990). See *Matter of Mendez-Moralez (PDF)*, 21 I&N Dec. 296, 300 (BIA 1996). For general guidance on discretion, see Volume 1, General Policies and Procedures, Part E, Adjudication, Chapter 8, Discretionary Analysis [1 USCIS-PM E.8].

[^ 21] See *Matter of Arai (PDF)*, 13 I&N Dec. 494 (BIA 1970). See *Matter of Lam (PDF)*, 16 I&N Dec. 432 (BIA 1978).

[^ 22] Before making a final decision, the officer may ask the applicant directly why he or she warrants a favorable exercise of discretion. The officer documents the response, or lack thereof, in the record. See Volume 1, General Policies and Procedures, Part E, Adjudication, Chapter 8, Discretionary Analysis, Section D, Documenting Discretionary Determinations [1 USCIS-PM E.8(D)]. See Volume 7, Part A, Adjustment of Status Policies and Procedures, Chapter 11, Decision Procedures [7 USCIS-PM A.11].

[^ 23] See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis [1 USCIS-PM E.8]. For a list of factors that should be considered in the discretionary analysis, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis, Section C, Adjudicating Discretionary Benefits, Subsection 2, Identifying Discretionary Factors [1 USCIS-PM E.8(C)(2)].

[^ 24] In the process of determining whether the applicant has otherwise met the eligibility requirements for adjustment of status, the officer might find that certain facts related to eligibility may be relevant to a discretionary decision. See *Matter of Mendez-Moralez (PDF)*, 21 I&N Dec. 296, 301 (BIA 1996) (In the context of waivers of inadmissibility requiring a showing of extreme hardship: ". . . those found eligible for relief under section 212(h)(1)(B) will by definition have already established extreme hardship to qualified family members, which would be a factor favorable to the alien in exercising discretion.").

[^ 25] In cases where USCIS has determined that the applicant has not met the statutory or regulatory requirements for adjustment of status, officers may still add a discretionary analysis to a denial. See Volume 1, General Policies and Procedures, Part E, Adjudication, Chapter 8, Discretionary Analysis, Section C, Adjudicating Discretionary Benefits [1 USCIS-PM E.8(C)].

[^ 26] See *Matter of Arai (PDF)*, 13 I&N Dec. 494, 496 (BIA 1970). See *Matter of Marin (PDF)*, 16 I&N Dec. 581, 584 (BIA 1978). See *Matter of Buscemi (PDF)*, 19 I&N Dec. 628, 633 (BIA 1988). See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 195 (BIA 1990). See *Matter of Mendez-Moralez (PDF)*, 21 I&N Dec. 296, 301-302 (BIA 1996) (". . . if the alien has relatives in the United States, the quality of their relationship must be considered in determining the weight to be awarded this equity.")

[^ 27] See *Matter of Arai (PDF)*, 13 I&N Dec. 494, 496 (BIA 1970). See *Matter of Marin (PDF)*, 16 I&N Dec. 581, 585 (BIA 1978). See *Matter of Buscemi (PDF)*, 19 I&N Dec. 628, 633 (BIA 1988). See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 195 (BIA 1990). See *Matter of Mendez-Moralez (PDF)*, 21 I&N Dec. 296, 301 (BIA 1996).

[^ 28] See *Matter of Arai (PDF)*, 13 I&N Dec. 494, 496 (BIA 1970). See *Matter of Marin (PDF)*, 16 I&N Dec. 581, 584-85 (BIA 1978). See *Matter of Buscemi (PDF)*, 19 I&N Dec. 628, 633 (BIA 1988). See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 195 (BIA 1990). See *Matter of Mendez-Moralez (PDF)*, 21 I&N Dec. 296, 301 (BIA 1996). Residence must be lawful to be considered a positive factor. See *Matter of Lee (PDF)*, 17 I&N Dec. 275, 278 (Comm. 1978).

[^ 29] Based on the totality of the circumstances, the absence of family, community, and residence ties, by itself, may not warrant an unfavorable exercise of discretion, but officers consider the lack of sufficient equities to offset other negative factors when making discretionary decisions that are in the best interest of the United States. See *Matter of Marin (PDF)*, 16 I&N Dec. 581, 587 (BIA 1978).

[^ 30] See *Matter of Mendez-Moralez (PDF)*, 21 I&N Dec. 296, 301 (BIA 1996).

[^ 31] See *Matter of Marin (PDF)*, 16 I&N Dec. 581, 584 (BIA 1978). See *Matter of Lee (PDF)*, 17 I&N Dec. 275, 278 (Comm. 1978). See *Matter of Buscemi (PDF)*, 19 I&N Dec. 628, 633 (BIA 1988). See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 195 (BIA 1990). See *Matter of Mendez-Moralez (PDF)*, 21 I&N Dec. 296, 301 (BIA 1996). However, the Board of Immigration Appeals (BIA) found that a record of immigration violations standing alone does not conclusively support a finding of lack of good moral character. Further, how recent the violation was can only be considered when there is a finding of a poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience. In such circumstances, there must be a measurable reformation of character over a period of time in order to properly assess an applicant's ability to assimilate into society. In all other instances,

when the cause for deportation has been removed and the person now appears eligible for issuance of a visa, the time factor should not be considered. See *Matter of Lee (PDF)*, 17 I&N Dec. 275 (Comm. 1978).

[^ 32] Fraud or false testimony may be considered as a matter of discretion regardless of materiality.

[^ 33] In cases where a removal order does not impact eligibility or jurisdiction over adjustment of status, for example, where a removal order has been issued to an “arriving alien” but not executed, USCIS generally does not exercise favorable discretion. The USCIS officer may consult with the local U.S. Immigration and Customs Enforcement (ICE) Enforcement and Removal Operations (ERO) office concerning the merits and equities of the case and whether the removal order might be withdrawn. If ICE withdraws or rescinds the removal order or obtains a withdrawal or rescission of the removal order from the Executive Office for Immigration Review (EOIR), USCIS adjudicates the case as appropriate. If the removal order is not withdrawn or rescinded, the removal order should be considered a significant adverse factor and any denial of adjustment may include the grounds cited in the removal order.

[^ 34] See *Matter of Marin (PDF)*, 16 I&N Dec. 581, 584-85 (BIA 1978). See *Matter of Buscemi (PDF)*, 19 I&N Dec. 628, 633 (BIA 1988). See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 195 (BIA 1990). See *Matter of Mendez-Moralez* (PDF), 21 I&N Dec. 296, 301 (BIA 1996).

[^ 35] See *Matter of Mendez-Moralez (PDF)*, 21 I&N Dec. 296, 301 (BIA 1996).

[^ 36] In *Matter of Marin (PDF)*, 16 I&N Dec. 581, 585 (BIA 1978), the BIA considered that a history of stable employment is a positive factor used to determine whether discretion should be favorably exercised. Conversely, officers should consider a history of long unemployment or underemployment, absent any disabilities or age in relation to employability, as a factor to determine whether or not approving the adjustment of status application is in the best interest of the United States.

[^ 37] Even if an exemption applies to an applicant who would otherwise be barred from adjustment of status, the officer may consider unauthorized employment in the totality of the circumstances.

[^ 38] This includes employment that is illegal under federal law even when state laws have decriminalized such conduct, including employment in the marijuana industry. Illegal industries under federal law include, but are not limited to, possession, manufacture or production, or distribution or dispensing of marijuana. See 21 U.S.C. 841(a) (“unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.”). See 21 U.S.C. 844 (simple possession). See 21 U.S.C. 802(15) (defining manufacture) and 8 U.S.C. 802(22) (defining production).

[^ 39] See *Matter of Marin (PDF)*, 16 I&N Dec. 581, 585 (BIA 1978). See *Matter of Buscemi (PDF)*, 19 I&N Dec. 628, 633 (BIA 1988). See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 195 (BIA 1990). See *Matter of Mendez-Moralez (PDF)*, 21 I&N Dec. 296, 301 (BIA 1996).

[^ 40] See *Matter of Marin (PDF)*, 16 I&N Dec. 581, 585 (BIA 1978). See *Matter of Buscemi (PDF)*, 19 I&N Dec. 628, 633 (BIA 1988). See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 195 (BIA 1990). See *Matter of Mendez-Moralez (PDF)*, 21 I&N Dec. 296, 301 (BIA 1996). However, reformation is not an absolute prerequisite to a favorable exercise of discretion. Rather, the discretionary analysis must be conducted on a case-by-case basis, with rehabilitation a factor to be considered in the exercise of discretion. See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 196 (BIA 1990) (considering rehabilitation a significant factor in view of the nature and extent of the respondent’s criminal history, which spanned 10 years).

[^ 41] The officer should not go behind the record of conviction to reassess an alien’s ultimate guilt or innocence, but rather inquire into the circumstances surrounding the commission of the crime in order to determine whether a favorable exercise of discretion is warranted. See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 197 (BIA 1990).

[^ 42] See *Matter of Marin (PDF)*, 16 I&N Dec. 581, 585 (BIA 1978). See *Matter of Buscemi (PDF)*, 19 I&N Dec. 628, 633 (BIA 1988). See *Matter of Edwards (PDF)*, 20 I&N Dec. 191, 196 (BIA 1990). See *Matter of Mendez-Moralez (PDF)*, 21 I&N Dec. 296, 301 (BIA 1996).

[^ 43] See Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens, PM-602-0187, issued February 28, 2025.

[^ 44] See *Matter of Mendez-Moralez (PDF)*, 21 I&N Dec. 296, 301 (BIA 1996).

[^ 45] See *Matter of Marin (PDF)*, 16 I&N Dec. 581, 584 (BIA 1978). See *Matter of Buscemi (PDF)*, 19 I&N Dec. 628, 633 (BIA 1988). See *Matter of Mendez-Moralez (PDF)*, 21 I&N Dec. 296, 301 (BIA 1996).

[^ 46] For a full discussion on weighing discretionary factors, see Volume 1, General Policies and Procedures, Part E, Adjudication, Chapter 8, Discretionary Analysis, Section C, Adjudicating Discretionary Benefits, Subsection 3, Weighing Factors [1 USCIS-PM E.8(C)(3)].

[^ 47] See *Matter of Arai (PDF)*, 17 I&N Dec. 494, 496 (BIA 1970). See *Matter of Patel (PDF)*, 17 I&N Dec. 597, 601 (BIA 1980). For example, USCIS generally does not favorably exercise discretion in certain cases involving violent or dangerous crimes except in extraordinary circumstances. Another example relates to applicants seeking adjustment based on T or U nonimmigrant status: Depending on the nature of the adverse factors, applicants may be required to clearly demonstrate that denial of adjustment would result in exceptional and extremely unusual hardship. Even if the applicant makes such a showing, however, USCIS may still find favorable exercise of discretion is not warranted in certain cases. See 8 CFR 245.23(e)(3). See 8 CFR 245.24(d)(11).

[^ 48] For more information, see Volume 1, General Policies and Procedures, Part E, Adjudication, Chapter 8, Discretionary Analysis, Section C, Adjudicating Discretionary Benefits, Subsection 4, Supervisory Review [1 USCIS-PM E.8(C)(4)].

[^ 49] For a full discussion on writing discretionary decisions, see Volume 1, General Policies and Procedures, Part E, Adjudication, Chapter 8, Discretionary Analysis, Section D, Documenting Discretionary Determinations [1 USCIS-PM E.8(D)].

Chapter 11 - Decision Procedures

A. Approvals

If the adjustment application is properly filed, the applicant meets all eligibility requirements, a visa number is immediately available, and the applicant is admissible to the United States, then an officer may approve the application.

1. Effective Date of Permanent Residence

For the majority of adjustment cases, the effective date of permanent residence is the date the adjustment application is approved. Certain sections of law, however, allow for the date of admission to roll back to an earlier date.

2. Class of Admission

Each approved case is given a class of admission (COA) that identifies the section of law the applicant used to adjust status to a lawful permanent resident. For abbreviation purposes, a symbol or code represents that classification.

Written notice of approval is mailed to the applicant and attorney or authorized representative, as applicable. Upon approval, the officer must confirm that the information is up-to-date and accurate in the relevant systems to ensure accurate statistical reporting and card production. In cases where an officer approved both the underlying petition and adjustment application, the officer should verify that the underlying petition shows as being approved in the system before approving the adjustment application.

If the officer determines that the case is approvable during the interview and the applicant anticipates immediate emergency travel, the officer may place a stamp as proof of temporary permanent resident status in the applicant's passport, per local office guidelines. The stamp must have a dry seal affixed to be valid for travel.

B. Notices of Intent to Deny

If an officer is basing a decision in whole or in part on information of which the applicant is unaware or could not reasonably be expected to be aware, the officer must issue a Notice of Intent to Deny (NOID).[1] The NOID provides the applicant an opportunity to review and respond to the information, unless the information is classified.[2]

C. Denials

An adjustment application must be denied for ineligibility. The application may also be denied for discretionary reasons, if applicable. Upon denial of a case, the officer must update ICMS and CLAIMS, and issue a notice of denial. Automatic denial notices are not issued by the systems.

Denial on Basis of Ineligibility or for Discretionary Reasons

Basis of Denial	Denial Notice Should …
Ineligibility	Explain what eligibility requirements are not met and why they are not met
Discretionary Reasons **(if applicable)**	Explain the positive and negative factors considered, the relative weight given to each factor individually and collectively, and why the negative factors outweigh the positive factors

In addition, a denial notice should:

- Provide the reasons for the denial in clear language that the applicant can understand;
- Cite to the relevant sections of law, regulations, and precedent decisions (if any); and
- Explain that there is no right to appeal the denial but that the applicant may file a motion to reopen or reconsider.

With rare exception, there is no appeal from the denial of adjustment of status.[3] USCIS, however, may certify the case for review by the Administrative Appeals Office (AAO).[4] The applicant also may renew the adjustment application in any subsequent removal proceedings.[5]

Footnotes

[^ 1] For example, investigative reports, information from informants, school records, or employment records not provided by the applicant.

[^ 2] See 8 CFR 103.2(b)(16)(iv).

[^ 3] See 8 CFR 245.2(a)(5)(ii). However, see 8 CFR 245.3 providing the right of appeal for applicants under Section 13 of the Act of September 11, 1957, Pub. L. 85-316 (PDF), and 8 CFR 245.23(i) providing the right of appeal for applicants based on T nonimmigrant status.

[^ 4] See 8 CFR 103.4(a)(4) and 8 CFR 103.4(a)(5). Certification to the AAO may be appropriate when a case involves complex legal issues or unique facts. An officer may consult through appropriate supervisory channels with the Office of the Chief Counsel for guidance on certifying a decision to the AAO.

[^ 5] See INA 240A.

Part B - 245(a) Adjustment

Chapter 1 - Purpose and Background

A. Purpose

Section 245 of the Immigration and Nationality Act (INA) allows certain aliens who are physically present in the United States to adjust status to that of a lawful permanent resident (LPR). Most adjustment applicants file their adjustment of status applications based on INA 245(a).

B. Background

The Immigration Act of 1924 required all intending immigrants to obtain an immigrant visa at a U.S. embassy or consulate abroad[1] (commonly known as "consular processing"). An alien physically present in the United States could not become an LPR without leaving the United States to consular process abroad.

By 1935, immigration authorities had developed an administrative process of "pre-examination" that enabled an alien temporarily in the United States to obtain LPR status more quickly and easily.[2] Pre-examination consisted of an official determination in the United States of the alien's eligibility for an immigrant visa, the immigrant's travel to Canada or elsewhere for an arranged immigrant visa appointment at a U.S. consulate, and the immigrant's prompt return and admission to the United States as a LPR. From 1935 to 1950, the government processed over 45,000 pre-examination cases.[3]

In 1952, Congress made the pre-examination process unnecessary by creating INA 245, which allowed eligible aliens to obtain LPR status through adjustment of status without leaving the United States.[4] Congress indicated that adjustment should be used for purposes of family unity or otherwise be in the public interest.[5]

Over time, Congress revised and consolidated the eligibility requirements for adjustment of status into the current INA 245(a). The bars, restrictions, and special considerations to adjustment are found in INA 245(c) through INA 245(k). Applicable inadmissibility grounds, including public safety and security concerns are found in INA 212.

C. Scope

The guidance in this Policy Manual part only addresses adjustment of status under INA 245(a).[6] Certain aliens may be eligible to adjust under other provisions of law, as detailed in other parts of this volume.

D. Legal Authorities

- INA 245(a); 8 CFR 245 – Adjustment of status to that of person admitted for permanent residence
- INA 245(c) – Bars to adjustment of status
- INA 245(k) – Inapplicability of certain provisions for certain employment-based immigrants

Footnotes

[^ 1] See Section 13 of the Immigration Act of 1924, Pub. L. 68-139 (May 26, 1924).

[^ 2] See 2 C. Gordon & H. Rosenfield, Immigration Law and Procedure, Section 7.3a. See *Jain v. Immigration and Naturalization Service*, 612 F.2d 683 (2nd Cir. 1979).

[^ 3] See Sofaer, The Change of Status Adjudication: A Case Study of the Informal Agency Process, 1 J. Legal Studies 349, 351 (1971).

[^ 4] See Section 245 of the Immigration and Nationality Act of 1952, Pub. L. 82-414 (PDF) (June 27, 1952).

[^ 5] See H.R. Rep. 82-1365 (Feb. 14, 1952).

[^ 6] There are many statutory bases for adjustment. For instance, refugees and asylees may adjust status under INA 209(c), which outlines slightly different rules and requirements for adjustment than under INA 245(a). The basis under which an applicant seeks adjustment of status is therefore key in determining the eligibility requirements for adjustment as well as exceptions, exemptions, waivers, and any other program-specific laws or benefits that may apply.

Chapter 2 - Eligibility Requirements

An alien must meet certain eligibility requirements to adjust status to that of a lawful permanent resident (LPR).

INA 245(a) Adjustment of Status Eligibility Requirements
The alien must have been: • Inspected and admitted into the United States; or • Inspected and paroled into the United States.
The alien must properly file an adjustment of status application.
The alien must be physically present in the United States.
The alien must be eligible to receive an immigrant visa.
An immigrant visa must be immediately available when the alien files the adjustment of status application[1] and at the time of final adjudication.[2]
The alien must be admissible to the United States for lawful permanent residence or eligible for a waiver of inadmissibility or other form of relief.
The alien merits the favorable exercise of discretion.[3]

A. “Inspected and Admitted” or “Inspected and Paroled”

In 1960, Congress amended INA 245(a) and made adjustment of status available to any otherwise eligible alien who has been “inspected and admitted or paroled” into the United States.[4] Since 1960, the courts, legacy Immigration and Naturalization Service, and USCIS have read the statutory language “inspected and admitted or paroled” as:

- Inspected and admitted into the United States; or
- Inspected and paroled into the United States.

This requirement must be satisfied before the alien applies for adjustment of status.[5] If an alien has not been inspected and admitted or inspected and paroled before filing an adjustment application, the officer must deny the adjustment application.[6]

The inspected and admitted or inspected and paroled requirement does not apply to the following aliens seeking adjustment of status:

- INA 245(i) applicants; and
- Violence Against Women Act (VAWA) applicants.[7]

Special immigrant juveniles (SIJ) and other special immigrants are not exempt from this requirement. However, statutory provisions expressly state that these special immigrants are considered paroled for adjustment eligibility purposes. Accordingly, the beneficiaries of approved SIJ petitions meet the inspected and admitted or inspected and paroled requirement, regardless of their manner of arrival in the United States.[8] Certain special immigrants also meet this requirement.[9]

1. Inspection

Authority

Per delegation by the Secretary of Homeland Security, U.S. Customs and Border Protection (CBP) has jurisdiction over and exclusive inspection authority at ports-of-entry.[10]

Definition and Scope

Inspection is the formal process of determining whether an alien may lawfully enter the United States. Immigration laws as early as 1875 specified that inspection must occur prior to an alien's landing in or entering the United States and that prohibited aliens were to be returned to the country from which they came at no cost or penalty to the conveyor or vessel.[11] Inspections for air, sea, and land arrivals are now codified in the Immigration and Nationality Act (INA), including criminal penalties for illegal entry.[12]

To lawfully enter the United States, an alien must apply and present himself or herself in person to an immigration officer at a U.S. port of entry when the port is open for inspection.[13] An alien who arrives at a port of entry and presents himself or herself for inspection is an applicant for admission. Through the inspection process, an immigration officer determines whether the alien is admissible and may enter the United States under all the applicable provisions of immigration laws.

As part of the inspection, the alien must:

- Present any and all required documentation, including fingerprints, photographs, other biometric identifiers, documentation of status in the United States, and any other requested evidence to determine the alien's identity and admissibility; and
- Establish that he or she is not subject to removal under immigration laws, Executive Orders, or Presidential Proclamations.[14]

In general, if the alien presents himself or herself for questioning in person, the inspection requirement is met.[15] Nonetheless, if the alien enters the United States by falsely claiming U.S. citizenship, the alien is not considered to have been inspected by an immigration officer. In addition, the entry is not considered an admission for immigration purposes.[16]

Inspection Outcomes

Upon inspection, the officer at the port of entry typically decides one of the following outcomes for the alien:

- The officer admits them;
- The officer paroles them;
- The officer allows them to withdraw his or her application for admission and depart immediately from the United States;[17]
- The officer denies them admission into the United States; or
- The officer defers the inspection to a later time at either the same or another CBP office or a port of entry.[18]

2. Admission[19]

An alien is admitted if the following conditions are met:[20]

- The alien applied for admission as an "alien" at a port of entry; and
- An immigration officer inspected the applicant for admission as an "alien" and authorized him or her to enter the United States in accordance with the procedures for admission.[21]

An alien who meets these two requirements is admitted, even if the alien obtained the admission by fraud.[22] Likewise, the alien is admitted, even if the CBP officer performed a cursory inspection.

As long as the alien meets the procedural requirements for admission, the alien meets the inspected and admitted requirement for adjustment of status.[23] Any type of admission can meet the inspected and admitted requirement, which includes, but is not limited to, admission as a nonimmigrant, an immigrant, or a refugee.[24]

Notwithstanding, if the alien makes a false claim to U.S. citizenship or to U.S. nationality at the port of entry and an immigration officer permits the alien to enter the United States, the alien has not been admitted.[25] A U.S. citizen arriving at a port of entry is not subject to inspection; therefore, an alien who makes a false claim to U.S. citizenship is considered to have entered without inspection.[26]

Similarly, an alien who entered the United States after falsely claiming to be a returning LPR is not considered to have been procedurally inspected and admitted because a returning LPR generally is not an applicant for admission.[27] An LPR returning from a temporary trip abroad would only be considered to be seeking admission or readmission to the United States if any of the following factors applies:

- The LPR has abandoned or relinquished his or her LPR status;
- The LPR has been absent from the United States for a continuous period in excess of 180 days;
- The LPR has engaged in illegal activity after having departed the United States;
- The LPR has departed from the United States while under legal process seeking his or her removal from the United States, including removal proceedings under the INA and extradition proceedings;
- The LPR has committed an offense described in the criminal-related inadmissibility grounds, unless the LPR has been granted relief for the offense;[28] or
- The LPR is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.[29]

Evidence of Admission

An Arrival/Departure Record (Form I-94), including a replacement[30] when appropriate, is the most common document evidencing an alien's admission.[31] The following are other types of documentation that may be accepted as proof of admission into the United States:

- Admission stamp in passport, which may be verified using DHS systems;
- Employment Authorization Card (Form I-688A), for special agricultural worker applicants, provided it was valid during the last claimed date of entry on the adjustment application;
- Temporary Resident Card (Form I-688), for special agricultural workers or legalization applicants granted temporary residence, provided it was valid during the last claimed date of entry on the adjustment application; and
- Border Crossing Card (Form I-586 or Form DSP-150[32]), provided it was valid on the date of last claimed entry.

When inspected and admitted to the United States, the following nonimmigrants are exempt from the issuance of an Arrival/Departure Record:[33]

- A Canadian citizen admitted as a visitor for business, visitor for pleasure, or who was permitted to directly transit through the United States;

- A nonimmigrant residing in the British Virgin Islands who was admitted only to the United States Virgin Islands as a visitor for business or pleasure;[34]
- A Mexican national admitted with a B-1/B-2 Visa and Border Crossing Card (Form DSP-150) at a land or sea port of entry as a visitor for business or pleasure for a period of 30 days to travel within 25 miles of the border; and
- A Mexican national in possession of a Mexican diplomatic or official passport.[35]

In these situations, an applicant should submit alternate evidence to prove his or her inspection and admission to the United States. This may include a Border Crossing Card, plane tickets evidencing travel to the United States, or other corroborating evidence.

3. Parole

Authority

The Secretary of Homeland Security delegated parole authority to USCIS, CBP, and U.S. Immigration and Customs Enforcement (ICE).[36]

Definition and Scope

An alien is paroled if the following conditions are met:

- They are seeking admission to the United States at a port of entry; and
- An immigration officer inspected them as an "alien" and permitted them to enter the United States without determining whether they may be admitted into the United States.[37]

A grant of parole is a temporary and discretionary act exercised on a case-by-case basis. Parole, by definition, is not an admission.[38]

Paroled for Deferred Inspection[39]

On occasion, CBP grants deferred inspection to arriving aliens found inadmissible during a preliminary inspection at a port of entry. Deferred inspection is generally granted only after CBP:

- Verifies the alien's identity and nationality;
- Determines that the alien would likely be able to overcome the identified inadmissibility by obtaining a waiver or additional evidence; and
- Determines that the alien does not present a national security risk to the United States.

The decision to defer inspection is at the CBP officer's discretion.

If granted deferred inspection, CBP paroles the alien into the United States and defers completion of the inspection to a later time. An alien paroled for a deferred inspection typically reports for completion of inspection within 30 days of the deferral[40] to a CBP office with jurisdiction over the area where the alien will be staying or residing in the United States.[41]

The grant of parole for a deferred inspection satisfies the "inspected and paroled" requirement for purposes of adjustment eligibility.[42]

Urgent Humanitarian Reasons or Significant Public Benefit

DHS may parole an alien based on urgent humanitarian or significant public benefit reasons.[43] DHS may grant urgent humanitarian or significant public benefit parole only on a case-by-case basis.[44] Any type of urgent humanitarian, significant public benefit, or deferred inspection-directed parole meets the "paroled into the United States" requirement.[45]

Parole in Place: Parole of Certain Aliens Present Without Admission or Parole

An alien who is present in the United States without inspection and admission or inspection and parole is an applicant for admission.[46] DHS can exercise its discretion to parole such an alien into the United States.[47] In general, USCIS grants parole in place only sparingly.

The fact that an alien is a spouse, child, or parent of an active duty member of the U.S. armed forces, a member in the Selected Reserve of the Ready Reserve, or someone who previously served in the U.S. armed forces or the Selected Reserve of the Ready Reserve ordinarily weighs heavily in favor of parole in place. Absent a criminal conviction or other serious adverse factors, parole in place would generally be an appropriate exercise of discretion for such an alien.

If DHS grants parole before an alien files an adjustment application, the applicant meets the "inspected and paroled" requirement for adjustment. Parole in place does not permit approval of an adjustment application that was filed before the grant of parole.[48]

Parole in place does not relieve the applicant of the need to meet all other eligibility requirements for adjustment of status and the favorable exercise of discretion.[49] For example, except for immediate relatives and certain other immigrants, an applicant must have continuously maintained a lawful status since entry into the United States.[50]

Conditional Parole

Conditional parole is also known as release from custody. This is a separate and distinct process from parole and does not meet the "inspected and paroled" requirement for adjustment eligibility.[51]

Evidence of Parole

Evidence of parole includes:

- A parole stamp on an advance parole document;[52]
- A parole stamp in a passport; or
- An Arrival/Departure Record (Form I-94) endorsed with a parole stamp.[53]

4. Commonwealth of the Northern Mariana Islands

A Commonwealth of the Northern Mariana Islands (CNMI) applicant who is granted parole meets the inspected and paroled requirement. On May 8, 2008, the Consolidated Natural Resources Act was signed into law, which replaced the CNMI's prior immigration laws and extended most U.S. immigration law provisions to the CNMI for the first time in history.[54] The transition period for implementation of U.S. immigration law in the CNMI began on November 28, 2009.

As of that date, all aliens present in the CNMI (other than LPRs) became present in the United States by operation of law without admission or parole. In recognition of the unique situation caused by the extension of U.S. immigration laws to the CNMI, all aliens present in the CNMI on or after that date who apply for adjustment of status are considered applicants for admission[55] to the United States and are eligible for parole.

Because of these unique circumstances, USCIS grants parole to applicants otherwise eligible to adjust status to serve as both an inspection and parole for purposes of meeting the requirements for adjustment. Under this policy, the USCIS Guam Field Office or the USCIS Saipan Application Support Center grants parole to an applicant otherwise eligible for parole and adjustment immediately prior to approving the adjustment of status application.

5. Temporary Protected Status

A grant of temporary protected status (TPS)[56] is not, in itself, an admission for purposes of adjustment under INA 245(a).[57]

Therefore, an alien who entered the United States without having been inspected and admitted or inspected and paroled, and who is subsequently granted TPS, does not meet the inspected and admitted or inspected and paroled requirement under INA 245(a) for adjustment.[58] However, a grant of TPS does not prevent an alien from demonstrating eligibility for INA 245(a) adjustment if the alien was inspected and admitted or inspected and paroled when last entering the United States.

For purposes of adjustment of status under INA 245, an alien with TPS is considered as being in and maintaining lawful status as a nonimmigrant only during the period that TPS is in effect.[59] TPS does not cure any previous failure to maintain continuously a lawful status in the United States.[60]

Admission Following Travel Abroad with Prior Consent

TPS beneficiaries may travel abroad temporarily with the prior consent of DHS under INA 244(f)(3).[61] When DHS provides prior consent to a TPS beneficiary to travel abroad, it documents that consent by issuing a TPS travel authorization document to the beneficiary.[62] Upon returning to the United States in accordance with the terms of DHS's prior authorization, a TPS beneficiary must be inspected and admitted into TPS, with certain exceptions.[63] TPS beneficiaries whom DHS has inspected and admitted into TPS after such authorized travel are "inspected and admitted" for purposes of adjustment of status under INA 245(a).[64] This is true even if the TPS beneficiary was present without admission or parole when initially granted TPS.[65] However, travel with TPS authorization does not execute an outstanding removal order.[66]

Past Treatment of Travel Abroad with Prior Consent

Previously, USCIS issued TPS beneficiaries advance parole documents under 8 CFR 244.15, which references the advance parole provisions as the procedure to authorize travel. Upon returning from abroad, TPS beneficiaries with advance parole documents were inspected and, if eligible, paroled into the United States. The treatment of such parole for purposes of INA 245(a) varied over the years, as summarized in the table below.

Effect of Authorized Travel on TPS Beneficiaries Under Applicable Policy

Date of Departure	Did Parole or Admission Upon Return Satisfy INA 245(a)?
From December 12, 1991, until February 25, 2016	While there was no stated agency policy, aliens were generally considered paroled for the purpose of INA 245(a) (regardless of whether the beneficiary had been admitted or paroled before departing).
From February 25, 2016, until August 20, 2020	Yes, regardless of whether the alien had been admitted or paroled before departing.[67]
After August 20, 2020, until July 1, 2022	No, the alien's status as admitted or paroled for INA 245(a) was unchanged by travel.[68]
On or after July 1, 2022	Yes, regardless of whether the alien had been admitted or paroled before departing.[69]

Retroactive Application of Current Policy

In some cases, explained below, USCIS applies the current policy retroactively and considers past travel to have resulted in an inspection and admission for purposes of INA 245(a), even if the policy or practice in place at the time the travel occurred instructed otherwise.

Past travel must meet each of the following requirements to be considered for retroactive application of current guidance:

- The alien obtained prior authorization to travel abroad temporarily on the basis of being a TPS beneficiary;[70]
- The alien's TPS was not withdrawn, or the designation for their foreign state (or part of a foreign state) was not terminated or did not expire during their travel;[71]
- The alien returned to the United States in accordance with the authorization to travel; and
- Upon return, the alien was inspected by INS or DHS at a designated port of entry and paroled or otherwise permitted to pass into the territorial boundaries of the United States in accordance with the TPS-based travel authorization.[72]

If the past travel does not meet each of these requirements, USCIS applies the policy that was in effect at the time of departure.[73] If the past travel does meet each of these requirements, USCIS will consider retroactive application of the current guidance.

In cases arising in the Fifth Circuit, USCIS treats the authorized reentry after any qualifying prior travel as an inspection and admission, regardless of the procedure used when the TPS beneficiary was permitted to reenter the United States and regardless of whether the travel documentation refers to advance parole.[74]

Elsewhere, USCIS determines on a case-by-case basis whether an alien who was paroled or otherwise permitted to enter after TPS-authorized travel under prior guidance should be treated as inspected and admitted for purposes of a given adjudication. USCIS makes the determination to apply this guidance retroactively based on the circumstances of the individual case, with consideration of any reliance on the prior policy, applicable law, and any other factors relevant to the individual application.

In cases arising outside of the Fifth Circuit, the officer first considers whether treating qualifying prior travel as an admission, rather than parole, is necessary for the approval of the application. In most cases, whether the prior entry is treated as an admission or a parole does not affect the outcome of an application for adjustment of status under INA 245(a).[75] If the distinction between admission and parole does not affect the outcome, the officer does not make a retroactivity determination.

Where the distinction between admission and parole is critical to the outcome of the adjudication, the officer assesses the individual case to determine whether to consider a prior return from TPS-authorized travel as an admission. In most instances, when the officer determines that an applicant meets all other eligibility requirements and merits adjustment of status in the exercise of discretion, it would be appropriate for the officer, on a case-by-case basis, to deem the prior parole to be an admission under the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA).[76]

Five-Factor Test for Retroactivity Determination (Retail Union Test)

The officer must apply the following five-factor test in any retroactivity determination for adjustment of status applications arising outside of the Fifth Circuit:[77]

- Factor 1: Whether the effect of TPS-authorized travel has previously been considered;
- Factor 2: Whether the new policy regarding the effect of TPS-authorized travel represents an abrupt departure from well-established practice or merely attempts to clarify an unsettled area of law;
- Factor 3: The extent to which the adjustment of status applicant to whom the new policy would apply relied on the former rule;[78]
- Factor 4: The burden (if any) that retroactive application of the policy would impose on the adjustment of status applicant; and
- Factor 5: The statutory interest in applying the new policy despite the applicant's reliance on the old policy.[79]

In the context of an adjustment of status application involving prior TPS-authorized travel, consideration of factors 1, 2, and 5 should be consistent across most cases:

- The effect of TPS-authorized travel under MTINA is not a question of first impression, as USCIS and INS had prior policy and practice on the question (factor 1);
- USCIS' adoption of the interpretation described in this guidance is a change from USCIS' prior practice and guidance (factor 2); and
- There is a strong statutory interest in applying the best interpretation of the statute (factor 5).

While factors 1 and 2 may weigh against retroactive application of this policy change, factor 5 generally weighs in favor of retroactive application.

The officer also considers whether a particular applicant relied on either *Matter of Z-R-Z-C-* or DHS's prior use of advance parole to implement TPS travel (factor 3).[80] If the applicant did rely on past policy or practice, the officer considers whether retroactive application of the new policy would negatively affect or otherwise burden the applicant due to such reliance (factor 4).

Accordingly, retroactivity determinations usually center on factors 3 and 4. In most cases the change in interpretation does not create a significant burden on the applicant but is instead favorable to the applicant, and the officer may deem a prior parole an admission for purposes of the adjustment of status application.

In the rare event that a TPS beneficiary relied on being paroled into the United States, rather than being inspected and admitted, in a way that negatively impacts eligibility for adjustment of status, the officer weighs the negative impact against the other factors in the *Retail Union* test on a case-by-case basis.[81] In this assessment, the negative impact carries significant weight, and because factors 1 and 2 also weigh against retroactivity, officers should generally avoid retroactive application if the applicant would be harmed.[82] However, if the harm in a particular case is outweighed by the other factors, then the officer may deem a prior parole an admission in that case.

USCIS expects that, under the *Retail Union* test, retroactive application of the current policy is appropriate in most adjustment of status applications and favorable to the applicants.

6. Asylum[83]

An asylee whose adjustment application is based on his or her asylee status adjusts under INA 209(b).[84] An asylee, however, may seek to adjust under INA 245(a) if the asylee prefers to adjust on a basis other than the asylee's status. This may arise in cases where, for example, an asylee marries a U.S. citizen and subsequently seeks to adjust status as an immediate relative of a U.S. citizen rather than under the asylee provision. In order to adjust under INA 245(a), however, the asylee must meet the eligibility requirements that apply under that provision.

There may be circumstances where asylees are not able to meet certain requirements for adjustment under INA 245(a). For instance, an alien who enters without inspection and is subsequently granted asylum does not satisfy the inspected and admitted or inspected and paroled requirement.[85] On the other hand, an asylee who departs the United States and is admitted or granted parole upon return to a port of entry meets the inspected and admitted or inspected and paroled requirement.

7. Waved Through at Port-of-Entry

In some cases, an alien may claim that he or she arrived at a port of entry and presented himself or herself for inspection as an alien, but the inspector waved (allowed to pass) him or her through the port of entry without asking any questions.

Where an alien physically presents himself or herself for questioning and makes no knowing false claim to U.S. citizenship, the alien is considered to have been inspected even though he or she volunteers no information and is asked no questions by the immigration authorities. Such an alien satisfies the inspected and admitted requirement of INA 245(a) as long as the alien sufficiently proves that he or she was indeed waved through by an immigration official at a port of entry.[86]

An officer may find that an adjustment applicant satisfies the inspected and admitted requirement based on a claim that he or she was waved through at a port of entry if:

- The applicant submits evidence to support the claim, such as third-party affidavits from those with personal knowledge of the facts stated in the affidavits and corroborating documentation; and
- The officer determines that the claim is credible.[87]

The burden of proof is on the applicant to establish eligibility for adjustment of status.[88] Accordingly, the applicant must support and sufficiently establish the claim that he or she was admitted as an alien and not as a presumed U.S. citizen. For example, if the applicant was in a car with U.S. license plates and with U.S. citizens onboard, the applicant should submit persuasive evidence to establish he or she physically presented himself or herself to the inspector and was admitted as an alien.[89]

B. Properly Filing an Adjustment Application

To adjust status, an alien must file an Application to Register Permanent Residence or Adjust Status (Form I-485) in accordance with the form instructions. The adjustment application must be properly signed and accompanied by the appropriate fee.[90] The application must be filed at the correct filing location, as specified in the form instructions. USCIS rejects adjustment applications if the application is:

- Filed at an incorrect location;
- Not filed with the correct fee, unless granted a fee waiver;
- Not properly signed; or
- Filed when an immigrant visa is unavailable.[91]

C. Eligible to Receive an Immigrant Visa

1. General Eligibility for an Immigrant Visa

An adjustment applicant must be eligible to receive an immigrant visa. An applicant typically establishes eligibility for an immigrant visa through an immigrant petition in one of the categories listed in the table below.

Eligibility to Receive an Immigrant Visa

Immigrant Category	Petition	Who May Qualify
Family-Based	Petition for Alien Relative (Form I-130)	• Immediate relatives of U.S. citizens[92] • Unmarried sons and daughters of U.S. citizens (21 years of age and older) • Spouses and unmarried children (under 21 years of age) of LPRs • Unmarried sons and daughters of LPRs • Married sons and daughters of U.S. citizens • Brothers and sisters of U.S. citizens (if the U.S. citizen is 21 years of age or older)
Family-Based	Petition for Alien Fiancé(e) (Form I-129F)	• Fiancé(e) of a U.S. citizen
Family-Based	Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360)	• Widow or widower of a U.S. citizen • VAWA self-petitioners
Employment-Based	Immigrant Petition for Alien Worker (Form I-140)	• Priority workers • Members of the professions holding an advanced degree or persons of exceptional ability • Skilled workers, professionals, and other workers
Employment-Based	Immigrant Petition by Standalone Investor (Form I-526)	• Standalone Investors
Employment-Based	Immigrant Petition by Regional Center Investor (Form I-526E)	• Regional Center Investors
Special Immigrants	Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360)	• Religious workers • Certain international employees • Panama Canal Zone employees • Certain physicians • International organization officers and employees • Special immigrant juveniles • Certain U.S. armed forces members • Certain broadcasters • Certain Afghanistan and Iraq nationals
Diversity Immigrant Visa[93]	Not applicable (Diversity visas do not require a USCIS-filed petition)	• Diversity immigrants

2. Dependents

The spouse and children of certain family-based, employment-based, and Diversity Immigrant Visa adjustment applicants may also obtain LPR status through their relationship with the principal applicant. Because the spouse and children do not have an independent basis to adjust status apart from their relationship to the principal immigrant, they are “dependents” of the principal for purpose of eligibility for adjustment of status.

Dependents do not have their own underlying immigrant petition and may only adjust based on the principal’s adjustment of status. In general, dependent applicants must have the requisite relationship to the principal both at the time of filing the adjustment application and at the time of final adjudication.[94]

3. Concurrent Filing

The immigrant petition establishing the underlying basis to adjust is typically filed before the alien files the adjustment application. In some instances, the applicant may file the adjustment application at the same time the immigrant petition is filed.[95]

D. Immigrant Visa Immediately Available at Time of Filing and at Time of Approval

In general, an immigrant visa must be available before an alien can apply for adjustment of status.[96] An immigrant visa is always available to applicants seeking adjustment as immediate relatives. Visas are numerically limited for most other immigrant categories eligible to adjust; applicants in these numerically limited categories may need to wait until a visa is available before they can file an adjustment application. Furthermore, an immigrant visa must be available for issuance on the date USCIS approves any adjustment application.[97]

E. Admissible to the United States

An adjustment of status applicant must be admissible to the United States.[98] An applicant who is inadmissible may apply for a waiver of the ground of inadmissibility, if a waiver is available, or another form of relief. The applicable grounds of inadmissibility and any available waivers depend on the immigrant category under which the applicant is applying.[99]

F. Bars to Adjustment of Status

An applicant may not be eligible to apply for adjustment of status if one or more bars to adjustment applies.[100] The bars to adjustment of status may apply to applicants who either entered the United States in a particular status or manner, or committed a particular act or violation of immigration law.[101] The table below refers to aliens ineligible to apply for adjustment of status, unless otherwise exempt.[102]

Aliens Barred from Adjustment of Status

Alien	INA Section	Entries and Periods of Stay to Consider	Exempt from Bar
Alien Crewman[103]	245(c)(1)	Only most recent permission to land, or admission prior to filing for adjustment	VAWA-based applicants
In Unlawful Immigration Status on the Date the Adjustment Application is Filed OR Who Failed to Continuously Maintain Lawful Status Since Entry into United States[104] OR Who Continues in, or Accepts, Unauthorized Employment Prior to Filing for Adjustment	245(c)(2)[105]	All entries and time periods spent in the United States (departure and return does not remove the ineligibility)[106]	VAWA-based applicants Immediate relatives[107] Certain special immigrants[108] 245(k) eligible[109]
Admitted in Transit Without a Visa (TWOV)	245(c)(3)	Only most recent admission prior to filing for adjustment	VAWA-based applicants
Admitted as a Nonimmigrant Without a Visa under a Visa Waiver Program[110]	245(c)(4)	Only most recent admission prior to filing for adjustment	VAWA-based applicants Immediate relatives
Admitted as Witness or Informant[111]	245(c)(5)	Only most recent admission prior to filing for adjustment	VAWA-based applicants
Who is Deportable Due to Involvement in Terrorist Activity or Group[112]	245(c)(6)	All entries and time periods spent in the United States	VAWA-based applicant[113]
Seeking Adjustment in an Employment-based Immigrant Category and Not in a Lawful Nonimmigrant Status	245(c)(7)	Only most recent admission prior to filing for adjustment	VAWA-based applicants Immediate relatives and other family-based applicants Special immigrant juveniles[114] 245(k) eligible[115]
Who has Otherwise Violated the Terms of a Nonimmigrant Visa[116] OR Who has Ever Engaged in Unauthorized Employment[117]	245(c)(8)[118]	All entries and time periods spent in the United States (departure and return does not remove the ineligibility)[119]	VAWA-based applicants Immediate relatives[120] Certain special immigrants 245(k) eligible[121]

In all cases, the applicant is subject to any and all applicable grounds of inadmissibility even if the applicant is not subject to any bar to adjustment, or is exempt from any or all the bars to adjustment.

1. Overlapping Bars

Some bars to adjustment may overlap in their application, despite their basis in separate sections of the law.[122] For example, an applicant admitted under the Visa Waiver Program who overstays the admission is barred by both INA 245(c)(2) and INA 245(c)(4). Because some bars overlap, more than one bar can apply to an applicant for the same act or violation. In such cases, the officer should address each applicable adjustment bar in the denial notice.

2. Exemptions from the Bars[123]

Congress has provided relief from particular adjustment bars to certain categories of immigrants such as VAWA-based adjustment applicants, immediate relatives, and designated special immigrants.

Furthermore, INA 245(k) exempts eligible applicants under the employment-based 1st, 2nd, 3rd and certain 4th preference[124] categories from the INA 245(c)(2), INA 245(c)(7), and INA 245(c)(8) bars. Specifically, an eligible employment-based adjustment applicant may qualify for this exemption if the applicant failed to maintain a lawful status, engaged in unauthorized employment, or violated the terms of his or her nonimmigrant status (admission under a nonimmigrant visa) for 180 days or less since his or her most recent lawful admission.[125]

Footnotes

[^ 1] See Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section B, Definition of Properly Filed [7 USCIS-PM A.3(B)].

[^ 2] See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].

[^ 3] See Part A, Adjustment of Status Policies and Procedures, Chapter 10, Legal Analysis and Use of Discretion [7 USCIS-PM A.10].

[^ 4] As originally enacted, INA 245(a) made adjustment available only to an alien who “was lawfully admitted…as a bona fide nonimmigrant and who is continuing to maintain that status.” See Immigration and Nationality Act of 1952, Pub. L. 82-414 (PDF), 66 Stat. 163, 217 (June 27, 1952). Admission as a bona fide nonimmigrant remained a requirement until 1960. See Pub. L. 86-648 (PDF) (July 14, 1960). Congress amended that threshold requirement several times. The 1960 amendment removed the requirement of admission as a bona fide nonimmigrant.

[^ 5] See 8 CFR 245.1(b)(3).

[^ 6] See legacy Immigration and Naturalization Service (INS) General Counsel Opinion 94-28, 1994 WL 1753132 (“Congress enacted INA 245 in such a manner that persons who entered the U.S. without inspection are ineligible to adjust”). See S. Rep. 86-1651, 1960 U.S.C.C.A.N. 3124, 3136 (“This legislation will not benefit the alien who has entered the United States in violation of the law”) and 3137 (“The wording of the amendments is such as not to grant eligibility for adjustment of status to alien crewmen and to aliens who entered the United States surreptitiously”). See *Matter of Robles* (PDF), 15 I&N Dec. 734 (BIA 1976) (explaining that entry into the United States after intentionally evading inspection is a ground for deportation under (then) INA 241(a)(2)).

[^ 7] See INA 245(a).

[^ 8] See INA 245(h)(1), which states that SIJ-based applicants are considered paroled into the United States for purposes of INA 245(a).

[^ 9] See INA 245(g), which holds that certain special immigrants, as defined under INA 101(a)(27)(k), are considered paroled into the United States for purposes of INA 245(a).

[^ 10] See Delegation of Authority to the Commissioner of U.S. Customs and Border Protection, Department of Homeland Security (DHS) Delegation No. 7010.3.

[^ 11] See Section 5 of the Act of March 3, 1875, 18 Stat. 477. See Sections 6, 8, 10, and 11 of the Act of March 3, 1891, 26 Stat. 1084. See Sections 8, 12, 16, and 18 of the Act of February 20, 1907, 34 Stat. 898. See Sections 10, 15, and 16 of the Immigration Act of 1917, Pub. L. 301 (February 5, 1917).

[^ 12] See INA 231-235 and INA 275. See *Matter of Robles* (PDF), 15 I&N Dec. 734 (BIA 1976) (holding that entry into the United States after intentionally evading inspection is a ground for deportation under (then) INA 241(a)(2)).

[^ 13] See 8 CFR 235.1(a). See *Matter of S-* (PDF), 9 I&N Dec. 599 (BIA 1962) (inspection is the process that determines an alien’s initial right to enter the United States upon presenting himself or herself for inspection at a port of entry). See *Ex Parte Saadi*, 23 F.2d 334 (S.D. Cal. 1927).

[^ 14] See INA 235(d). See 8 CFR 235.1(f)(1).

[^ 15] See *Matter of Areguillin* (PDF), 17 I&N Dec. 308 (BIA 1980), and *Matter of Quilantan* (PDF), 25 I&N Dec. 285 (BIA 2010), which held that an alien who had physically presented himself or herself for questioning and made no knowing false claim of citizenship had satisfied the inspected and admitted requirement of INA 245(a); alternatively, an alien who gains admission to the U.S. upon a knowing false claim to U.S. citizenship cannot be deemed to have been inspected and admitted. See *Matter of Pinzon* (PDF), 26 I&N Dec. 189 (BIA 2013).

[^ 16] See *Reid v. INS*, 420 U.S. 619, 624 (1975) (an alien who enters the United States based on a false claim to U.S. citizenship is excludable under former INA 212(a)(19), or INA 212(a)(6)(C) today, and considered to have entered without inspection).

[^ 17] See INA 235(a)(4).

[^ 18] Deferred inspection is a form of parole. An alien who is deferred inspection is paroled into the United States for the period of time necessary to complete the inspection. See 8 CFR 235.2(c). For more information on deferred inspection, see Subsection 3, Parole [7 USCIS-PM B.2(A)(3)].

[^ 19] See INA 101(a)(13)(A). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) amended the statute by changing the concept of “entry” to “admission” and “admitted.” See Section 301(a) of IIRIRA, Division C of Pub. L. 104-208 (PDF), 110 Stat. 3009, 3009-575 (September 30, 1996). INA 101(a)(13)(B) clarifies that parole is not admission.

[^ 20] See INA 101(a)(13)(A) (“The terms ‘admission’ and ‘admitted’ mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.”). Legislative history does not elaborate on the meaning of “lawful.”

[^ 21] See 8 CFR 235.1(f)(1).

[^ 22] See *Matter of Areguilin* (PDF), 17 I&N Dec. 308 (BIA 1980). See INA 291 (burden of proof). See *Emokah v. Mukasey*, 523 F.3d 110 (2nd Cir 2008). While it is an “admission,” procuring admission by fraud or willful misrepresentation is illegal and has several consequences. For example, the alien may be inadmissible and removable. See INA 212(a)(6)(C) and

INA 237(a)(1)(A).

[^ 23] See *Matter of Quilantan* (PDF), 25 I&N Dec. 289, 290 (BIA 2010). See *Matter of Areguilin* (PDF), 17 I&N Dec. 308 (BIA 1980). See INA 245(a). The alien is not inadmissible as an illegal entrant under INA 212(a)(6)(A)(i). For more information on admissibility, see Volume 8, Admissibility [8 USCIS-PM].

[^ 24] A grant of nonimmigrant status to an alien in the United States does not automatically constitute an “admission.” For example, an alien who is present in the United States without being inspected and admitted or paroled and who is subsequently granted U nonimmigrant status while in the United States is not “admitted” for purposes of INA 245(a). See *Sanchez v. Mayorkas* (PDF), 141 S.Ct. 1809, 1814-15 (2021). See Subsection 5, Temporary Protected Status [7 USCIS-PM B.2(A)(5)].

[^ 25] See *Matter of Pinzon* (PDF), 26 I&N Dec. 189 (BIA 2013) (an alien who enters the United States by falsely claiming U.S. citizenship is not deemed to have been inspected by an immigration officer, so the entry is not an “admission” under INA 101(a)(13)(A)).

[^ 26] See *Reid v. INS*, 420 U.S. 619, 624 (1975). See *Matter of S-* (PDF), 9 I&N Dec. 599 (BIA 1962). An alien who makes a false claim to U.S. citizenship is inadmissible for making the claim (INA 212(a)(6)(C)(ii)). The alien may also be inadmissible for presence without admission or parole (INA 212(a)(6)(A)(i)) and unlawful presence after previous immigration violations (INA 212(a)(9)(C)).

[^ 27] Such aliens are inadmissible for presence without admission or parole and may be inadmissible for unlawful presence after previous immigration violations. See INA 212(a)(6)(A)(i) and INA 212(a)(9)(C).

[^ 28] See INA 212(a)(2). See INA 212(h) and INA 240A(a).

[^ 29] See INA 101(a)(13)(C). See generally *Matter of Collado-Munoz*, 21 I&N Dec. 1061 (BIA 1997). The alien who enters by making a false claim to LPR status at a port of entry and who is permitted to enter is inadmissible for presence without admission or parole (INA 212(a)(6)(A)(i)) and fraud and misrepresentation (INA 212(a)(6)(C)(i)). The alien may also be inadmissible for unlawful presence after previous immigration violations. See INA 212(a)(9)(C).

[^ 30] This will typically be documented by an approved Application for Replacement/Initial Nonimmigrant Arrival-Departure Document (Form I-102).

[^ 31] CBP or USCIS can issue an Arrival/Departure Record (Form I-94). If admitted to the United States by CBP at an airport or seaport after April 30, 2013, CBP may have issued an electronic Form I-94 to the applicant instead of a paper Form I-94. To obtain a paper version of an electronic Form I-94, visit the CBP website. Some travelers admitted to the United States at a land border, airport, or seaport, after April 30, 2013, with a passport or travel document and who were issued a paper Form I-94 by CBP may also be able to obtain a replacement Form I-94 from the CBP website. Applicants may also obtain Form I-94 by filing an Application for Replacement/Initial Nonimmigrant Arrival-Departure Record (Form I-102), with USCIS.

[^ 32] U.S. Department of State Form DSP-150.

[^ 33] See 8 CFR 235.1(h)(1)(i)-(v).

[^ 34] See 8 CFR 212.1(b).

[^ 35] See 8 CFR 212.1(c).

[^ 36] See Delegation to the Bureau of Citizenship and Immigration Services, DHS Delegation No. 0150.1; Delegation of Authority to the Assistant Secretary for U.S. Immigration and Customs Enforcement, DHS Delegation No. 7030.2; Delegation of Authority to the Commissioner of U.S. Customs and Border Protection, DHS Delegation No. 7010.3.

[^ 37] See INA 212(d)(5)(A).

[^ 38] See INA 101(a)(13)(B) and 212(d)(5)(A).

[^ 39] See 8 CFR 235.2.

[^ 40] CBP generally issues a Notice to Appear 30 days after a person’s non-appearance for the deferred inspection, so an officer should review the relevant case and lookout systems for any entries related to CBP.

[^ 41] CBP generally creates either an A-file or T-file to document the deferred inspection.

[^ 42] See legacy Immigration and Naturalization Service (INS) General Counsel Opinion 94-28, 1994 WL 1753132 (whether deferred inspection constitutes parole for purposes of adjustment of status under INA 245).

[^ 43] See INA 212(d)(5).

[^ 44] See INA 212(d)(5).

[^ 45] Only parole under INA 212(d)(5)(A) meets this requirement.

[^ 46] See INA 235(a).

[^ 47] See legacy INS General Counsel Opinion 98-10, 1998 WL 1806685.

[^ 48] As with any immigration benefit request, eligibility for adjustment must exist when the application is filed and continue through adjudication. See 8 CFR 103.2(b)(1).

[^ 49] For example, parole does not erase any periods of prior unlawful status. Therefore, an alien who entered without inspection will remain ineligible for adjustment of status, even after a grant of parole, unless he or she is an immediate relative or falls within one of the other designated exceptions to INA 245(c)(2) or INA 245(c)(8).

[^ 50] See INA 245(c)(2). See Chapter 4, Status and Nonimmigrant Visa Violations (INA 245(c)(2) and INA 245(c)(8)) [7 USCIS-PM B.4].

[^ 51] See INA 236(a)(2)(B). Neither the statute nor regulations deem a release on conditional parole equal to a parole under INA 212(d)(5)(A). Several circuits and the BIA have opined on this and rejected the argument that the two concepts are equivalent processes. See *Ortega-Cervantes v. Gonzales* (PDF), 501 F.3d 1111 (9th Cir. 2007). See *Matter of Castillo-Padilla* (PDF), 25 I&N Dec. 257 (BIA 2010). See *Delgado-Sobalvarro v. Atty. Gen.* (PDF), 625 F.3d 782 (3rd Cir. 2010). See *Cruz Miguel v. Holder*, 650 F.3d 189 (2nd Cir. 2011).

[^ 52] See Authorization for Parole of an Alien into the United States (Form I-512 or I-512L).

[^ 53] See 8 CFR 235.1(h)(2). If an alien was admitted to the United States by CBP at an airport or seaport after April 30, 2012, the alien may have been issued an electronic Form I-94 by CBP, instead of a paper Form I-94. For more information, see the CBP website.

[^ 54] See Consolidated Natural Resources Act of 2008, Pub. L. 110-229 (PDF) (May 8, 2008).

[^ 55] See INA 235(a)(1).

[^ 56] See INA 244. See 8 CFR 244.

[^ 57] On June 7, 2021, the Supreme Court held that a grant of TPS is not an admission, stating that where an alien was not lawfully admitted or paroled, "TPS does not alter that fact." See *Sanchez v. Mayorkas (PDF)*, 141 S.Ct. 1809 (2021). Before this decision, the U.S. Courts of Appeals in the Sixth Circuit, Eighth Circuit, and Ninth Circuit had ruled that an alien who enters the United States without inspection and who is subsequently granted TPS meets the inspected and admitted or inspected and paroled requirement under INA 245(a). USCIS applied these rulings only to applications for adjustment of status filed by applicants residing within these respective jurisdictions. The Supreme Court decision in *Sanchez* overrules the rulings of the Sixth, Eighth, and Ninth Circuits; therefore, on or after June 7, 2021, a grant of TPS is no longer an admission for adjustment of status purposes in any circuit. However, USCIS deems applicants who became lawful permanent residents under the Sixth, Eighth, or Ninth Circuit Court precedents before June 7, 2021, to have been lawfully admitted for permanent residence. See *Flores v. USCIS (PDF)*, 718 F.3d 548 (6th Cir. 2013). See *Velasquez v. Barr (PDF)*, 979 F.3d 572 (8th Cir. 2020). See *Ramirez v. Brown (PDF)*, 852 F.3d 954 (9th Cir. 2017).

[^ 58] See *Sanchez v. Mayorkas (PDF)*, 141 S.Ct. 1809 (2021). See *Matter of H-G-G-*, 27 I&N Dec. 617 (AAO 2019).

[^ 59] See INA 244(f)(4). See 8 CFR 244.10(f)(2)(iv).

[^ 60] See *Matter of H-G-G-*, 27 I&N Dec. 617 (AAO 2019).

[^ 61] See INA 244(f)(3). See 8 CFR 244.10(f)(2)(iii).

[^ 62] See 8 CFR 244.15(a). Although 8 CFR 244.15 provides that permission to travel abroad is sought and provided "pursuant to the Service's advance parole provisions," the regulation was issued in 1991 before enactment of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Pub. L. 102-232 (PDF) (December 12, 1991), as amended, and, consequently, the reference in 8 CFR 244.15 to advance parole was overruled by Section 304(c) of that statute, which required that eligible TPS beneficiaries "shall be inspected and admitted" upon return from qualifying authorized travel. See DHS Office of General Counsel, Immigration Consequences of Authorized Travel and Return to the United States by Individuals Holding Temporary Protected Status, Attachment p. 28, issued April 6, 2022. Until 8 CFR 244.15 is amended in accordance with MTINA, and corresponding changes are made to related forms and other documentation, USCIS considers the reference to advance parole in 8 CFR 244.15 to encompass any advance discretionary authorization to travel under INA 244(f)(3). See Rescission of *Matter of Z-R-Z-C-* as an Adopted Decision; agency interpretation of authorized travel by TPS beneficiaries, PM-602-0188, issued July 1, 2022. Related forms and documentation include the Application for Temporary Protected Status (Form I-821) and Application for Travel Documents, Parole Documents, and Arrival/Departure Records (Form I-131).

[^ 63] See Section 304(c) of MTINA, Pub. L. 102-232 (PDF), 105 Stat. 1733, 1749 (December 12, 1991), as amended. TPS beneficiaries subject to certain criminal, national security, and related grounds of inadmissibility as described in INA 244(c)(2)(A)(iii) may not be eligible for admission into TPS when returning from travel authorized under INA 244(f)(3).

[^ 64] Inspection and admission after TPS-authorized travel also satisfies the admission requirement of INA 245(k). However, admission into TPS does not mean that the TPS beneficiary is "admissible" as required by INA 245(a)(2), as MTINA specifies that only certain inadmissibility grounds apply to beneficiaries returning to the United States after TPS-authorized travel. See Section 304(c) of MTINA, Pub. L. 102-232 (PDF), 105 Stat. 1733, 1749 (December 12, 1991), as amended.

[^ 65] See DHS Office of General Counsel, Immigration Consequences of Authorized Travel and Return to the United States by Individuals Holding Temporary Protected Status, Attachment p. 28, issued April 6, 2022.

[^ 66] See *Duarte v. Mayorkas*, 27 F.4th 1044 (5th Cir. 2022). For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section D, Jurisdiction [7 USCIS-PM A.3(D)]. Additionally, USCIS applies the holding of *Matter of Arrabally and Yerrabelly (PDF)*, 25 I&N Dec. 771 (BIA 2012)—that an alien who leaves the United States temporarily with advance parole does not make a departure from the United States within the meaning of INA 212(a)(9)(B)(i)(II)—to aliens who leave the United States with authorization under INA 244(f)(3), as the Board's reasoning is equally applicable to TPS-authorized travel and return under MTINA.

[^ 67] See General Adjustment of Status Policies and Section 245(a) of the Immigration and Nationality Act, PA-2016-001, issued February 25, 2016.

[^ 68] See *Matter of Z-R-Z-C-*, Adopted Decision 2020-02 (AAO Aug. 20, 2020), PM-602-0179, issued August 20, 2020, rescinded July 1, 2022.

[^ 69] See Rescission of *Matter of Z-R-Z-C-* as an Adopted Decision; agency interpretation of authorized travel by TPS beneficiaries, PM-602-0188, issued July 1, 2022.

[^ 70] TPS beneficiaries are aliens granted TPS in accordance with INA 244(a)(1)(A).

[^ 71] See INA 244(c)(3). See INA 244(b)(3).

[^ 72] See Section 304(c) of MTINA, Pub. L. 102-232 (PDF), 105 Stat. 1733, 1749 (December 12, 1991), as amended.

[^ 73] These TPS beneficiaries do not meet the requirements specified in Section 304(c) of MTINA, Pub. L. 102-232 (PDF), 105 Stat. 1733, 1749 (December 12, 1991), as amended.

[^ 74] See *Duarte v. Mayorkas*, 27 F.4th 1044, 1061 (5th Cir. 2022) (concluding that "USCIS was … not authorized to grant the Appellants the advance parole that the 512L form it issued them purported to allow" and that as a result they "were admitted and not paroled into the country").

[^ 75] Determining whether a prior entry was an admission or parole may be necessary, for example, in employment-based adjustment of status applications by aliens seeking an exception to the bars to adjustment in INA 245(c)(2), (7), and (8). The exception at INA 245(k) requires, in part, that the applicant be present in the United States "pursuant to a lawful admission." In such cases, USCIS conducts the individualized assessment described above.

[^ 76] See Pub. L. 102-232 (PDF) (December 12, 1991), as amended.

[^ 77] The five-factor test formulated by the D.C. Circuit entails consideration of whether the particular case is one of first impression, whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, the extent to which the party against whom the new rule is applied relied on the former rule, the degree of the burden which a retroactive order imposes on a party, and the statutory interest in applying a new rule despite the reliance of a party on the old standard. See *Retail, Wholesale and Department Store Union AFL-CIO v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972). See *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322 (9th Cir. 1982). See *Matter of Cordero-Garcia*, 27 I&N Dec. 652, 657 (BIA 2019) (adopting the test in the immigration context).

[^ 78] "The former rule" meaning prior USCIS or INS legal interpretation, policy, or practice regarding the effect of TPS-authorized travel.

[^ 79] See *Retail, Wholesale and Department Store Union AFL-CIO v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972).

[^ 80] See the table, Effect of Authorized Travel on TPS Beneficiaries Under Applicable Policy, above.

[^ 81] See *Retail, Wholesale and Department Store Union AFL-CIO v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972). Because USCIS applies the holding of *Matter of Arrabally and Yerrabelly (PDF)*, 25 I&N Dec. 771 (BIA 2012) to travel authorized under INA 244(f)(3) followed by admission to the United States into TPS, an alien who leaves the United States temporarily on TPS-authorized travel does not make a departure from the United States within the meaning of INA 212(a)(9)(B)(i)(II). Therefore, whether or not USCIS considers travel under MTINA as an admission after authorized travel or a parole after advance parole will not adversely affect aliens with respect to reliance upon *Matter of Arrabally*.

[^ 82] See *Retail, Wholesale and Department Store Union AFL-CIO v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) (citing *SEC v. Chenery Corp.*, 332 U.S. 194 (1947)) (explaining that courts must assess whether retroactivity would produce more "mischief" than the ill effects of continuing to enforce a rule which is "contrary to statutory design or legal and equitable principles").

[^ 83] See 8 CFR 209.2. For more information on asylee adjustment, see Part M, Asylee Adjustment [7 USCIS-PM M].

[^ 84] Due to the different statutory bases, different eligibility requirements, exceptions, and waivers apply to applicants seeking adjustment based on their asylum status compared to those seeking adjustment under INA 245(a).

[^ 85] The grant of asylum is not an admission contemplated under INA 101(a)(13)(A). See *Matter of V-X-* (PDF), 26 I&N Dec. 147 (BIA 2013). See legacy INS General Counsel Opinion, expressed by INS Central Office, Deputy Asst. Commissioner, Adjudications, R. Michael Miller, in letter dated September 4, 1986, reprinted in Interpreter Releases, Vol. 63, No. 40, October 10, 1986, pp. 891-892.

[^ 86] See *Matter of Quilantan* (PDF), 25 I&N Dec. 285, 291-92 (BIA 2010). See *Matter of Areguillin* (PDF), 17 I&N Dec. 308 (BIA 1980). See 8 CFR 103.2(b).

[^ 87] Any documentary evidence of admission should be consistent with entry information provided in the adjustment application or in oral testimony and should not contradict any other admission or departure evidence in DHS records. For example, when there is no Arrival/Departure Record or passport with an admission stamp, an officer may rely on information in DHS records, information in the applicant's file, and the applicant's testimony to make a determination on whether the applicant was inspected and admitted or inspected and paroled into the United States.

[^ 88] See 8 CFR 103.2(b). See Part A, Adjustment of Status Policies and Procedures, Chapter 10, Legal Analysis and Use of Discretion [7 USCIS-PM A.10].

[^ 89] For more information, see Subsection 2, Admission [7 USCIS-PM B.2(A)(2)].

[^ 90] See 8 CFR 103.2(a) and 8 CFR 103.2(b). See 8 CFR 103.2(a)(2). See Fee Schedule (Form G-1055). The applicant may submit a fee waiver request. See Request for Fee Waiver (Form I-912).

[^ 91] See 8 CFR 103.2(a)(7) and 8 CFR 245.2(a)(2)(i). In addition, USCIS should process a fee refund when an adjustment application is accepted in error because a visa was unavailable at the time of filing and the error is recognized before interview or adjudication. For more information on the definition of "properly filed" and fee refunds, see Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions [7 USCIS-PM A.3] and Volume 1, General Policies and Procedures, Part B, Submission of Benefit Requests, Chapter 3, Fees [1 USCIS-PM B.3].

[^ 92] See INA 201(b). Immediate relatives of a U.S. citizen include the U.S. citizen's spouse, children (unmarried and under 21 years of age), and parents (if the U.S. citizen is 21 years of age or older). Widow(er)s of U.S. citizens and aliens admitted to the United States as a fiancé(e) or child of a fiancé(e) of a U.S. citizen may also be considered immediate relatives if they meet certain conditions.

[^ 93] Diversity visas do not rely on a USCIS-filed petition to obtain a visa. The diversity visa lottery is conducted by the U.S. Department of State.

[^ 94] See 8 CFR 103.2(b)(1).

[^ 95] See Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section C, Concurrent Filings [7 USCIS-PM A.3(C)].

[^ 96] See Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section B, Definition of "Properly Filed," Subsection 4, Visa Availability Requirement [7 USCIS-PM A.3(B)(4)] and Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].

[^ 97] See INA 245(a)(3). See 8 CFR 245.1(g)(1), 8 CFR 245.2(a)(5)(ii), and 8 CFR 103.2(b)(1). For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].

[^ 98] If one or more of the grounds listed in INA 212 applies to an applicant then the applicant may be inadmissible. For more information, see Volume 8, Admissibility [8 USCIS-PM] and Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM].

[^ 99] See Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM].

[^ 100] See INA 245(c).

[^ 101] Even if aliens are barred from adjusting under INA 245(a), they may still adjust under another statutory basis as long as they meet the applicable eligibility requirements.

[^ 102] An immigrant category may exempt an applicant or make an applicant eligible for a waiver of certain adjustment bars and grounds of inadmissibility. Even if an exemption applies to an applicant who would otherwise be barred from adjustment of status, the applicant may still be denied adjustment as a matter of discretion. For more information on discretion, see Part A, Adjustment of Status Policies and Procedures, Chapter 10, Legal Analysis and Use of Discretion [7 USCIS-PM A.10].

[^ 103] It is service as a crewman that triggers the bar to adjustment, not the actual nonimmigrant status. This bar applies if the alien was actually permitted to land under the D-1 or D-2 visa category. The bar also applies if the alien was a crewman admitted as a C-1 to join a crew, or as a B-2 if serving on a crew.

[^ 104] This does not apply to aliens who failed to maintain lawful status through no fault of their own or solely for technical reasons, as defined in 8 CFR 245.1(d)(2).

[^ 105] The INA 245(c)(2) bar addresses three distinct types of immigration violations.

[^ 106] See 8 CFR 245.1(d)(3).

[^ 107] See INA 201(b). Immediate relatives of a U.S. citizen include the U.S. citizen's spouse, children (unmarried and under 21 years of age), and parents (if the U.S. citizen is 21 years of age or older). Widow(er)s of U.S. citizens and aliens admitted to the United States as a fiancé(e) or child of a fiancé(e) of a U.S. citizen may also be considered immediate relatives if they meet certain conditions.

[^ 108] See special immigrants described in INA 101(a)(27)(H)-(K).

[^ 109] If an adjustment applicant is eligible for the 245(k) exemption, then he or she is exempted from the INA 245(c)(2) bar to adjustment. See Chapter 8, Inapplicability of Bars to Adjustment, Section E, Employment-Based Exemption under INA 245(k) [7 USCIS-PM B.8(E)].

[^ 110] See INA 212(l) and INA 217.

[^ 111] See INA 101(a)(15)(S) and INA 245(j). The applicants are beneficiaries of a request by a law enforcement agency to adjust status (Inter-Agency Alien Witness and Informant Record (Form I-854)).

[^ 112] See INA 237(a)(4)(B).

[^ 113] Although VAWA-based applicants are exempt from all INA 245(c) bars per statute, a VAWA-based applicant may still be determined to be removable (INA 237(a)(4)(B)) or inadmissible (INA 212(a)(3)) due to egregious public safety risk and on security and related grounds.

[^ 114] INA 245(c)(7) does not apply to VAWA-based applicants, immediate relatives, family-based applicants, or special immigrant juveniles because these aliens are not seeking adjustment as employment-based applicants. See 8 CFR 245.1(b)(9).

[^ 115] If an employment-based adjustment applicant is eligible for the INA 245(k) exemption, then he or she is exempted from the INA 245(c)(7) bar to adjustment. See Chapter 8, Inapplicability of Bars to Adjustment, Section E, Employment-Based Exemption under INA 245(k) [7 USCIS-PM B.8(E)].

[^ 116] This is also referred to as an alien who has violated the terms of his or her nonimmigrant status.

[^ 117] There are no time restrictions on when such a violation must have occurred while physically present in the United States. Violations either before or after the filing of Form I-485 will render an alien ineligible to adjust status under INA 245(a). An alien seeking employment during the pendency of his or her adjustment applicant must fully comply with the requirements of INA 274A and 8 CFR 274a. See 62 FR 39417 (PDF) (Jul. 23, 1997).

[^ 118] The INA 245(c)(8) bar addresses two distinct types of immigration violations.

[^ 119] See 8 CFR 245.1(d)(3).

[^ 120] USCIS interprets the exemption listed in INA 245(c)(2) for immediate relatives and certain special immigrants as applying to the 245(c)(8) bar in addition to the 245(c)(2) bar. See 62 FR 39417 (PDF) (Jul. 23, 1997).

[^ 121] If an adjustment applicant is eligible for the 245(k) exemption, then he or she is exempted from the INA 245(c)(8) bar to adjustment. See Chapter 8, Inapplicability of Bars to Adjustment, Section E, Employment-Based Exemption under INA 245(k) [7 USCIS-PM B.8(E)].

[^ 122] See INA 245(c)(2), INA 245(c)(7), and INA 245(c)(8).

[^ 123] See Chapter 8, Inapplicability of Bars to Adjustment [7 USCIS-PM B.8].

[^ 124] This applies to religious workers only.

[^ 125] Notwithstanding INA 245(c)(2), INA 245(c)(7), and INA 245(c)(8), the officer should treat an alien who meets the conditions set forth in INA 245(k) in the same manner as an applicant under INA 245(a).

Chapter 3 - Unlawful Immigration Status at Time of Filing (INA 245(c)(2))

An applicant is barred from adjustment of status if the applicant is in an unlawful immigration status on the date of filing the adjustment application.[1] This bar to adjustment does not apply to:

- Immediate relatives;[2]
- Violence Against Women Act (VAWA)-based applicants;
- Certain alien doctors and their accompanying spouse and children;[3]
- Certain G-4 international organization employees, NATO-6 employees, and their family members;[4]
- Special immigrant juveniles;[5]
- Certain members of the U.S. armed forces and their spouses and children;[6] or
- Employment-based applicants who meet the INA 245(k) exemption.

A. Lawful Immigration Status[7]

Aliens in the United States who are considered to be in lawful immigration status generally include:

- Lawful permanent residents (LPR), including lawful temporary residents and conditional permanent residents;

- Nonimmigrants;[8]
- Refugees;[9]
- Asylees;[10]
- Parolees;[11]
- Aliens in temporary protected status (TPS); and
- Aliens lawfully present in the Commonwealth of the Northern Mariana Islands (CNMI) between November 28, 2009 and November 27, 2011 based on a valid, unexpired, and lawfully obtained period of stay that was CNMI-authorized prior to November 28, 2009 that remains valid on the date of adjustment application.

Simply filing an application for an immigration benefit or having a pending benefit application generally does not put an applicant in a lawful immigration status.[12] In general, once an immigrant benefit application is approved, an applicant is in lawful immigration status as of the date of the filing of the application.

B. Unlawful Immigration Status

An alien is in unlawful immigration status if he or she is in the United States without lawful immigration status either because the alien never had lawful status or because the alien's lawful status has ended.

Aliens in unlawful immigration status generally include those:

- Who entered the United States without inspection and admission or parole;[13] and
- Whose lawful immigration status expired or was rescinded, revoked, or otherwise terminated.[14]

C. Time in Unlawful Immigration Status

If in unlawful immigration status, the alien's unlawful status generally begins:

- On the day the alien enters the United States without inspection;
- On the day the alien violates the terms or conditions of his or her nonimmigrant status;[15] or
- On the day after the alien's authorized status has been violated, has expired, been rescinded, revoked, or otherwise terminated while he or she is physically present in the United States.[16]

Unlawful immigration status generally ends when either of the following events occur, whichever is earlier:

- The alien obtains lawful immigration status, or
- The alien departs the United States.

D. Difference between Lawful Immigration Status and Period of Authorized Stay

Lawful immigration status is distinct from being in a period of authorized stay. Periods of authorized stay are only relevant when determining an alien's accrual of unlawful presence for inadmissibility purposes.[17] Although an alien in a lawful immigration status is also in a period of authorized stay, the opposite is not necessarily true. Those in a period of authorized stay may or may not be in a lawful immigration status.

Officers consider the difference between lawful immigration status and a period of authorized stay when determining whether an applicant is in lawful immigration status for purposes of the INA 245(c)(2) adjustment bar.

E. Effect of Pending Application or Petition

A pending application to extend or change status (Form I-129 or Form I-539), a pending adjustment application, or a pending petition does not confer lawful immigration status on an applicant. In addition, a pending application or petition does not automatically afford protection against removal if the alien's status expires after submission of the application. The alien may have no actual lawful status in the United States and may be subject to removal proceedings unless and until the extension of stay (EOS) application, change of status (COS) application, adjustment application, or petition is approved.

1. Extension of Stay or Change of Status

An alien may file an adjustment application after expiration of his or her nonimmigrant status while the alien's timely-filed EOS or COS application is pending.[18] In such cases, the officer should defer adjudication of the adjustment application until USCIS adjudicates the EOS or COS application so long as there are no other grounds for denial.

If USCIS ultimately approves the EOS or COS application, then the alien is considered to be in lawful immigration status on the date the adjustment application is filed. If USCIS denies the EOS or COS application, then the alien is generally considered to be in unlawful immigration status as of the expiration of the alien's current nonimmigrant status and likewise on the date the adjustment application is filed. In this instance, the INA 245(c)(2) bar would apply, unless an exemption is available.

The following scenario illustrates the distinction between lawful immigration status and a period of stay authorized by the Secretary of Homeland Security. The scenario provides an example of when an applicant may be considered to be in unlawful immigration status after filing multiple applications to extend and change status.

Example: Effect of Multiple Applications to Extend or Change Status

Date	Event
September 28, 2007	An alien is admitted to the United States as a B-2 nonimmigrant visitor.
March 16, 2008	An employer timely filed an L-1 petition (Petition for a Nonimmigrant Worker (Form I-129) for the B-2 nonimmigrant visitor, including a request on behalf of the nonimmigrant to change status to an L-1 nonimmigrant intracompany transferee nonimmigrant classification.
March 28, 2008	The B-2 nonimmigrant visitor's authorized stay expires, as indicated on the Arrival/Departure Record (Form I-94).
September 10, 2008	The alien untimely filed an application to extend B-2 nonimmigrant visitor status after the employer receives a Request for Evidence (RFE) on the L-1 petition.

Date	Event
December 7, 2008	The RFE goes unanswered and USCIS denies the L-1 petition and the accompanying COS application.
January 11, 2009	The employer untimely files a second L-1 petition (Form I-129) for the alien.
February 8, 2009	USCIS denies the alien's application to extend B-2 nonimmigrant visitor status because it was filed after the expiration of his authorized stay.
February 11, 2009	USCIS approves the second L-1 petition (Form I-129) for the alien but denies the accompanying application to change status from B-2 nonimmigrant visitor to L-1 because the alien was out of status at the time the petition was filed.

This example highlights that an alien seeking an EOS or COS cannot indefinitely avoid any time out of or in violation of lawful status just because of a pending application to extend or change status.

When USCIS denied the first L-1 petition and COS application on December 7, 2008, the applicant was out of B-2 status as of March 29, 2008. Even though USCIS ultimately denied the first L-1 petition and COS request, the petition was timely filed. Accordingly, the petition provided the alien a period of authorized stay while the petition was pending from March 16, 2008 through final adjudication on December 7, 2008.

Notwithstanding, the untimely filed application for extension of B-2 status did not provide the alien any period of authorized stay. In addition, the applications and petitions filed did not grant any lawful status to the alien or create a “bridge” of continuing lawful status stemming from the first timely filed petition.

2. Adjustment

A pending adjustment application does not put an applicant in a lawful immigration status. For example, if USCIS previously denied adjustment of status to an applicant and the applicant reapplies for adjustment, the period the first application was pending does not count as time spent in lawful immigration status.

3. Petition

A pending or approved petition does not confer lawful immigration status on the beneficiary. An immigrant petition merely classifies the beneficiary in a particular immigrant visa category, which forms the basis for the beneficiary’s adjustment application.

Footnotes

[^ 1] See INA 245(c)(2). See 8 CFR 245.1(b)(5). This chapter only addresses one of the three immigration violations described in the INA 245(c)(2) bar. For more information on the other two immigration violations, see Chapter 4, Status and Nonimmigrant Visa Violations - INA 245(c)(2) and INA 245(c)(8) [7 USCIS-PM B.4] and Chapter 6, Unauthorized Employment – INA 245(c)(2) and INA 245(c)(8) [7 USCIS-PM B.6].

[^ 2] See INA 201(b). Immediate relatives of a U.S. citizen include the U.S. citizen’s spouse, children (unmarried and under 21 years of age), and parents (if the U.S. citizen is 21 years of age or older). Widow(er)s of U.S. citizens and aliens admitted to the United States as a fiancé(e) or child of a fiancé(e) of a U.S. citizen may also be considered immediate relatives if they meet certain conditions.

[^ 3] See INA 101(a)(27)(H).

[^ 4] See INA 101(a)(27)(I).

[^ 5] See INA 101(a)(27)(J).

[^ 6] See INA 101(a)(27)(K).

[^ 7] See 8 CFR 245.1(d).

[^ 8] See INA 101(a)(15).

[^ 9] See INA 207.

[^ 10] See INA 208.

[^ 11] See INA 212(d)(5)(A).

[^ 12] For more information, see Section E, Effect of Pending Application or Petition [7 USCIS-PM B.3(E)].

[^ 13] USCIS systems may indicate an entry without inspection as “EWI.”

[^ 14] For example, an alien who was admitted as a nonimmigrant is in an unlawful status if the alien has violated any of the terms or conditions of the nonimmigrant status – such as by engaging in unauthorized employment, termination of the employment that was the basis for the nonimmigrant status, failing to maintain a full course of study, or engaging in conduct specified in 8 CFR 212.1(e)-(g). The alien’s status also becomes unlawful if the alien remains in the United States after DHS terminates the alien’s nonimmigrant status under 8 CFR 214.1(d).

[^ 15] The relevant terms or conditions include those that apply to all nonimmigrants, such as 8 CFR 214.1(e)-(g), as well as those that apply to the specific nonimmigrant classification. For example, a B-2 visitor who worked without authorization and an F-1 student who failed to maintain a full course of study would both be out of status.

[^ 16] Extension of stay or change of status applications, once approved, may retroactively confer lawful immigration status. For more information, see Section E, Effect of Pending Application or Petition [7 USCIS-PM B.3(E)].

[^ 17] See INA 212(a)(9)(B) and INA 212(a)(9)(C). Those in a period of stay authorized are protected from accruing unlawful presence. For example, an alien whose adjustment of status application is pending is in a period of stay authorized and does not accrue unlawful presence. However, although an alien is in a period of stay authorized, it may be that the alien is in unlawful status. See Section E, Effect of a Pending Application or Petition [7 USCIS-PM B.3(E)].

[^ 18] In some cases, USCIS may excuse untimely filing and approve an extension of stay or change of status request. For more information, see Chapter 4, Status and Nonimmigrant Visa Violations – INA 245(c)(2) and INA 245(c)(8), Section E, Exceptions, Subsection 3, Effect of Extension of Stay and Change of Status [7 USCIS-PM B.4(E)(3)].

Chapter 4 - Status and Nonimmigrant Visa Violations (INA 245(c)(2) and INA 245(c)(8))

Any adjustment applicant is ineligible to adjust status under INA 245(a) if, other than through no fault of his or her own or for technical reasons,[1] he or she has ever:

- Failed to continuously maintain a lawful status since entry into the United States;[2] or
- Violated the terms of his or her nonimmigrant status.[3]

The INA 245(c)(2) and INA 245(c)(8) bars to adjustment do not apply to:

- Immediate relatives;[4]
- Violence Against Women Act (VAWA)-based applicants;
- Certain physicians and their accompanying spouse and children;[5]
- Certain G-4 international organization employees, NATO-6 employees, and their family members;[6]
- Special immigrant juveniles;[7] or
- Certain members of the U.S. armed forces and their spouse and children.[8]

Employment-based applicants also may be eligible for exemption from this bar under INA 245(k).[9]

A. Failure to Continuously Maintain Lawful Immigration Status

The bar to adjustment for failing to continuously maintain a lawful status since entry into the United States applies to an applicant for adjustment who has:

- Failed to maintain continuously a lawful status since their most recent entry; and
- An applicant who has ever been out of lawful status at any time since any entry.[10]

Example: Failure to Continuously Maintain Lawful Status

Date	Event
September 1, 2010	An alien is admitted to the United States as a nonimmigrant student at a university.
January 15, 2011	The nonimmigrant student takes a leave of absence from the university for a semester without the permission of the designated school official. The nonimmigrant student status is terminated as a result.
September 1, 2011	The alien departs the United States.
January 1, 2014	The alien is admitted to the United States as a nonimmigrant intracompany transferee for a company.
January 1, 2015	The company files an employment-based immigrant visa petition to classify the nonimmigrant as an employment-based first preference multinational manager. The nonimmigrant simultaneously files an adjustment of status application.

In this example, the nonimmigrant intracompany transferee is subject to the INA 245(c)(2) bar to adjustment due to the prior failure to continuously maintain nonimmigrant student status in 2011. The nonimmigrant transferee, however, may be exempt from that bar under INA 245(k).[11]

B. Violation of Terms of Nonimmigrant Visa

The bar for otherwise violating the terms of a nonimmigrant visa refers to a violation of the terms and conditions of an alien's specific nonimmigrant status as set forth in relevant regulations.[12] This bar applies not only to applicants who violated the terms of their most recent nonimmigrant status but also to those who have ever violated the terms of a nonimmigrant status at any time during any prior periods of stay in the United States as a nonimmigrant.[13]

Terms of nonimmigrant status include, but are not limited to:

- Time limitations on the period of admission and any subsequent extensions or changes of status;[14]
- Compliance with applicable requirements;[15]
- Limitations on employment;[16]
- Compliance with any registration, photographing, and fingerprinting requirements, including National Security Entry Exit Registration System (NSEERS) registration,[17] that relate to the maintenance of nonimmigrant status;[18]
- Full and truthful disclosure of all information requested by USCIS; and[19]
- Obedience to all laws of U.S. jurisdictions which prohibit the commission of crimes of violence and for which a sentence of more than one-year imprisonment may be imposed.[20]

For example, an L-1B worker who works for an employer other than the employer authorized by the approved L-1B petition violates the terms of his or her nonimmigrant status and may be barred not only by INA 245(c)(8) but also INA 245(c)(2).

C. Effect of Departure

The departure and subsequent reentry of an applicant who has at any time failed to maintain a lawful immigration status or violated the terms of the nonimmigrant status on any previous entry into the United States does not erase the bar. Otherwise, an applicant who has failed to maintain lawful status or violated status could simply depart the United States, reenter immediately, and become eligible to file for adjustment of status.[21]

D. Periods of Time to Consider

Unless an exemption applies, an applicant is barred from adjusting status if the applicant commits either of these two violations at any time, no matter how long ago, and even if such violations occur only for one day.

Neither the INA nor USCIS places time restrictions on when the violation (or violations) must have occurred. Therefore, the violation is not required to have occurred during any particular period of time. For these reasons, USCIS counts any violation that occurs after any entry into the United States.[22] It does not matter how much time has passed since that entry or whether the person subsequently left the United States and returned lawfully.

An officer, therefore, must consider all of the applicant's entries and time spent inside the United States when considering these adjustment bars. The officer should disregard how much time has passed since each entry and whether the applicant subsequently left the United States and returned lawfully.

E. Exceptions

For purposes of INA 245(c)(2) and INA 245(c)(8), an applicant's failure to maintain lawful immigration status or violation of nonimmigrant status may be excused only for the particular period of time under consideration if:

- The applicant was reinstated to F, M, or J status;
- The applicant's failure to maintain status was through no fault of his or her own or for technical reasons; or
- The applicant was granted an extension of nonimmigrant stay or a change of nonimmigrant status.[23]

1. Reinstatement to F, M, or J Status

If USCIS reinstates a nonimmigrant to F or M student status or if the U.S. Department of State reinstates a nonimmigrant to J exchange visitor status, the reinstatement only excuses the particular period of time the nonimmigrant failed to maintain status. The reinstatement does not excuse any prior or future failure to maintain status.[24]

In order to qualify for reinstatement, a student or exchange visitor must establish that the violation resulted from circumstances beyond his or her control, such as a natural disaster, illness or closure of a school, oversight or neglect by the designated school officer (DSO) or responsible officer (RO), or the reduction in the student's course load authorized by the DSO. The reinstatement is in effect the functional equivalent of waiving the violation. In this instance, the violation subject to the reinstatement would not bar the alien from adjusting status.

2. No Fault of the Applicant or For Technical Reasons

No Fault Provision

An applicant's failure to continuously maintain lawful immigration status or violation of nonimmigrant status may be excused only for the particular period of time under consideration if the applicant's failure or violation was through no fault of the applicant or for technical reasons.[25]

The meaning of "other than through no fault of his or her own or for technical reasons" is limited to the following circumstances:[26]

- Inaction of another person or organization designated by regulation to act on behalf of an applicant or over whose actions the applicant has no control, if the inaction is acknowledged by that person or organization;[27]
- Technical violation resulting from inaction of USCIS;
- Technical violation caused by the physical inability of the applicant to request an extension of nonimmigrant stay from USCIS in person or by mail; or
- Technical violation resulting from legacy Immigration and Naturalization Service (INS)'s application of the 5-year or 6-year period of stay for certain H-1 nurses, if the nurse was re-instated to H-1 status as a result of the Immigration Amendments of 1988.[28]

If an officer determines that the applicant was out of status based solely on any of the above circumstances, the officer should annotate that determination on the adjustment application and adjudicate the application.[29]

Inaction of Designated Official or Organization

Instances of qualifying inaction include the failure of a designated school official or exchange visitor program sponsor to provide required notification to USCIS of an applicant's continuation of status or to forward a request for continuation of an applicant's status to USCIS. The official or organization designated to act on behalf of the applicant must notify USCIS and acknowledge responsibility for the inaction.[30]

This exception does not include instances in which a petitioner delays completing required documents to give to the applicant for submission to USCIS.[31]

This exception generally does not apply to most claims that an applicant's attorney or representative provided ineffective counsel or failed to file an application or other documents to USCIS on the applicant's behalf.[32] The applicant and the attorney or representative are both responsible for complying with all applicable USCIS filing requirements and official correspondence or requests for information, and the applicant has control over the actions of the representative.

Example: Failure to Continuously Maintain Status Due to Inaction of Designated Official

Date	Event
August 1, 2008	An alien is admitted as a nonimmigrant student authorized to attend a university full-time.
August 15, 2009	After a year of study, the nonimmigrant transfers to another university through appropriate procedures, including updating the Certificate of Eligibility for Nonimmigrant (F-1) Student Status (Form I-20 A-B). The Designated School Official (DSO) at the first university fails to properly update the Student and Exchange Visitor Information System (SEVIS), which now shows a large gap in the student's attendance between the first and second universities.
October 1, 2010	During a benefit request review, a USCIS officer notices the potential violation of status and issues a Request for Evidence to the nonimmigrant student. In response, the nonimmigrant student submits a letter from the DSO at the first university explaining the school had failed to timely record the transfer in SEVIS. The student provides copies of her transcripts, showing full-time attendance as explained in the DSO's letter.

In this example, the exception applies because the DSO failed to update SEVIS with the transfer information, and the failure was beyond the alien's control. Conversely, the exception would not apply if the nonimmigrant student had withdrawn from school without DSO permission. Instead, such action would have resulted in a failure to maintain nonimmigrant student status.

Technical Violation Resulting from Inaction of USCIS[33]

One example of the phrase "a technical violation resulting from the inaction of USCIS" is where an applicant ceases to have a lawful status because USCIS failed to adjudicate a properly and timely filed request to extend or change nonimmigrant status.

Often an officer can verify a technical violation resulting from USCIS inaction or oversight through review of USCIS systems and the Record of Proceeding. In other instances, an adjustment applicant who claims a technical violation of status based on USCIS' failure to adjudicate a pending application must prove that:

- The applicant properly filed an application to extend or change nonimmigrant status prior to the expiration date of his or her nonimmigrant status;
- The applicant was a bona fide nonimmigrant at the time of filing his or her application to extend or change nonimmigrant status, which includes establishing intent consistent with the terms and conditions of the nonimmigrant status sought;
- The applicant filed an application to extend or change nonimmigrant status that was meritorious in fact, not frivolous or fraudulent, or otherwise designed to delay removal or departure from the United States;
- The applicant has not otherwise violated his or her nonimmigrant status;
- The applicant remained a bona fide nonimmigrant until the time he or she properly filed an adjustment application; and
- The applicant is not in removal proceedings.

Failure to maintain status because of a pending labor certification application with the U.S. Department of Labor or a pending immigrant visa petition with USCIS does not qualify under this exception.[34]

Technical Violation Caused by the Physical Inability of the Applicant

There may be instances when a nonimmigrant is physically unable to file an application to extend or change nonimmigrant status, such as when an applicant is hospitalized with an illness or medical condition at the time the nonimmigrant status expires.[35]

An adjustment applicant who claims that he or she technically violated his or her status because of a physical inability to file an extension or change of status application must establish that:

- He or she was subject to a physical impairment such that the nature, scope, and duration of the physical impairment reasonably prevented the applicant from filing the extension or change of status application;
- He or she has not otherwise violated his or her nonimmigrant status;
- He or she remained a bona fide nonimmigrant until the time he or she properly filed an adjustment application; and
- He or she is not in removal proceedings.

The adjustment applicant must include a corroborating letter from the hospital, attending, or treating physician that explains the circumstances, nature, scope, and duration of the physical impairment.

Technical Violation Involving Certain H-1 Nurses

An adjustment applicant may claim that he or she was only out of status because of legacy INS's application of the maximum period of stay for certain H-1 nurses. In this instance, the applicant must show that he or she was subsequently reinstated to H-1 status.[36] This special provision allowed for extension of H-1 status of certain registered nurses who held such status for at least five years and whose status expired in 1988 or 1989, or expired in 1987, but was under request for administrative extension.[37] While this exception still applies, it only covers a time period through December 31, 1989. Therefore, it is unlikely that an officer will encounter this exemption due to passage of time.

3. Effect of Extension of Stay and Change of Status[38]

At the time of adjustment, an officer must consider all of the applicant's current and previous entries into and stays in the United States, including current and previous applications for extension of stay (EOS) or change of status (COS).[39] The following examples provide more detail on the effect of EOS and COS applications on a pending adjustment application.

Timely Filed Application to Extend Stay Granted by USCIS

When USCIS approves a nonimmigrant's timely filed application to extend status, the start date of the extended status is retroactive to the expiration date of the initial or previously extended period of status. USCIS' practice of making the approval effective as of the prior expiration date recognizes that the nonimmigrant has been maintaining the same nonimmigrant status throughout the processing and adjudication of the extension application.

Example: Effect of Timely Filed Extension of Stay Application

Date	Event
January 1, 2009	An alien is admitted to the United States as a B-2 nonimmigrant visitor.
June 30, 2009	The B-2 nonimmigrant's authorized stay expires, as indicated on the Arrival/Departure Record (Form I-94).
June 1, 2009	The B-2 nonimmigrant timely files an application to extend visitor status.
August 1, 2009	The B-2 nonimmigrant files an adjustment application.
September 1, 2009	USCIS extends the B-2 nonimmigrant's visitor status valid from June 30, 2009 to December 31, 2009.

In this scenario, USCIS considers the applicant to have continuously maintained lawful status for purposes of adjusting status. In contrast, if USCIS denied the extension application, the applicant would have fallen out of status as of June 30 and would be barred from adjusting status, unless an exemption applies.

Timely Filed Application to Change Status Granted by USCIS

When USCIS approves a nonimmigrant's timely filed application to change status, the start date for the new nonimmigrant status is effective on the date of approval. The start date acknowledges the fact that USCIS only authorizes the nonimmigrant's change of status as of the date of the approval.

If a gap of time exists between the expiration date of the previous nonimmigrant status and the start date of the new status, USCIS considers the nonimmigrant to have continued to maintain a lawful status only if:

- The nonimmigrant timely filed the COS application;
- USCIS granted the request to change status; and
- The nonimmigrant did not violate any terms and conditions of the initial status.

Example: Effect of Timely Filed Change of Status Application

Date	Event
February 1, 2009	An alien is admitted as a B-1 nonimmigrant visitor.
July 1, 2009	An employer timely files a Petition for a Nonimmigrant Worker (Form I-129) on behalf of the B-1 nonimmigrant to change status to an L-1 nonimmigrant intracompany transferee.
August 1, 2009	The B-1 nonimmigrant's authorized stay expires, as indicated on the Arrival/Departure Record (Form I-94).
September 15, 2009	USCIS approves Form I-129 to change status and grants L-1 status as of September 15, 2009.

Even though there is a gap of nearly two months between the expiration date of the B-1 status and the date USCIS approved Form I-129, USCIS does not count the gap against the applicant when determining if they maintained status. In this case, USCIS considers the applicant to have maintained lawful status from February 1, 2009 through September 15, 2009 for purposes of adjusting status.

In contrast, if USCIS denied the application to change nonimmigrant status, the applicant would have fallen out of valid status as of August 1 and would be barred from adjusting status, unless an exemption applies.

Untimely Filed EOS or COS Application Excused and Granted by USCIS

USCIS generally denies EOS and COS applications when the applicant failed to maintain nonimmigrant status or when the applicant's status expired prior to filing the application.[40]

If an applicant's nonimmigrant status expires before he or she files an application to extend or change status, the application is not timely filed. USCIS has discretion to excuse the untimely filing and approve an EOS or COS application if the applicant can demonstrate that:

- The delay was due to extraordinary circumstances beyond the applicant's control;
- The officer finds the delay commensurate with the circumstances;
- The applicant has not otherwise violated his or her nonimmigrant status;
- The applicant remains a bona fide nonimmigrant; and
- The applicant is not in removal proceedings.

As with a timely EOS or COS application, if USCIS approves an untimely filed application to extend or change status, the approval is effective as of the date of the expiration of the prior nonimmigrant admission period. For this reason, USCIS considers the applicant to have maintained lawful status despite the gap in time between the expiration of the prior nonimmigrant admission and the date of the approval.

Example: Effect of Untimely Filed Extension of Stay Application Excused and Granted by USCIS

Date	Event
January 1, 2009	An alien is admitted to the United States as a B-2 nonimmigrant.
June 30, 2009	The B-2 nonimmigrant's authorized stay expires, as indicated on the Arrival/Departure Record (Form I-94).
August 5, 2009	The B-2 nonimmigrant untimely files a EOS application. The B-2 nonimmigrant explains that he was unable to file his extension request timely, because he was hospitalized with a debilitating medical condition when his B-2 status expired. He also provides corroborating evidence from the attending medical staff at the hospital.
September 1, 2009	USCIS excuses the untimely filing and approves the EOS application.

In this scenario, USCIS considers the applicant to have continuously maintained lawful status for purposes of adjusting status. In contrast, if USCIS denied the EOS application, the applicant would have fallen out of valid status as of June 30 and would be barred from adjusting status, unless an exemption applies.

F. Temporary Protected Status and Maintenance of Status – INA 245(c)(2)

For purposes of adjustment of status, an applicant in temporary protected status (TPS) is in and maintaining a lawful immigration status as a nonimmigrant during the period TPS is authorized.[41] In addition, if an applicant was eligible to apply for TPS but was prevented by regulation from filing a late application for TPS registration, the applicant is considered as maintaining a lawful nonimmigrant status until the TPS benefit is granted.[42]

Unless the applicant is otherwise exempt, the granting of TPS does not excuse or cure any other lapses or violations of lawful immigration status or forgive any unauthorized employment.

G. Properly Filed Adjustment Application – INA 245(c)(2) and INA 245(c)(8)

For purposes of the bars to adjustment, a nonimmigrant only needs to maintain his or her nonimmigrant status until the time he or she properly files an adjustment application with USCIS so long as the nonimmigrant does not engage in any unauthorized employment after filing the adjustment application.[43] An applicant does not violate the terms of his or her nonimmigrant status merely by filing an application to adjust status as long as the application was properly filed when the applicant was in lawful nonimmigrant status.[44]

H. National Security Entry Exit Registration System and Violation of Visa – INA 245(c)(8)

Although the National Security Entry Exit Registration System (NSEERS) special registration requirements for nonimmigrants from designated countries effectively ended on April 28, 2011, USCIS continues to review whether nonimmigrants subject to the special registration requirements complied with the terms of the special registration when it was in effect.[45]

USCIS considers whether there was a willful failure to register and whether any failure to register was reasonably excusable. USCIS may consult with ICE to resolve any compliance or non-compliance issues. A willful failure to comply with the former NSEERS special registration provisions constitutes a failure to maintain nonimmigrant status.[46]

I. Evidence to Consider

An officer may request and review any and all of the applicant's Arrival/Departure Records (Forms I-94), approval notices (Forms I-797), USCIS records, current and expired passports, and other evidence or testimony that pertains to maintenance of lawful status and compliance with the terms and conditions of nonimmigrant status.

Footnotes

[^ 1] The language "…other than through no fault of his own or for technical reasons…" listed in INA 245(c)(2) also applies to INA 245(c)(8) and is defined in 8 CFR 245.1(d)(2).

[^ 2] See INA 245(c)(2). See 8 CFR 245.1(b)(6). This chapter only addresses one of the three immigration violations described in the INA 245(c)(2) bar. For more information on the other two immigration violations, see Chapter 3, Unlawful Immigration Status at Time of Filing – INA 245(c)(2) [7 USCIS-PM B.3] and Chapter 6, Unauthorized Employment – INA 245(c)(2) and INA 245(c)(8) [7 USCIS-PM B.6].

[^ 3] See INA 245(c)(8). An example of violating the terms of a nonimmigrant status would be if a B-2 visitor were to enroll in college and attend classes. This chapter only addresses one of the two immigration violations described in the INA 245(c)(8) bar. For more information on the other immigration violation, see Chapter 6, Unauthorized Employment – INA 245(c)(2) and INA 245(c)(8) [7 USCIS-PM B.6].

[^ 4] See INA 201(b). Immediate relatives of a U.S. citizen include the U.S. citizen's spouse, children (unmarried and under 21 years of age), and parents (if the U.S. citizen is 21 years of age or older). Widow(er)s of U.S. citizens and aliens admitted to the United States as a fiancé(e) or child of a fiancé(e) of a U.S. citizen may also be considered immediate relatives if they meet certain conditions.

[^ 5] See INA 101(a)(27)(H).

[^ 6] See INA 101(a)(27)(I).

[^ 7] See INA 101(a)(27)(J).

[^ 8] See INA 101(a)(27)(K).

[^ 9] See Chapter 8, Inapplicability of Bars to Adjustment, Section E, Employment-Based Exemption under INA 245(k) [7 USCIS-PM B.8(E)].

[^ 10] See INA 245(c)(2). See Section I, Evidence to Consider [7 USCIS-PM B.4(I)].

[^ 11] See INA 245(k)(2)(A).

[^ 12] See INA 245(c)(8). The INA 245(c)(8) bar applies to an applicant "who has otherwise violated the terms of a nonimmigrant visa." The related provision in INA 245(k)(2)(C) exempts an eligible applicant who has "otherwise violated the terms and conditions of the alien's admission." Based on the direct connection to the INA 245(c)(8) bar, it is clear that the use of the word "admission" in INA 245(k)(2)(C) is referring to admission under a nonimmigrant visa. Therefore, this adjustment bar is referred to as either "violated the terms of the applicant's admission under a nonimmigrant visa" or as "violated the terms of the applicant's nonimmigrant status."

[^ 13] See Section D, Periods of Time to Consider [7 USCIS-PM B.4(D)].

[^ 14] See 8 CFR 214.

[^ 15] See 8 CFR 214.1(a)(3) and 8 CFR 215.8.

[^ 16] See 8 CFR 214.1(e).

[^ 17] See 8 CFR 264.1(f). See 76 FR 23830 (PDF) (Apr. 28, 2011). See Section H, National Security Entry Exit Registration System and Violation of Visa – INA 245(c)(8) [7 USCIS-PM B.4(H)].

[^ 18] See 8 CFR 214.1(f).

[^ 19] See 8 CFR 214.1(f).

[^ 20] See 8 CFR 214.1(g).

[^ 21] See 8 CFR 245.1(b)(6) and 8 CFR 245.1(d)(3). See 52 FR 6320, 6320-21 (Mar. 3, 1987).

[^ 22] This may include violations that occur after the applicant files the adjustment application. For more information, see Section G, Properly Filed Adjustment Application – INA 245(c)(2) and INA 245(c)(8) [7 USCIS-PM B.4(G)].

[^ 23] See 62 FR 39417, 39421 (PDF) (Jul. 23, 1997).

[^ 24] See 8 CFR 214.2(f)(16).

[^ 25] See INA 245(c)(2). See INA 245(c)(8). See Volume 1, General Policies and Procedures, Part H, Emergencies or Unforeseen Circumstances, Chapter 2, Emergencies or Unforeseen Circumstances-Related Flexibilities, Section A, Immigration Policy Flexibilities, Subsection 1, Nonimmigrants Present in the United States [1 USCIS-PM H.2(A)(1)].

[^ 26] See 8 CFR 245.1(d)(2). See 8 CFR 214.1(c)(4).

[^ 27] A parent who does not act on behalf of a child is not an instance of a qualifying inaction.

[^ 28] See Pub. L. 100-658 (PDF) (November 15, 1988).

[^ 29] If the adjustment of status application is approved, any pending EOS or COS applications should be administratively closed, indicating that status was acquired through other means. If the officer determines that the applicant did not meet one of the four conditions, any properly and timely filed pending EOS or COS should be adjudicated without prejudice to the filing of the adjustment application and the officer may then proceed with the adjudication of the adjustment application.

[^ 30] See 8 CFR 214.2(f) and (j). See 245.1(d)(2)(i).

[^ 31] See 52 FR 6320 (Mar. 3, 1987).

[^ 32] There may be certain exceptions that apply. The longstanding case on ineffective counsel has been Matter of Lozada (PDF), 19 I&N Dec. 637 (BIA 1988). In this case, the Board of Immigration Appeals (BIA) ruled that the alien must establish that he or she was prejudiced by the action or inaction of counsel. The BIA also described the requirements for filing a motion to reopen deportation (now removal) proceedings based on a claim of ineffective counsel. The alien's motion should be supported by an affidavit attesting to the relevant facts. The alien's affidavit should include a statement describing the agreement with counsel regarding specific actions to be taken and what counsel did or did not represent in that regard. The BIA also determined that former counsel must be informed of the allegations of ineffective assistance and be provided an opportunity to response. Lastly, per prior counsel's handling of the case involved a violation of ethical or legal responsibilities, the alien's motion should reflect whether a complaint has been filed with the appropriate disciplinary authorities. If not, the alien should explain the reason why.

[^ 33] See 8 CFR 245.1(d)(2)(ii).

[^ 34] See 52 FR 6320 (PDF) (Mar. 3, 1987).

[^ 35] See 8 CFR 245.1(d)(2)(iii).

[^ 36] For the terms of reinstatement, see Immigration Amendments of 1988, Pub. L. 101-658 (PDF) (November 15, 1988).

[^ 37] See Immigration Amendments of 1988, Pub. L. 100-658 (PDF) (November 15, 1988).

[^ 38] See Application to Extend/Change Nonimmigrant Status (Form I-539) or Petition for a Nonimmigrant Worker (Form I-129). If, for example, an alien would like to change his or her status from a visitor (B-1) to an L-1, a company or an organization would file Form I-129 on behalf of the alien.

[^ 39] See 8 CFR 214.1(c)(4) and 8 CFR 248.1(b).

[^ 40] Except in the case of an alien applying to obtain V nonimmigrant status. See INA 101(a)(15)(V). See 8 CFR 214.15(f).

[^ 41] See 8 CFR 244.10(f)(2)(iv).

[^ 42] See 8 CFR 244.10(f)(2)(v).

[^ 43] Even so, a properly filed adjustment of status application does not, in and of itself, accord lawful status or cure any violation of a nonimmigrant visa. For example, if an alien applied for adjustment of status three days prior to the expiration of his or her nonimmigrant status and USCIS eventually denies the adjustment application, the alien is considered to be in unlawful status after the expiration of the nonimmigrant status. Consequently, if the same alien later files a second adjustment application, the period of time after the nonimmigrant status expired and during which the first adjustment application was pending counts against the 180-day period when considering eligibility for relief under INA 245(k) in adjudication of the second adjustment application. See Dhuka v. Holder, 716 F. 3d 149 (5th Cir. 2013).

[^ 44] See 62 FR 39417, 39421 (PDF) (Jul. 23, 1997).

[^ 45] See 76 FR 23830 (PDF) (Apr. 28, 2011).

[^ 46] See INA 237(a)(1)(C)(i), INA 245(c)(8), and 8 CFR 214.1(f).

Chapter 5 - Employment-Based Applicant Not in Lawful Nonimmigrant Status (INA 245(c)(7))

Any employment-based adjustment applicant who is not in a lawful nonimmigrant status at the time of filing for adjustment is barred from adjusting status, even if the applicant is lawfully present in the United States.[1] For example, a parolee is barred from seeking employment-based adjustment, because a parolee is not a lawful nonimmigrant status.[2]

Employment-based applicants may be eligible for exemption from this bar under INA 245(k).[3] The INA 245(c)(7) bar also does not apply to Violence Against Women Act (VAWA)-based applicants, immediate relatives, family-based applicants, special immigrant juveniles, or certain members of the U.S. armed forces because these applicants are not seeking adjustment as employment-based applicants.[4]

For purposes of this bar to adjustment, the term "lawful nonimmigrant status" refers to:

- An applicant in a lawful status classified under the nonimmigrant statutory provisions;[5] and
- An applicant in temporary protected status.[6]

Lawful nonimmigrant status does not include parolees, asylees, or certain other aliens who are otherwise authorized to be physically present in the United States.

Period of Time to Consider and Effect of Departure

In determining whether this adjustment bar applies, an officer should only consider the applicant's immigration status on the date the applicant filed the current adjustment application. Any time the applicant was not in lawful status prior to filing the adjustment application is irrelevant for INA 245(c)(7) purposes.

Furthermore, this bar does not apply to applicants who were in a lawful nonimmigrant status at the time of filing for adjustment, subsequently left the United States, and returned using an approved advance parole travel document while the adjustment application remains pending. Advance parole simply allows the applicant to resume the processing of the adjustment application without abandoning the application because of a brief departure.

The examples below highlight when this adjustment bar applies and when it does not apply.

Example: Effect of Current and Prior Immigration Status on INA 245(c)(7) Bar

Date	Event
April 26, 2009	An alien is admitted as a B-2 nonimmigrant visitor and departs the United States on August 5, 2009.
September 2, 2009	The alien is paroled into the United States on public interest grounds until September 1, 2010.
December 20, 2009	The alien is approved as the beneficiary of a second-preference employment-based immigrant visa petition on December 20, 2009.
January 7, 2010	The alien files an adjustment of status application on January 7, 2010.

In this case, even though the applicant had previously been a B-2 nonimmigrant, the applicant was a parolee at the time of filing for adjustment of status. Therefore, INA 245(c)(7) bars the applicant from adjustment of status as the beneficiary of an employment-based petition.

Example: Effect of No Lawful Status on INA 245(c)(7) Bar

Date	Event
January 2, 2008	An alien is admitted as an H-2B nonimmigrant.
January 1, 2009	The H-2B nonimmigrant's authorized stay expires, as indicated on the Arrival/Departure Record (Form I-94).
April 1, 2009	A company files an employment-based immigrant visa petition for the alien concurrently with the filing of an adjustment of status application.

In this case, the applicant stayed past the time authorized to remain in the United States and was not in a valid nonimmigrant status at the time his adjustment application is filed. INA 245(c)(7) bars the applicant from adjusting status under an employment basis. The applicant, however, may qualify for the INA 245(k) exemption.[7]

Example: Effect of Departure Following Grant of Advance Parole on INA 245(c)(7) Bar

Date	Event
January 2, 2008	An alien is admitted as an H-2B nonimmigrant.
March 2, 2008	A company files an employment-based petition for the H-2B nonimmigrant concurrently with the following applications: adjustment of status, advance parole, and employment authorization.
April 1, 2008	The H-2B nonimmigrant has a family emergency and needs to travel back to her home country.
May 1, 2008	USCIS grants the H-2B nonimmigrant's advance parole application.
June 1, 2008	The H-2B nonimmigrant returns to the United States using her advance parole document.
August 1, 2008	USCIS approves the H-2B nonimmigrant's adjustment application.
January 1, 2009	The H-2B nonimmigrant's authorized stay expires, as indicated on the Arrival/Departure Record (Form I-94).

In this instance, the adjustment application is properly filed before expiration of the applicant's H-2B nonimmigrant status. Even though the adjustment applicant departs and returns to the United States using the advance parole document, the INA 245(c)(7) bar does not apply to the applicant.

Footnotes

[^ 1] See 8 CFR 245.1(b)(9).

[^ 2] This bar does not apply to applicants who were in a lawful nonimmigrant status at the time of filing for adjustment, subsequently left the United States on advance parole, and subsequently were paroled into the United States upon return while the adjustment application remains pending. The parole simply allows the applicant to resume the processing of the adjustment application without having the application considered abandoned due to a brief departure. See 62 FR 39417, 39421 (PDF) (Jul. 23, 1997).

[^ 3] See Chapter 8, Inapplicability of Bars to Adjustment, Section E, Employment-Based Exemption under INA 245(k) [7 USCIS-PM B.8(E)].

[^ 4] See 8 CFR 245.1(b)(9).

[^ 5] See INA 101(a)(15).

[^ 6] See INA 244(f)(4). See 8 CFR 244.10(f)(2)(iv)-(v).

[^ 7] See Chapter 8, Inapplicability of Bars to Adjustment, Section E, Employment-Based Exemption under INA 245(k) [7 USCIS-PM B.8(E)].

Chapter 6 - Unauthorized Employment (INA 245(c)(2) and INA 245(c)(8))

With certain exceptions, an applicant is barred from adjusting status if:

- He or she continues in or accepts unauthorized employment prior to filing an application for adjustment of status;[1] or
- He or she has ever engaged in unauthorized employment, whether before or after filing an adjustment application.[2]

These bars apply not only to unauthorized employment since an applicant's most recent entry but also to unauthorized employment during any previous periods of stay in the United States.[3]

As previously discussed, the INA 245(c)(2) and INA 245(c)(8) bars to adjustment do not apply to:[4]

- Immediate relatives;
- Violence Against Women Act (VAWA)-based applicants;
- Certain physicians and their accompanying spouse and children;[5]
- Certain G-4 international organization employees, NATO-6 employees, and their family members;[6]
- Special immigrant juveniles;[7] or

- Certain members of the U.S. armed forces and their accompanying spouse and children.[8]

Employment-based applicants also may be eligible for exemption from this bar under INA 245(k).[9]

An applicant employed while his or her adjustment application is pending final adjudication must maintain USCIS employment authorization and comply with the terms and conditions of that authorization.[10] The filing of an adjustment application itself does not authorize employment.

A. Definitions

1. Unauthorized Employment

Unauthorized employment is any service or labor performed for an employer within the United States by an alien who is not authorized by the INA or USCIS to accept employment or who exceeds the scope or period of the alien's employment authorization.[11]

Example: Unauthorized Employment Resulting in Adjustment Bar

Date	Event
January 2, 2005	An alien is admitted as an H-1B nonimmigrant to work for an employer.
April 1, 2006	The alien takes a position with another employer who fails to file a nonimmigrant visa petition for the alien prior to employment.
August 15, 2007	The new employer files an employment-based immigrant visa petition for the alien that is approved. The alien concurrently files an adjustment application.
September 15, 2007	USCIS approves an Employment Authorization Document (EAD) for the alien based on the pending adjustment application.
January 1, 2008	The H-1B nonimmigrant's authorized stay expires, as indicated on the Arrival/Departure Record (Form I-94).

In this example, the applicant left his authorized H-1B employer in April 2006. The applicant was not granted any H-1B status, EAD, or other USCIS employment authorization allowing him to work elsewhere until September 15, 2007. Therefore, the applicant's employment with the second employer was unauthorized from April 1, 2006, until September 15, 2007. The applicant is barred from adjusting status based on INA 245(c)(2) and INA 245(c)(8) for the unauthorized employment violations.[12]

2. Authorized Employment

For purposes of these bars, an applicant is authorized to work while a properly filed adjustment application is pending if:

- The applicant applied for and USCIS authorized employment;[13]
- USCIS granted the applicant employment authorization prior to filing an adjustment application and the authorization does not expire while the adjustment application is pending; or
- The applicant did not need to apply for work authorization, because such authorization is incident to the applicant's nonimmigrant status.[14]

Certain categories of nonimmigrants are authorized to engage in employment as an incident of status, subject to any restrictions stated in the regulations.[15] As long as the adjustment applicant complies with applicable terms and conditions of the nonimmigrant status, the applicant does not need to obtain an EAD to continue authorized employment during the time specified while the adjustment application is pending. These applicants, however, may apply for an EAD if they prefer.

In all other cases, an adjustment applicant must file an Application for Employment Authorization (Form I-765) concurrently with or subsequent to filing an Application to Register Permanent Residence or Adjust Status (Form I-485) and await USCIS issuance of the EAD before engaging in employment.[16] This includes refraining from employment after the applicant's work-authorized status or previously approved EAD expires until USCIS issues the new EAD.

Finally, in all cases, if USCIS denies the adjustment application, any EAD granted based on that adjustment application may be subject to termination.[17]

B. Periods of Time to Consider and Effect of Departure

The INA 245(c)(2) bar applies to unauthorized employment prior to filing the adjustment application. The departure and subsequent reentry of an applicant who was employed without authorization in the United States prior to filing an adjustment application does not erase the this bar. Otherwise, an applicant who engaged in unauthorized employment could simply depart the United States, reenter immediately, and become eligible to file for adjustment of status.[18]

The INA 245(c)(8) bar applies to any time engaged in unauthorized employment while physically present in the United States regardless of whether it occurred before or after submission of the adjustment application. USCIS places no time restrictions on when unauthorized employment must have occurred, because the INA does not state that the unauthorized employment must have occurred during any particular period of time.[19]

An officer, therefore, should review an applicant's entire employment history in the United States to determine whether the applicant has engaged in unauthorized employment. In addition to an applicant's most recent entry and admission, an officer should examine all of the applicant's previous entries and admissions into the United States. An officer should disregard how much time has passed since each entry and whether the applicant subsequently left the United States and returned lawfully.

C. Evidence to Consider

An officer may request, review, and consider the following documentation to determine whether the applicant may be barred from adjustment based on unauthorized employment under INA 245(c)(2) or INA 245(c)(8):

- Arrival/Departure Record (Form I-94);
- Notice of Action (Form I-797);
- Pay stubs;
- W-2 statements;
- Income tax records;
- Employment contracts; and
- Any additional documents, evidence, or testimony regarding the nature and scope of the applicant's employment history in the United States.

Footnotes

[^ 1] See INA 245(c)(2).

[^ 2] See INA 245(c)(8).

[^ 3] See Section B, Periods of Time to Consider and Effect of Departure [7 USCIS-PM B.6(B)].

[^ 4] Both INA 245(c)(2) and INA 245(c)(8) bar applicants from adjusting if they have engaged in unauthorized employment. However, the language of INA 245(c)(2) includes a specific exclusion for immediate relatives and certain special immigrants that is missing from the language of INA 245(c)(8). Applying traditional concepts of statutory construction, USCIS interprets the exemptions in INA 245(c)(2) to apply to INA 245(c)(8) as well. See 62 FR 39417 (PDF), 39422 (Jul. 23, 1997). See 8 CFR 245.1(b)(10).

[^ 5] See INA 101(a)(27)(H).

[^ 6] See INA 101(a)(27)(I). This group is exempt from INA 245(c)(2), INA 245(c)(7), and INA 245(c)(8).

[^ 7] See INA 101(a)(27)(J).

[^ 8] See INA 101(a)(27)(K).

[^ 9] See Chapter 8, Inapplicability of Bars to Adjustment, Section E, Employment-Based Exemption under INA 245(k) [7 USCIS-PM B.8(E)].

[^ 10] See INA 274A, 8 CFR 274a, and 62 FR 39417 (PDF) (Jul. 23, 1997).

[^ 11] See 8 CFR 274a.12(a)-(c) for examples of authorized employment.

[^ 12] While there is an exemption under INA 245(k) for employment-based applicants who have worked without authorization, the applicant is not eligible to claim that exemption because “the applicant’s unauthorized employment exceeded the 180-day limitation. INA 245(k) only applies to certain applicants whose immigration violations, if any, do not exceed the 180-day limit.

[^ 13] See 8 CFR 274a.12, which indicates classes of aliens that must apply for work authorization.

[^ 14] See 62 FR 39417, 39421 (PDF) (Jul. 23, 1997).

[^ 15] Examples of nonimmigrants authorized to work incident to status include E-1, E-2, E-3, H-1B, H-3, L-1, O-1, P-1, and R-1, among others.

[^ 16] See 8 CFR 274a.12(c)(9).

[^ 17] See 8 CFR 274a.14(b).

[^ 18] See 52 FR 6320, 6320-21 (PDF) (Mar. 3, 1987). See Chapter 8, Inapplicability of Bars to Adjustment [7 USCIS-PM B.8].

[^ 19] See 8 CFR 245.1(b)(10). See 62 FR 39417, 39421 (PDF) (Jul. 23, 1997).

Chapter 7 - Other Barred Adjustment Applicants

There are additional classes of applicants barred from adjusting status. When determining whether the bars below apply, an officer should only consider the applicant’s current period of stay since the most recent admission into the United States prior to filing his or her adjustment application, unless the applicant is an alien removable for engagement in terrorist activity.

When reviewing whether the bar for aliens removable for engagement in terrorist activity applies, an officer should examine every entry, admission, and time spent in the United States by the applicant. It is irrelevant how much time has passed since each entry or whether the applicant subsequently left the United States and returned lawfully.

A. Alien Crewmen

An alien crewman is barred from adjusting status.[1] This bar applies to an applicant serving as a crewman who is permitted to land as a D-1 or D-2 nonimmigrant, as shown on the applicant’s Arrival/Departure Record (Form I-94) or Crewman’s Landing Permit (Form I-95), and by the corresponding visa contained in the crewman’s passport. The bar also applies to an applicant who was admitted as a C-1 nonimmigrant to join a crew.[2]

In addition, the applicant’s service as a crewman is controlling regardless of the applicant’s actual nonimmigrant status, if any. For example, an applicant admitted in B-2 nonimmigrant visitor status while serving as a crewman is barred from adjustment.[3] The bar applies even if the applicant was not employed as a crewman in the sense of serving as a crewman for pay.[4] The bar does not apply, however, to Violence Against Women Act (VAWA)-based applicants.

B. Alien Admitted in Transit Without Visa

Any alien admitted to the United States in transit without a visa (TWOV) is barred from adjusting status.[5] This bar does not apply to an alien who was admitted as a transit alien with a C-1 or C-2 or C-3 nonimmigrant visa.

On August 2, 2003, DHS and the Department of State suspended the TWOV program. On August 7, 2003, DHS published an interim rule implementing the suspension.[6] Aliens who transit through the United States after that date are required to obtain a C nonimmigrant visa.[7] Thus, the bar does not apply to an alien (other than crewmen) admitted as a C-1 or C-2 or C-3 nonimmigrant if the alien had a C-1, C-2, or C-3 nonimmigrant visa in order to transit through the United States. Nevertheless, INA 245(c)(3) still bars an applicant who, in fact, was admitted as a TWOV when he or she last came to the United States. The bar does not apply, however, to VAWA-based applicants.

C. Visa Waiver Programs

An alien admitted as a nonimmigrant without a visa under a Visa Waiver Program is barred from adjustment of status.[8] Similarly, an alien admitted as a nonimmigrant without a visa to Guam or to the CNMI is barred from adjustment of status.[9] These bars do not apply, however, to those seeking to adjust status as an immediate relative of a U.S. citizen or VAWA-

based applicants.

D. Alien Admitted as Witness or Informant

An alien admitted to the United States as an informant of terrorist or criminal activity (S nonimmigrant) is barred from adjusting status.[10] The state or federal law enforcement agency (LEA) that originally requested the alien's S nonimmigrant status may request that the S nonimmigrant be allowed to adjust status to that of a lawful permanent resident. The LEA initiates this special process through a filing with the Department of Justice.[11] Aliens admitted as S nonimmigrants are prohibited from seeking adjustment of status apart from this process. The bar does not apply, however, to VAWA-based applicants.

E. Alien Removable for Engagement in Terrorist Activity

An alien is barred from adjusting status if:

- He or she is deportable for having engaged in or incited terrorist activity;
- He or she has been a member of or received military training from a terrorist organization; or
- He or she has been associated with terrorist organizations, and he or she intends to engage in such activities while in the United States that could endanger the welfare, safety, or security of the United States.[12]

The officer should consider all entries and time periods spent inside the United States when determining whether this bar applies. Furthermore, any restricted activity, whether it occurs before or after an applicant files the adjustment application, bars the applicant from adjusting status. Finally, in addition to the adjustment bar, the applicant may also be inadmissible for such activity.[13] While the bar does not apply to VAWA-based applicants, VAWA-based applicants may still be inadmissible for such activity.

F. Nonimmigrant Admitted as Fiancé(e) of U.S. Citizen

A nonimmigrant fiancé(e) of a U.S. citizen cannot adjust status except on the basis of the marriage to the U.S. citizen who filed a Petition for Alien Fiancé(e) (Form I-129F) on behalf of the fiancé(e).[14] Likewise, a child of the fiancé(e) may only adjust on the basis of his or her parent's marriage to the U.S. citizen petitioner.[15]

The terms of the nonimmigrant fiancé(e) status require that the nonimmigrant fiancé(e) marry the petitioner within 90 days after becoming a nonimmigrant.[16] Furthermore, if the nonimmigrant has not been married for two years or more at the time of adjustment, the nonimmigrant fiancé(e) and any children of the fiancé(e) may only obtain permanent residence on a conditional basis.[17]

Marriage Legally Terminated

A nonimmigrant fiancé(e) who contracts a valid and bona fide marriage to the U.S. citizen petitioner within the requisite 90-day time period remains eligible to adjust status on that basis, even if the marriage is legally terminated (whether by death, dissolution, or divorce) prior to adjustment of status and regardless of whether the nonimmigrant fiancé(e) remarries thereafter.[18] The applicant remains subject to all conditional permanent residency requirements, if applicable.[19]

G. Conditional Permanent Residents

In general, an alien granted lawful permanent resident status on a conditional basis[20] is ineligible to adjust status on a new basis under the provisions of INA 245(a).[21] Instead, conditional permanent residents (CPRs) must generally comply with the requirements of INA 216 or 216A to remove the conditions on their lawful permanent resident status.[22]

This bar to adjustment, however, only applies to an alien in the United States in lawful CPR status. In *Matter of Stockwell (PDF)*,[23] the Board of Immigration Appeals adopted a narrow interpretation of the regulation implementing this adjustment bar,[24] stating that the bar no longer applies if USCIS terminates the alien's CPR status.[25]

USCIS can terminate CPR status for reasons specified in INA 216 or INA 216A.[26] Although the immigration judge may review the termination in removal proceedings, the bar no longer applies upon USCIS terminating the CPR status; it is not necessary that an immigration judge have affirmed USCIS' decision to terminate CPR status before the alien may file a new adjustment application.

Therefore, under INA 245(a), USCIS may adjust the status of an alien whose CPR status was previously terminated, if:[27]

- The alien has a new basis for adjustment;
- The alien is otherwise eligible to adjust;[28] and
- USCIS has jurisdiction over the adjustment application.[29]

When seeking adjustment of status again, the applicant may not reuse the immigrant petition associated with the previous CPR adjustment or admission. Therefore, the applicant must have a new basis to adjust.

An applicant seeking to adjust status again who was admitted as a fiancé(e) (K nonimmigrant) may only re-adjust based on an approved Petition for Alien Relative (Form I-130) filed by the same U.S. citizen who filed the Petition for Alien Fiancé(e) (Form I-129F) on his or her behalf.[30]

The applicant must also be otherwise eligible to adjust status including not being inadmissible or barred by INA 245(c).

Adjudication and Decision

If the applicant successfully adjusts status on a new basis, USCIS generally considers the date of admission to be the date USCIS approved the subsequent adjustment application.[31] Time spent in the prior CPR status does not count toward the residency requirement for naturalization purposes.[32]

If USCIS determines the applicant is not eligible to adjust, USCIS denies the application.[33] USCIS officers should follow current agency guidance on issuing a Notice to Appear after denying the application.[34]

Footnotes

[^ 1] See INA 245(c)(1).

[^ 2] See *Matter of Tzimas (PDF)*, 10 I&N Dec. 101 (BIA 1962).

[^ 3] See *Matter of Campton (PDF)*, 13 I&N Dec. 535, 538 (BIA 1970). See *Matter of G-D-M- (PDF)*, 25 I&N Dec. 82 (BIA 2009) (service as crewman, not nonimmigrant status, is controlling for determining eligibility for non-lawful permanent resident cancellation).

[^ 4] See *Matter of Campton (PDF)*, 13 I&N Dec. 535, 538 (BIA 1970).

[^ 5] See INA 245(c)(3).

[^ 6] See 68 FR 46926 (PDF) (Aug. 7, 2003).

[^ 7] See INA 101(a)(15)(C). See 68 FR 46926, 46926-28 (PDF) (Aug. 7, 2003). See 68 FR 46948, 46948-49 (PDF) (Aug. 7, 2003).

[^ 8] See INA 217. See INA 245(c)(4).

[^ 9] See INA 212(l). See INA 245(c)(4).

[^ 10] See INA 245(c)(5).

[^ 11] See INA 245(j). See 8 CFR 245.11.

[^ 12] See INA 245(c)(6). See INA 237(a)(4)(B). See INA 212(a)(3)(B) and INA 212(a)(3)(F). See INA 212(a)(3)(B) in general for definitions related to terrorist activities and exceptions.

[^ 13] See INA 212(a)(3).

[^ 14] See INA 101(a)(15)(K). See INA 245(d).

[^ 15] See INA 245(d).

[^ 16] See INA 214(d). See INA 101(a)(15)(K).

[^ 17] See INA 245(d) and INA 216. See *Matter of Sesay (PDF)*, 25 I&N Dec. 431 (2011).

[^ 18] See *Matter of Sesay (PDF)*, 25 I&N Dec. 431 (2011). See *Matter of Dixon (PDF)*, 16 I&N Dec. 355 (BIA 1977). See *Matter of Blair (PDF)*, 14 I&N Dec. 153 (Reg. Comm.1972). The marriage upon which the alien obtained K nonimmigrant status must have been bona fide, even if it was terminated, in order to adjust status. See *Lutwak v. United States*, 344 U.S. 604 (1953). See *Matter of Laureano (PDF)*, 19 I&N Dec. 1 (BIA 1983). If the evidence would permit a reasonable fact finder to conclude that the marriage was not bona fide, adjustment would properly be denied. It is necessary to follow the standard procedure in 8 CFR 103.2(b)(16) before denying adjustment based on evidence of which the applicant may not be aware.

[^ 19] See INA 245(d) and INA 216.

[^ 20] See INA 216 and INA 216A.

[^ 21] See INA 245(d) and INA 245(f). See 8 CFR 245.1(c)(5).

[^ 22] See Petition to Remove the Conditions on Residence (Form I-751) and Petition by Investor to Remove Conditions on Permanent Resident Status (Form I-829).

[^ 23] See *Matter of Stockwell (PDF)*, 20 I&N Dec. 309 (BIA 1991).

[^ 24] See 8 CFR 245.1(c)(5) (previously 8 CFR 245.1(b)(12), which *Matter of Stockwell* cites to).

[^ 25] The same is also true if the alien loses his or her CPR status, for example, through abandonment, rescission, or the entry of an administratively final order of removal. See INA 246 and 8 CFR 1.2.

[^ 26] USCIS issues a Notice to Appear upon termination. See 8 CFR 216.3(a), 216.4(b)(3), 216.4(d)(2), 216.5(f), 216.6(a)(5), 216.6(b)(3), and 216.6(d)(2). An alien whose CPR status is terminated by USCIS may request an immigration judge review that termination decision during removal proceedings.

[^ 27] If an alien's adjustment application was denied before the effective date of this guidance, November 21, 2019, the alien may file a new adjustment application (unless he or she is still able to timely file a motion to reopen or reconsider) for USCIS to adjudicate his or her application based on this guidance. See Notice of Appeal or Motion (Form I-290B) for more information.

[^ 28] For general information on eligibility for adjustment, see Part A, Adjustment of Status Policies and Procedures [7 USCIS-PM A].

[^ 29] Once removal proceedings have commenced, jurisdiction over an application for adjustment of status generally rests with the Executive Office for Immigration Review (EOIR). Therefore, USCIS generally does not have jurisdiction to adjudicate adjustment applications for applicants in removal proceedings, unless EOIR subsequently terminates those proceedings. Additionally, it is not necessary that an immigration judge have affirmed USCIS' decision to terminate CPR status before the new adjustment application may be filed. For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section D, Jurisdiction [7 USCIS-PM A.3(D)].

[^ 30] See INA 245(d) and 8 CFR 245.1(c)(6). See *Caraballo-Tavera v. Holder*, 683 F.3d 49 (2nd Cir. 2012). However, a K-1 nonimmigrant who is subsequently granted U nonimmigrant status (for victims of qualifying criminal activity) or T nonimmigrant status (for victims of a severe form of trafficking in persons) while in the United States may apply to adjust status based on any eligibility category that applies to him or her. See INA 248(b).

[^ 31] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 11, Decision Procedures, Section A, Approvals, Subsection 1, Effective Date of Permanent Residence [7 USCIS-PM A.11(A)(1)].

[^ 32] For more information, see Volume 12, Citizenship and Naturalization, Part D, General Naturalization Requirements, Chapter 3, Continuous Residence [12 USCIS-PM D.3].

[^ 33] For more information on denials, see Part A, Adjustment of Status Policies and Procedures, Chapter 11, Section C, Denials [7 USCIS-PM A.11(C)].

[^ 34] See Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens, PM-602-0187, issued February 28, 2025.

Chapter 8 - Inapplicability of Bars to Adjustment

Some or all of the INA 245(c) adjustment bars do not apply to certain categories of adjustment applicants. When adjudicating an adjustment application, an officer should carefully consider which bars apply.

A. VAWA Self-Petitioners and Beneficiaries

All bars to adjustment do not apply to a battered or abused spouse, child, or parent of a U.S. citizen or a battered or abused spouse or child of a lawful permanent resident with an approved Violence Against Women Act (VAWA) self-petition.[1]

B. Immediate Relatives

Certain adjustment bars do not apply to an immediate relative, including the spouse or child (unmarried and under 21 years old) of a U.S. citizen, and the parent of a U.S. citizen older than 21.[2]

An adjustment applicant applying as an immediate relative may be eligible to adjust status even if:

- The applicant is now employed or has ever been employed in the United States without authorization;
- The applicant is not in lawful immigration status on the date he or she files the adjustment application;
- The applicant has ever failed to continuously maintain a lawful status since entry into the United States;
- The applicant was last admitted to Guam or the Commonwealth of the Northern Mariana Islands (CNMI) as a visitor under the Guam or CNMI Visa Waiver Program and is not a Canadian citizen;
- The applicant was last admitted to the United States as a nonimmigrant visitor without a visa under the Visa Waiver Program; or
- The applicant has ever violated the terms of his or her nonimmigrant status.

C. Certain Special Immigrants

Some adjustment bars to not apply to certain special immigrants (employment-based fourth preference category), depending on program-specific requirements. Specific information about some of these special immigrants and the adjustment bars that apply to them is provided below.

1. Religious Workers[3]

An adjustment applicant may be eligible to adjust status based on an approved religious worker petition even if:

- The applicant is now employed or has ever been employed in the United States without authorization;
- The applicant is not maintaining a lawful nonimmigrant status on the date he or she files the adjustment application;
- The applicant has ever failed to continuously maintain a lawful status since entry into the United State; or
- The applicant has ever violated the terms of his or her nonimmigrant status.

2. Special Immigrant Juveniles[4]

The only adjustment bar that applies to a special immigrant juvenile adjustment applicant is the bar for being deportable due to involvement in a terrorist activity or group.[5] There is no exemption if this bar applies.

3. Afghanistan and Iraq Nationals[6]

This immigrant visa category generally includes:

- Special immigrant Afghanistan or Iraq national who worked with the U.S. armed forces as a translator;
- Special immigrant Iraq national who was employed by or on behalf of the U.S. government; and
- Special immigrant Afghanistan national who was employed by or on behalf of the U.S. government or in the International Security Assistance Force (ISAF) in Afghanistan.

An adjustment applicant applying as a special immigrant Afghanistan or Iraq national may be eligible to adjust status even if:

- The applicant is now employed or has ever been employed in the United States without authorization;
- The applicant is not in lawful immigration status on the date he or she files the adjustment application;
- The applicant has ever failed to continuously maintain a lawful status since entry into the United States;
- The applicant is not maintaining a lawful nonimmigrant status on the date he or she files the adjustment application; or
- The applicant has ever violated the terms of his or her nonimmigrant status.

4. G-4 International Organization Employees, NATO-6 Employees, and Their Family Members

This immigrant visa category generally includes:

- Retired officer or employee of an international organization or a North Atlantic Treaty Organization (NATO) (and derivative spouse);
- Surviving spouse of a deceased officer or employee of an international organization or NATO; and
- Unmarried son or daughter of a current or retired officer or employee of an international organization or NATO.

An adjustment applicant applying as a NATO-6 employee or family member is ineligible for adjustment of status if any of the bars to adjustment of status apply. However, certain adjustment bars do not apply to G-4 international organization employees and family members.[7] A G-4 international organization employee or family member may be eligible to adjust status even if:

- The applicant is now employed or has ever been employed in the United States without authorization;
- The applicant is not in lawful immigration status on the date he or she files the adjustment application;

- The applicant has ever failed to continuously maintain a lawful status since entry into the United States; or
- The applicant has ever violated the terms of his or her nonimmigrant visa.

If a G-4 special immigrant falls under any other adjustment bar, however, he or she is not eligible to adjust status.

More information on the adjustment bar applicability and exemptions available to special immigrants is provided in the program-specific parts of this Volume.

D. Applicants Eligible to Adjust under INA 245(i)

An applicant who is ineligible to adjust status under INA 245(a) or is barred from adjusting by INA 245(c) may be eligible to adjust status under INA 245(i).

E. Employment-Based Exemption under INA 245(k)

INA 245(k) provides certain employment-based adjustment applicants with an exemption from the INA 245(c)(2), INA 245(c)(7), and INA 245(c)(8) adjustment bars.

This exemption applies to an applicant who has not failed to maintain a lawful status, engaged in unauthorized employment, or violated the terms and conditions of his or her admission for an aggregate period exceeding 180 days. When determining whether an applicant is eligible for the INA 245(k) exemption, USCIS only considers the time period following the applicant's most recent lawful admission. Therefore, the exemption applies to:

- An eligible applicant who fails to maintain a lawful status, engages in unauthorized employment, or violates the terms and conditions of his or her nonimmigrant visa following his or her most recent admission, as long as the aggregate period of the violations is 180 days or less;
- An eligible applicant who does not commit any status, employment, or nonimmigrant visa violations following his or her most recent lawful admission but failed to maintain a lawful status, engaged in unauthorized employment, or violated the terms and conditions of his or her nonimmigrant visa following previous admissions or entries, regardless of the aggregate period of the violations; and
- An eligible applicant who has committed status, nonimmigrant visa, and employment violations following his or her previous admissions or entries and his or her most recent lawful admission, as long as the aggregate period of the violations following the most recent lawful admission is 180 days or less. The 180-day period can range from 0 days for no violations to a maximum of 180 days for multiple violations following the applicant's most recent admission.

The table below summarizes the effect of certain immigration violations on eligibility for the exemption.

Certain Immigration Violations Committed During Various Time Periods in the United States and Their Effect on Eligibility for INA 245(k) Exemption

Following Most Recent	Following Previous Admissions or Entries	Eligible for Exemption?
Commits status, employment, or nonimmigrant visa violations not exceeding 180 days	Does not commit any status, employment, or nonimmigrant visa violations OR Commits status, employment, or nonimmigrant visa violations, regardless of whether exceeds 180 days	Yes
Commits status, employment, or nonimmigrant visa violations exceeding 180 days	Does not commit any status, employment, or nonimmigrant visa violations OR Commits status, employment, or nonimmigrant visa violations, regardless of whether exceeds 180 days	No
Does not commit any status, employment, or nonimmigrant visa violations	Commits status, employment, or nonimmigrant visa violations, regardless of whether exceeds 180 days	Yes

1. General Eligibility

An adjustment applicant must meet the following requirements to be eligible for the INA 245(k) exemption:

- The applicant must be eligible to adjust based on certain employment-based immigrant categories;
- The applicant must be physically present in the United States on the date he or she files the adjustment application pursuant to a lawful admission; and
- The applicant must not have committed certain immigration violations for more than 180 days in the aggregate following that last lawful admission.

2. Employment-Based Applicants

An adjustment applicant seeking the INA 245(k) exemption must be the beneficiary of an approved immigrant petition in one of the following employment-based categories:

- Aliens of extraordinary ability, outstanding professors and researchers, and certain multinational managers and executives (1st preference, EB-1);
- Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability(2nd preference, EB-2);
- Skilled workers, professionals, and other workers (3rd preference, EB-3);
- Qualified immigrant investors (5th preference, EB-5); or
- Religious workers.[8]

Eligible dependents of principal applicants described above may also benefit from the exemption in their own right if they meet the exemption requirements.

3. Violations Totaling More Than 180 Days

To be eligible for the exemption, an adjustment applicant must not have committed any of the following immigration violations for more than an aggregate of 180 days since the applicant's most recent lawful admission:

- Failed to continuously maintain a lawful immigration status;
- Engaged in unauthorized employment; or
- Violated the terms of the applicant's nonimmigrant status.

Count Only Violations After Most Recent Lawful Admission

When determining whether an applicant is eligible for the exemption, the law counts only status violations and unauthorized employment since the applicant's most recent lawful admission. Any such violations the applicant committed during previous periods of stay in the United States are not counted.[9]

Therefore, regardless of how many days of immigration violations described in INA 245(c)(2), INA 245(c)(7), or INA 245(c)(8) an applicant commits, if he or she leaves and is readmitted lawfully (and is an eligible employment-based adjustment applicant), the applicant may qualify for an the exemption if the applicant's violations do not total more than 180 days in the aggregate since that most recent lawful admission.

Example: Effect of Immigration Violations Committed During Previous Period of Stay

Date	Event
January 1, 2015	An alien is admitted as an F-1 nonimmigrant student authorized to attend a university full-time.
March 1, 2015	The alien stops attending the university.
December 1, 2015	The alien departs the United States.
January 1, 2016	The alien is admitted for one year as a B-2 nonimmigrant visitor.
June 1, 2016	The alien files an adjustment application with an employer's immigrant petition seeking EB-2 classification.

In this example, the alien violated her nonimmigrant status when she stopped attending the university. This violation resulted in the alien's failure to maintain lawful status from March 1 through November 30, a total of 275 days of immigration violations. When the alien applies for adjustment on June 1, 2016, however, she has committed no immigration violations since her most recent lawful admission.

Because the alien is an employment-based adjustment applicant and since her last lawful admission she has not exceeded the 180-day limit on immigration violations imposed by INA 245(k), the alien qualifies for the exemption. Therefore, the alien is exempted from the INA 245(c)(2) and INA 245(c)(8) bars that would otherwise have made her ineligible for adjustment. The 275 days of violations the alien committed during her prior stay in the United States are irrelevant and do not bar her from adjustment.

Effect of Parole

An adjustment applicant who entered the United States on parole is not "lawfully admitted" because parole is not an admission.[10] Therefore, entry or reentry based on parole does not restart the clock for purposes of calculating status or work violations under the exemption.

For example, an applicant who was lawfully admitted, worked without authorization for one year, and then departed and returned on parole does not qualify for the exemption. Because the parole is not an admission, the applicant's unauthorized employment still counts since it occurred following his last lawful admission. The one year of unauthorized employment exceeds the 180-day limit, making the applicant ineligible for the exemption and therefore barred from adjustment by INA 245(c)(2)and INA 245(c)(8) based on the unauthorized employment.

4. Calculating Period of Violations

If an applicant has committed a status or employment violation following his or her most recent lawful admission, the phrase "aggregate period not exceeding 180 days" means the total of all types of violations taken together. The 180-day period is not counted separately for each type of violation, but altogether.

The officer should count each day in which one or more of these violations existed as one day. Any day in which more than one violation occurred should not be double-counted. Accordingly, an officer should add together any and all days in which there is one or more of the violations to determine if the violations, as a whole, exceed the 180-day limit.

Failed to Maintain Lawful Status or Violated Terms of Nonimmigrant Status

In most cases, the counting of days against the 180-day limit begins on the earliest of the following:

- The day the applicant's immigration status expired;
- The day the applicant's immigration status was revoked or rescinded; or
- The day the applicant violated his or her immigration status.

The counting of days out of status usually stops on the earliest of the following:

- The day the applicant properly files an adjustment application;
- The day the applicant obtains lawful immigration status; or
- The day the applicant departs the United States.

For example, if an applicant enters the United States as a nonimmigrant and continues to stay in the United States after such nonimmigrant status expires, the applicant has failed to continuously maintain a lawful status at the point the status expires. If the applicant later acquires a new lawful status, for instance, temporary protected status, then the applicant is no longer failing to maintain a lawful status. The time period between the two lawful statuses is counted towards the 180-day limit in determining if the applicant is eligible for the exemption.

Unauthorized Employment

USCIS calculates the number of days an applicant engaged in unauthorized employment beginning on the first day of such employment and continuing until the earliest of the following:

- The day the applicant ceases the unauthorized employment;
- The day USCIS approves the applicant's employment authorization document (EAD);[11]or
- The day USCIS approves the applicant's adjustment application.

The filing of an adjustment application does not authorize employment or excuse unauthorized employment. As such, the adjustment filing does not stop the counting of days of unauthorized employment.[12]

USCIS counts each day an applicant engaged in unauthorized employment against the 180-day limit, regardless of whether the applicant unlawfully worked only a few hours on a given day, worked a part-time schedule, or worked a full-time schedule with leave benefits and weekends and holidays off. Absent evidence of interruptions in unauthorized employment, USCIS considers each day since the date the unauthorized employment began as a day of unauthorized work regardless of the applicant's work schedule.

For example, if an applicant worked without authorization for four hours a day, Monday through Friday, throughout the month of April, all 30 days for that month must be counted as unauthorized employment.

For periods in which it appears that the applicant has engaged in unauthorized employment, the applicant bears the burden of establishing that work was authorized or that he or she did not in fact engage in unauthorized employment. Evidence of termination or interruption of unauthorized employment may include a letter of termination or other documentation from the applicant's employer.

In addition, an applicant who works without authorization after filing an adjustment application does not stop the counting of time by departing the United States and re-entering on parole.

Special Considerations

The following situations do not count toward the 180-day limit:

- Any violations that occurred prior to the applicant's last lawful admission;
- Any time period for which the applicant had USCIS authorization to engage in employment;[13]
- Any time period when the applicant had a pending application for extension of nonimmigrant status or change of nonimmigrant status, if USCIS ultimately approved the application;
- Any time period of unlawful status that USCIS determines was the result of a "technical violation" or through no fault of the applicant;[14]
- Any time period before or after completion of a nonimmigrant student's educational objective or a nonimmigrant exchange visitor's program as authorized by regulation,[15] if the nonimmigrant did not violate the terms and conditions of the status; and
- Any time period in violation of nonimmigrant student or exchange visitor status if the status was later reinstated, but only for the time covered by the reinstatement.[16]

Example: Effect of Unauthorized Employment on Eligibility for INA 245(k) Exemption

Date	Event
January 1, 2010	An alien is admitted as a B-2 nonimmigrant visitor for pleasure.
June 1, 2010	The B-2 nonimmigrant begins work for an employer on a one-month contract, without first obtaining work authorization.
July 1, 2010	The B-2 nonimmigrant's contract with the employer ends.
September 1, 2010	The B-2 nonimmigrant submits an adjustment application with the employer's immigrant petition seeking EB-3 classification for the B-2 nonimmigrant.
February 28, 2011	The B-2 nonimmigrant's authorized stay expires, as indicated on the Arrival/Departure Record (Form I-94).

In this example, the applicant's work results in three separate immigration violations: The applicant engaged in unauthorized employment, violated the terms and conditions of his nonimmigrant admission, and failed to continuously maintain a lawful status. Since these three violations occur on the same days, they are only counted once. Therefore, these immigration violations add up to 30 days, counting from June 1 through June 30.

Once the applicant began to work without authorization on June 1, he stopped maintaining a lawful status. The failure to continuously maintain a lawful status continues until the applicant files a properly filed adjustment application on September 1, totaling 92 days without lawful status. Because the time period from June 1 through June 30 was already counted for the three violations above, the failure to continuously maintain lawful status only adds 62 days, counting from July 1 through August 31.

If USCIS approves the applicant's petition for EB-3 immigrant visa classification, he is eligible for the INA 245(k) exemption. The applicant's immigration violations total 92 days and therefore do not exceed the 180-day limit. The applicant meets the eligibility requirements for the exemption and is not barred from adjustment by INA 245(c)(2), INA 245(c)(7), or INA 245(c)(8) bars, which would otherwise apply.

Example: Effect of Immigration Violations on INA 245(k) Exemption Eligibility where Violations Occurred During Different Periods of Stay

Date	Event
December 1, 2007	An alien is admitted to the United States as a B-2 nonimmigrant.
June 1, 2008	The alien's B-2 nonimmigrant status expires, as evidenced by the Arrival/Departure Record.
September 10, 2008	The alien leaves the United States.
January 1, 2009	An employer files an H-1B petition for the alien.
February 1, 2009	The alien is admitted as an H-1B nonimmigrant for three years.
January 31, 2012	The H-1B's nonimmigrant authorized stay expires, as indicated on the Arrival/Departure Record (Form I-94).
May 1, 2012	An employment-based petition and adjustment application are concurrently filed for the alien.
July 15, 2012	Both the petition and the application are approved and the alien is adjusted to a permanent resident.

In this example, the alien's initial period of admission as a B-2 nonimmigrant visitor expired more than three months prior to the initial departure. During the subsequent admission, the alien filed for adjustment three months after H-1B status terminated.

The time spent out of status during the alien's first admission as a B-2 nonimmigrant was not calculated because the time spent out of status or in violation of status prior to the nonimmigrant's last admission is not considered for INA 245(k) purposes. Since the alien is an employment-based adjustment applicant and his three-month violation following his last lawful admission did not exceed 180 days, the applicant is exempted from the INA 245(c)(2) bar.

5. Evidence to Consider

An applicant seeking the INA 245(k) exemption must properly file an adjustment application as specified in the form instructions, but he or she is not required to submit any additional forms or fees. If an officer determines that an INA 245(c)(2), INA 245(c)(7), or INA 245(c)(8) bar applies in a particular case, the officer should use the following evidence submitted in support of the adjustment application to analyze the applicant's eligibility for the exemption:

- Copies of all Arrival/Departure Records (Forms I-94) showing authorized admission into the United States;
- Copies of the biographic pages of any passports containing nonimmigrant visas along with the passport pages containing the visas;
- Copies of any passport pages showing recorded travel into or out of the United States, such as admission stamps;
- Copies of any documentation showing all places of residence dating back at least five years from the date of filing for adjustment and showing all periods of employment; and
- Receipt or Approval Notices (Forms I-797) for any immigration benefit, including nonimmigrant status, changes of nonimmigrant status or extensions of stay, and employment authorization.

If the evidence of record is insufficient to determine the applicant's eligibility for the exemption, an officer should first attempt to obtain any missing information using authorized USCIS-approved databases. An officer also may issue a Request for Evidence or Notice of Intent to Deny.

6. Effect of Exemption

An applicant who qualifies under INA 245(k) is exempt from the INA 245(c)(2), INA 245(c)(7), and INA 245(c)(8) adjustment bars. This does not, however, exempt an applicant from any other bar, eligibility requirement, or ground of inadmissibility.[17] Therefore, once an officer determines that the applicant qualifies for the exemption, the officer must next determine whether the applicant is otherwise eligible for adjustment.

Footnotes

[^ 1] See INA 245(c). See Chapter 2, Eligibility Requirements, Section F, Bars to Adjustment of Status [7 USCIS-PM B.2(F)].

[^ 2] See INA 201(b)(2)(A). Immediate relatives of a U.S. citizen include the U.S. citizen's spouse, children (unmarried and under 21 years of age), and parents (if the U.S. citizen is 21 years of age or older). Widow(er)s of U.S. citizens and aliens admitted to the United States as a fiancé(e) or child of a fiancé(e) of a U.S. citizen may also be considered immediate relatives if they meet certain conditions. See INA 245(c)(2),INA 245(c)(4), and INA 245(c)(8). See Chapter 2, Eligibility Requirements, Section F, Bars to Adjustment of Status [7 USCIS-PM B.2(F)].

[^ 3] See INA 101(a)(27)(C) and INA 245(k). For more information, see Section E, Employment-Based Exemption under INA 245(k) [7 USCIS-PM B.8(E)].

[^ 4] See INA 101(a)(27)(J) and INA 245(c).

[^ 5] See INA 245(c)(6). Special immigrant juveniles are excluded from applicability of INA 245(c)(2) and, as previously mentioned, by applying traditional concepts of statutory construction, USCIS interprets the exclusion from INA 245(c)(2) to apply to INA 245(c)(8). as well. See 62 FR 39417 (PDF), 39422 (July 23, 1997) and 8 CFR 245.1(b)(5), 8 CFR 245.1(b)(6), and 8 CFR 245.1(b)(10). INA 245(c)(7) also does not apply. See 8 CFR 245.1(b)(9). See Chapter 5, Employment-Based Applicant Not in Lawful Nonimmigrant Status – INA 245(c)(7) [7 USCIS-PM B.5]. Finally, INA 245(c)(1), INA 245(c)(3), INA 245(c)(4), and INA 245(c)(5) also do not apply since a special immigrant juvenile is considered to be paroled into the United States and when reviewing these bars, USCIS focuses on the most recent admission. See INA 245(h)(1). See 8 CFR 245.1(a) and 8 CFR 245.1(e)(3).

[^ 6] For information about Afghan and Iraq translators, see Section 1059 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-163 (PDF), 119 Stat. 3136, 3443 (January 6, 2006), as amended by Pub. L. 110-36 (PDF) (June 15, 2007). For information about Iraq nationals employed by or on behalf of the U.S. Government, see Section 1244 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181 (PDF), 122 Stat. 3, 396 (January 28, 2008), as amended by Pub. L. 110-242 (PDF) (June 3, 2008) and Section 602(b)(9) of the Afghan Allies Protection Act of 2009, Title VI of Pub. L. 111-8 (PDF), 123 Stat. 524, 809 (March 11, 2009). For information about Afghan nationals employed by, or on behalf of, the U.S. Government, see Section 602(b) of the Afghan Allies Protection Act of 2009, Title VI of Pub. L. 111-8 (PDF), 123 Stat. 524, 807 (March 11, 2009).

[^ 7] See INA 245(c)(2) and INA 245(c)(8). See 8 CFR 245.1(b).

[^ 8] Described in INA 101(a)(27)(C). Other than religious workers, employment-based 4th preference (EB-4) applicants are not eligible for the INA 245(k) exemption.

[^ 9] Although these specified violations committed during previous periods of U.S. stay are not relevant for purposes of eligibility for the INA 245(k) exemption, there may still be adverse immigration consequences for these violations. See INA 212(a)(9)(B)-(C) and INA 222(g). For example, if an alien accumulates more than 180 days of unlawful presence in the United States and subsequently departs, he or she may be inadmissible to the United States for three years or more after such departure, unless a waiver is granted or the alien is exempt. INA 222(g) also provides that an alien's nonimmigrant visa is automatically void if the alien remains in the United States beyond the authorized period of stay.

[^ 10] See INA 101(a)(13)(B) and INA 212(d)(5)(A).

[^ 11] Applicants for adjustment who have no other authorization to work and wish to work based on the pending application must first file an Application for Employment Authorization (Form I-765) and wait until it is approved before beginning work.

[^ 12] Therefore, it is possible for an applicant to accrue days of unauthorized employment against the 180-day limit after filing an adjustment application.

[^ 13] However, any unlawful employment that continues or begins after the applicant applies for adjustment is counted toward the 180-day period until USCIS approves work authorization.

[^ 14] See 8 CFR 245.1(d)(2). See Volume 1, General Policies and Procedures, Part H, Emergencies or Unforeseen Circumstances, Chapter 2, Emergencies or Unforeseen Circumstances-Related Flexibilities, Section A, Immigration Policy Flexibilities, Subsection 1, Nonimmigrants Present in the United States [1 USCIS-PM H.2(A)(1)].

[^ 15] See 8 CFR 214.2(f) and 8 CFR 214.2(j).

[^ 16] See 8 CFR 214.2(f) and 22 CFR 62.45.

[^ 17] For example, it would not exempt the applicant from an eligibility requirement such as the requirement that an applicant must have been inspected and admitted or inspected and paroled.

Part C - 245(i) Adjustment

Chapter 1 - Purpose and Background

A. Purpose

Certain aliens physically present in the United States may be ineligible to adjust status under INA 245(a) because they entered the United States without inspection, violated their nonimmigrant status, were employed in the United States without authorization, or are otherwise barred from adjustment by INA 245(c).[1] Congress enacted INA 245(i) to allow certain otherwise ineligible aliens a pathway to become lawful permanent residents provided they meet specific requirements.[2]

B. Background

Congress initially enacted INA 245(i) in 1994 as a temporary measure providing certain aliens who were otherwise ineligible for adjustment with a pathway to adjust to permanent resident status.[3] The law required that 245(i) applicants file an application and pay an additional statutory sum (sometimes also referred to as a "fee") by the sunset date.

The law originally was scheduled to expire on October 1, 1997. After several short term extensions, Congress made INA 245(i) permanent by repealing the sunset date and replacing it with a requirement that an applicant be the beneficiary (including a spouse or child of the principal beneficiary, if otherwise eligible under INA 203(d)) of an immigrant visa petition or permanent labor certification application filed on or before January 14, 1998.[4]

In 2000, Congress extended the deadline for filing the qualifying petition or application until April 30, 2001 and added a new requirement that an applicant basing his or her eligibility on being a beneficiary of a qualifying petition or application filed after January 14, 1998, establish that the principal beneficiary of the qualifying petition or application was physically present in the United States on December 21, 2000 in order to adjust status under INA 245(i).[5]

C. Overcoming INA 245(a) Adjustment Ineligibility

Aliens may seek to adjust status under INA 245(i) if they are disqualified from adjusting status under INA 245(a).[6] INA 245(i) may overcome any or all of the following reasons for 245(a) adjustment ineligibility, to include circumstances where the alien:[7]

- Last entered the United States without being admitted or paroled after inspection by an immigration officer;[8]
- Last entered the United States as an alien crewman;[9]
- Is now employed or has ever been employed in the United States without authorization;[10]
- Is not in lawful immigration status on the date of filing the application for adjustment of status;[11]
- Has ever failed to continuously maintain a lawful status since entry into the United States;[12]
- Was last admitted to the United States in transit without a visa;[13]
- Was last admitted to the United States as a nonimmigrant visitor without a visa under the Guam and Commonwealth of the Northern Mariana Islands Visa Waiver Program;[14]
- Was last admitted to the United States as a nonimmigrant visitor without a visa under the Visa Waiver Program;[15]
- Is seeking employment-based adjustment of status, and is not in a lawful nonimmigrant status on the date of filing the application for adjustment of status;[16] and
- Has ever violated the terms of his or her nonimmigrant status.[17]

D. Two-Step Adjudication

An INA 245(i) adjustment application differs from all other adjustment applications because it involves a two-step adjudication process.

Overview of Adjudication of 245(i) Adjustment Applications	
Step 1	Determine whether the 245(i) applicant qualifies as: • A grandfathered alien, or • A grandfathered alien's current spouse or child.
Step 2	Determine whether the applicant is otherwise eligible to adjust under 245(i).

In processing 245(i) adjustment of status applications, officers should follow the general adjustment guidelines for adjudication and final decision procedures.[18]

E. Legal Authorities

- INA 245(i); 8 CFR 245.10 - Adjustment in status of certain aliens physically present in the United States

Footnotes

[^ 1] See INA 245(c) and 8 CFR 245.1(a)-(b). See Instructions to Form I-485 Supplement A. For further explanation of INA 245(a) eligibility requirements as well as the adjustment bars, see Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 2] Throughout this part, INA 245(i) is sometimes referred to as simply 245(i).

[^ 3] See Section 506(b)-(c) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1995, Pub. L. 103-317 (PDF), 108 Stat. 1724, 1765-66 (August 26, 1994).

[^ 4] See Section 111 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. 105-119 (PDF), 111 Stat. 2440, 2458 (November 26, 1997).

[^ 5] See Section 1502 of the Legal Immigration and Family Equity (LIFE) Act, Pub. L. 106-554 (PDF), 114 Stat. 2763, 2763A-324 (December 21, 2000).

[^ 6] Certain aliens are exempt from some of the bases of ineligibility under INA 245(a). See INA 245(c) and 8 CFR 245.1(a)-(b). For further explanation of INA 245(a) eligibility requirements as well as the adjustment bars, see Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 7] See 8 CFR 245.1(b). See Instructions to Form I-485 Supplement A.

[^ 8] See INA 245(a). See 8 CFR 245.1(b)(3).

[^ 9] See INA 245(c)(1). See 8 CFR 245.1(b)(2).

[^ 10] See INA 245(c)(2) and INA 245(c)(8). See 8 CFR 245.1(b)(4) and 8 CFR 245.1(b)(10).

[^ 11] See INA 245(c)(2). See 8 CFR 245.1(b)(5).

[^ 12] This bar does not apply if the failure to maintain status was through no fault of the alien or for technical reasons. See INA 245(c)(2). See 8 CFR 245.1(b)(6).

[^ 13] See INA 245(c)(3). See 8 CFR 245.1(b)(1).

[^ 14] See INA 245(c)(4). See 8 CFR 245.1(b)(7).

[^ 15] See INA 245(c)(4). See 8 CFR 245.1(b)(8). For more information on the Visa Waiver Program, see the U.S. Department of State website.

[^ 16] See INA 245(c)(7). See 8 CFR 245.1(b)(9).

[^ 17] See INA 245(c)(8). See 8 CFR 245.1(b)(10).

[^ 18] See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6] and Chapter 11, Decision Procedures [7 USCIS-PM A.11].

Chapter 2 - Grandfathering Requirements

An officer must first determine whether an INA 245(i) applicant qualifies as a grandfathered alien or as the current spouse or child of a grandfathered alien at the time of adjustment.

A. Definition of Grandfathered Alien

A grandfathered alien is or was the principal or derivative beneficiary[1] of:

- A qualifying immigrant visa petition; or
- A qualifying labor certification application.[2]

If the qualifying immigrant visa petition or labor certification application was filed after January 14, 1998, the principal beneficiary must also have been physically present in the United States on December 21, 2000.

B. Qualifying Immigrant Visa Petition or Labor Certification Application

A qualifying immigrant visa petition or permanent labor certification application is defined as a petition or application that was both “properly filed” on or before April 30, 2001 and “approvable when filed.”[3]

A qualifying immigrant visa petition[4] may include any of the following forms:

- Petition for Alien Relative (Form I-130)
- Immigrant Petition for Alien Worker (Form I-140)
- Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360)
- Immigrant Petition by Alien Entrepreneur (Form I-526)

A qualifying permanent labor certification application[5] refers to an Application for Alien Labor Certification (ETA Form 750).[6]

1. Properly Filed[7]

Qualifying Immigrant Visa Petition

For purposes of INA 245(i), an immigrant visa petition is considered properly filed if:

- The petition was physically received by legacy Immigration and Naturalization Service (INS)[8] on or before April 30, 2001, or, if mailed, postmarked on or before April 30, 2001, regardless of when INS received it; and
- The petition was submitted with the correct fees and proper signature.[9]

A petition received with either an illegible or missing postmark is timely filed if INS physically received the petition by May 3, 2001, and stamped it with a “Filed Prior to 245(i) Sunset” stamp.[10]

Qualifying Permanent Labor Certification Application

A permanent labor certification application is properly filed if it was filed on or before April 30, 2001 and accepted for processing according to the regulations of the Secretary of the U.S. Department of Labor (DOL) that existed at the time of filing.

During the INA 245(i) qualifying time period and under authority delegated by DOL, permanent labor certification applications were generally filed directly with the state workforce agency (SWA) (such as a State Employment Service Agency) in the state where the offered job was located. The SWA indicated the filing date or receipt date on the first page of the ETA Form 750, Part A in the “Endorsements” block located in the lower right corner, specifically in the area indicated as “L.O.” (which indicates “local office”).

Therefore, a permanent labor certification application is considered properly filed where the SWA date-stamped the application, thereby indicating the application was complete and accepted for processing. Such a complete application remains properly filed, notwithstanding any need for the employer to amend the application or provide additional documents and information as required by DOL to ultimately obtain a favorable adjudication of the application.[11]

Permanent labor certification applications received by a SWA that do not bear a "Filed Prior to 245(i) Sunset" stamp may meet INA 245(i) filing requirements if they were given a receipt date of no later than April 30, 2001. USCIS accepts the receipt date that the DOL or SWA ultimately assigned to the permanent labor certification application.

2. Approvable When Filed[12]

An immigrant visa petition or permanent labor certification application is considered "approvable when filed" if the petition or application was:

- Properly filed;
- Meritorious in fact; and
- Non-frivolous.

Therefore, once the petition or application is determined to have been properly filed,[13] the petition or application is considered approvable when filed if it is both meritorious in fact and non-frivolous.

Meritorious in Fact: Immigrant Visa Petition

To be considered "meritorious in fact," the beneficiary of an immigrant visa petition must have met all the substantive eligibility requirements at the time of filing for the specified immigrant category. Stated another way, the immigrant visa petition is meritorious in fact if the petition merited a legal victory upon filing had it been fully adjudicated, even if the petition was not fully processed or actually approved.[14]

For example, a beneficiary claiming to be the child of a U.S. citizen must have met the definition of a child[15] at the time the immigrant petition was filed. In the case of a marriage-based immigrant visa petition, the marriage must have been bona fide at its inception.[16] USCIS will consider all available evidence to determine if the beneficiary met all the eligibility requirements at the time of filing, including evidence of fraud.

Meritorious in Fact: Permanent Labor Certification Application

The standard for determining whether a permanent labor certification application is meritorious in fact is different than for immigrant petitions: whereas the substantive eligibility requirements for immigrant petitions are fixed at the time of filing, that is not the case for permanent labor certification applications. Specifically, the terms and conditions of employment stated in the original application (such as job qualifications and rate of pay) are subject to the requirements as stated on the application for permanent labor certification.

A permanent labor certification application is considered meritorious in fact if:

- The employer filing the application was extending a bona fide offer of employment;
- The employer had the apparent ability to hire the beneficiary; and
- There is no evidence of fraud.

Accordingly, a properly filed labor certification application is presumed to be meritorious in fact if the application is non-frivolous and if no apparent bars to approval existed at the time it was filed.[17]

Factors for Determining Approvable When Filed

Approval or denial of a qualifying immigrant visa petition or permanent labor certification application is not determinative. However, if an immigrant visa petition or permanent labor certification application was ultimately approved, the petition or application was generally approvable when filed.[18] Likewise, if the qualifying immigrant visa petition or labor certification application was ultimately denied or revoked, the petition or application is generally not considered "approvable when filed" unless it was denied due to circumstances that arose after the time of filing.[19]

In all cases, USCIS bases the determination of approvable when filed on the circumstances that existed at the time the immigrant visa petition or permanent labor certification application was filed. For example, a petition or application may still be considered "approvable when filed" even if the employer filing the petition or application later went out of business.[20]

A petition or application that was properly filed on or before April 30, 2001, and was approvable when filed may grandfather the beneficiary even if the petition was later withdrawn, denied, or revoked due to circumstances that arose after the time of filing.[21] This same principle applies if the U.S. Department of State later terminates the beneficiary's immigrant visa registration.[22]

Non-Frivolous

An immigrant visa petition or permanent labor certification application is "frivolous" if the petition or application is deemed to be "patently without substance."[23] Therefore, a non-frivolous petition or application is one filed in good faith and is based on a reasonable belief that there is some basis in law or fact for approval; a frivolous filing is one completely lacking in legal merit and is expected to be denied.[24]

3. Used Petitions and Applications

Once a qualifying immigrant visa petition or permanent labor certification application has been used by an alien as the basis for obtaining lawful permanent resident (LPR) status,[25] the petition or application cannot be used again.[26] A qualifying petition or application does not grandfather a beneficiary if that beneficiary has previously obtained LPR status on the basis of that petition or application.[27] To determine whether a petition or application has been used previously, an officer should check available USCIS and DOL systems as needed.

C. Beneficiary of Qualifying Immigrant Visa Petition or Permanent Labor Certification Application

1. Special Considerations for Principal Beneficiaries

A principal beneficiary for purposes of INA 245(i) grandfathering is either:

- The alien named as the direct beneficiary on the qualifying immigrant visa petition; or
- The alien named on the qualifying permanent labor certification application as the person to whom the U.S. employer is extending an offer of employment.

Substituted Principal Beneficiary of a Permanent Labor Certification Application

An alien may be eligible to adjust under INA 245(i) if the employer who filed a qualifying permanent labor certification application properly substituted the alien as the beneficiary of the application effective on or before April 30, 2001. The substitution makes the original beneficiary ineligible for 245(i) adjustment based on that application.[28]

Example: Timely Substituted Principal Beneficiary of Qualifying Application

Date	Event
March 1, 1998	An employer properly files a permanent labor certification application for an employee that was approvable when filed and which DOL ultimately approved.
April 1, 2001	The employer substituted a new employee for the original employee because the employer no longer intended to use the approved labor certification application for the original employee. The employer files an employment-based immigrant visa petition for the new employee, requesting substitution and using the labor certification application initially approved for the original employee.
June 1, 2003	The new employee files an adjustment of status application based on the petition filed by the employer.

In this example, the new employee may seek to adjust as a principal beneficiary under INA 245(i) because the person was the properly substituted beneficiary of the approved labor certification application at the time the 245(i) filing period ended on April 30, 2001. The original employee may not seek 245(i) adjustment on the basis of this permanent labor certification application because the person was replaced as the beneficiary prior to April 30, 2001. However, an untimely substitution (that is, one occurring after April, 30, 2001) would not affect the original principal beneficiary's eligibility to seek 245(i) adjustment.

2. Special Considerations for Derivative Beneficiaries

Grandfathering Eligibility

A qualifying immigrant visa petition or labor certification application may serve to grandfather the principal beneficiary's immediate family members at the time the visa petition or labor certification application was filed (his or her spouse and child(ren)) as grandfathered derivative beneficiaries.[29] The spouse or child does not have to be named in the qualifying petition or application and does not have to continue to be the principal beneficiary's spouse or child. As long as an applicant can demonstrate that he or she was the spouse or child (unmarried and under 21 years of age) of a grandfathered principal beneficiary on the date the qualifying petition or application was properly filed, the applicant is grandfathered and eligible to seek INA 245(i) adjustment in his or her own right.[30]

A derivative beneficiary who qualifies as a grandfathered alien may benefit from INA 245(i) in the same way as a principal beneficiary. If the derivative beneficiary meets all eligibility requirements, the beneficiary may adjust despite an entry without inspection or being subject to the specified adjustment bars.[31]

Underlying Basis for Adjustment

If a grandfathered derivative beneficiary[32] remains the spouse or child of the grandfathered principal beneficiary, the derivative beneficiary may accompany or follow to join the principal beneficiary, provided the principal beneficiary is adjusting status under INA 245(i). In this case, the grandfathered principal beneficiary is the principal adjustment applicant and the grandfathered derivative beneficiary is the derivative applicant.[33]

A grandfathered derivative beneficiary may also adjust under INA 245(i) in his or her own right, on some basis completely independent of the grandfathered principal beneficiary.[34] This is true whether or not the grandfathered derivative beneficiary remains the grandfathered principal beneficiary's spouse or child. For instance, a grandfathered derivative beneficiary spouse who becomes divorced from the grandfathered principal beneficiary after the qualifying petition or application is filed is still a grandfathered alien eligible to seek adjustment independently under 245(i). Similarly, a grandfathered derivative beneficiary child who marries or reaches 21 years of age after the qualifying petition or application is filed is still grandfathered and eligible to seek INA 245(i) adjustment on his or her own basis through a different petition.

Example: Derivative Beneficiary Eligible After Divorce from Principal Beneficiary

Date	Event
January 1, 2000	An employer files a permanent labor certification application on behalf of a married employee. The married employee is the principal beneficiary of the permanent labor certification application. The application is determined to be approvable when filed and the married employee alien is a grandfathered alien. As the employee was married at the time the labor certification application was filed, the employee's spouse is the derivative beneficiary and is also a grandfathered alien.
January 1, 2003	The employee and spouse divorce.
Today	The employee's former spouse is selected in the diversity visa program.

In this example, the employee is the grandfathered principal beneficiary for INA 245(i) adjustment because the qualifying permanent labor certification application was filed directly on the employee's behalf before April 30, 2001. The employee's former spouse is a grandfathered derivative beneficiary because they were married at the time the qualifying permanent labor certification application was filed. The qualifying application serves to grandfather both the principal and derivative beneficiaries. Therefore, as a grandfathered derivative beneficiary, the former spouse may apply for adjustment under 245(i) based on being selected in the diversity visa program, regardless of the grandfathered principal beneficiary's basis for adjustment and regardless of the fact that their marital relationship no longer exists.

If a grandfathered derivative beneficiary is adjusting on a separate basis from the grandfathered principal beneficiary, the grandfathered derivative beneficiary becomes the principal adjustment applicant. As the principal applicant, the grandfathered derivative beneficiary's current spouse and child(ren) may accompany (or follow-to-join) the applicant.[35]

3. Determining Whether An Adjustment Applicant Qualifies as Grandfathered Alien for 245(i)

The following flowchart provides a step-by-step process for determining whether an adjustment applicant meets the definition of a grandfathered alien. In addition to being a grandfathered alien, INA 245(i) applicants must also meet all other eligibility requirements to adjust under 245(i).[36]

Step-by-Step Determination: Grandfathered Alien

Step	If yes, then…	If no, then…
Step 1: Is the applicant a principal or derivative beneficiary of an immigrant visa petition?	Go to Step 3.	Go to Step 2.
Step 2: Is the applicant a principal or derivative beneficiary of a permanent labor certification application?	Go to Step 3.	The applicant is not eligible for 245(i) adjustment.
Step 3: Was the petition or application filed on or before April 30, 2001?[37]	Go to Step 4.	The applicant is not eligible for 245(i) adjustment.
Step 4: Has the applicant previously obtained LPR status on the basis of the petition or application?	The applicant is not eligible for 245(i) adjustment.[38]	Go to Step 5.
Step 5: Was the petition or application properly filed?	Go to Step 6.	The applicant is not eligible for 245(i) adjustment.
Step 6: Was the petition or application approvable when filed?	The applicant is a grandfathered alien.	The applicant is not eligible for 245(i) adjustment.

4. Effect of Grandfathering

Once a 245(i) adjustment applicant establishes that he or she is a grandfathered alien, the applicant remains grandfathered and future eligibility for adjustment under INA 245(i) is preserved until the applicant adjusts to LPR status.[39] The applicant may use the qualifying petition or application as the basis for adjustment of status if the petition or application is still valid. In addition, the applicant may seek to adjust under another family-based, employment-based, special immigrant, or diversity visa immigrant category for which the applicant is eligible.[40]

Effect on Lawful Status and Unlawful Presence

The fact that an alien is determined to be a grandfathered alien for INA 245(i) purposes does not confer any immigration status on the alien nor does it place the alien in a period of stay authorized by the Secretary of Homeland Security for purposes of stopping the accrual of any unlawful presence pursuant to INA 212(a)(9).[41]

An alien's nonimmigrant status is not affected by the fact that he or she is eligible to seek 245(i) benefits.[42]

D. Current Family Members of Grandfathered Aliens

In general, today's principal adjustment applicant's spouse or child(ren)[43] may also adjust status if "accompanying" or "following-to-join" the principal.[44] A spouse or child is "accompanying" the principal when seeking to adjust status together with the principal or within 6 months of when the principal became a permanent resident; the spouse or child is considered to be following-to-join if seeking to adjust more than 6 months after the principal became a permanent resident.[45]

The spouse and child(ren) as of the date of adjustment accompanying (or following-to-join) a principal INA 245(i) applicant (who is a grandfathered alien) are eligible to seek adjustment under 245(i) even though they are not grandfathered aliens in their own right. The spouse and child(ren) may also benefit from INA 245(i) provisions allowing applicants to adjust despite an entry without inspection or being subject to the specified adjustment bars.[46] If the spouse and child(ren) were properly inspected and admitted or inspected and paroled (and are not subject to the INA 245(c) bars) they do not need to file a Supplement A. The spouse and child(ren) may simply seek adjustment under INA 245(a) by filing only the Application to Register Permanent Residence or Adjust Status (Form I-485).

1. Grandfathered Principal Beneficiary's Spouse and Children

An alien may be eligible to adjust as a grandfathered derivative beneficiary under INA 245(i) in his or her own right or as an accompanying (or following-to-join) spouse or child if:

- The alien demonstrates that he or she was the spouse or child (unmarried and under 21 years of age) of a grandfathered principal beneficiary at the time a qualifying petition or application was properly filed; and
- The alien is still the spouse or child of the principal beneficiary.[47]

An alien who became the spouse or child of a grandfathered principal beneficiary after the qualifying petition or application was filed may only seek INA 245(i) adjustment through the principal beneficiary as an accompanying (or following-to-join) immigrant.[48] These applicants do not qualify as grandfathered derivative beneficiaries who may adjust in their own right under INA 245(i).[49]

Example: Spouse and Child Acquired After Filing of Principal Beneficiary's Qualifying Application

Date	Event
January 1, 1998	An alien enters the United States without inspection.
January 1, 2000	An employer files a permanent labor certification application on behalf of the alien. The alien is unmarried at time of filing.
January 1, 2002	The alien marries an alien and has a child.
January 1, 2004	The employment-based immigrant visa petition filed on the alien's behalf is approved. The alien applies for adjustment of status, as do the spouse and child.

As a principal beneficiary of the qualifying permanent labor certification application, the alien is grandfathered and eligible to file for adjustment under INA 245(i). Because the alien married and had the child after the qualifying application was filed, the spouse and child are not grandfathered derivative beneficiaries and may not adjust in their own right under 245(i). The spouse and child, however, may still seek INA 245(i) adjustment (or INA 245(a) adjustment, if eligible) as the principal beneficiary's accompanying (or following-to-join) spouse and child under INA 203(d).

Eligibility of Grandfathered Principal Beneficiary's Spouse or Child

The following chart provides a summary of whether the spouse or child of a grandfathered principal beneficiary may be grandfathered in his or her own right or eligible to accompany or follow to join the grandfathered principal beneficiary.

245(i) Adjustment Eligibility of Grandfathered Principal Beneficiary's Spouse or Child

When Was Relationship Established?	Eligible as an Accompanying or Following-to-Join Applicant?	Eligible as a Grandfathered Derivative Beneficiary Who May Apply to Adjust Under INA 245(i) Independently from Principal?
Before the qualifying petition or application was filed (on or before April 30, 2001)	Yes, if relationship continues to exist and principal beneficiary is granted LPR status (and remains an LPR)	Yes, on a different basis, whether or not relationship to principal beneficiary continues to exist[50]
After April 30, 2001 but before principal beneficiary adjusts status	Yes, if relationship continues to exist and principal beneficiary is granted LPR status (and remains an LPR)	No
After principal beneficiary adjusts status	No	No

2. Grandfathered Derivative Beneficiary's Spouse and Children

Derivative beneficiaries of a qualifying immigrant visa petition or labor certification application are grandfathered in their own right. These grandfathered derivative beneficiaries may adjust independently from the principal beneficiary of the grandfathering petition or application. Accordingly, their current spouse and children may be eligible to adjust under the usual accompanying or following-to-join rules.

Continuing Spouse or Child Relationship Required

The accompanying (or following-to-join) spouse or child must continue to have the qualifying relationship with the principal adjustment applicant (grandfathered derivative beneficiary) both at the time of filing and approval of their individual adjustment applications.[51]

Example: Child Derivative Beneficiary Now a Married Adult

Date	Event
July 1, 1999	An alien enters the United States without inspection with his or her child.
April 30, 2001	A family-based 4th preference immigrant visa petition is properly filed on the alien's behalf and was approvable when filed. The alien is the principal beneficiary of the immigrant petition. The alien's child is a derivative beneficiary. For the purposes of adjustment of status under INA 245(i), both the alien and the alien's child are grandfathered.
June 1, 2008	The child is now an adult and marries another alien.
March 1, 2010	USCIS approves an employment-based petition filed on behalf of the former child and the former child files an application for adjustment of status seeking to utilize INA 245(i).

In this example, the alien's qualifying petition serves to grandfather both the alien and the alien's child. After marrying, the child is no longer considered a child for classification purposes and therefore can no longer adjust with the grandfathered principal beneficiary as an accompanying (or following-to-join) child. However, as a grandfathered derivative beneficiary, the former child may independently adjust under a new basis. The former child's spouse may seek to adjust as an accompanying (or following-to-join) spouse. The spouse, while not a grandfathered alien based on the 1999 petition in this example, may adjust under INA 245(i) as a derivative of his or her spouse[52] if necessary to overcome any applicable adjustment bars, or may adjust under INA 245(a) (if eligible).[53]

The following chart provides a summary of when the spouse or child of a grandfathered derivative beneficiary of a qualifying immigrant visa petition or permanent labor certification application may be eligible to accompany or follow-to-join under INA 245(i).

245(i) Adjustment Eligibility of Grandfathered Derivative Beneficiary's Spouse or Child

When Was Relationship Established?	Eligible as an Accompanying or Following-to-Join Applicant?
Before grandfathered derivative beneficiary adjusts status	Yes, if relationship continues to exist and derivative beneficiary remains an LPR[54]
After grandfathered derivative beneficiary adjusts status	No

E. Physical Presence Requirement

If claiming to be a grandfathered alien based on a qualifying petition or application that was filed after January 14, 1998, the applicant must show that the principal beneficiary of the petition or application was physically present in the United States on December 21, 2000 to adjust under INA 245(i).[55]

Because this physical presence requirement applies only to the principal beneficiary, the physical presence of any derivative beneficiaries on December 21, 2000 is not relevant. Grandfathered derivative beneficiaries, however, must show that the grandfathered principal beneficiary was physically present on December 21, 2000, if the qualifying petition or application was filed after January 14, 1998.

The physical presence requirement does not apply to applicants who qualify for INA 245(i) based on immigrant visa petitions and permanent labor certification applications filed on or before January 14, 1998.

Example: Principal Beneficiary

Date	Event
June 1, 1999	An alien enters the United States without inspection.
April 30, 2001	A 3rd preference Petition for Alien Relative (Form I-130) is properly filed on behalf of the alien and which was approvable when filed.

In this example, the applicant is the principal beneficiary of a qualifying petition. Since the petition was filed after January 14, 1998, the alien must show that he or she was physically present in the United States on December 21, 2000, to be a grandfathered alien and adjust under INA 245(i).

Example: Derivative Beneficiary Spouse Later Divorces

Date	Event
July 1, 1999	A married couple enter the United States without inspection.
February 1, 2000	A permanent labor certification application is properly filed on behalf of one spouse and was approvable when filed. That spouse becomes the principal beneficiary of the application, and the other spouse becomes the derivative beneficiary.
January 20, 2005	The married couple divorces.
October 12, 2005	The derivative beneficiary remarries an LPR. The LPR files a petition for the derivative beneficiary as the spouse of an LPR.

In this example, the qualifying permanent labor certification application serves to grandfather the derivative beneficiary. The fact that the principal beneficiary and the derivative beneficiary are now divorced is not relevant for INA 245(i) purposes. The derivative beneficiary is a grandfathered alien in his or her own right and eligible to seek adjustment under INA 245(i) independently of the principal beneficiary, if the principal beneficiary was physically present in the United States on December 21, 2000.

Footnotes

[^ 1] Grandfathered principal beneficiaries are also known as the direct beneficiary or named beneficiary. Grandfathered derivative beneficiaries are the principal beneficiary's spouse or unmarried children under 21 years of age at the time the qualifying petition or application was filed. For more information, see Section C, Beneficiary of Qualifying Immigrant Visa Petition or Permanent Labor Certification Application [7 USCIS-PM C.2(C)].

[^ 2] See 8 CFR 245.10(a)(1)(i).

[^ 3] See 8 CFR 245.10(a)(1)(i)(A)-(B).

[^ 4] See INA 204.

[^ 5] See INA 212(a)(5)(A).

[^ 6] This form is no longer in use. The form was replaced by Application for Permanent Employment Certification (ETA Form 9089 (PDF)).

[^ 7] See 8 CFR 245.10(a)(2).

[^ 8] "Legacy INS" refers to the predecessor agency of USCIS that existed during the time of the 245(i) qualifying filing period.

[^ 9] Field offices and service centers were required to retain evidence of the mailing date as part of the record of proceeding for all immigrant visa petitions received between May 1, 2001 and May 3, 2001. INS also affixed a stamp stating "Filed Prior to 245(i) Sunset" on all immigrant visa petitions received on or after May 1, 2001 that qualified as timely filed.

[^ 10] It was not uncommon for there to be a discrepancy between the date INS physically received the filing and the filing date shown in INS electronic records (the latter being the date INS processed the check or money order for payment of the filing fee). In some offices, the sheer volume of petition filings delayed recording the system filing date by up to several weeks or even months. If the applicant is a derivative grandfathered beneficiary or accompanying (or following-to-join) spouse or child, an officer may need to resolve any discrepancy in the filing date by reviewing the principal grandfathered beneficiary's A-file.

[^ 11] See *Matter of Butt (PDF)*, 26 I&N Dec. 108 (BIA 2013). See Subsection 2, Approvable When Filed [7 USCIS-PM C.2(B)(2)].

[^ 12] See 8 CFR 245.10(a)(3).

[^ 13] See Subsection 1, Properly Filed [7 USCIS-PM C.2(B)(1)].

[^ 14] See *Ogundipe v. Mukasey (PDF)*, 541 F.3d 257, 261 (4th Cir. 2008) ("'Meritorious' means 'meriting a legal victory' or 'having legal worth'. . .").

[^ 15] See INA 101(b)(1).

[^ 16] See *Matter of Jara Riero and Jara Espinol (PDF)*, 24 I&N Dec. 267 (BIA 2007). See *Lasprilla v. Ashcroft (PDF)*, 365 F.3d 98 (1st Cir. 2004).

[^ 17] See *Matter of Butt (PDF)*, 26 I&N Dec. 108 (BIA 2013).

[^ 18] USCIS will consider evidence of fraud and the potential revocation of the approved visa petition when considering whether an approved petition was approvable when filed.

[^ 19] See *Chung Hou Hsiao v. Hazuda (PDF)*, 869 F.3d 1034 (9th Cir. 2017) and *Echevarria v. Keisler (PDF)*, 505 F.3d 16 (1st Cir. 2007). Changed circumstances after filing may include: an employer going out of business or a valid, bona fide marriage ending in divorce before the alien could adjust status.

[^ 20] See 8 CFR 245.10(a)(4).

[^ 21] See 8 CFR 245.10(a)(3) and 8 CFR 245.10(i). Even though the withdrawn, denied, or revoked petition or application may still serve to grandfather the beneficiary, the petition or application cannot serve as the underlying basis for adjustment (unless the petition remains valid under INA 204(j)). The applicant must still have an approved petition or be selected for a diversity visa to establish an eligible basis for adjustment under INA 245(i). See Chapter 3, Eligibility and Filing Requirements, Section A, Adjustment Eligibility under INA 245(i) [7 USCIS-PM C.3(A)] and Chapter 4, Documentation and Evidence, Section D, Demonstrating Underlying Basis for Adjustment [7 USCIS-PM C.4(D)].

[^ 22] See INA 203(g) and 8 CFR 205.1(a)(1).

[^ 23] See 8 CFR 245.10(a)(3).

[^ 24] See Black's Law Dictionary (11th ed. 2019).

[^ 25] See 66 FR 16383, 16384 (March 26, 2001). See *Matter of Villareal-Zuniga (PDF)*, 23 I&N Dec. 886 (BIA 2006). See *Matter of Harry Bailen Builders, Inc. (PDF)*, 19 I&N Dec. 412 (Comm. 1986).

[^ 26] See 8 CFR 204.2(h)(2). See *Matter of Villareal-Zuniga*, 23 I&N Dec. 886 (BIA 2006). See *Mansour v. Holder*, 739 F.3d 412 (8th Cir. 2014). See *Castro-Soto v. Holder*, 596 F.3d 68 (1st Cir. 2020). See 20 CFR 656.30(c)(2).

[^ 27] This is because the alien has already acquired the only intended benefit of 245(i): LPR status. See 66 FR 16383, 16384 (March 26, 2001).

[^ 28] See 8 CFR 245.10(j).

[^ 29] See INA 203(d). See INA 245(i)(1)(B). See 8 CFR 245.10(a)(1)(i). Under INA 245(i), spouses and children are only included as grandfathered derivative beneficiaries if they are "eligible to receive a visa under section 203(d)." Immediate relatives of U.S. citizens are not included.

[^ 30] Where the relationship was created after the qualifying petition or application was filed, the grandfathered principal beneficiary's current spouse or child may still adjust under INA 245(i) as an accompanying (or following-to-join) adjustment applicant. See Section D, Current Family Members of Grandfathered Aliens, Subsection 1, Grandfathered Principal Beneficiary's Spouse and Children [7 USCIS-PM C.2(D)(1)]. Such child or spouse would not be a grandfathered alien in his or her own right but would be eligible to use INA 245(i) as the derivative spouse or child of a grandfathered alien. See *Matter of Estrada and Estrada (PDF)*, 26 I&N Dec. 180 (BIA 2013).

[^ 31] See Chapter 1, Purpose and Background, Section C, Overcoming INA 245(a) Adjustment Ineligibility [7 USCIS-PM C.1(C)].

[^ 32] For information about derivative family members acquired after the qualifying petition or labor certification application, see Section D, Current Family Members of Grandfathered Aliens [7 USCIS-PM C.2(D)].

[^ 33] See INA 203(d).

[^ 34] The derivative beneficiary is still required to seek adjustment under a family-based, employment-based, special immigrant, or diversity visa immigrant category. See Chapter 3, Eligibility and Filing Requirements, Section A, Adjustment Eligibility under INA 245(i) [7 USCIS-PM C.3(A)], and Chapter 4, Documentation and Evidence, Section D, Demonstrating Underlying Basis for Adjustment [7 USCIS-PM C.4(D)].

[^ 35] See Section D, Current Family Members of Grandfathered Aliens [7 USCIS-PM C.2(D)].

[^ 36] See Chapter 3, Eligibility and Filing Requirements, Section A, Adjustment Eligibility under INA 245(i) [7 USCIS-PM C.3(A)].

[^ 37] If the petition or labor certification application was filed after January 14, 1998, and on or before April 30, 2001, the principal beneficiary must have been physically present in the United States on December 21, 2000. See INA 245(i)(1)(C). See Section E, Physical Presence Requirement [7 USCIS-PM C.2(E)].

[^ 38] On the basis of the previously used petition or application. The applicant may be eligible for 245(i) adjustment on a different basis.

[^ 39] See 8 CFR 245.10(a)(1)(i).

[^ 40] See 8 CFR 245.10(h).

[^ 41] See 8 CFR 245.10(m).

[^ 42] See 8 CFR 245.10(l). Lawful immigration status for a nonimmigrant is defined in 8 CFR 245.1(d)(1)(ii).

[^ 43] The child must be unmarried and under 21 years of age. See INA 101(b)(1).

[^ 44] See INA 203(d). See 22 CFR 40.1(a)(1). See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6].

[^ 45] See 9 FAM 503.2-4(A)(c), If Spouse or Child Acquired Prior to Admission, and 9 FAM 503.2-4(A)(d), If Spouse or Child Acquired Subsequent to Admission.

[^ 46] See Chapter 1, Purpose and Background, Section C, Overcoming INA 245(a) Adjustment Ineligibility [7 USCIS-PM C.1(C)].

[^ 47] For more information on adjusting as a grandfathered derivative beneficiary, see Section C, Beneficiary of Qualifying Immigrant Visa Petition or Permanent Labor Certification Application, Subsection 2, Special Considerations for Derivative Beneficiaries [7 USCIS-PM C.2(C)(2)].

[^ 48] See INA 203(d).

[^ 49] Similarly, the spouse of a qualified principal beneficiary who married the principal beneficiary only after the principal beneficiary adjusted under INA 245(i) is not eligible to adjust as a grandfathered derivative beneficiary under 245(i). See *Landin-Molina v. Holder (PDF)*, 580 F.3d 913 (9th Cir. 2009).

[^ 50] The spouse remains eligible to adjust (on a different basis) even if the spouse later became divorced from the principal beneficiary and the child remains eligible to adjust (on a different basis) even if the child has since married or turned 21 years of age.

[^ 51] See 8 CFR 103.2(b)(1). See 9 FAM 502.1-1(C)(2)(b)(2)(A), Basis for Following-to-Join. In contrast, grandfathered derivative beneficiaries only need to establish the qualifying relationship existed at the time the qualifying petition or labor certification application was properly filed. This is a unique aspect of INA 245(i) adjustment. Grandfathered derivative beneficiaries do not need to show the qualifying relationship continues to exist at the time they seek adjustment unless they are adjusting as an accompanying or following-to-join spouse or child of the principal beneficiary. For more information on qualifying to adjust status as a principal applicant's accompanying or following-to-join spouse or child, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6].

[^ 52] See INA 203(d).

[^ 53] See *Matter of Estrada (PDF)*, 26 I&N Dec. 180 (BIA 2013).

[^ 54] See FAM 502.1-1(C)(2)(b)(2)(f), Effect of Principal Alien's Naturalization on Derivative Status.

[^ 55] See INA 245(i)(1)(C) and 8 CFR 245.10(n).

Chapter 3 - Eligibility and Filing Requirements

A. Adjustment Eligibility under INA 245(i)

Grandfathered aliens and their current spouse and children are eligible to adjust under INA 245(i) if they meet certain eligibility requirements.

INA 245(i) Adjustment of Status Eligibility Requirements
The applicant must be included in the categories of restricted aliens under regulation.[1]
The applicant must properly file: • Application to Register Permanent Residence or Adjust Status (Form I-485), and • Adjustment of Status Under Section 245(i) (Form I-485 Supplement A).[2]
The applicant must pay the additional $1,000 statutory sum (unless exempt).[3]
The applicant is physically present in the United States at the time of filing Form I-485 and Supplement A.
The applicant is a grandfathered alien or is the current spouse or child of a grandfathered alien.
If the qualifying petition or application was filed between January 14, 1998 and April 30, 2001, the principal beneficiary was physically present in the United States on December 21, 2000.
The applicant is eligible for an immigrant visa as the beneficiary of an immigrant visa petition or by qualifying under certain other immigrant categories.
The applicant has an immigrant visa immediately available at the time he or she files Form I-485 and at the time USCIS approves the applicant's Form I-485 and Supplement A.
The applicant is admissible to the United States or is eligible for a waiver of inadmissibility or other form of relief.
The applicant merits the favorable exercise of discretion.[4]

B. Filing the Adjustment Application

1. Form I-485 Application and Supplement A

Applicants seeking adjustment of status under INA 245(i) must file both:

- Application to Register Permanent Residence or Adjust Status (Form I-485) with appropriate filing fee, and
- Adjustment of Status Under Section 245(i) (Form I-485 Supplement A) with payment of the $1,000 sum (unless exempt).[5]

Each applicant must file a separate Form I-485 and Supplement A (if applying under 245(i)) regardless of whether the applicant is a grandfathered beneficiary or spouse or child accompanying (or following-to-join) a grandfathered beneficiary. Applicants must complete the form and Supplement A according to the form instructions.[6] If the applicant is required to pay the $1,000 statutory sum, the applicant must do so before USCIS adjudicates the Form I-485.[7] The statutory sum is an absolute statutory eligibility requirement, is not a fee, and may not be waived.

INA 245(i) only applies to adjustment applications filed on or after the original date of enactment on October 1, 1994.[8] INA 245(i) does not apply to:

- Any adjustment application filed before October 1, 1994; or
- Any motions to reopen or reconsider an adjustment application filed before October 1, 1994.[9]

If USCIS denies an adjustment application filed prior to October 1, 1994, the applicant may file a new adjustment application to seek 245(i) benefits.[10]

The burden always remains on an applicant applying to adjust under INA 245(i) to satisfy all filing requirements, including the filing of the Supplement A and paying the additional sum. While 8 CFR 245.10(d) requires the agency to issue a notice of intent to deny where an applicant, who appears eligible under 245(i), has filed an application for adjustment without either the Supplement A or the additional sum, this regulation only applies to those applications that were pending on the effective date of the regulation, March 26, 2001.[11] Therefore, notice under 8 CFR 245.10(d) was only required for those applicants who appeared to be eligible for INA 245(i) at that time. That regulation (8 CFR 245.10(d)) does not require USCIS to issue a notice of intent to deny an applicant who has applied for adjustment of status under INA 245(a) after March 26, 2001.

2. Filing by Grandfathered Beneficiaries

Grandfathered beneficiaries (whether principal or derivative) eligible to adjust under INA 245(i) may file Supplement A and pay the $1,000 sum, if required, either:

- At the same time as Form I-485; or
- Any time after filing Form I-485 while it remains pending.[12]

Applicants who file Supplement A after their Form I-485 should attach a copy of the Notice of Action (Form I-797) (fee receipt) for the pending Form I-485.

3. Filing by Family Members of Grandfathered Beneficiaries

The current spouse or child (unmarried and under 21 years of age) of a grandfathered beneficiary (whether principal or derivative) eligible to accompany or follow-to-join[13] that beneficiary may file Form I-485:

- Together with the principal applicant's Form I-485;
- At any time while the principal applicant's previously-filed Form I-485 remains pending; or
- At any time after the principal applicant became a lawful permanent resident (LPR), provided the applicant's relationship as the principal applicant's spouse or child existed at the time the principal applicant became an LPR (and provided the principal applicant remains in LPR status).[14]

The accompanying (or following-to-join) spouse or child applicant may file Supplement A and pay the $1,000 sum, if required, either:

- At the same time as Form I-485; or
- Any time after filing Form I-485 while it remains pending.

Applicants who file Supplement A after their Form I-485 should attach the Notice of Action (Form I-797) (fee receipt) for the pending Form I-485.

If the accompanying (or following-to-join) spouse and children were properly inspected and admitted or paroled and are not subject to the INA 245(c) bars, the spouse and children need not file a Supplement A and may simply seek adjustment under INA 245(a) by filing only Form I-485.

Footnotes

[^ 1] See 8 CFR 245.10(b) and 8 CFR 245.1(b). See Instructions to Form I-485 Supplement A.

[^ 2] Form I-485 Supplement A is sometimes referred to simply as Supplement A.

[^ 3] See Chapter 4, Documentation and Evidence, Section B, Paying the Statutory $1,000 Sum [7 USCIS-PM C.4(B)].

[^ 4] See Part A, Adjustment of Status Policies and Procedures, Chapter 9, Legal Analysis and Use of Discretion [7 USCIS-PM A.9].

[^ 5] See Chapter 4, Documentation and Evidence, Section B, Paying the Statutory $1,000 Sum [7 USCIS-PM C.4(B)].

[^ 6] See 8 CFR 103.2.

[^ 7] See instructions to Supplement A. For detailed fee information, see the USCIS website.

[^ 8] See 8 CFR 245.10(b)(4) (Form I-485) and 8 CFR 245.10(b)(5) (Supplement A).

[^ 9] See 8 CFR 245.10(e).

[^ 10] See 8 CFR 245.10(e) and (f)(2).

[^ 11] See 8 CFR 245.10(d), 66 FR 16383, 16389 (Mar. 26, 2001). This approach to pending applications parallels previous regulations relating to changing eligibility requirements for adjustment of status under INA 245(i). See 62 FR 55152, 55154 (Oct. 23, 1997), former 8 CFR 245.10(d).

[^ 12] An applicant may not file Supplement A after USCIS adjudicates the Form I-485. If the applicant is required to pay the $1,000 statutory sum, the applicant must do so before USCIS adjudicates the Form I-485. See instructions to Supplement A.

[^ 13] See INA 203(d). See 22 CFR 40.1(a)(1).

[^ 14] See 9 FAM 502.1-1(C)(2)(b)(2)(a), Basis for Following-to-Join.

Chapter 4 - Documentation and Evidence

INA 245(i) applicants must submit the forms and documentation generally required of all adjustment applicants.[1] In addition, applicants should carefully review and follow the instructions for Supplement A, submit the appropriate application forms and fees, and provide documentation to prove eligibility for 245(i) adjustment.[2]

The applicant has the burden of proving that he or she meets the eligibility requirements for INA 245(i) adjustment.[3]

A. Documentation and Evidence

An applicant should submit the following documentation to adjust status under INA 245(i):[4]

- Application to Register Permanent Residence or Adjust Status (Form I-485) with the correct fee;
- Adjustment of Status Under Section 245(i) (Form I-485 Supplement A) with additional $1,000 sum (unless exempt);[5]
- Proof that the principal applicant is eligible to adjust status under 245(i) as a grandfathered beneficiary of a qualifying immigrant visa petition or permanent labor certification application (as discussed below);
- Copy of the Approval Notice (Form I-797) for the principal applicant's immigrant petition or other basis for adjustment;
- Two passport-style photographs;
- Copy of government-issued identity document with photograph;
- Copy of the applicant's birth certificate;
- Copy of passport page with nonimmigrant visa (if applicable);
- Copy of passport page with admission or parole stamp (if applicable);
- Copy of Arrival/Departure Record (Form I-94) or copy of U.S. Customs and Border Protection (CBP) admission or parole stamp on the travel document (if applicable);[6]
- Report of Immigration Medical Examination and Vaccination Record (Form I-693);
- Affidavit of Support (if applicable);
- Declaration of Self-Sufficiency (Form I-944) (if applicable);
- Certified police and court records of criminal charges, arrests, or convictions (if applicable);
- Application for Waiver of Grounds of Inadmissibility (Form I-601) (if applicable);
- Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212) (if applicable);
- Request for Waiver of Certain Rights, Privileges, Exemptions, and Immunities (Form I-508) (for applicants holding A, G, or E nonimmigrant status); and
- Documentation of past or present J-1 or J-2 nonimmigrant status, including proof of compliance with or waiver of the 2-year foreign residence requirement under INA 212(e) (if applicable).

In addition, a spouse or child who is a derivative of a grandfathered alien should submit the following:

- A copy of documentation showing relationship to the principal applicant (such as a marriage certificate, birth certificate, or adoption decree); and

- A copy of the approval notice or receipt (Form I-797) for the principal applicant's Form I-485 or a copy of the principal applicant's permanent resident card (Form I-551) (if applicable and not filing together with the principal applicant).

B. Paying $1,000 Sum

Applicants seeking adjustment under INA 245(i) must submit the $1,000 sum required by law unless they are exempt. This sum is in addition to the required fees associated with Form I-485.[7]

All 245(i) applicants must pay the additional $1,000 except for applicants who are:

- Unmarried and under 17 years of age;
- The spouse of a legalized alien who qualifies for Family Unity Benefits and has filed an Application for Family Unity Benefits (Form I-817). (The applicant should attach a copy of the USCIS Approval Notice or Receipt (Form I-797) for the properly filed Application for Family Unity Benefits (Form I-817) as evidence); or
- The unmarried child under 21 years of age of a legalized alien who qualifies for Family Unity Benefits and who has filed an Application for Family Unity Benefits (Form I-817) (the applicant should attach a copy of the USCIS Approval Notice or Receipt (Form I-797) for the properly filed Application for Family Unity Benefits (Form I-817) as evidence).[8]

An alien applying for adjustment of status under INA 245(i) must file Supplement A and pay the $1,000 sum with each adjustment application that the alien files, unless they are exempt.[9]

C. Establishing Grandfathering Eligibility

1. Proof of Qualifying Immigrant Visa Petition

An applicant generally can prove the existence of a qualifying immigrant visa petition[10] by submitting a copy of the Form I-797 approval notice for the immigrant petition showing the principal beneficiary's name and qualifying date of filing.

The following table outlines documentary evidence an applicant may submit to satisfy the three requirements to prove he or she has a qualifying petition.

Proof of Qualifying Immigrant Visa Petition

Requirement	Documentary Evidence[11]	Filing Deadline
Beneficiary of an immigrant visa petition	• Receipt or Approval Notice (Form I-797) for a Form I-130, I-140, I-360, or I-526	On or before April 30, 2001
Petition was "properly filed"	• Receipt or Approval Notice (Form I-797) showing date petition filing was accepted • Petition stamped with "Filed Prior to 245(i) Sunset" stamp • Postmarked envelope in the applicant's A-file • Petitions submitted with illegible or missing postmarks or submitted by private mail service were considered timely filed if physically received by May 3, 2001	On or before April 30, 2001
Petition was "approvable when filed"	• Approval Notice (Form I-797) showing petition is approved • If petition is still pending or was withdrawn, denied, or revoked, applicant may submit other relevant evidence establishing eligibility for petition approval (see below)[12]	On or before April 30, 2001

Absent an approved petition, an applicant may submit any relevant evidence to show the petition was approvable when filed, meaning the petition was meritorious in fact and non-frivolous (not patently without substance).

The following tables provide examples of evidence the applicant may submit to prove certain types of petitions were "approvable when filed."

Examples of Evidence that Family-Based Petition[13] was Approvable When Filed

Evidence	To Establish
• Birth certificates • Marriage certificates • Divorce decrees	Requisite relationship at time petition was filed.
• Bank statements • Life, health, or auto insurance policies • Rental or mortgage receipts	Bona fide marital intent at the time the petition was filed (if a marriage-based case).[14]

Examples of Evidence that Employment-Based Petition[15] was Approvable When Filed

Evidence	To Establish
• Copy of educational degrees or training • Proof of qualifying experience • Trade certifications • Professional licenses	Beneficiary had the requisite experience, skills, or education for the job.

Evidence	To Establish
• Copies of employer's business license • W-2 forms or pay stubs • Employment records or tax records • Employer affidavits	Petitioning business existed, had bona fide intention to employ the beneficiary, and had the ability to pay the beneficiary (as of the time of filing).

It may be more difficult for an applicant to obtain documents from the original petitioning employer or family member with the passage of time. In many cases, however, applicants are able to obtain employment or legal documents through a state or county business licensing board, secretary of state's office or state labor board, and other public records. An officer should consider the totality of the circumstances when determining whether a petition was "approvable when filed."

USCIS makes this determination based on the circumstances that existed at the time the petition was filed. A petition that was approvable when filed but was later withdrawn, denied, or revoked due to circumstances that arose after the time of filing may still qualify the applicant for 245(i) adjustment if he or she is otherwise eligible.[16]

2. Proof of Qualifying Labor Certification Application

An applicant can generally prove the existence of a qualifying permanent labor certification application[17] by submitting a copy of the Application for Alien Labor Certification (ETA Form 750) showing the principal beneficiary's name and bearing a state workforce agency's date stamp, an agency letter, or other official DOL document specifying the date of receipt or filing.

The following table outlines documentary evidence an applicant may submit to satisfy the three requirements to prove he or she has a qualifying permanent labor certification application.

Proof of Qualifying Labor Certification Application

Requirement	Documentary Evidence[18]	Filing Deadline
Beneficiary of a permanent labor certification application	• Form ETA 750 • Receipt from DOL or a State Wage Authority (SWA) for a Form ETA 750	On or before April 30, 2001
Application was "properly filed"	Receipt from DOL or SWA dated no later than April 30, 2001	On or before April 30, 2001
Application was "approvable when filed"	Evidence that application was accepted for filing (including receipt notice from DOL or SWA) and no evidence of fraud or ineligibility	On or before April 30, 2001

3. Proof of Physical Presence

Applicants whose INA 245(i) adjustment applications are based on a qualifying immigrant visa petition or permanent labor certification application filed after January 14, 1998, must prove that the principal beneficiary of that petition or application was physically present in the United States on December 21, 2000.[19]

In some cases, a single document may suffice to prove physical presence, but often applicants must submit several documents. USCIS ordinarily places the greatest weight on federal, state, or municipal government-issued documents. Examples of documents that applicants may submit copies of as evidence of physical presence include but are not limited to:

- Arrival-Departure Record (Form I-94);
- Nonimmigrant visa page from passport;
- Authorization for Parole of an Alien into the United States (Form I-512L) or other U.S. government-issued document showing parole into the United States after inspection by an immigration officer;
- Notice to Appear in Immigration Court;
- Official correspondence or other notices from a U.S. government agency;
- A state driver's license;
- Income tax or property tax records, returns, or payments;
- School or college transcripts and records;
- Medical records;
- Lease agreements and rental receipts;
- Utility bill receipts; or
- Employment records, such as payroll records or pay stubs.[20]

Applicants who submit a personal affidavit attesting to physical presence must also submit documentation in support of the affidavit.[21] USCIS evaluates all documentation on a case-by-case basis.[22]

D. Demonstrating Underlying Basis for Adjustment

Applicants for INA 245(i) adjustment must be eligible for an immigrant visa under a family-based, employment-based, special immigrant, or diversity visa immigrant category. The applicant may adjust based on:

- The qualifying immigrant visa petition used to establish grandfathering, if the petition is still valid;
- The immigrant visa petition associated with the permanent labor certification application used to establish grandfathering, if the petition is still valid;
- A separate immigrant visa petition; or
- Selection in the diversity visa program.

For instance, an applicant may be a grandfathered alien based on a permanent labor certification application but ultimately adjust status through a petition filed on his or her behalf by his or her lawful permanent resident (LPR) spouse.[23]

Eligibility requirements vary depending on the immigrant visa category under which an applicant seeks to adjust. An officer should review the record for proof that the applicant is eligible for an immigrant visa in the category that forms the basis for the applicant's adjustment. The Form I-485 instructions and the other category-specific parts of this volume provide detailed information on documentation and evidence applicants must submit with Form I-485, depending on their specific basis for adjustment.

E. Proof of Family Relationship

Applicants seeking INA 245(i) adjustment as a grandfathered derivative beneficiary[24] must show that the required relationship to the grandfathered principal beneficiary existed at the time the qualifying petition or application was properly filed. Grandfathered derivative beneficiaries do not, however, need to show that the relationship continues to exist at the time they file the adjustment application.

Applicants seeking adjustment as an accompanying (or following-to-join) spouse or child of a grandfathered beneficiary (who is the principal adjustment applicant) must show the spouse or child relationship currently exists.[25] Such applicants must also demonstrate that the grandfathered beneficiary is currently applying for, has already applied for, or was granted adjustment of status under INA 245(i) and remains an LPR.

An applicant can generally prove the required relationship by submitting a marriage certificate (for spouse) or birth certificate or adoption decree (for child).

An applicant can generally prove the grandfathered beneficiary is applying for or was granted adjustment of status by submitting a copy of the Approval Notice or Receipt (Form I-797) for that Form I-485, or a copy of the permanent resident card (Form I-551), if applicable.

F. Admissibility

Like other applicants for adjustment of status, INA 245(i) applicants must establish that they are admissible to the United States.

Because a fundamental aspect of INA 245(i) is to permit certain aliens to adjust status despite entry without inspection, the ground of inadmissibility related to aliens present in the United States without inspection and admission or inspection and parole does not apply to these applicants.[26]

INA 245(i), however, does not protect applicants from other inadmissibility grounds. If an officer determines that an applicant is inadmissible, then the applicant is ineligible for 245(i) adjustment unless the applicant has obtained a waiver or some other form of relief from all applicable grounds of inadmissibility.

G. Relief from Adjustment Bars

In general, applicants are ineligible for adjustment of status under INA 245(a) if any of the statutory adjustment bars apply to them.[27]INA 245(i) exempts eligible applicants from most of the INA 245(c) bars[28] to adjustment of status.[29] However, applicants described in the INA 245(c)(6) bar (deportable under INA 237(a)(4)(B) for having engaged in terrorist activities, as defined in INA 212(a)(3)(B)(iii)), are ineligible to adjust under INA 245(i) because such activities make the applicant inadmissible.[30]

Footnotes

[^ 1] See INA 245(a). See 8 CFR 103.2 and 8 CFR 245.2. See Part A, Adjustment of Status Policies and Procedures, Chapter 4, Documentation [7 USCIS-PM A.4].

[^ 2] See Chapter 3, Eligibility and Filing Requirements, Section A, Adjustment Eligibility under INA 245(i) [7 USCIS-PM C.3(A)]. See 8 CFR 103.2(b).

[^ 3] See 8 CFR 103.2(b)(1). See Part A, Adjustment of Status Policies and Procedures, Chapter 10, Legal Analysis and Use of Discretion, Section A, Burden of Proof and Standard of Proof [7 USCIS-PM A.10(A)]. See Chapter 3, Eligibility and Filing Requirements, Section A, Adjustment Eligibility under INA 245(i) [7 USCIS-PM C.3(A)].

[^ 4] Documents that are not in English must be accompanied by a full, certified English translation. See 8 CFR 103.2(b)(3). Applicants should submit only photocopies of original documents unless USCIS specifically requests an original document.

[^ 5] See Section B, Paying the Statutory $1,000 Sum [7 USCIS-PM C.4(B)].

[^ 6] Aliens admitted to the United States by CBP at an airport or seaport after April 30, 2013 may be issued an electronic Form I-94 by CBP instead of a paper Form I-94. Such aliens may visit the CBP website to obtain a paper version of an electronic Form I-94.

[^ 7] If the applicant is required to pay the $1,000 sum, the applicant must do so before USCIS adjudicates the Form I-485. See instructions to Supplement A. For detailed fee information, see the USCIS website.

[^ 8] See 8 CFR 245.10(c).

[^ 9] See 8 CFR 245.10(c).

[^ 10] For a detailed discussion of what is considered a "qualifying" petition or labor certification application, see Chapter 2, Grandfathering Requirements, Section B, Qualifying Immigrant Visa Petition or Permanent Labor Certification Application [7 USCIS-PM C.2(B)].

[^ 11] These documents may only be contained in the grandfathered principal beneficiary's A-file.

[^ 12] Petitions that are withdrawn, denied, or revoked by USCIS, or whose visa registration has been terminated by the U.S. Department of State under INA 203(g), may still serve to grandfather the person as long as the qualifying petition was properly filed and approvable when filed. In such cases, the burden is on the applicant to submit evidence that the petition was properly filed and approvable when filed.

[^ 13] See Petition for Alien Relative (Form I-130) and Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360).

[^ 14] See *Matter of Laureano (PDF)*, 19 I&N Dec. 1 (BIA 1983).

[^ 15] See Immigrant Petition for Alien Worker (Form I-140), Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360), and Immigrant Petition by Alien Entrepreneur (Form I-526).

[^ 16] See Chapter 2, Grandfathering Requirements, Section B, Qualifying Immigrant Visa Petition or Permanent Labor Certification Application, Subsection 2, Approvable When Filed [7 USCIS-PM C.2(B)(2)].

[^ 17] For a detailed discussion of what is considered a “qualifying” petition or labor certification application, see Chapter 2, Grandfathering Requirements, Section B, Qualifying Immigrant Visa Petition or Permanent Labor Certification Application [7 USCIS-PM C.2(B)].

[^ 18] These documents may only be contained in the principal grandfathered beneficiary’s A-file.

[^ 19] See INA 245(i)(1)(C) and 8 CFR 245.10(n). See Chapter 2, Grandfathering Requirements, Section E, Physical Presence Requirement [7 USCIS-PM C.2(E)].

[^ 20] See 8 CFR 245.10(n)(1)-(4).

[^ 21] See 8 CFR 245.10(n)(5)(i).

[^ 22] For more information on evidence that demonstrates an applicant’s physical presence in the United States on a specific date, see 8 CFR 245.22.

[^ 23] See 8 CFR 245.10(k) (addressing employment-based applications).

[^ 24] See Chapter 2, Grandfathering Requirements, Section C, Beneficiary of Qualifying Immigrant Visa Petition or Permanent Labor Certification Application, Subsection 2, Special Considerations for Derivative Beneficiaries [7 USCIS-PM C.2(C)(2)].

[^ 25] See Chapter 2, Grandfathering Requirements, Section D, Current Family Members of Grandfathered Aliens [7 USCIS-PM C.2(D)].

[^ 26] See INA 212(a)(6)(A)(i).

[^ 27] See INA 245(c)-(e). For more information on the adjustment bars, see Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 28] See Chapter 1, Purpose and Background, Section C, Overcoming INA 245(a) Adjustment Ineligibility [7 USCIS-PM C.1(C)].

[^ 29] Applicants described in the INA 245(c)(5) bar (admitted as a nonimmigrant witness or informant under INA 101(a)(15)(S)) are barred from adjustment unless they obtain an approved Inter-Agency Alien Witness and Informant Record (Form I-854). See 8 CFR 245.11.

[^ 30] See 8 CFR 245.10(g).

Chapter 5 - Adjudication and Decision

A. General

When adjudicating INA 245(i) adjustment applications, officers should follow the general guidance for adjustment applications.[1]

As appropriate, officers may issue a Request for Evidence or Notice of Intent to Deny to provide the applicant an opportunity to submit additional documentation regarding adjustment eligibility or inadmissibility grounds.

B. Waiver of Interview

All adjustment of status applicants must be interviewed by an officer unless the interview is waived by USCIS.[2] The decision to waive the interview should be made on a case-by-case basis.[3] The interview enables USCIS to verify important information about the applicant to determine eligibility for adjustment. For family-based applications, USCIS generally requires the Form I-130 petitioner to appear for the interview with the principal adjustment of status applicant. In addition, derivatives are also required to appear regardless of the immigrant visa category.

C. Adjudication

The following table provides a step-by-step overview of an INA 245(i) adjudication.

Step-by-Step Overview of Adjudication of INA 245(i) Adjustment Application	
Step 1	Determine that the applicant is either: • A grandfathered alien (whether a principal or derivative beneficiary), including verifying that the qualifying immigrant visa petition or permanent labor certification application was properly filed on or before April 30, 2001 and was approvable when filed; or • The current spouse or child accompanying (or following to join) a grandfathered alien.
Step 2	If the qualifying petition or application was filed after January 14, 1998, verify that the grandfathered principal beneficiary was physically present in the United States on December 21, 2000.
Step 3	Verify the applicant has paid the $1,000 sum (unless exempt).
Step 4	Determine that the applicant is otherwise eligible to adjust under 245(i).
Step 5	Determine that the applicant is eligible for an immigrant visa in the family-based, employment-based, special immigrant, or diversity visa immigrant category (whether or not based on the qualifying petition or application).
Step 6	Determine that an immigrant visa is immediately available for the applicant’s underlying immigrant category.[4]
Step 7	Determine that the applicant is admissible to the United States or is eligible for a waiver of inadmissibility or other form of relief.
Step 8	Determine that the applicant merits the favorable exercise of discretion.

D. Decision

1. Approval

The officer must verify that the applicant meets all the relevant eligibility requirements, including that the applicant merits the favorable exercise of discretion, before approving the application to adjust status under INA 245(i).

The applicant becomes a lawful permanent resident as of the date USCIS approves the adjustment application.[5]

2. Denial

If the officer determines that the applicant is ineligible for adjustment, the officer must deny the adjustment application. The officer must provide the applicant a written reason for the denial.[6] Although there are no appeal rights for the denial of an INA 245(i) adjustment application, the applicant may file a motion to reopen or reconsider. The denial notice should include instructions for filing a Notice of Appeal or Motion (Form I-290B). An applicant may also renew the adjustment application in any subsequent removal proceedings.[7]

Footnotes

[^ 1] See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6] and Chapter 11, Decision Procedures [7 USCIS-PM A.11].

[^ 2] See 8 CFR 245.6.

[^ 3] See Part A, Adjustment of Status Policies and Procedures, Chapter 5, Interview Guidelines [7 USCIS-PM A.5].

[^ 4] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].

[^ 5] The date of approval is shown on the Notice of Action (Form I-797) and on the permanent resident card (Form I-551).

[^ 6] See 8 CFR 103.2(b)(19) and 8 CFR 103.3(a).

[^ 7] See 8 CFR 245.2(a)(5)(ii).

Part D - Family-Based Adjustment

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures.

See more

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures. We are working quickly to update and incorporate all of the AFM content into the USCIS Policy Manual, the agency's centralized online repository for immigration policies. Until then, we have moved any remaining AFM content to its corresponding Policy Manual Part. To the extent that a provision in the Policy Manual conflicts with remaining AFM content or Policy Memoranda, the updated information in the Policy Manual prevails. If you have questions or concerns about any discrepancies among these resources, contact PolicyFeedback@uscis.dhs.gov.

AFM Chapter 23 - Adjustment of Status to Lawful Permanent Resident (External)

Part E - Employment-Based Adjustment

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AFM Chapter 23 - Adjustment of Status to Lawful Permanent Resident (External)

Chapter 1 - Purpose and Background [Reserved]

Chapter 2 - Eligibility Requirements [Reserved]

Chapter 3 - Immigrant Visa Availability and Priority Dates [Reserved]

Chapter 4 - Documentation and Evidence [Reserved]

Chapter 5 - Job Portability after Adjustment Filing and Other AC21 Provisions

A. Background

In 2000, Congress enacted the American Competitiveness in the Twenty-First Century Act of 2000[1] (AC21) which, in part, added INA 204(j). This provision allows certain employment-based adjustment of status applicants experiencing delays in the employment-based adjustment of status process some flexibility to change jobs or employers while their Application to Register Permanent Residence or Adjust Status (Form I-485) is pending.[2]

If eligible under INA 204(j), the Immigrant Petition for Alien Workers (Form I-140) (and underlying permanent labor certification, if applicable) may remain valid and the beneficiary of an approved employment-based immigrant visa petition in the 1st, 2nd, or 3rd preference category may transfer, or "port," to a qualifying new job offer that is in the same or a similar occupational classification as the job offer for which the petition was filed. The new job offer may be through the same employer that filed the petition or a different employer.

These provisions are referred to as "portability." Employment-based adjustment applicants who use such benefits are considered to have "ported" the petition filed on their behalf to the new job offer.

An applicant who successfully ports the petition on which the adjustment application[3] is based to a new job or employer retains the priority date of the underlying petition.

B. Eligibility Requirements

1. General Portability Requirements

To qualify for portability under INA 204(j), the adjustment applicant must meet the following eligibility requirements:

- The applicant is the beneficiary of an approved Form I-140 petition or of a pending petition that is ultimately approved;
- The petition is filed in the employment-based 1st, 2nd, or 3rd preference category;[4]
- The applicant's properly filed adjustment application has been pending with USCIS for 180 days or more at the time USCIS receives the request to port;[5]
- The new job offer through which the applicant seeks to adjust status is in the same or similar occupational classification as the job specified in the petition; and
- The applicant submitted a request to port. If the applicant makes a request to port on or after January 17, 2017, the applicant must submit a Confirmation of a Valid Job Offer or Request for Job Portability Under INA Section 204(j) (Form I-485, Supplement J). If the applicant requested to port before January 17, 2017, the applicant could have requested to port through a letter, since Form I-485, Supplement J did not go into effect until January 17, 2017.

The new job offer may be with the same petitioner or with an entirely new employer, including self-employment. Applicants can submit the portability request and evidence with the adjustment application or in any in-person interviews or in response to a request or other notice from USCIS.

2. Approved Petition Required

If USCIS has approved an applicant's Form I-140 petition and the applicant's adjustment application remained unadjudicated for 180 days or more (from the adjustment application receipt date), the approved petition remains valid unless the petition's approval is later substantively revoked. This applies even if the applicant changes jobs or employers so long as the new offer of employment is in the same or similar occupation. If the adjustment application has been pending for less than 180 days, the approved petition does not remain valid with respect to a new offer of employment.

An unadjudicated petition is not valid merely because the petition was filed with USCIS or through the passage of 180 days. Rather, the petition must have been filed on behalf of an alien who was entitled to the employment-based classification at the time that the petition was filed, and therefore must be approved prior to a favorable determination on a portability request. If at any time USCIS revokes approval of the petition, the applicant is not eligible for the job flexibility provisions of Section 106(c) of AC21.[6]

In revocation cases, the officer adjudicating the adjustment application may deny the adjustment application and Supplement J request. In all cases, an offer of employment must have been valid and the employer must have had the intent (at the time the petition was approved) to employ the beneficiary upon adjustment.

3. Withdrawal of Petition

In general, if USCIS receives a request from a petitioner to withdraw a pending Form I-140 petition, USCIS issues an acknowledgment of the withdrawal request and denies any corresponding adjustment application. However, if the pending petition is approvable and the adjustment application was pending for 180 days or more, the petition may remain valid for priority date retention and possible eligibility under INA 204(j) for the adjustment application.[7]

In addition, if USCIS receives a request from a petitioner to withdraw a petition that has been approved for fewer than 180 days, and any corresponding adjustment application has not been pending for at least 180 days (or has not been filed), USCIS automatically revokes the approval of the petition.[8] However, if USCIS receives a withdrawal request from a petitioner 180 days or more after the approval of the petition, or a corresponding adjustment application has been pending for 180 days or more, the petition remains valid for priority date retention. The applicant may be eligible under INA 204(j) for the adjustment application (unless USCIS revokes the approval of the petition under substantive grounds) if he or she satisfies all of the requirements to port based on a new same or similar position and the adjustment application has been pending 180 days or more at the time of withdrawal.[9]

If the adjustment applicant is not eligible under INA 204(j), the applicant must obtain a new employment-based preference petition in order to file a new adjustment application, even if withdrawal of the original petition occurred after it had been approved for at least 180 days or a corresponding adjustment application was pending for at least 180 days.

4. Termination of Original Petitioner's Business

In general, if the Form I-140 petitioner's business terminates before USCIS approves the Form I-140 petition, USCIS denies the petition and denies any corresponding adjustment application.[10] However, if the petition was approvable at the time of filing and remained approvable until the adjustment application had been pending for 180 days or more, the petition remains valid for priority date retention, and possible eligibility under INA 204(j) for the adjustment application.[11]

In addition, USCIS automatically revokes the approval of the petition in cases where:

- The petitioner's business terminates after the approval of the petition;
- The petition has been approved for fewer than 180 days at the time; and
- A corresponding adjustment application has not been pending for at least 180 days (or has not been filed).[12]

However, if the business termination occurs 180 days or more after the approval of the petition or a corresponding adjustment application has been pending for 180 days or more, the petition may remain valid for priority date retention. The applicant may be eligible to port under INA 204(j) for the adjustment application (unless USCIS revokes the approval of the petition under substantive grounds) if he or she satisfies all of the requirements to port based on a new same or similar position and the adjustment application has been pending 180 or more days when the business terminated.[13]

If the applicant is not eligible under INA 204(j) but otherwise meets the timing criteria to sustain the validity of the petition, the applicant must obtain a new employment-based preference petition in order to file a new adjustment application.[14]

5. Adjustment Application Pending 180 Days or More

For portability purposes, counting the number of days the adjustment application has been pending begins on the day the applicant properly filed the adjustment application with USCIS and includes every subsequent calendar day until USCIS receives the applicant's request to port (so long as the application remains unadjudicated).

If the Form I-140 petitioner withdraws the petition or the petitioner's business terminates before USCIS approves the petition, the portability provisions only apply if the adjustment application has been pending for 180 calendar days or more. If the adjustment application has been pending for fewer than 180 calendar days, portability does not apply and the petition is not approvable.[15]

An immigrant visa must be available at the time an applicant files an adjustment application.[16] However, a visa does not need to remain continuously available for the 180 days to accrue. The fact that a visa number becomes unavailable after the filing of the adjustment application does not stop the number of days required for Form I-140 petition portability eligibility from accruing.

6. New Job in Same or Similar Occupational Classification

To determine whether a new job offer is valid for purposes of INA 204(j) portability, the new job offer must be in either the same occupational classification or a similar occupational classification as the job specified in the underlying Form I-140 petition.

Same Occupational Classification

The term "same occupational classification" means an occupation that resembles in every relevant respect the occupation for which the underlying employment-based immigrant visa petition was approved.[17] Accordingly, USCIS evaluates whether the jobs are identical, resembling in every relevant respect, or the same kind of category or thing when determining whether two job offers are in the same occupational classification.

Similar Occupational Classification

The term "similar occupational classification" means an occupation that shares essential qualities or has a marked resemblance or likeness with the occupation for which the underlying employment-based immigrant visa petition was approved.[18] When determining whether two job offers are in similar occupational classifications, USCIS evaluates whether the jobs share essential qualities or have a marked resemblance or likeness.

Factors to Consider

To determine if the new job offer is in the same or similar occupational classification as the job listed on the petition, officers evaluate the totality of the circumstances. As part of this evaluation, officers may consider and compare various factors and evidence relating to the jobs. Relevant factors include, but are not limited to:

- The U.S. Department of Labor (DOL) occupational codes assigned to the respective jobs;
- Job duties;
- Job titles;
- The required skills and experience;
- The educational and training requirements;
- Any licenses or certifications specifically required;
- The offered wage or salary; and
- Any other material and credible evidence relevant to a determination of whether the new position is in the same or a similar occupational classification.

A change to the same or a similar occupational classification may involve lateral movement, career progression, or porting to self-employment, either in the same or a different geographic location.

With respect to porting to self-employment, all other eligibility requirements must be satisfied. First, as with all other portability determinations, the employment must be in a same or similar occupational classification as the job for which the original petition was filed. Second, the adjustment applicant should provide sufficient evidence to confirm that the applicant's business and the job offer are legitimate. If the submitted evidence is insufficient to confirm the legitimacy, or the officer identifies fraud indicators that raise doubts about the legitimacy of the self-employment, the officer may request evidence to show that the self-employment is legitimate. Third, as with any portability case, USCIS focuses on whether the petition represented the truly intended employment at the time of the filing of both the petition and the adjustment application. This means that, as of the time of the filing of the petition and at the time of filing the adjustment application (if not filed concurrently), the original petitioner must have had the intent to employ the beneficiary, and the beneficiary must also have intended to undertake the employment upon adjustment.[19] Officers may take the petition and supporting documents themselves as evidence of such intent, but in certain cases requesting additional evidence or initiating an investigation may be appropriate.

7. Using Standard Occupational Classification Codes

U.S. Department of Labor's Standard Occupational Classification

Standard Occupational Classification (SOC) codes may help address uncertainty in the portability determination process. As mentioned above, USCIS does not consider SOC codes or their descriptions as the sole determining factor(s) or mandatory factor(s) in portability determinations. USCIS considers other relevant factors or evidence in the totality of the circumstances.[20]

In making portability determinations, officers may refer to DOL's labor market expertise as reflected in its SOC system. The SOC system is used to organize occupational data and classify workers into distinct occupational categories.[21] Occupations are generally categorized based on the type of work performed and, in some cases, on the skills, education, and training required to perform the job.

Organization of SOC System

The SOC organizes all occupations into major groups, which are then broken down in descending order into minor groups, broad occupations, and detailed occupations.[22] All workers are classified into one of these detailed occupations. Detailed occupations with similar job duties and, in some cases, skills, education, and training are generally grouped together in the same broad occupation.

The SOC system is organized using numeric codes consisting of six digits. Each digit or group of digits represents the level of similarity of positions. An occupation is not assigned to more than one category at the lowest level of the classification (sixth digit).

For example, the SOC code for the detailed occupational classification of "web developer" is 15-1254 and is broken down as follows:

- The first two digits (15) indicate the major group classification, which includes all computer and mathematical occupations. Major Group 15-0000: Computer and Mathematical Occupations.
- The third digit (1) indicates the minor group classification, which includes all computer occupations. Minor Group 15-1200: Computer Occupations.
- The fourth and fifth digits (25) indicate the broad occupation classification, which includes software and web developers, programmers, and testers. Broad occupation 15-1250 Software and Web Developers, Programmers, and Testers.
- The sixth digit (4) indicates the detailed occupation classification, which includes only web developers. Detailed Occupation 15-1254: Web Developers.

The SOC system classifies supervisors and managers of other workers distinctly. Supervisors of workers in many major groups may be classified along with the workers they supervise. As such, supervisors usually have work experience and perform activities similar to the workers they supervise.[23]

Management Occupations (such as those primarily engaged in planning and directing) are generally classified in a separate major group (Major Group 11-0000).[24] Persons classified in this major group are generally managers of persons categorized in other major groups and their duties may include supervision of such other persons.

For example, the SOC code 11-9041 is assigned to the detailed occupation Architectural and Engineering Managers, which covers persons who "[p]lan, direct, or coordinate activities in such fields as architecture and engineering or research and development in these fields."[25] Under normal career progression, a person in an occupation in any given major group may advance to a corresponding and related occupation in the major group for managers.

In all cases, USCIS officers should review all relevant evidence when determining whether two jobs are in the same or similar occupational classification(s) for purposes of INA 204(j) portability (see above), to include SOC codes to compare the respective jobs as well as relevant information in alternative resources.[26]

Determining Appropriate SOC Code

Determining the appropriate SOC codes for the relevant jobs depends on the type of petition filed on behalf of the adjustment applicant:

- For petitions that are supported by labor certifications from DOL, the SOC codes for the original position have been certified by DOL. The SOC code associated with the new position, as reported on Supplement J, must be established by the applicant with supporting evidence from the intending employer.
- For petitions that do not require labor certifications from DOL, the applicant must establish the proper SOC code for both the original position and the new position. The applicant should submit supporting evidence from the intending employer for the new position.

With respect to SOC codes other than those certified by DOL in a labor certification, the burden is on the applicant to demonstrate by a preponderance of the evidence that the SOC code may properly be associated with the relevant position.[27]

If the applicant establishes by a preponderance of the evidence that the detailed occupational codes describing the original and new positions are the same (for example, those where all six digits of the code match), and the totality of the circumstances supports that determination, officers may generally treat such evidence favorably in determining whether the two positions are in the same or similar occupational classification(s) for INA 204(j) portability purposes.[28]

Similarly, if the applicant establishes by a preponderance of the evidence that the two jobs are described by two distinct detailed occupation codes within the same broad occupation code, officers may treat such evidence favorably in determining whether the two positions are in similar occupational classifications. USCIS generally considers such positions to be in similar occupational classifications unless the preponderance of the evidence indicates that favorable treatment is not warranted (upon review of the evidence and considering the totality of the circumstances).[29]

For example, the detailed occupations of Computer Programmers (15-1251), Software Developers (15-1252), Software Quality Assurance Analysts and Testers (15-1253), Web Developers (15-1254), and Web and Digital Interface Designers (15-1255) are found within the broad occupational group of Software and Web Developers, Programmers, and Testers (15-1250). Officers may consider these detailed occupations to be in similar occupational classifications given the largely similar duties and areas of study associated with each classification.[30]

In certain instances, however, simply establishing that the two jobs are described within the same broad occupation may not be sufficient to establish by a preponderance of the evidence that the two jobs are in similar classifications.

For example, the detailed occupations of Geographers (19-3092) and Political Scientists (19-3094) are found within the broad occupational code for Miscellaneous Social Scientists and Related Workers (19-3090).[31] Although such occupations are grouped together in the same broad occupational code, the workers in those respective occupations largely do not share the same duties, experience, and educational backgrounds. In such cases, the officer may determine that the two jobs are not in similar occupational classifications for purposes of INA 204(j) portability.

The burden is on the applicant to demonstrate that the relevant positions are in the same or similar occupational classification(s). When making such determinations, and when determining whether the relevant positions have been properly categorized by the applicant under the SOC, USCIS reviews the evidence of each case and considers the totality of the circumstances.

Career Progression

USCIS recognizes that persons earn opportunities for career advancement as they gain experience over time. As with other cases, USCIS considers cases involving career progression under the totality of the circumstances to determine whether the applicant has established by a preponderance of the evidence that the relevant positions are in similar occupational classifications for INA 204(j) portability purposes.

In many instances, a person's progress in his or her career may easily fit the standards discussed in the preceding guidance, such as when a person moves into a more senior but related position that does not have a managerial or supervisory role (such as a promotion from a software engineer to a senior software engineer). In such cases, officers should consider whether the original position and the new position are in the same or similar occupational classification(s), consistent with the preceding section.

In other instances, career progression may involve a different analysis, such as when a person moves from a non-managerial or non-supervisory position into a managerial or supervisory role. In such cases, officers may treat certain evidence favorably in determining whether the two jobs are in similar occupational classifications for purposes of INA 204(j) portability. Specifically, in cases where the evidence submitted by the applicant establishes that the applicant is primarily responsible for managing the same or similar functions of their original jobs or the work of persons whose jobs are in the same or similar occupational classification(s) as the applicants' original positions.

Example (Similar Occupational Classification)

If the occupation described in the original job offer was assigned the SOC code of 15-1152 for Software Developers, officers may determine that a new job offer described in the SOC code of 11-3021 for Computer and Information Systems Managers is in a similar occupational classification.[32]

This is because Computer and Information Systems Managers generally manage those in positions that fall within occupational classifications that are the same as or similar to the occupational classification of the original job offer (such as Computer Programmers (15-1251), Software Developer (15-1252), and Web Developer (15-1254), all of which are grouped together under the broad occupational code for Software and Web Developers, Programmers and Testers (15-1250)).[33]

Example (Not Similar Occupational Classification)

If the occupation described in the original job offer was assigned the SOC code of 35-2014 for Cooks, Restaurant, officers may determine that a new job offer described in the SOC code of 11-9051 for Food Service Managers is not in a similar occupational classification.

This is because the duties of Food Service Managers (duties that include planning, directing, or coordinating activities of an organization that serves food and beverages) are generally different from those of restaurant cooks, who largely prepare meals. Moreover, the SOC code for Food Service Managers specifically excludes “Chefs and Head Cooks,” who supervise restaurant cooks and persons in other similar positions.[34]

Non-Managerial Career Progression

There may be instances where the evidence (in light of the totality of the circumstances) warrants a favorable portability determination based on normal career progression. This may apply even though the person is not managing persons in jobs that are in the same or similar occupational classification(s) as the applicant’s original position.

For example, if an applicant’s original job duties as a restaurant cook included ordering supplies, setting menu prices, and planning the daily menu, a change to a food service manager position may be considered a normal career progression. This may apply if the applicant’s responsibilities as a food service manager include ordering food and beverages, equipment, and supplies; as well as overseeing food preparation, portion sizes, and overall presentation of food.

While the applicant may not be directly supervising cooks in his or her new position, the applicant may provide evidence that he or she is overseeing some of the functions that a cook would perform to demonstrate that the two positions are in similar occupational classifications.

As noted above, in all cases that involve career progression, officers must consider the totality of the circumstances to determine whether the preponderance of the evidence establishes that the two positions are in similar occupational classifications for INA 204(j) portability purposes.

Other Variations

Even in cases where SOC codes are not grouped together or the relevant positions do not reflect normal career progression, USCIS reviews the evidence presented under the totality of the circumstances to determine if the two jobs can be considered to be in the same or similar occupational classification(s).

For example, a person whose original job was coded within the major group code of 15-0000 for Computer and Mathematical Occupations may find a job in an engineering field that is classified under the major group code of 17-0000 for Architecture and Engineering Occupations.[35] If the preponderance of the evidence indicates that the two jobs share essential qualities or have a marked resemblance or likeness, the person may be eligible to port to the new position.

USCIS also recognizes that variations in job duties arising from performing jobs for different employers, including employers in different economic sectors, do not necessarily preclude two positions from being in similar occupational classifications for purposes of INA 204(j) portability.

For example, if the original position was for a Personal Financial Advisor (13-2052) at a financial consulting firm, the applicant’s duties may have included reviewing financial information.[36] This may include using knowledge of tax and investment strategies; assessing clients’ assets, liabilities, cash flow, taxes, and financial objectives; and networking and business development.[37]

If the new position is for a Financial Analyst (13-2051) in-house with a pharmaceutical company, the job duties may involve reviewing and recommending the financial objectives of the organization, including quantitative analyses of information involving investment programs or financial data of public or private institutions, including valuation of businesses.[38]

While the duties of the two positions differ to some degree, such positions may be similar to each other when viewed in the totality of the circumstances considering that the overarching duty of both positions is to apply accounting and investment principles in order to develop financial strategies; and the same skills, experience, and education may be required to perform both jobs.

As a further example, if the original position was for a Microbiologist (19-1022) at a federal research laboratory, the applicant’s duties may have included: investigate the growth, structure, development, and other characteristics of microscopic organisms, such as bacteria, algae, or fungi. Includes medical microbiologists who study the relationship between organisms and disease or the effects of antibiotics on microorganisms.[39]

If the new job offer is for a Medical Scientist, Except Epidemiologist (19-1042) at a private medical research laboratory, the duties may include: research dealing with the understanding of human diseases and the improvement of human health. Engage in clinical investigation, research and development, or other related activities.[40]

When reviewing the evidence under the totality of the circumstances, USCIS may consider the two positions to be similar because the primary duties involved share essential qualities or have a marked resemblance or likeness, particularly if they require similar education, experience, and skills to perform the associated duties, even though the two positions do not share the same broad occupation.

Differences in Wages

USCIS may consider the wages offered for the original position and the new position in determining whether the two positions meet the requirements for INA 204(j) portability. The mere fact that both positions offer similar wages is not conclusive evidence to establish that the two positions are in the same or similar occupational classification(s). Likewise, a difference in salaries alone would not preclude an officer from finding that two positions are in the same or similar classification.

USCIS recognizes that normal raises occur through the passage of time to account for inflation or promotion. USCIS also recognizes that there may be differences in pay due to varying rates of pay in different economic sectors or geographic locations, as well as other factors, such as corporate mergers, size of employer, or differences in compensation structure. Additionally, there could be differences in wages in cases involving moves from for-profit employers to nonprofit employers, academic institutions, or public employers (or vice versa).

Applicants should explain in detail any substantial discrepancy in wages between the original position and the new position. In all instances, officers review a difference in wages and any explanation for that difference along with all other evidence presented.

C. Making a Portability Request

1. When Required

If an applicant is filing or has filed an adjustment application as the principal beneficiary of a valid Form I-140 petition in an employment-based immigrant visa category that requires a job offer, the applicant must file a Confirmation of a Valid Job Offer or Request for Job Portability Under INA Section 204(j) (Form I-485, Supplement J) in order to confirm the job offer remains valid, or to request job portability under INA 204(j) to a new, full-time, permanent job offer that he or she intends to accept once the adjustment application is approved.

Applicants seeking or granted a national interest waiver of the job offer requirement[41] and applicants seeking or granted classification as an alien of extraordinary ability[42] do not need to file Supplement J or request job portability under INA 204(j) because these employment-based immigrant visa categories are not tied to a specific job offer.

2. Timing of Request

Applicants may request portability after the adjustment application has been pending 180 days, including during an adjustment interview or in response to a Request for Evidence or Notice of Intent to Deny sent by USCIS following a request to withdraw the petition.[43]

3. Format and Suggested Evidence

If the applicant makes a request to port on or after January 17, 2017, the applicant must submit a Supplement J. If the applicant requested to port before January 17, 2017, the applicant could have requested to port through a letter. However, even for requests filed before that date, USCIS may request Supplement J to validate the employment offer. While the applicant completes the portions of the supplement pertaining to him or herself, the employer completes the sections pertaining to itself and the new job.

The applicant should submit the following documents in support of the Supplement J when requesting portability:

- A copy of Notice of Action (Form I-797), establishing the date of acceptance of the adjustment application under INA 245, which shows that the Form I-485 has been pending for 180 days or more (receipt date); and
- A copy of Notice of Action (Form I-797), showing that the applicant is the principal beneficiary of an approved or still pending Form I-140 petition.

USCIS also considers secondary evidence when the above evidence is not available, but failure to provide these notices of action may result in delayed processing.

4. Adjudication

When adjudicating the Supplement J, USCIS reviews the evidence of record in the totality of the circumstances to determine if the new job offer is in the same or similar occupational classification as the job listed on the underlying petition.[44]

If the officer determines that the new job is in the same or similar occupational classification, the officer approves the Supplement J and continues with adjudication of the adjustment application. If USCIS determines that the new job offer is not in the same or similar occupational classification, USCIS denies the Supplement J. Therefore, USCIS denies the adjustment application and may add any other bases for denial (if applicable).

D. Effect of Principal Beneficiary's Death on Portability

Derivative adjustment applicants may remain eligible to adjust despite the death of the principal applicant.[45] In these circumstances, USCIS may approve a pending petition or reinstate approval of an automatically revoked petition without regard to portability considerations.

Footnotes

[^ 1] In 2002, AC21, Pub. L. 106-313 (PDF), 114 Stat. 1251, 1254 (October 17, 2000), was amended by the Twenty-First Century Department of Justice Appropriations Authorization Act (the 21st Century DOJ Appropriations Act), Pub. L. 107-273 (PDF) (November 2, 2002).

[^ 2] See Section 106(c) of AC21, Pub. L. 106-313 (PDF), 114 Stat. 1251, 1254 (October 17, 2000). See 8 CFR 245.25.

[^ 3] See Application to Register Permanent Residence or Adjust Status (Form I-485).

[^ 4] Portability is not applicable to adjustment applicants whose immigrant visa petitions are based on classification as an individual with extraordinary ability under INA 203(b)(1)(A) or physicians for whom USCIS has granted a national interest waiver (NIW) under INA 203(b)(2)(B)(ii). See INA 204(j). See 8 CFR 204.5(e)(5) and 8 CFR 204.12(f). Although these applicants are not eligible for AC21 portability, they are permitted to change employers, including becoming self-employed. Individuals of extraordinary ability do not require a job offer but must show clear evidence that they intend to work in the area of their expertise. See 8 CFR 204.5(h)(5). Physicians with immigrant visa petitions based on an NIW under INA 203(b)(2)(B)(ii) must file a new Form I-140 petition if they desire to change employers or establish their own practice before completing their employment obligation. See 8 CFR 204.12(f). While adjustment applicants with immigrant visa petitions based on an NIW under INA 203(b)(2)(B)(i) are eligible to port, because the job offer is waived and they are not required to demonstrate a job offer at the time of adjustment, there is no need for them to file a Form I-485, Supplement J if they change jobs. However, USCIS may inquire whether such applicants are continuing to work in the area or field that forms the basis of their immigrant visa eligibility. See 81 FR 82398, 82424 (PDF) (Nov. 18, 2016). See the instructions for the Confirmation of Valid Job Offer or Request for Job Portability Under INA Section 204(j) (Form I-485, Supplement J).

[^ 5] See 8 CFR 245.25(a)(2)(i) and 8 CFR 205.1(a)(3)(iii)(C)-(D).

[^ 6] See 8 CFR 245.25(a)(2)(iii). See *Matter of Al Wazzan (PDF)*, 25 I&N Dec. 359, 365 (AAO 2010) ("[T]he petition must be 'valid' to begin with if it is to 'remain valid with respect to a new job.'").

[^ 7] See 8 CFR 205.1(a)(3)(iii)(C). If the petition is subsequently approved, it remains valid unless USCIS revokes the approval under substantive grounds.

[^ 8] See 8 CFR 205.1(a)(3)(iii)(C).

[^ 9] See 8 CFR 205.1(a)(3)(iii)(C). See 8 CFR 205.1(a)(3)(iii)(D). See 8 CFR 245.25(a)(2)(iii).

[^ 10] See 8 CFR 103.2(b)(1).

[^ 11] See 8 CFR 245.25(a)(2)(ii)(B)(*2*). If the petition is subsequently approved, it remains valid unless USCIS revokes the approval under substantive grounds.

[^ 12] See 8 CFR 205.1(a)(iii)(D).

[^ 13] See 8 CFR 205.1(a)(iii)(D).

[^ 14] See 8 CFR 205.1(a)(iii)(D).

[^ 15] See 8 CFR 245.25(a)(2)(ii)(B)(*2*).

[^ 16] See 8 CFR 245.1(a) and 8 CFR 245.1(g)(1).

[^ 17] See 8 CFR 245.25(b).

[^ 18] See 8 CFR 245.25(b).

[^ 19] See 8 CFR 245.25(a)(3).

[^ 20] Officers may reference additional resources to determine whether two jobs are in the same or similar occupational classification(s), including, for example, the DOL Bureau of Labor Statistics (BLS)' Occupational Outlook Handbook, the DOL Employment and Training Administration-sponsored Occupational Information Network (O*NET), or the DOL BLS' Occupational Employment Statistics database.

[^ 21] See DOL BLS' Standard Occupational Classification. DOL revises the SOC codes periodically.

[^ 22] See DOL BLS' Standard Occupational Classification.

[^ 23] See DOL BLS' 2018 Standard Occupational Classification User Guide (PDF).

[^ 24] See Classification Principles and Coding Guidelines, DOL BLS, 2018 Standard Occupational Classification User Guide (PDF). See Standard Occupational Classification, 11-0000 Management Occupations, DOL BLS, 2018 Standard Occupational Classification User Guide (PDF).

[^ 25] See DOL BLS, Standard Occupational Classification, 11-0000 Management Occupations.

[^ 26] As noted above, officers may reference additional resources to determine whether two jobs are in the same or similar occupational classification(s), including, for example, the DOL BLS' Occupational Outlook Handbook, the DOL Employment and Training Administration-sponsored Occupational Information Network (O*NET), or the DOL BLS' Occupational Employment Statistics database.

[^ 27] See *Matter of Chawathe (PDF)*, 25 I&N Dec. 369, 375 (AAO 2010).

[^ 28] If an occupation is not included as a distinct detailed occupation in the structure, it is classified in an appropriate ''All Other" occupation. ''All Other'' occupations are placed in the structure when it is determined that the detailed occupations comprising a broad occupation group do not account for all of the workers in the group, even though such workers may perform a distinct set of work activities. These occupations appear as the last occupation in the group with a code ending in ''9'' and are identified in their title by having ''All Other'' appear at the end. See DOL BLS' 2018 Standard Occupational Classification User Guide (PDF). Under such circumstances, officers should carefully review the evidence to determine that the two positions are in the same or similar occupational classification.

[^ 29] According to DOL: "Broad occupations often include several detailed occupations that are difficult to distinguish without further information. For example, people may report their occupation as biologist or psychologist without identifying a concentration. Broad occupations, such as psychologist, include more detailed occupations, such as industrial-organizational psychologists, for those requiring further detail. For cases in which there is little confusion about the content of a detailed occupation, the broad occupation is the same as the detailed occupation. For example, because it is relatively easy to identify lawyers, the broad occupation, lawyers, is the same as the detailed occupation." See Chester Levine et al., Revising the Standard Occupational Classification System (PDF), *BLS Monthly Labor Review* (May 1999), 39-40. Therefore, broad occupational codes may be helpful indicators that two positions are similar.

[^ 30] See DOL BLS, 2018 Standard Occupational Classification System, 15-0000 Computer and Mathematical Occupations.

[^ 31] See DOL BLS, 2018 Standard Occupational Classification System, 19-0000 Life, Physical, and Social Science Occupations.

[^ 32] See DOL BLS' 2018 Standard Occupational Classification System.

[^ 33] See DOL BLS, 2018 Standard Occupational Classification System, 15-1250 Software and Web Developers, Programmers, and Testers.

[^ 34] See DOL BLS, 2018 Standard Occupational Classification System, 11-0000 Management Occupations.

[^ 35] See DOL BLS, 2018 Standard Occupational Classification System, 15-0000 Computer and Mathematical Occupations and 17-0000 Architecture and Engineering Occupations.

[^ 36] See DOL BLS, 2018 Standard Occupational Classification System, 13-2052 Personal Financial Advisors.

[^ 37] See DOL BLS, 2018 Standard Occupational Classification System, 13-2052 Personal Financial Advisors.

[^ 38] See DOL BLS, 2018 Standard Occupational Classification System, 13-2051 Financial and Investment Analysts.

[^ 39] See DOL BLS, 2018 Standard Occupational Classification System, 19-1022 Microbiologists.

[^ 40] See DOL BLS, 2018 Standard Occupational Classification System, 19-1042 Medical Scientists, Except Epidemiologists.

[^ 41] See INA 203(b)(2)(B).

[^ 42] See INA 203(b)(1)(A).

[^ 43] For more information on how withdrawal or revocation of the petition may affect portability, see Section B, Eligibility Requirements, Subsection 2, Approved Petition Required [7 USCIS-PM E.5(B)(2)].

[^ 44] See Section B, Eligibility Requirements, Subsection 6, New Job in Same or Similar Occupational Classification [7 USCIS-PM E.5(B)(6)].

[^ 45] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 9, Death of Petitioner or Principal Beneficiary [7 USCIS-PM A.9].

Chapter 6 - Adjudication [Reserved]

Chapter 7 - National Interest Waiver Physicians [Reserved]

Part F - Special Immigrant-Based Adjustment

Chapter 1 - Purpose and Background

The Immigration and Nationality Act (INA) allows certain special immigrants physically present in the United States to adjust status to that of a lawful permanent resident (LPR).[1] The INA defines the term “special immigrant” to include various categories of aliens, such as religious workers, special immigrant juveniles, and employees and former employees of the U.S. government or others who have benefited the U.S. government abroad.[2] Most special immigrants apply for adjustment under the employment-based fourth preference (EB-4) immigrant category.[3]

Special immigrants are subject to many of the same eligibility requirements as applicants seeking adjustment based on a family or employment-based preference category. For example, special immigrants are subject to immigrant visa availability. That means that an immigrant visa must be immediately available when the applicant files the adjustment of status application and at the time of final adjudication.[4] There are, however, some differences.

While some special immigrants are allowed to file their Application to Register Permanent Residence or Adjust Status (Form I-485) concurrently with the underlying immigrant petition, most special immigrants must first receive approval of the underlying special immigrant petition before filing an adjustment application.[5] Furthermore, some categories require the adjustment application to be filed before a specified deadline.[6]

Footnotes

[^ 1] See INA 245(a).

[^ 2] See INA 101(a)(27). Congress also created additional special immigrant classifications through public laws not incorporated in the INA. These unique special immigrant classifications are also discussed in this Part.

[^ 3] See INA 203(b)(4). Technically, LPRs returning from a temporary visit abroad and immigrants applying for re-acquisition of U.S. citizenship are included in the definition of special immigrant. See INA 101(a)(27)(A)-(B). However, these special immigrants are outside the scope of the EB-4 immigrant category per INA 203(b)(4). In addition, certain Afghanistan and Iraq nationals may also seek adjustment as special immigrants, however, they do not fall under the EB-4 immigrant category since they are not included in INA 101(a)(27). Instead, the authority lies in separate public laws, which also provides for separately allocated visa numbers.

[^ 4] See INA 245(a)(3). See Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section B, Definition of Properly Filed [7 USCIS-PM A.3(B)]. See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].

[^ 5] See Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section C, Concurrent Filings [7 USCIS-PM A.3(C)]. Aliens file a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) to obtain special immigrant classification. Special immigrant juveniles, for example, may file both underlying petition and adjustment application at the same time. They do not need to wait for the petition’s approval before filing the adjustment application, as is the general rule. See Chapter 7, Special Immigrant Juveniles [7 USCIS-PM F.7].

[^ 6] In addition to the relevant program-specific chapters, applicants should refer to the relevant regulations, corresponding form instructions, and general adjustment guidance in this part for more information on eligibility and filing requirements. See Part A, Adjustment of Status Policies and Procedures [7 USCIS-PM A] and Part B, 245(a) Adjustment [7 USCIS-PM B].

Chapter 2 - Religious Workers

A. Purpose and Background

Ministers of a religious denomination have long been a part of the framework of U.S. immigration law. Congress provided lawful permanent residence for certain ministers and their families as early as the Immigration Act of 1924.[1] In 1990, Congress created a new special immigrant category that includes both ministers and other religious workers in the Immigration and Nationality Act (INA).[2]

While the statutory provision for minister is permanent, the Immigration Act of 1990 (IMMACT 90)[3] specified that other religious workers must adjust status or immigrate before October 1, 1994.[4] Congress has extended this sunset date several times.[5] While there is no limit on the number of ministers who may adjust status or immigrate, there is an annual limit of 5,000 for all other religious workers.[6]

B. Legal Authorities

- INA 101(a)(27)(C) – Certain ministers and religious workers
- INA 203(b)(4) – Certain special immigrants
- INA 245; 8 CFR 245 – Adjustment of status of nonimmigrant to that of person admitted for permanent residence
- 8 CFR 204.5(m) – Religious workers

C. Eligibility Requirements

To adjust to lawful permanent resident (LPR) status as a special immigrant religious worker, an applicant must meet the eligibility requirements shown in the table below.[7]

Religious Worker Adjustment of Status Eligibility Requirements
The applicant has been inspected and admitted or inspected and paroled into the United States.
The applicant is physically present in the United States at the time of filing and adjudication of an adjustment application.
The applicant is eligible to receive an immigrant visa because the applicant is the beneficiary of an approved Form I-360 classifying him or her as a special immigrant religious worker.[8]
The applicant had an immigrant visa immediately available when he or she filed the adjustment of status application[9] and at the time of final adjudication.[10]
The applicant is not subject to any applicable bars to adjustment of status.[11]
The applicant is admissible to the United States or eligible for a waiver of inadmissibility or other form of relief.[12]
The applicant merits the favorable exercise of discretion.[13]

1. Eligibility to Receive an Immigrant Visa[14]

To be eligible to receive an immigrant visa to adjust status as a religious worker, the principal applicant must obtain classification as a religious worker from USCIS. Either the applicant or the applicant's employer must file a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) to obtain this classification.

An alien may be classified as a special immigrant religious worker based on full-time employment with a bona fide nonprofit religious organization in the United States or bona fide organization affiliated with the religious denomination in the United States if all of the following criteria are met:

- The work to be performed in the organization is: solely as a minister for a religious denomination, in a religious vocation in a professional or nonprofessional capacity, or in a religious occupation either in a professional or nonprofessional capacity;
- The religious worker has been a member of a religious denomination that has a bona fide nonprofit religious organization in the United States for at least 2 years immediately preceding the filing of the petition for classification as a religious worker; and
- The religious worker must have been working continuously in one of the positions described above either abroad or in the United States[15] for at least 2 years immediately preceding the filing of the petition. Only employment after 14 years of age qualifies under this requirement.[16]

The religious organization seeking to employ the alien as a special immigrant religious worker may file Form I-360 with USCIS on behalf of the alien. Alternatively, the alien may file the Form I-360 as a self-petitioner.[17] The petition must include evidence to prove the above eligibility criteria.[18] USCIS may conduct an on-site inspection of all petitioning organizations. If USCIS conducts a pre-approval inspection, satisfactory completion of the inspection is a condition of approval of any petition. USCIS may also randomly inspect a petitioner's site after adjudication.

Verifying the Underlying Basis to Adjust Status and Determining Ongoing Eligibility[19]

The religious worker petition should already be adjudicated and approved when the officer adjudicates the adjustment application. USCIS does not re-adjudicate the religious worker petition at the time of the adjudication of the adjustment application. However, the officer should ensure that the applicant remains classified as a religious worker and thus is eligible to adjust as a religious worker. As a result, there may be instances when USCIS may require the applicant to provide additional evidence to show he or she continues to be classified as a religious worker. In other words, the officer must verify the status of any underlying immigrant petition that forms the basis for adjustment.

2. Bars to Adjustment

Unless exempt, religious workers and their derivatives are ineligible for adjustment of status if any of the bars to adjustment of status apply.[20] Religious workers and their derivatives may be exempt under INA 245(k) from some of the bars to adjustment.[21] To qualify for an exemption, the applicant must not have accrued more than 180 days of certain immigration violations since his or her last lawful admission. If the applicant does not qualify for the exemption, then the applicant remains subject to the adjustment bars.[22]

3. Admissibility and Waiver Requirements

In general, an applicant who is inadmissible to the United States may only obtain LPR status if he or she obtains a waiver or other form of relief, if available.[23] In general, if a ground of inadmissibility applies, an applicant must apply for a waiver or other form of relief to overcome that inadmissibility.[24] If a waiver or other form of relief is granted, USCIS may approve the application to adjust status if the applicant is otherwise eligible.

The following table specifies which grounds of inadmissibility apply and which do not apply to applicants seeking LPR status based on the religious worker classification.

Applicability of Grounds of Inadmissibility: Religious Workers

Ground of Inadmissibility	Applies	Exempt or Not Applicable
INA 212(a)(1) – Health-Related	X	
INA 212(a)(2) – Crime-Related	X	
INA 212(a)(3) – Security-Related	X	
INA 212(a)(4) – Public Charge	X	
INA 212(a)(5) – Labor Certification and Qualifications for Certain Immigrants		X

Ground of Inadmissibility	Applies	Exempt or Not Applicable
INA 212(a)(6) – Illegal Entrants and Immigration Violators	X	
INA 212(a)(7)(A) – Documentation Requirements for Immigrants	X	
INA 212(a)(8) – Ineligibility for Citizenship	X	
INA 212(a)(9) – Aliens Previously Removed	X	
INA 212(a)(10) – Practicing Polygamists, Guardians Required to Accompany Helpless Persons, International Child Abductors, Unlawful Voters, and Former Citizens who Renounced Citizenship to Avoid Taxation	X	

4. Sunset Date

Except for ministers, all other religious workers and their derivatives must adjust to LPR status on or before the designated sunset date.[25] USCIS denies any adjustment applications based on special immigrant religious worker petitions (other than for ministers) that are pending or filed after the designated sunset date.

5. Treatment of Family Members

The spouse or child (unmarried and under 21 years of age) of a religious worker may accompany or follow-to-join the principal applicant if the spouse or child is otherwise eligible.[26] The spouse and child may, as derivative applicants, apply to adjust status under the same immigrant category and priority date as the principal applicant.

D. Documentation and Evidence

An applicant should submit the following documentation to adjust status as a religious worker:

- Application to Register Permanent Residence or Adjust Status (Form I-485), with the correct fee;
- Copy of the Approval Notice (Form I-797) for the principal applicant's special immigrant religious worker petition;[27]
- Employment letter from the applicant's Form I-360 employer-petitioner;[28]
- Two passport-style photographs;
- Copy of government-issued identity document with photograph;
- Copy of birth certificate;
- Copy of passport page with nonimmigrant visa (if applicable);
- Copy of passport page with admission or parole stamp (if applicable);
- Copy of Arrival/Departure Record (Form I-94) or copy of U.S. Customs and Border Protection (CBP) admission or parole stamp on the travel document (if applicable);[29]
- Evidence of continuously maintaining a lawful status since arrival in the United States;
- Any other evidence, as needed, to show that an adjustment bar does not apply or that the applicant qualifies for an exemption;[30]
- Report of Immigration Medical Examination and Vaccination Record (Form I-693);[31]
- Certified police and court records of criminal charges, arrests, or convictions (if applicable);
- Application for Waiver of Grounds of Inadmissibility (Form I-601) or other form of relief (if applicable); and
- Documentation of past or present J-1 or J-2 nonimmigrant status, including proof of compliance with or waiver of the 2-year foreign residence requirement under INA 212(e) (if applicable).

In addition, a spouse or child who is filing as a derivative applicant should submit the following:

- Copy of documentation showing relationship to the principal applicant, such as a marriage certificate or adoption decree (if applicable);
- Copy of approval notice (Form I-797) for the principal applicant's Form I-360; and
- Copy of the approval or receipt notice (Form I-797) for the principal applicant's Form I-485 or a copy of the principal applicant's permanent resident card (Form I-551), (if applicable and not filing together with the principal applicant).

E. Adjudication[32]

An officer adjudicating the adjustment application must review the application for completeness and supporting documents to verify the applicant's eligibility under these provisions. The A-file should contain evidence of the approved Form I-360 petition. As appropriate, the A-file should also contain a denominational certification for religious organizations that are affiliated with a religious denomination.[33] The officer may issue a Request for Evidence for any missing information or documents.

The officer should verify that a USCIS site visit was satisfactorily completed. The officer may request an initial or follow-up site visit as needed before adjudicating the principal's adjustment adjudication.[34]

In addition, the officer should review the title and duties stated in the special immigrant religious worker petition and ensure the principal applicant was properly classified as a minister or other religious worker based on the underlying petition.[35] If the principal applicant is not a minister but some other religious worker, the officer must verify that the principal's and any family member's adjustment adjudications can be approved before the specified sunset date.

1. Filing

An applicant seeking adjustment of status as a special immigrant religious worker may file his or her adjustment application with USCIS after USCIS approves the special immigrant petition[36] (as long as the petition is still valid), provided:

- USCIS has jurisdiction over the adjustment application;[37] and
- The visa availability requirements are met.[38]

These applicants may not file an adjustment application concurrently with Form I-360.[39]

2. Interview

The officer must schedule the applicant for an in-person interview at the appropriate field office and transfer jurisdiction to that field office for final adjudication in cases where:

- The officer cannot make a decision based on the evidence of record; or
- The applicant does not meet the criteria for an interview waiver.[40]

3. Decision

Approval

The officer must determine that the applicant meets all the eligibility requirements as well as merits the favorable exercise of discretion before approving the application to adjust status as a special immigrant religious worker (or family member).[41] If the application for adjustment of status is approvable, the officer must determine if a visa is available at the time of final adjudication.[42]

If approved, USCIS assigns the codes of admission to applicants adjusting under this category as shown in the table below.

Classes of Applicants and Codes of Admission

Applicant	Code of Admission
Minister of religion	SD6
Spouse of minister (SD6)	SD7
Child of minister (SD6)	SD8
Other religious worker	SR6
Spouse of other religious worker (SR6)	SR7
Child of other religious worker (SR6)	SR8

The applicant becomes an LPR as of the date of approval of the adjustment application.[43]

Denial

If the officer determines that the applicant is ineligible for adjustment, the officer must deny the adjustment application. The officer must provide the applicant a written reason for the denial.[44] Although there are no appeal rights for the denial of an adjustment application, the applicant may file a motion to reopen or reconsider. The denial notice should include instructions for filing a Notice of Appeal or Motion (Form I-290B).

Footnotes

[^ 1] See Section 4(d) of Pub. L. 68-139, 43 Stat. 153, 155 (May 26, 1924) which states, “An immigrant who continuously for at least two years immediately preceding the time of his application for admission to the United States has been, and who seeks to enter the United States solely for the purpose of, carrying on the vocation of minister of any religious denomination, or professor of a college, academy, seminary, or university; and his wife and his unmarried children, under 18 years of age, if accompanying or following to join him.”

[^ 2] See INA 101(a)(27)(C).

[^ 3] See Pub. L. 101-649 (PDF) (November 29, 1990).

[^ 4] In this chapter, the term “religious workers” broadly includes both ministers (clergy) and all other types of eligible religious workers; we also use the terms “ministers” and “other religious workers” when discussing the different eligibility rules that apply to these two categories.

[^ 5] Except for ministers, all other religious workers seeking adjustment of status as a special immigrant religious worker must have their Form I-485 approved before the specified sunset date. See Section 3 of Pub. L. 112-176 (PDF), 126 Stat. 1325, 1325 (September 28, 2012). For information on the current sunset date, see the USCIS website.

[^ 6] See INA 203(b)(4).

[^ 7] See INA 245(a) and (c). See 8 CFR 245. See Instructions to Form I-485.

[^ 8] The job offered to the applicant based on the Form I-360 must still exist with the employer that filed the petition, and the applicant must intend to accept this employment upon approval of the applicant’s Form I-485.

[^ 9] See Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section B, Definition of “Properly Filed” [7 USCIS-PM A.3(B)].

[^ 10] See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].For information on Visa Availability and Priority Dates, see the DOS Visa Bulletin.

[^ 11] See INA 245(c). See Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 12] For more information, see Volume 8, Admissibility [8 USCIS-PM] and Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM].

[^ 13] See INA 245(a). For more information, see Part A, Adjustment of Status Policies and Procedures [7 USCIS-PM A] and Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 14] See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6] and Part B, 245(a) Adjustment, Chapter 2, Eligibility Requirements, Section C, Eligible to Receive an Immigrant Visa [7 USCIS-PM B.2(C)].

[^ 15] Federal regulations at 8 CFR 204.5(m)(4) and (11) specify that any qualifying employment an alien performs in the United States must have occurred while the alien was in a lawful immigration status. However, the U.S. Court of Appeals in Shalom Pentecostal Church v. Acting Secretary DHS, 783 F.3d 156 (3rd Cir. 2015), found this regulatory requirement to be inconsistent with the statute. As a result of this decision and a growing number of Federal courts reaching the same conclusion, USCIS decided to apply the Shalom Pentecostal decision nationally. As of July 5, 2015, USCIS does not deny special immigrant religious worker petitions based on the lawful status requirements at 8 CFR 204.5(m)(4) and 8 CFR 204.5(m)(11). Therefore, any employment in the United States can be used to qualify an alien under the special immigrant religious worker requirements, regardless of whether the alien was in a lawful or unlawful immigration status.

[^ 16] See 8 CFR 204.5(m)(4) and (11).

[^ 17] See 8 CFR 204.5(m)(6).

[^ 18] See Instructions to Form I-360 for more information on the special immigrant petition for religious workers. Required documentation and information includes the Employer Attestation section and Religious Denomination Certification section in Form I-360.

[^ 19] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6].

[^ 20] See INA 245(c). For more information on the bars to adjustment, see Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 21] See INA 245(c)(2), INA 245(c)(7), and INA 245(c)(8).

[^ 22] See INA 245(k). See Part B, 245(a) Adjustment, Chapter 8, Exemptions from Bars to Adjustment, Section C, Certain Special Immigrants [7 USCIS-PM B.8(C)] and Section E, Employment-Based Exemption under INA 245(k) [7 USCIS-PM B.8(E)].

[^ 23] See INA 212(a) for the specific grounds of inadmissibility.

[^ 24] See Volume 8, Admissibility [8 USCIS-PM] and Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM]. See Application for Waiver of Grounds of Inadmissibility (Form I-601) and Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212).

[^ 25] See the USCIS website for the current sunset date.

[^ 26] See INA 101(a)(27)(C) and INA 203(d). For the definition of child, see INA 101(b)(1).

[^ 27] See Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360).

[^ 28] The letter should be on official business letterhead verifying the job offer, the job title or position, summary of duties, and wages or salary to be paid. If the applicant filed the Form I-360 as a self-petitioner, the applicant should include a signed statement confirming that he or she intends to work in the occupation specified in the Form I-360.

[^ 29] Aliens admitted to the United States by CBP at an airport or seaport after April 30, 2013, may be issued an electronic Form I-94 by CBP instead of a paper Form I-94. Such aliens may visit the CBP Web site to obtain a paper version of an electronic Form I-94.

[^ 30] Such as evidence that the INA 245(c)(2) adjustment bar does not apply because the applicant's failure to maintain status was through no fault of his or her own or for technical reasons, or evidence that the applicant qualifies for an exemption under INA 245(k). See 8 CFR 245.1(d)(2). See Part B, 245(a) Adjustment, Chapter 4, Status and Nonimmigrant Visa Violations – INA 245(c)(2) and INA 245(c)(8), Section E, Exceptions [7 USCIS-PM B.4(E)] and Chapter 8, Exemptions from Bars to Adjustment, Section E, Employment-Based Exemption under INA 245(k) [7 USCIS-PM B.8(E)].

[^ 31] The applicant may submit Form I-693 together with Form I-485 or later at USCIS' request. See the USCIS website for more information. For more information on when to submit Form I-693, see Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility, Chapter 4, Review of Medical Examination Documentation [8 USCIS-PM B.4].

[^ 32] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6].

[^ 33] The denominational certification includes the name of the employing organization, the name of the religious denomination, a signature and date attesting that the religious denomination is tax exempt as a 501(c)(3) organization, the attesting name and title of the person signing the document, and the attesting organization name, street address, and contact information. See 8 CFR 204.5(m)(8)(iii)(D).

[^ 34] See 8 CFR 204.5(m)(12). See Religious Worker Benefit Fraud Assessment Summary (PDF) (July 2006) by the USCIS Office of Fraud Detection and National Security.

[^ 35] An officer can assess the title and duties of the special immigrant religious worker by reviewing the Employer Attestation section of the Petition for Amerasian, Widow(er), and Special Immigrant (Form I-360).

[^ 36] See Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360).

[^ 37] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section D, Jurisdiction [7 USCIS-PM A.3(D)].

[^ 38] The applicant must have an immigrant visa immediately available when he or she filed the adjustment of status application and at the time of final adjudication. See Section C, Eligibility Requirements [7 USCIS-PM F.7(C)].

[^ 39] See Ruiz-Diaz v. United States, 618 F.3d 1055 (9th Cir. 2010) (affirming USCIS rule prohibiting religious workers from concurrently filing as a permissible construction of the statute). See 8 CFR 245.2(a)(2)(i)(B).

[^ 40] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 5, Interview Guidelines [7 USCIS-PM A.5].

[^ 41] See INA 245(a). For more information, see Part A, Adjustment of Status Policies and Procedures [7 USCIS-PM A] and Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 42] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].

[^ 43] The date of approval is shown in the USCIS approval notice mailed to the applicant; that date is also shown on the actual Permanent Resident Card (Form I-551) the applicant receives after adjustment approval.

[^ 44] See 8 CFR 103.2(b)(19) and 8 CFR 103.3(a).

Chapter 3 - International Employees of U.S. Government Abroad

A. Purpose and Background

As early as 1952, Congress provided a special immigrant category for certain employees and honorably retired former employees of the U.S. government abroad.[1] Originally, this special immigrant category had no annual limit to the number of visas that could be issued. However, these special immigrants became subject to the preference-based numerical limitations when Congress placed such special immigrants under the employment-based fourth preference visa classification.[2]

This special immigrant category allows aliens who have served faithfully in the employment of the U.S. government abroad over long periods of time to become lawful permanent residents (LPRs).[3] The U.S. Department of State (DOS) adjudicates petitions for classification as special immigrant international employees of the U.S. government abroad.

Most applicants who immigrate as a special immigrant international employee do so from abroad, through consular processing. However, eligible applicants present in the United States may file an Application to Register Permanent Residence or Adjust Status (Form I-485) to obtain LPR status.

B. Legal Authorities

- INA 101(a)(27)(D) – Certain employees or former employees of the U.S. government abroad
- INA 203(b)(4) – Certain special immigrants
- INA 245; 8 CFR 245 – Adjustment of status of nonimmigrant to that of person admitted for permanent residence
- 22 CFR 42.34 – Certain U.S. government employees

C. Eligibility Requirements

To adjust to LPR status as a special immigrant international employee, an applicant must meet the eligibility requirements shown in the table below.[4]

Adjustment of Status Eligibility Requirements for Special Immigrant International Employees
The applicant has been inspected and admitted or inspected and paroled into the United States.
The applicant is physically present in the United States at the time of filing and adjudication of the adjustment application.
The applicant is eligible to receive an immigrant visa because the applicant is the beneficiary of an approved petition[5] classifying him or her as a special immigrant international employee.
The applicant had an immigrant visa immediately available when he or she filed the adjustment of status application[6] and at the time of final adjudication.[7]
The applicant is not subject to any applicable bars to adjustment of status.[8]
The applicant is admissible to the United States or eligible for a waiver of inadmissibility or other form of relief.[9]
The applicant merits the favorable exercise of discretion.[10]

1. Eligibility to Receive an Immigrant Visa[11]

Eligible international employees and honorably retired former employees of the U.S. government abroad are subject to a unique process to demonstrate eligibility to receive an immigrant visa to adjust status as a special immigrant international employee.

Step One – Exceptional Circumstances

First, the principal officer of a Foreign Service establishment must have found that exceptional circumstances exist and on that basis recommended the grant of special immigrant status.

Step Two – National Interest

Second, the Secretary of State must have accepted the recommendation and found it to be in the national interest to grant the status.

Step Three – Form DS-1884

Finally, based on the determinations described in the prior two steps, the employee may seek classification as a special immigrant by filing a Petition to Classify Special Immigrant under INA 203(b)(4) as an Employee or Former Employee of the U.S. Government Abroad (Form DS-1884 (PDF)) with DOS.[12] USCIS plays no role in the adjudication of this petition.

A Form DS-1884 (PDF) is valid for 6 months after it is approved.[13] Notwithstanding, if a visa is unavailable at the time of approval, the petition is valid for 6 months after a visa becomes available.[14] In addition, DOS can extend the validity of the petition if it determines that an extension is in the national interest.[15]

2. Priority Dates

The priority date for a special immigrant international employee is the date on which the immigrant petition is filed with DOS. The filing date of the petition is the date that a properly completed form and the required fee are accepted by a Foreign Service post.[16]

3. Bars to Adjustment

Special immigrant international employees and their derivatives are ineligible for adjustment of status if any of the bars to adjustment of status apply.[17]

4. Admissibility and Waiver Requirements

In general, an applicant who is inadmissible to the United States may only obtain LPR status if he or she obtains a waiver or other form of relief, if available.[18] If a ground of inadmissibility applies, an applicant must generally apply for a waiver or other form of relief to overcome that inadmissibility.[19] If a waiver or other form of relief is granted, USCIS may approve the application to adjust status if the applicant is otherwise eligible.

The following table specifies which grounds of inadmissibility apply and which do not apply to applicants seeking LPR status based on the international employee classification.

Applicability of Grounds of Inadmissibility: International Employees of the U.S. Government Abroad

Ground of Inadmissibility	Applies	Exempt or Not Applicable
INA 212(a)(1) – Health-Related	X	
INA 212(a)(2) – Crime-Related	X	
INA 212(a)(3) – Security-Related	X	
INA 212(a)(4) – Public Charge	X	
INA 212(a)(5) – Labor Certification and Qualifications for Certain Immigrants		X
INA 212(a)(6) – Illegal Entrants and Immigration Violators	X	
INA 212(a)(7)(A) – Documentation Requirements for Immigrants	X	
INA 212(a)(8) – Ineligibility for Citizenship	X	
INA 212(a)(9) – Aliens Previously Removed	X	
INA 212(a)(10) – Practicing Polygamists, Guardians Required to Accompany Helpless Persons, International Child Abductors, Unlawful Voters, and Former Citizens who Renounced Citizenship to Avoid Taxation	X	

5. Treatment of Family Members

The spouse or child (unmarried and under 21 years of age) of a special immigrant international employee may, if otherwise eligible, accompany or follow-to-join the principal applicant.[20] The spouse and child may, as derivative applicants, apply to adjust status under the same immigrant category and priority date as the principal applicant.

D. Documentation and Evidence

An applicant should submit the following documentation to adjust status as a special immigrant international employee:

- Application to Register Permanent Residence or Adjust Status (Form I-485), with the correct fee;
- Evidence of an approved Form DS-1884 (PDF);
- Evidence of financial support (as appropriate);
- Two passport-style photographs;
- Copy of government-issued identity document with photograph;
- Copy of birth certificate;
- Copy of passport page with nonimmigrant visa (if applicable);
- Copy of passport page with admission or parole stamp (if applicable);
- Copy of Arrival/Departure Record (Form I-94) or copy of U.S. Customs and Border Protection (CBP) admission or parole stamp on the travel document (if applicable);[21]
- Evidence of continuously maintaining a lawful status since arrival in the United States;
- Any other evidence, as needed, to show that an adjustment bar does not apply;[22]
- Report of Immigration Medical Examination and Vaccination Record (Form I-693);[23]
- Certified police and court records of criminal charges, arrests, or convictions (if applicable);
- Application for Waiver of Grounds of Inadmissibility (Form I-601) or other form of relief (if applicable); and
- Documentation of past or present J-1 or J-2 nonimmigrant status, including proof of compliance with or waiver of the 2-year foreign residence requirement under INA 212(e) (if applicable).

In addition, a spouse or child who is filing as a derivative applicant should submit the following:

- A copy of documentation showing relationship to the principal applicant, such as a marriage certificate or adoption decree (if applicable); and
- A copy of the approval or receipt notice (Form I-797) for the principal applicant's Form I-485 or a copy of the principal applicant's permanent resident card (Form I-551) (if applicable and not filing together with the principal applicant).

E. Adjudication[24]

1. Filing

An applicant seeking adjustment of status as a special immigrant international employee may file his or her adjustment application with USCIS after DOS approves the Petition to Classify Special Immigrant under INA 203(b)(4) as an Employee or Former Employee of the U.S. Government Abroad (Form DS-1884 (PDF)), provided:

- USCIS has jurisdiction over the adjustment application;[25] and
- The visa availability requirements are met.[26]

These applicants may not file an adjustment application concurrently with Form DS-1884 (PDF).

2. Interview

The officer must schedule the applicant for an in-person interview at the appropriate field office and transfer jurisdiction to that field office for final adjudication in cases where:

- The officer cannot make a decision based on the evidence of record; or
- The applicant does not meet the criteria for an interview waiver.[27]

3. Decision

Approval

The officer must determine that the applicant meets all the eligibility requirements as well as merits the favorable exercise of discretion before approving the application to adjust status as a special immigrant international employee or family member.[28]

If the application for adjustment of status is approvable, the officer must determine if a visa is available at the time of final adjudication.[29]

If approved, USCIS assigns the following codes of admission to applicants adjusting under this category as shown in the table below.

Classes of Applicants and Codes of Admission

Applicant	Code of Admission
Special Immigrant Employee or Former Employee of the U.S. Government Abroad	SE6
Spouse of Employee (SE6)	SE7
Child of Employee (SE6)	SE8

Upon the approval of the adjustment application, the applicant becomes an LPR as of the date of approval.

Denial

If the officer determines that the applicant is ineligible for adjustment, the officer must deny the adjustment application. The officer must provide a written reason for the denial.[30] Although there are no appeal rights for the denial of an adjustment application, the applicant may file a motion to reopen or reconsider. The denial notice should include instructions for filing a Notice of Appeal or Motion (Form I-290B).

Footnotes

[^ 1] See Immigration and Nationality Act (INA) of 1952, Pub. L. 82-414 (PDF), 66 Stat. 163 (June 27, 1952). See INA 101(a)(27)(D).

[^ 2] See H.R. Rep. No. 1365, 82nd Cong., 2nd Sess. 1951. See INA 203(b)(4) ("Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified special immigrants described in section 101(a)(27)…").

[^ 3] Eligible employees include those who have worked for the American Institute in Taiwan (AIT), which Congress created through the Taiwan Relations Act of 1979. See Pub. L. 96-8 (PDF), 93 Stat. 14 (April 10, 1979). See the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416 (PDF), 108 Stat. 4305 (October 25, 1994). Although a private, non-profit corporation, the AIT is largely funded and overseen by DOS and was designated as the entity through which the U.S. government was to conduct any programs, transactions, or other relations with Taiwan.

[^ 4] See 8 CFR 245.1.

[^ 5] See Petition to Classify Special Immigrant under INA 203(b)(4) as an Employee or Former Employee of the U.S. Government Abroad (Form DS-1884 (PDF)).

[^ 6] See Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section B, Definition of "Properly Filed" [7 USCIS-PM A.3(B)].

[^ 7] See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].For information on Visa Availability and Priority Dates, see the DOS Visa Bulletin.

[^ 8] See INA 245(c). See Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 9] For more information, see Volume 8, Admissibility [8 USCIS-PM] and Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM].

[^ 10] See INA 245(a). For more information, see Part A, Adjustment of Status Policies and Procedures [7 USCIS-PM A] and Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 11] See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6] and Part B, 245(a) Adjustment, Chapter 2, Eligibility Requirements, Section C, Eligible to Receive an Immigrant Visa [7 USCIS-PM B.2(C)].

[^ 12] Unlike other special immigrants, the Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) is not used to classify special immigrant international employees.

[^ 13] See 22 CFR 42.34(b)(4).

[^ 14] See 9 Foreign Affairs Manual (FAM) 502.5-3(C)(2)(e)(4)(b), Effect of Numerical Limits.

[^ 15] See 22 CFR 42.34(b)(5).

[^ 16] See 22 CFR 42.34(b)(2).

[^ 17] See INA 245(c). For more information on the bars to adjustment, see Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 18] See INA 212(a) for the specific grounds of inadmissibility.

[^ 19] See Volume 8, Admissibility [8 USCIS-PM] and Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM]. See Application for Waiver of Grounds of Inadmissibility (Form I-601) and Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212).

[^ 20] See INA 101(a)(27)(C) and INA 203(d). For the definition of child, see INA 101(b)(1).

[^ 21] Aliens admitted to the United States by CBP at an airport or seaport after April 30, 2013, may be issued an electronic Form I-94 by CBP instead of a paper Form I-94. Such aliens may visit the CBP website to obtain a paper version of an electronic Form I-94.

[^ 22] Such as evidence that the INA 245(c)(2) adjustment bar does not apply because the applicant's failure to maintain status was through no fault of his or her own or for technical reasons. See 8 CFR 245.1(d)(2). See Part B, 245(a) Adjustment, Chapter 4, Status and Nonimmigrant Visa Violations – INA 245(c)(2) and INA 245(c)(8), Section E, Exceptions [7 USCIS-PM B.4(E)].

[^ 23] The applicant may submit Form I-693 together with Form I-485 or later at USCIS' request. See the USCIS website for more information. For more information on when to submit Form I-693, see Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility, Chapter 4, Review of Medical Examination Documentation [8 USCIS-PM B.4].

[^ 24] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6].

[^ 25] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section D, Jurisdiction [7 USCIS-PM A.3(D)].

[^ 26] The applicant must have an immigrant visa immediately available when he or she filed the adjustment of status application and at the time of final adjudication. See Section C, Eligibility Requirements [7 USCIS-PM F.7(C)].

[^ 27] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 5, Interview Guidelines [7 USCIS-PM A.5].

[^ 28] See INA 245(a). For more information, see Part A, Adjustment of Status Policies and Procedures [7 USCIS-PM A] and Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 29] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].

[^ 30] See 8 CFR 103.2(b)(19) and 8 CFR 103.3(a).

Chapter 4 - Panama Canal Zone Employees

A. Purpose and Background

On September 7, 1977, the United States signed the Panama Canal Treaty, agreeing to the eventual transfer of control of the Panama Canal from the United States to the Panamanian government. The Panama Canal Act of 1979 effectively implemented the treaty that, among other things, resulted in the involuntary separation or geographic relocation of most U.S. citizens working as federal employees in the Canal Area.[1]

The Panama Canal Act also impacted certain Panamanian nationals and others working at the Panama Canal. In particular, the legislation impacted those employed as firefighters, police officers, or security guards who were considered threatened or at risk as a direct result of their employment. Congress created a special immigrant category for certain former employees of the Panama Canal Company or Canal Zone government as a result of the perceived threat and to reward certain employees for their faithful service.[2]

Congress originally limited this special immigrant category to 15,000 immigrant visas in total, with no more than 5,000 immigrant visas available per year. Congress later removed these numerical limitations in the Immigration and Nationality Technical Corrections Act of 1994.[3] These special immigrant former employees of the Panama Canal Company or Canal Zone government, however, are subject to the yearly numerical limits of the employment-based fourth preference immigrant category.

Due to the difficulty in verifying the periods and nature of employment and the periods of residence, USCIS generally should consult with the U.S. Embassy in Panama City and the Department of State prior to granting any cases under these provisions, unless consultation already occurred during adjudication of the underlying special immigrant petition to verify this information.[4] This program has no sunset date.

B. Legal Authorities

- INA 101(a)(27)(E), INA 101(a)(27)(F), and INA 101(a)(27)(G) – Employees of Panama Canal Company or Canal Zone government
- INA 203(b)(4) – Certain special immigrants
- INA 245; 8 CFR 245 – Adjustment of status of nonimmigrant to that of person admitted for permanent residence
- 22 CFR 42.32(d)(3) - Panama Canal employees

C. Eligibility Requirements

To adjust to lawful permanent resident (LPR) status as a special immigrant Panama Canal Zone employee, an applicant must meet the following eligibility requirements:

Adjustment of Status Eligibility Requirements for Special Immigrant Panama Canal Zone Employees
The applicant has been inspected and admitted or inspected and paroled into the United States.
The applicant is physically present in the United States at the time of filing and adjudication of the adjustment application.

Adjustment of Status Eligibility Requirements for Special Immigrant Panama Canal Zone Employees
The applicant is eligible to receive an immigrant visa because the applicant is the beneficiary of an approved Form I-360 classifying him or her as a special immigrant Panama Canal Zone employee.
The applicant had an immigrant visa immediately available when he or she filed the adjustment of status application[5] and at the time of final adjudication.[6]
The applicant is not subject to any applicable bars to adjustment of status.[7]
The applicant is admissible to the United States or eligible for a waiver of inadmissibility or other form of relief.[8]
The applicant merits the favorable exercise of discretion.[9]

1. Eligibility to Receive an Immigrant Visa[10]

To be eligible to receive an immigrant visa to adjust status as a special immigrant Panama Canal Zone employee, the principal applicant must obtain such classification from USCIS by filing a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360).

The table below outlines the various special immigrant Panama Canal Zone employee categories provided by law.

Types of Special Immigrant Panama Canal Zone Employee

Citation	Employed by…	Employed at least…	Additional Requirements
INA 101(a)(27)(E)	Panama Canal Company or Canal Zone government	One year on or prior to October 1, 1979	Lived in Panama Canal Zone on April 1, 1979
INA 101(a)(27)(F)	U.S. Government in the Canal Zone	15 years prior to October 1, 1979	Panamanian national and honorably retired from service or continues to be employed by the U.S. government in an area of the former Canal Zone
INA 101(a)(27)(G)	Panama Canal Company or Canal Zone government on April 1, 1979	Five years, as of date of the ratification of the Panama Canal Zone Treaty of 1977	Personal safety, or the safety of their spouse and children, is placed in danger because of the nature of the employment and the Panama Canal Treaty

Aliens who qualify as a current or former employee of the U.S. Government in the Canal Zone[11] might also qualify as a special immigrant employee or honorably retired employee of the U.S. Government.[12] An applicant who is eligible under both categories may seek to adjust under whichever category may be more advantageous.

Verifying the Underlying Basis to Adjust Status and Determining Ongoing Eligibility[13]

The Panama Canal Zone employee petition should already be adjudicated and approved when the officer adjudicates the adjustment application. USCIS does not re-adjudicate the Panama Canal Zone employee petition at the time of the adjudication of the adjustment application. However, the officer should ensure that the applicant remains classified as a Panama Canal Zone employee and thus is eligible to adjust as a Panama Canal Zone employee. As a result, there may be instances when USCIS may require the applicant to provide additional evidence to show he or she continues to be classified as a Panama Canal Zone employee. In other words, the officer must verify the status of any underlying immigrant petition that forms the basis for adjustment.

2. Bars to Adjustment

Special immigrant Panama Canal Zone employees and their derivatives are ineligible for adjustment of status if any of the bars to adjustment of status apply.[14]

3. Admissibility and Waiver Requirements

In general, an applicant who is inadmissible to the United States may only obtain LPR status if he or she obtains a waiver or other form of relief, if available.[15] In general, if a ground of inadmissibility applies, an applicant must apply for a waiver or other form of relief to overcome that inadmissibility.[16] If a waiver or other form of relief is granted, USCIS may approve the application to adjust status if the applicant is otherwise eligible.

The following table specifies which grounds of inadmissibility apply and which do not apply to applicants seeking LPR status based on the Panama Canal Zone employee classification.

Applicability of Grounds of Inadmissibility: Panama Canal Zone Employees

Ground of Inadmissibility	Applies	Exempt or Not Applicable
INA 212(a)(1) – Health-Related	X	
INA 212(a)(2) – Crime-Related	X	
INA 212(a)(3) – Security-Related	X	
INA 212(a)(4) – Public Charge	X	
INA 212(a)(5) – Labor Certification and Qualifications for Certain Immigrants		X
INA 212(a)(6) – Illegal Entrants and Immigration Violators	X	

Ground of Inadmissibility	Applies	Exempt or Not Applicable
INA 212(a)(7)(A) – Documentation Requirements for Immigrants	X	
INA 212(a)(8) – Ineligibility for Citizenship	X	
INA 212(a)(9) – Aliens Previously Removed	X	
INA 212(a)(10) – Practicing Polygamists, Guardians Required to Accompany Helpless Persons, International Child Abductors, Unlawful Voters, and Former Citizens who Renounced Citizenship to Avoid Taxation	X	

4. Treatment of Family Members

The spouse or child[17] of a special immigrant Panama Canal Zone employee may accompany or follow-to-join the principal applicant if the spouse or child is otherwise eligible.[18] The spouse and child may, as derivative applicants, apply to adjust status under the same immigrant category and priority date as the principal applicant.

D. Documentation and Evidence

An applicant should submit the following documentation to adjust status as a special immigrant Panama Canal Zone employee:

- Application to Register Permanent Residence or Adjust Status (Form I-485), with the correct fee;
- Copy of the approval notice (Form I-797) for the principal applicant's special immigrant petition (Form I-360);
- Two passport-style photographs;
- Copy of government-issued identity document with photograph;
- Copy of birth certificate;
- Copy of passport page with nonimmigrant visa (if applicable);
- Copy of passport page with admission or parole stamp (if applicable);
- Copy of Arrival/Departure Record (Form I-94) or copy of U.S. Customs and Border Protection (CBP) admission or parole stamp on the travel document (if applicable);[19]
- Evidence of continuously maintaining a lawful status since arrival in the United States;
- Any other evidence, as needed, to show that an adjustment bar does not apply;[20]
- Report of Immigration Medical Examination and Vaccination Record (Form I-693);[21]
- Certified police and court records of criminal charges, arrests, or convictions (if applicable);
- Application for Waiver of Grounds of Inadmissibility (Form I-601) or other form of relief (if applicable); and
- Documentation of past or present J-1 or J-2 nonimmigrant status, including proof of compliance with or waiver of the 2-year foreign residence requirement under INA 212(e) (if applicable).

In addition, a spouse or child who is filing as a derivative applicant should submit the following:

- A copy of documentation showing relationship to the principal applicant, such as a marriage certificate or adoption decree (if applicable); and
- A copy of the approval or receipt notice (Form I-797) for the principal applicant's Form I-485 or a copy of the principal applicant's permanent resident card (Form I-551) (if applicable and not filing together with the principal applicant).

E. Adjudication[22]

1. Filing

An applicant seeking adjustment of status as a special immigrant Panama Canal Zone employee may file his or her adjustment application with USCIS after USCIS approves the special immigrant petition[23] (as long as the petition is still valid), provided:

- USCIS has jurisdiction over the adjustment application;[24] and
- The visa availability requirements are met.[25]

These applicants may not file an adjustment application concurrently with Form I-360.

2. Interview

The officer must schedule the applicant for an in-person interview at the appropriate field office and transfer jurisdiction to that field office for final adjudication in cases where:

- The officer cannot make a decision based on the evidence of record; or
- The applicant does not meet the criteria for an interview waiver.[26]

3. Decision

Approval

The officer must determine that the applicant meets all the eligibility requirements as well as merits the favorable exercise of discretion before approving the application to adjust status as a special immigrant Panama Canal Zone employee or family member.[27] If the application for adjustment of status is approvable, the officer must determine if a visa is available at the time of final adjudication.[28]

If approved, USCIS assigns the following codes of admission to applicants adjusting under this category:

Classes of Applicants and Codes of Admission

Applicant	Code of Admission
Former employees of the Panama Canal Company or Canal Zone government[29]	SF6
Spouse of former employee (SF6)	SF7
Child of former employee (SF6)	SF7
Former employees of the U.S. Government in the Panama Canal Zone[30]	SG6
Spouse of former employee (SG6)	SG7
Child of former employee (SG6)	SG7
Former employees of the Panama Canal Company or Canal Zone government employed on April 1, 1979[31]	SH6
Spouse of former employee (SH6)	SH7
Child of former employee (SH6)	SH7

The applicant becomes an LPR as of the date of approval of the adjustment application.[32]

Denial

If the officer determines that the applicant is ineligible for adjustment, the officer must deny the adjustment application. The officer must provide the applicant a written reason for the denial.[33] Although there are no appeal rights for the denial of an adjustment application, the applicant may file a motion to reopen or reconsider. The denial notice should include instructions for filing a Notice of Appeal or Motion (Form I-290B).

Footnotes

[^ 1] See Pub. L. 96-70 (PDF), 93 Stat. 452 (September 27, 1979).

[^ 2] See Section 3201 of Pub. L. 96-70 (PDF), 93 Stat. 452, 496 (September 27, 1979).

[^ 3] See Section 212 of Pub. L. 103-416 (PDF), 108 Stat. 4305, 4314 (October 25, 1994) (striking Section 3201(c) of Pub. L. 96-70, 93 Stat. 452, 497 (September 27, 1979)).

[^ 4] See Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360). See 9 Foreign Affairs Manual (FAM) 502.5-4, Fourth Preference Special Immigrants – Panama Canal Employees.

[^ 5] See Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section B, Definition of Properly Filed [7 USCIS-PM A.3(B)].

[^ 6] See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].For information on Visa Availability and Priority Dates, see the DOS Visa Bulletin.

[^ 7] See INA 245(c). See Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 8] For more information, see Volume 8, Admissibility [8 USCIS-PM] and Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM].

[^ 9] See INA 245(a). For more information, see Part A, Adjustment of Status Policies and Procedures [7 USCIS-PM A] and Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 10] See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6] and Part B, 245(a) Adjustment, Chapter 2, Eligibility Requirements, Section C, Eligible to Receive an Immigrant Visa [7 USCIS-PM B.2(C)].

[^ 11] See INA 101(a)(27)(F).

[^ 12] See INA 101(a)(27)(D). See Chapter 3, International Employees of U.S. Government Abroad [7 USCIS-PM F.3].

[^ 13] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6].

[^ 14] See INA 245(c). For more information on the bars to adjustment, see Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 15] See INA 212(a) for the specific grounds of inadmissibility.

[^ 16] See Volume 8, Admissibility [8 USCIS-PM] and Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM]. See Application for Waiver of Grounds of Inadmissibility (Form I-601) and Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212).

[^ 17] Unmarried and under 21 years of age.

[^ 18] See INA 101(a)(27)(C) and INA 203(d). For the definition of child, see INA 101(b)(1).

[^ 19] Aliens admitted to the United States by CBP at an airport or seaport after April 30, 2013, may be issued an electronic Form I-94 by CBP instead of a paper Form I-94. Such aliens may visit the CBP website to obtain a paper version of an electronic Form I-94.

[^ 20] Such as evidence that the INA 245(c)(2) adjustment bar does not apply because the applicant's failure to maintain status was through no fault of his or her own or for technical reasons. See 8 CFR 245.1(d)(2). See Part B, 245(a) Adjustment, Chapter 4, Status and Nonimmigrant Visa Violations – INA 245(c)(2) and INA 245(c)(8), Section E, Exceptions [7 USCIS-PM B.4(E)].

[^ 21] The applicant may submit Form I-693 together with Form I-485 or later at USCIS' request. See the USCIS website for more information. For more information on when to submit Form I-693, see Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility, Chapter 4, Review of Medical Examination Documentation [8 USCIS-PM B.4].

[^ 22] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6].

[^ 23] See Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360).

[^ 24] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section D, Jurisdiction [7 USCIS-PM A.3(D)].

[^ 25] The applicant must have an immigrant visa immediately available when he or she filed the adjustment of status application and at the time of final adjudication. See Section C, Eligibility Requirements [7 USCIS-PM F.7(C)].

[^ 26] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 5, Interview Guidelines [7 USCIS-PM A.5].

[^ 27] See INA 245(a). For more information, see Part A, Adjustment of Status Policies and Procedures [7 USCIS-PM A] and Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 28] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].

[^ 29] Under INA 101(a)(27)(E).

[^ 30] Under INA 101(a)(27)(F).

[^ 31] Under INA 101(a)(27)(G).

[^ 32] The date of approval is shown in the USCIS approval notice mailed to the applicant; that date is also shown on the actual Permanent Resident Card (Form I-551) the applicant receives after adjustment approval.

[^ 33] See 8 CFR 103.2(b)(19) and 8 CFR 103.3(a).

Chapter 5 - Certain Physicians

A. Purpose and Background

Prior to 1981, the United States required graduates of foreign medical schools licensed and practicing medicine in the United States to have passed the Visa Qualifying Examination (VQE) in order to immigrate as a practicing (clinical) physician. To address an immediate need for physicians and avoid bureaucratic delays, Congress eliminated this requirement in 1981[1] for certain foreign medical graduate physicians as part of a new special immigrant category.[2] This program has no sunset date.

B. Legal Authorities

- INA 101(a)(27)(H) – Special immigrant physicians
- INA 203(b)(4) – Certain special immigrants
- INA 245; 8 CFR 245 – Adjustment of status of nonimmigrant to that of person admitted for permanent residence

C. Eligibility Requirements

To adjust to lawful permanent resident (LPR) status as a special immigrant physician, an applicant must meet the eligibility requirements shown in the table below.

Special Immigrant Physician Adjustment of Status Eligibility Requirements
The applicant has been inspected and admitted or inspected and paroled into the United States.
The applicant is physically present in the United States at the time of filing and adjudication of an adjustment application.
The applicant is eligible to receive an immigrant visa because the applicant is the beneficiary of an approved Form I-360 classifying him or her as a special immigrant physician.
The applicant had an immigrant visa immediately available when he or she filed the adjustment of status application[3] and at the time of final adjudication.[4]
The applicant is not subject to any applicable bars to adjustment of status.[5]
The applicant is admissible to the United States or eligible for a waiver of inadmissibility or other form of relief.[6]
The applicant merits the favorable exercise of discretion.[7]

1. Eligibility to Receive an Immigrant Visa[8]

To be eligible to receive an immigrant visa to adjust status as a special immigrant physician, the principal applicant must be classified as a special immigrant physician by USCIS. The applicant must obtain such classification by filing a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360).[9]

Requirements for classification as a special immigrant physician include:

- Graduation from a foreign medical school or licensure as practicing physician in a foreign country;
- Full and permanent licensure to practice medicine in a U.S. state on January 9, 1978, and practicing medicine in a state on that date;
- Admission to the United States before January 10, 1978, as a J or H nonimmigrant;
- Continuous presence in the United States since that admission in the practice or study of medicine.

The special immigrant physician must submit evidence to establish these requirements as part of filing the Form I-360 petition.

Verifying the Underlying Basis to Adjust Status and Determining Ongoing Eligibility[10]

The special immigrant physician petition should already be adjudicated and approved when the officer adjudicates the adjustment application. USCIS does not re-adjudicate the special immigrant physician petition at the time of the adjudication of the adjustment application. However, the officer should ensure that the applicant remains classified as a special immigrant physician and thus is eligible to adjust as a special immigrant physician. As a result, there may be instances when USCIS may require the applicant to provide additional evidence to

show he or she continues to be classified as a special immigrant physician. In other words, the officer must verify the status of any underlying immigrant petition that forms the basis for adjustment.

2. Bars to Adjustment

Certain adjustment bars do not apply to special immigrant physicians and their derivatives.[11] If these special immigrants fall under any other adjustment bar, however, they are not eligible to adjust status.[12]

3. Admissibility and Waiver Requirements

In general, an applicant who is inadmissible to the United States may only obtain LPR status if he or she obtains a waiver or other form of relief, if available.[13] In general, if a ground of inadmissibility applies, an applicant must apply for a waiver or other form of relief to overcome that inadmissibility.[14] If a waiver or other form of relief is granted, USCIS may approve the application to adjust status if the applicant is otherwise eligible.

The following table specifies which grounds of inadmissibility apply and which do not apply to applicants seeking LPR status based on the special immigrant physician classification.

Applicability of Grounds of Inadmissibility: Special Immigrant Physicians

Ground of Inadmissibility	Applies	Exempt or Not Applicable
INA 212(a)(1) – Health-Related	X	
INA 212(a)(2) – Crime-Related	X	
INA 212(a)(3) – Security-Related	X	
INA 212(a)(4) – Public Charge	X	
INA 212(a)(5) – Labor Certification and Qualifications for Certain Immigrants		X
INA 212(a)(6) – Illegal Entrants and Immigration Violators	X	
INA 212(a)(7)(A) – Documentation Requirements for Immigrants	X	
INA 212(a)(8) – Ineligibility for Citizenship	X	
INA 212(a)(9) – Aliens Previously Removed	X	
INA 212(a)(10) – Practicing Polygamists, Guardians Required to Accompany Helpless Persons, International Child Abductors, Unlawful Voters, and Former Citizens who Renounced Citizenship to Avoid Taxation	X	

4. Treatment of Family Members

The spouse or child (unmarried and under 21 years of age) of a special immigrant physician, if otherwise eligible, may accompany or follow-to-join the principal applicant.[15] As derivative applicants, the spouse and child may apply to adjust status under the same immigrant category and priority date as the principal applicant.

D. Documentation and Evidence

An applicant should submit the following documentation to adjustment status as a special immigrant physician:

- Application to Register Permanent Residence or Adjust Status (Form I-485), with the correct fee;
- Copy of the approval notice (Form I-797) for the principal applicant's special immigrant physician petition;[16]
- Two passport-style photographs;
- Copy of government-issued identity document with photograph;
- Copy of birth certificate;
- Copy of passport page with nonimmigrant visa (if applicable);
- Copy of passport page with admission or parole stamp (if applicable);
- Copy of Arrival/Departure Record (Form I-94) or copy of U.S. Customs and Border Protection (CBP) admission or parole stamp on the travel document (if applicable);[17]
- Report of Immigration Medical Examination and Vaccination Record (Form I-693);[18]
- Certified police and court records of criminal charges, arrests, or convictions (if applicable);
- Application for Waiver of Grounds of Inadmissibility (Form I-601) or other form of relief (if applicable); and
- Documentation of past or present J-1 or J-2 nonimmigrant status, including proof of compliance with or waiver of the 2-year foreign residence requirement under INA 212(e) (if applicable).

In addition, a spouse or child who is filing as a derivative applicant should submit the following:

- A copy of documentation showing relationship to the principal applicant, such as a marriage certificate or adoption decree (if applicable); and
- A copy of the approval or receipt notice (Form I-797) for the principal applicant's Form I-485 or a copy of the principal applicant's permanent resident card (Form I-551) (if applicable and not filing together with the principal applicant).

E. Adjudication[19]

1. Filing

An applicant seeking adjustment of status as a special immigrant physician may file his or her adjustment application with USCIS after USCIS approves the special immigrant petition[20] (as long as the petition is still valid), provided:

- USCIS has jurisdiction over the adjustment application;[21] and
- The visa availability requirements are met.[22]

These applicants may not file an adjustment application concurrently with Form I-360.

2. Interview

The officer must schedule the applicant for an in-person interview at the appropriate field office and transfer jurisdiction to that field office for final adjudication in cases where:

- The officer cannot make a decision based on the evidence of record; or
- The applicant does not meet the criteria for an interview waiver.[23]

3. Decision

Approval

The officer must determine that the applicant meets all the eligibility requirements as well as merits the favorable exercise of discretion before approving the application to adjust status as a special immigrant physician or family member.[24] If the application for adjustment of status is approvable, the officer must determine if a visa is available at the time of final adjudication.[25]

If approved, USCIS assigns the following codes of admission to applicants adjusting under this category:

Classes of Applicants and Codes of Admission

Applicant	Code of Admission
Special Immigrant Physician	SJ6
Spouse of Immigrant Physician (SJ6)	SJ7
Child of Immigrant Physician (SJ6)	SJ7

The applicant becomes an LPR as of the date of approval of the adjustment application.[26]

Denial

If the officer determines that the applicant is ineligible for adjustment, the officer must deny the adjustment application. The officer must provide the applicant a written reason for the denial.[27] Although there are no appeal rights for the denial of an adjustment application, the applicant may file a motion to reopen or reconsider. The denial notice should include instructions for filing a Notice of Appeal or Motion (Form I-290B).

Footnotes

[^ 1] At that time, the VQE was known as Parts I and II of the National Board of Medical Examiners examination.

[^ 2] See Immigration and Nationality Act Amendments of 1981, Pub. L. 97-116 (PDF), 95 Stat. 1611 (December 29, 1981).

[^ 3] See Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section B, Definition of "Properly Filed" [7 USCIS-PM A.3(B)].

[^ 4] See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].For information on Visa Availability and Priority Dates, see the DOS Visa Bulletin.

[^ 5] See INA 245(c). See Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 6] For more information, see Volume 8, Admissibility [8 USCIS-PM] and Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM].

[^ 7] See INA 245(a). For more information, see Part A, Adjustment of Status Policies and Procedures [7 USCIS-PM A] and Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 8] See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6] and Part B, 245(a) Adjustment, Chapter 2, Eligibility Requirements, Section C, Eligible to Receive an Immigrant Visa [7 USCIS-PM B.2(C)].

[^ 9] See Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360).

[^ 10] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6].

[^ 11] See INA 245(c)(2) and INA 245(c)(8).

[^ 12] See INA 245(c). For more information on the bars to adjustment, see Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 13] See INA 212(a) for the specific grounds of inadmissibility.

[^ 14] See Volume 8, Admissibility [8 USCIS-PM] and Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM]. See Application for Waiver of Grounds of Inadmissibility (Form I-601) and Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212).

[^ 15] See INA 101(a)(27)(C) and INA 203(d). For the definition of child, see INA 101(b)(1).

[^ 16] See Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360).

[^ 17] Aliens admitted to the United States by CBP at an airport or seaport after April 30, 2013, may be issued an electronic Form I-94 by CBP instead of a paper Form I-94. Such aliens may visit the CBP website to obtain a paper version of an electronic Form I-94.

[^ 18] The applicant may submit Form I-693 together with Form I-485 or later at USCIS' request. See the USCIS website for more information. For more information on when to submit Form I-693, see Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility, Chapter 4, Review of Medical Examination Documentation [8 USCIS-PM B.4].

[^ 19] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6].

[^ 20] See Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360).

[^ 21] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section D, Jurisdiction [7 USCIS-PM A.3(D)].

[^ 22] The applicant must have an immigrant visa immediately available when he or she filed the adjustment of status application and at the time of final adjudication. See Section C, Eligibility Requirements [7 USCIS-PM F.7(C)].

[^ 23] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 5, Interview Guidelines [7 USCIS-PM A.5].

[^ 24] See INA 245(a). For more information, see Part A, Adjustment of Status Policies and Procedures [7 USCIS-PM A] and Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 25] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].

[^ 26] The date of approval is shown in the USCIS approval notice mailed to the applicant; that date is also shown on the actual Permanent Resident Card (Form I-551) the applicant receives after adjustment approval.

[^ 27] See 8 CFR 103.2(b)(19) and 8 CFR 103.3(a).

Chapter 6 - Certain G-4 or NATO-6 Employees and their Family Members

A. Purpose and Background

Employees of recognized international organizations hold nonimmigrant G-4, N, or NATO-6 status in the United States while they are operating in their official capacities. These nonimmigrants' immediate family members are generally eligible for a corresponding dependent nonimmigrant status.[1] Examples of some qualifying international organizations include the North Atlantic Treaty Organization (NATO) and International Telecommunications Satellite Organization (INTELSAT).[2]

In 1986, Congress created a special immigrant category to provide G-4 nonimmigrants a basis to adjust to lawful permanent resident status.[3] In 1988, Congress added a separate special immigrant category to provide a similar opportunity to foreign retired employees of NATO and their qualifying spouses, widow(er)s, children, and adult sons and daughters.[4] This category applies to:

- Retired officer or employee of a qualifying international organization or NATO (and derivative spouse);
- Surviving spouse of a deceased officer or employee of a qualifying international organization or NATO; and
- Unmarried son or daughter of a current or retired officer or employee of a qualifying international organization or NATO.

B. Legal Authorities

- INA 101(a)(27)(I) and INA 101(a)(27)(L) – Certain employees of international organizations
- INA 203(b)(4) – Certain special immigrants
- INA 245; 8 CFR 245 – Adjustment of status of nonimmigrant to that of person admitted for permanent residence
- 8 CFR 101.5 – Special immigrant status for certain G-4 nonimmigrants
- 22 CFR 42.32(d)(5) – Certain international organization and NATO civilian employees
- 22 CFR 41.24 – International organization aliens
- 22 CFR 41.25 – NATO representatives, officials, and employees

C. Eligibility Requirements

To adjust to lawful permanent resident (LPR) status as a G-4 international organization or NATO-6 employee or family member, an applicant must meet the eligibility requirements shown in the table below.[5]

G-4 International Organization or NATO-6 Employees and Family Members Adjustment of Status Eligibility Requirements
The applicant has been inspected and admitted or inspected and paroled into the United States.
The applicant maintained G-4, N, or NATO-6 status and has resided and been physically present in the United States for the periods of time required by statute.
The applicant is physically present in the United States at the time of filing and adjudication of an adjustment application.
The applicant is eligible to receive an immigrant visa.
The applicant had an immigrant visa immediately available when he or she filed the adjustment of status application[6] and at the time of final adjudication.[7]

G-4 International Organization or NATO-6 Employees and Family Members Adjustment of Status Eligibility Requirements
The applicant is not subject to any applicable bars to adjustment of status.[8]
The applicant is admissible to the United States or eligible for a waiver of inadmissibility or other form of relief.[9]
The applicant merits the favorable exercise of discretion.[10]

1. Eligibility to Receive an Immigrant Visa[11]

An applicant must be eligible to receive an immigrant visa to adjust status.[12] An adjustment applicant typically establishes eligibility for an immigrant visa through an immigrant petition. A G-4 international organization or NATO-6 employee or family member can establish eligibility for an immigrant visa by obtaining classification from USCIS by filing a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360).

Therefore, in order for a G-4 international organization or NATO-6 employee or family member adjustment applicant to be eligible to receive an immigrant visa, he or she must be one of the following:

- The applicant is the beneficiary of an approved Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) classifying him or her as G-4 international organization employee or family member or NATO-6 employee or family member;
- The applicant has a pending Form I-360 (that is ultimately approved); or
- The applicant is filing the adjustment application concurrently with the Form I-360 (and the Form I-360 is ultimately approved).[13]

The following table provides information on the qualifications that principal I-360 applicants must meet to obtain such classification.

Types of Special Immigrant G-4 International Organization Employee or Family Member or NATO-6 Employee or Family Member

Type	Nonimmigrant Status	Physical Presence	Resided in the United States	When to Apply for Adjustment[14]
Retired officer or employee[15]	Must have maintained G-4, N, or NATO-6 status during requisite period of residence and physical presence in the United States[16]	½ of 7 years prior to application	15 years before date of retirement	No later than 6 months after retirement
Surviving spouse of a deceased officer or employee[17]	Must have maintained G-4, N, or NATO-6 status during requisite period of residence and physical presence in the United States	½ of 7 years prior to application	15 years before death of spouse	No later than 6 months after spouse's death
Unmarried son or daughter of a current or former officer or employee[18]	Must have maintained G-4, N, or NATO-6 status during requisite period of residence and physical presence in the United States	½ of 7 years prior to application	7 years between the ages of five and 21[19] (before 22nd birthday)	No later than applicant's 25th birthday
Spouse of a retired officer or employee (accompanying or following to join)[20]	Not applicable	Not applicable	Not applicable	Not applicable

Nonimmigrant Status

Applicants under this category (except for the spouse of a qualified retiree) must establish that the time spent in the United States accruing residence and physical presence was completed while the applicant was maintaining a valid G-4, N, or NATO-6 nonimmigrant status.

Maintaining status for these purposes is defined as maintaining qualified employment with a qualifying G international organization or maintaining the qualifying family relationship with the G-4 international organization employee. Unauthorized employment does not disqualify an otherwise eligible beneficiary from G-4 status for residence and physical presence purposes, provided the qualifying G status is maintained.[21]

Residence and Physical Presence

Applicants (except for the spouse of a qualified retiree) must establish the specified residence and physical presence to be eligible for adjustment of status. The date of filing the adjustment of status application fixes the date for calculating the residence and physical presence requirements. The applicant must have complied with all requirements as of that filing date.[22]

An absence from the United States for official business or vacation is not subtracted from the aggregate residence or physical presence, as long as the applicant did not abandon residence in the United States and was still stationed in the United States during that time. However, any time an unmarried son or daughter spends outside the United States to attend school does not count towards the physical presence requirement.[23]

USCIS determines residence and physical presence on a case-by-case basis, taking into account all factors relevant to the applicant's absences from the United States.

Verifying the Underlying Basis to Adjust Status and Determining Ongoing Eligibility[24]

The special immigrant petition should already be adjudicated and approved when the officer adjudicates the adjustment application. USCIS does not re-adjudicate the special immigrant petition at the time of the adjudication of the adjustment application. However, the officer should ensure that the applicant remains classified as a special immigrant G-4 international

organization employee or family member or NATO-6 employee or family member and thus is eligible to adjust as a special immigrant G-4 international organization employee or family member or NATO-6 employee or family member.

As a result, there may be instances when USCIS may require the applicant to provide additional evidence to show he or she continues to be classified as a special immigrant G-4 international organization employee or family member or NATO-6 employee or family member. In other words, the officer must verify the status of any underlying immigrant petition that forms the basis for adjustment.

2. Bars to Adjustment

Special immigrant NATO-6 employees and family members are ineligible for adjustment of status if any of the bars to adjustment of status apply.[25] Certain adjustment bars do not apply to G-4 international organization employees and family members.[26] G-4 special immigrants are ineligible to adjust status, however, in cases where they fall under an applicable adjustment bar.[27]

3. Admissibility and Waiver Requirements

In general, an applicant who is inadmissible to the United States may only obtain LPR status if he or she obtains a waiver or other form of relief, if available.[28] In general, if a ground of inadmissibility applies, an applicant must apply for a waiver or other form of relief to overcome that inadmissibility.[29] If a waiver or other form of relief is granted, USCIS may approve the application to adjust status if the applicant is otherwise eligible.

The following table specifies which grounds of inadmissibility apply and which do not apply to applicants seeking LPR status based on the G-4 international organization or NATO-6 employee or family member classification.

Applicability of Grounds of Inadmissibility: G-4 International Organization and NATO-6 Employees and Family Members

Ground of Inadmissibility	Applies	Exempt or Not Applicable
INA 212(a)(1) – Health-Related	X	
INA 212(a)(2) – Crime-Related	X	
INA 212(a)(3) – Security-Related	X	
INA 212(a)(4) – Public Charge	X	
INA 212(a)(5) – Labor Certification and Qualifications for Certain Immigrants		X
INA 212(a)(6) – Illegal Entrants and Immigration Violators	X	
INA 212(a)(7)(A) – Documentation Requirements for Immigrants	X	
INA 212(a)(8) – Ineligibility for Citizenship	X	
INA 212(a)(9) – Aliens Previously Removed	X	
INA 212(a)(10) – Practicing Polygamists, Guardians Required to Accompany Helpless Persons, International Child Abductors, Unlawful Voters, and Former Citizens who Renounced Citizenship to Avoid Taxation	X	

4. Treatment of Family Members

The spouse of a retired G-4, N, or NATO-6 employee may, if otherwise eligible, accompany or follow-to-join the principal applicant and apply to adjust status as a derivative under the same immigrant category and priority date.[30] An unmarried son or daughter is considered to be the principal adjustment applicant and so is not treated as a derivative applicant. No other family members of principal applicants may adjust as derivative applicants.

D. Documentation and Evidence

An applicant should submit the following documentation to adjust status as a special immigrant employee of an international organization officer or family member of such an employee:

- Application to Register Permanent Residence or Adjust Status (Form I-485), with the correct fee; Copy of the receipt or approval notice (Form I-797) for the principal applicant's petition (unless the applicant is filing the petition together with the Form I-485);[31]
- Copy of every page of passport and any other documents showing that you resided and were physically present in the United States for the required time period;
- Evidence of maintenance of G-4, N, or NATO-6 nonimmigrant status since your last entry into the United States;
- Interagency Record of Request (Form I-566);
- Request for Waiver of Certain Rights, Privileges, Exemptions, and Immunities (Form I-508);
- Two passport-style photographs;
- Copy of government-issued identity document with photograph;
- Copy of birth certificate;

- Copy of passport page with nonimmigrant visa (if applicable);
- Copy of passport page with admission or parole stamp (if applicable);
- Copy of Arrival/Departure Record (Form I-94) or copy of U.S. Customs and Border Protection (CBP) admission or parole stamp on the travel document (if applicable);[32]
- Any other evidence, as needed, to show that an adjustment bar does not apply;[33]
- Report of Immigration Medical Examination and Vaccination Record (Form I-693);[34]
- Certified police and court records of criminal charges, arrests, or convictions (if applicable);
- Application for Waiver of Grounds of Inadmissibility (Form I-601) or other form of relief (if applicable); and
- Documentation of past or present J-1 or J-2 nonimmigrant status, including proof of compliance with or waiver of the 2-year foreign residence requirement under INA 212(e) if applicable.

In addition, a spouse filing as a derivative applicant should submit the following:

- A copy of documentation showing relationship to the principal applicant, such as a marriage certificate (if applicable); and
- A copy of the approval or receipt notice (Form I-797) for the principal applicant's Form I-485 or a copy of the principal applicant's permanent resident card (Form I-551) (if applicable and not filing together with the principal applicant).

Applicants must be able to establish they meet the relevant eligibility grounds, including residence, physical presence, and a qualifying relationship, when necessary. An officer should ensure there is sufficient documentation included with the application to substantiate eligibility.

E. Adjudication[35]

1. Filing

An applicant seeking adjustment of status as a special immigrant G-4 international organization or NATO-6 employee may file his or her adjustment application with USCIS concurrently with the Form I-360 petition, while the Form I-360 petition is pending, or after USCIS approves the Form I-360 petition (as long as the petition is still valid), provided:

- USCIS has jurisdiction over the adjustment application;[36] and
- The visa availability requirements are met.[37]

2. Interview

The officer must schedule the applicant for an in-person interview at the appropriate field office and transfer jurisdiction to that field office for final adjudication in cases where:

- The officer cannot make a decision based on the evidence of record; or
- The applicant does not meet the criteria for an interview waiver.[38]

3. Decision

Approval

The officer must determine that the applicant meets all the eligibility requirements as well as merits the favorable exercise of discretion before approving the application to adjust status as a special immigrant international organization employee (or family member).[39] If the adjustment application is approvable, the officer must determine if a visa is available at the time of final adjudication.[40]

If approved, USCIS assigns the following codes of admission to applicants adjusting under this category:

Classes of Applicants and Codes of Admission

Applicant	Code of Admission
Retired G-4 Employee	SK6
Spouse of G-4 Employee (SK6)	SK7
Unmarried Son or Daughter of G-4 Employee (SK6)	SK8
Surviving Spouse of Deceased G-4 Employee (SK6)	SK9
Retired NATO-6 Employee	SN6
Spouse of NATO-6 Employee (SN6)	SN7
Unmarried Son or Daughter of NATO-6 Employee (SN6)	SN8
Surviving Spouse of Deceased NATO-6 Employee (SN6)	SN9

The applicant becomes an LPR as of the date of approval of the adjustment application.[41]

Denial

If the officer determines that the applicant is ineligible for adjustment, the officer must deny the adjustment application. The officer must provide the applicant a written reason for the denial.[42] Although there are no appeal rights for the denial of an adjustment application, the applicant may file a motion to reopen or reconsider. The denial notice should include instructions for filing a Notice of Appeal or Motion (Form I-290B).

Footnotes

[^ 1] As long as their international organizations remain recognized, the employees and their family members enjoy certain privileges, immunities, and protections, including protection from most grounds of inadmissibility and deportation.

[^ 2] See 9 Foreign Affairs Manual (FAM) 402.3-7(N), International Organizations for more qualifying international organizations. See 9 FAM 502.5-6(B), Certain International Organization and NATO Civilian Employees.

[^ 3] See INA 101(a)(27)(I). See Section 312(a) of the Immigration Reform and Control Act of 1986, Pub. L. 99-603 (PDF), 100 Stat. 3359, 3434 (November 6, 1986), as amended by Section 2(o)(1) of the Immigration Technical Corrections Act of 1988, Pub. L. 100-525 (PDF), 102 Stat. 2609, 2613 (October 24, 1988).

[^ 4] See INA 101(a)(27)(L). See Section 421 of the American Competitiveness and Workforce Improvement Act of 1998, Title IV of Pub. L. 105-277 (PDF), 112 Stat. 2681-641, 2681-657 (October 21, 1998).

[^ 5] See INA 245(a) and (c). See 8 CFR 245. See Instructions to Form I-485.

[^ 6] See Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section B, Definition of Properly Filed [7 USCIS-PM A.3(B)].

[^ 7] See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].For information on Visa Availability and Priority Dates, see the DOS Visa Bulletin.

[^ 8] See INA 245(c). See Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 9] For more information, see Volume 8, Admissibility [8 USCIS-PM] and Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM].

[^ 10] See INA 245(a). For more information, see Part A, Adjustment of Status Policies and Procedures [7 USCIS-PM A] and Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 11] See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6] and Part B, 245(a) Adjustment, Chapter 2, Eligibility Requirements, Section C, Eligible to Receive an Immigrant Visa [7 USCIS-PM B.2(C)].

[^ 12] See INA 245(a)(2).

[^ 13] A retired employee must file Form I-360 petition no later than 6 months after retiring from the international organization. A surviving spouse of a deceased employee must file Form I-360 petition no later than 6 months after the employee's date of death. See INA 101(a)(27)(I)(ii) and INA 101(a)(27)(I)(iii).

[^ 14] Special immigrant employees of qualifying international organizations and qualified family members, who consular process rather than adjust status, must appear for the final visa interview and issuance of the immigrant visa within 6 months of approval of the Form I-360. See 22 CFR 42.32(d)(5)(ii).

[^ 15] See INA 101(a)(27)(I)(iii).

[^ 16] See 8 CFR 101.5(d).

[^ 17] See INA 101(a)(27)(I)(ii).

[^ 18] See INA 101(a)(27)(I)(i).

[^ 19] See INA 101(a)(27)(I)(i). Based on common understanding of the phrase "between the ages of 5 and 21 years," the establishment of residence may include the entire year during which the applicant is considered 21-years-old, but the requirement must be met before the applicant's 22nd birthday.

[^ 20] See INA 101(a)(27)(I)(iv).

[^ 21] See 8 CFR 101.5(d).

[^ 22] See 8 CFR 101.5(a).

[^ 23] See 8 CFR 101.5(c).

[^ 24] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6].

[^ 25] See INA 245(c). For more information on the bars to adjustment, see Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 26] See INA 245(c)(2) and INA 245(c)(8). See 8 CFR 245.1(b).

[^ 27] See INA 245(c). For more information on the bars to adjustment, see Part B, 245(a) Adjustment, Chapter 8, Exemptions from Bars to Adjustment, Section C, Certain Special Immigrants [7 USCIS-PM B.8(C)].

[^ 28] See INA 212(a) for the specific grounds of inadmissibility.

[^ 29] See Volume 8, Admissibility [8 USCIS-PM] and Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM]. See Application for Waiver of Grounds of Inadmissibility (Form I-601) and Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212).

[^ 30] See INA 101(a)(27)(I)(iv).

[^ 31] See Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360).

[^ 32] Aliens admitted to the United States by CBP at an airport or seaport after April 30, 2013 may be issued an electronic Form I-94 by CBP instead of a paper Form I-94. Such aliens may visit the CBP Web site to obtain a paper version of an electronic Form I-94.

[^ 33] Such as evidence that the INA 245(c)(2) adjustment bar does not apply because the applicant's failure to maintain status was through no fault of his or her own or for technical reasons. See 8 CFR 245.1(d)(2). See Part B, 245(a) Adjustment, Chapter 4, Status and Nonimmigrant Visa Violations – INA 245(c)(2) and INA 245(c)(8), Section E, Exceptions [7 USCIS-PM B.4(E)]. Since the adjustment bars at INA 245(c)(2) and INA 245(c)(8) do not apply to special immigrant G-4 employees and family members as a matter of law, applicants applying for adjustment under this category do not need to submit any additional evidence regarding these bars. See INA 245(c)(2) and 8 CFR 245.1(b).

[^ 34] The applicant may submit Form I-693 together with Form I-485 or later at USCIS' request. See the USCIS website for more information. For more information on when to submit Form I-693, see Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility, Chapter 4, Review of Medical Examination Documentation [8 USCIS-PM B.4].

[^ 35] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6].

[^ 36] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section D, Jurisdiction [7 USCIS-PM A.3(D)].

[^ 37] The applicant must have an immigrant visa immediately available when he or she filed the adjustment of status application and at the time of final adjudication. See Section C, Eligibility Requirements [7 USCIS-PM F.7(C)].

[^ 38] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 5, Interview Guidelines [7 USCIS-PM A.5].

[^ 39] See INA 245(a). For more information, see Part A, Adjustment of Status Policies and Procedures [7 USCIS-PM A] and Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 40] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].

[^ 41]The date of approval is shown in the USCIS approval notice mailed to the applicant; that date is also shown on the actual Permanent Resident Card (Form I-551) the applicant receives after adjustment approval.

[^ 42] See 8 CFR 103.2(b)(19) and 8 CFR 103.3(a).

Chapter 7 - Special Immigrant Juveniles

A. Purpose and Background[1]

Congress created the special immigrant juvenile (SIJ) classification when it enacted the Immigration Act of 1990 (IMMACT 90).[2] Certain juveniles in the United States may be eligible for SIJ classification. Once classified as an SIJ, juveniles may be eligible to adjust status, if they meet all eligibility requirements.

B. Legal Authorities

- INA 101(a)(27)(J) – Special immigrant juveniles
- INA 203(b)(4) – Certain special immigrants
- INA 245; 8 CFR 245 – Adjustment of status of nonimmigrant to that of person admitted for permanent residence
- INA 245(h) – Application of adjustment provisions with respect to special immigrants
- 8 CFR 245.1(e)(3) – Special immigrant juveniles
- 8 CFR 204.11 – Special immigrant juvenile classification
- Section 153 of the Immigration Act of 1990 (IMMACT 90)[3] – Special immigrant status for certain aliens declared dependent on a juvenile court
- Section 302 of the Miscellaneous and Technical Immigration and Nationality Amendments of 1991[4]
- Section 113 of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act of 1998[5]
- Section 235(d) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)[6] – Permanent protection for certain at-risk children

C. Eligibility Requirements

To adjust to lawful permanent resident (LPR) status as an SIJ, an applicant must meet the eligibility requirements shown in the table below.[7]

SIJ-Based Adjustment of Status Eligibility Requirements

Eligibility Requirement	Where can I find more information?
The applicant must have been: • Inspected and admitted into the United States; or • Inspected and paroled into the United States.	See Subsection 1, Inspected and Admitted or Inspected and Paroled [7 USCIS-PM F.7(C)(1)].
The applicant is physically present in the United States at the time of filing and adjudication of an adjustment application.	See Part A, Adjustment of Status Policies and Procedures [7 USCIS-PM A].
The applicant is eligible to receive an immigrant visa.	See Subsection 2, Eligibility to Receive an Immigrant Visa [7 USCIS-PM F.7(C)(2)].
The applicant has an immigrant visa immediately available when he or she files the adjustment of status application and at the time of final adjudication.	See Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section B, Definition of Properly Filed [7 USCIS-PM A.3(B)] and Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].
The applicant is not subject to any applicable bars to adjustment of status.	See Subsection 3, Bars to Adjustment [7 USCIS-PM F.7(C)(3)].
The applicant is admissible to the United States or eligible for a waiver of inadmissibility or other form of relief.	See Subsection 4, Admissibility and Waiver Requirements [7 USCIS-PM F.7(C)(4)].
The applicant merits the favorable exercise of discretion.	See Part A, Adjustment of Status Policies and Procedures, Chapter 10, Legal Analysis and Use of Discretion [7 USCIS-PM A.10] and Part B, 245(a) Adjustment [7 USCIS-PM B].

1. Inspected and Admitted or Inspected and Paroled

SIJs are not exempt from the general adjustment requirement that applicants be inspected and admitted or inspected and paroled.[8] However, the INA expressly states that SIJs are considered paroled into the United States for purposes of adjustment under INA 245(a). Accordingly, the beneficiary of an approved SIJ petition is treated for purposes of the adjustment application as if the beneficiary has been paroled, regardless of the beneficiary's manner of arrival in the United States.[9]

2. Eligibility to Receive an Immigrant Visa[10]

An applicant must be eligible to receive an immigrant visa to adjust status.[11] An adjustment applicant typically establishes eligibility for an immigrant visa through an approved immigrant petition. An SIJ can establish eligibility for an immigrant visa by obtaining classification from USCIS by filing an SIJ-based Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) (SIJ petition).[12]

Therefore, in order for an SIJ-based adjustment applicant to be eligible to receive an immigrant visa, he or she must be one of the following:

- The applicant is the beneficiary of an approved Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) classifying him or her as an SIJ;
- The applicant has a pending Form I-360 (that is ultimately approved); or
- The applicant is filing the adjustment application concurrently with the Form I-360 (and the Form I-360 is ultimately approved).

Verifying the Underlying Basis to Adjust Status and Determining Ongoing Eligibility[13]

The SIJ petition should already be adjudicated and approved when the officer adjudicates the adjustment application. USCIS does not re-adjudicate the SIJ petition at the time of the adjudication of the adjustment application. However, the officer should ensure that the applicant remains classified as an SIJ and thus is eligible to adjust as an SIJ. As a result, there may be instances when USCIS may require the applicant to provide additional evidence to show he or she continues to be classified as an SIJ. In other words, the officer must verify the status of any underlying immigrant petition that forms the basis for adjustment.

Revocation of Approved Petition

USCIS may revoke an approved SIJ petition upon notice as necessary[14] for what it deems to be good and sufficient cause,[15] such as, if the record contains evidence or information that materially conflicts with the evidence or information that was the basis for petitioner's eligibility for SIJ classification. USCIS issues a Notice of Intent to Revoke (NOIR) and provides the petitioner an opportunity to offer evidence in support of the petition and in opposition to the grounds alleged for revocation of the approved petition.[16]

Furthermore, USCIS automatically revokes an approved SIJ petition,[17] as of the date of approval, if any one of the circumstances below occurs before a decision on the adjustment application is issued:

- Reunification of the petitioner with one or both parents by virtue of a juvenile court order,[18] where a juvenile court previously deemed reunification with that parent, or both parents, not viable due to abuse, neglect, abandonment, or a similar basis under state law;[19] or
- Reversal by the juvenile court of the determination that it would not be in the petitioner's best interest to be returned (to a placement) to the petitioner's or the petitioner's parent's country of nationality or last habitual residence.[20]

If one of the above grounds for automatic revocation occurs, USCIS issues a notice to the petitioner of such revocation of the SIJ petition, which means the applicant is no longer classified as a SIJ.[21]

If the petition is revoked, either upon notice or as an automatic revocation,[22] then the officer should deny the adjustment application because the applicant no longer has an underlying basis to adjust status.

3. Bars to Adjustment[23]

An applicant classified as an SIJ is barred from adjustment if deportable due to engagement in terrorist activity or association with terrorist organizations.[24] There is no waiver of or exemption to this adjustment bar if it applies. Therefore, if the terrorist-related bar to adjustment applies, an SIJ is ineligible for adjustment of status.

4. Admissibility and Waiver Requirements[25]

In general, an applicant who is inadmissible to the United States may only obtain LPR status if he or she obtains a waiver or other form of relief, if available.[26] In general, if a ground of inadmissibility applies, an applicant must apply for a waiver or other form of relief to overcome an inadmissibility ground that applies.[27] USCIS may approve the application to adjust status if a waiver or other form of relief is granted and the applicant is otherwise eligible.

The following table specifies which grounds of inadmissibility do not apply to applicants seeking LPR status based on the SIJ classification.[28]

Inadmissibility Grounds that Do Not Apply to Special Immigrant Juveniles	
INA 212(a)(4)	Public Charge
INA 212(a)(5)(A)	Labor Certification
INA 212(a)(6)(A)	Present without admission or parole
INA 212(a)(6)(C)	Misrepresentation
INA 212(a)(6)(D)	Stowaways
INA 212(a)(7)(A)	Documentation Requirements for Immigrants
INA 212(a)(9)(B)	Unlawful Presence

The following table specifies which grounds of inadmissibility do apply to applicants seeking LPR status based on the SIJ classification and for which a waiver or other form of relief may be available.

Inadmissibility Grounds that Apply to Special Immigrant Juveniles	
INA 212(a)(1)	Health-Related
INA 212(a)(2)	Crime-Related
INA 212(a)(3)	Security-Related
INA 212(a)(6)(B)	Failure to Attend Removal Proceedings

Inadmissibility Grounds that Apply to Special Immigrant Juveniles	
INA 212(a)(6)(E)	Smugglers
INA 212(a)(6)(F)	Subject of Civil Penalty
INA 212(a)(6)(G)	Student Visa Abusers
INA 212(a)(8)	Ineligibility for Citizenship
INA 212(a)(9)(A)	Certain Aliens Previously Removed
INA 212(a)(9)(C)	Aliens Unlawfully Present After Previous Immigration Violations
INA 212(a)(10)	Practicing Polygamists, Guardians Required to Accompany Helpless Persons, International Child Abductors, Unlawful Voters, and Former Citizens who Renounced Citizenship to Avoid Taxation

An applicant found inadmissible based on any of the above applicable grounds may be eligible for an SIJ-specific waiver of these inadmissibility grounds for:

- Humanitarian purposes;
- Family unity; or
- When it is otherwise in the public interest.[29]

The following table specifies which grounds of inadmissibility cannot be waived under the SIJ-specific waiver for such purposes.[30]

Inadmissibility Grounds that Cannot Be Waived[31]	
INA 212(a)(2)(A)	Conviction of Certain Crimes
INA 212(a)(2)(B)	Multiple Criminal Convictions
INA 212(a)(2)(C)	Controlled Substance Traffickers
INA 212(a)(3)(A)	Security and Related Grounds
INA 212(a)(3)(B)	Terrorist Activities
INA 212(a)(3)(C)	Foreign Policy Related
INA 212(a)(3)(E)	Participants in Nazi Persecution, Genocide, or the Commission of Any Act of Torture or Extrajudicial Killing

Juvenile Delinquency

Findings of juvenile delinquency are not considered criminal convictions for purposes of immigration law. However, certain grounds of inadmissibility do not require a conviction. In some cases, certain conduct alone may be sufficient to trigger an inadmissibility ground.[32]

Furthermore, findings of juvenile delinquency may also be part of a discretionary analysis.[33] USCIS will consider findings of juvenile delinquency on a case-by-case basis based on the totality of the evidence to determine whether a favorable exercise of discretion is warranted. Therefore, an adjustment applicant must disclose all arrests and charges. If any arrest or charge was disposed of as a matter of juvenile delinquency, the applicant must include the court or other public record that establishes this disposition.

In the event that an applicant is unable to provide such records because the applicant's case was expunged or sealed, the applicant must provide information about the arrest and evidence demonstrating that such records are unavailable under the law of the particular jurisdiction. USCIS evaluates sealed and expunged records according to the nature and severity of the criminal offense.

5. Treatment of Family Members

Dependents of SIJs cannot file as derivative applicants. SIJ beneficiaries may petition for certain qualifying family members through family-based immigration after they have adjusted status to LPR.[34] However, a juvenile who adjusts status based on an SIJ classification may not confer an immigration benefit to their natural or prior adoptive parents after naturalization.[35] This prohibition also applies to a non-abusive, custodial parent, if one exists.

D. Documentation and Evidence

An applicant should submit the following documentation to adjust status as an SIJ:[36]

- Application to Register Permanent Residence or Adjust Status (Form I-485);
- Copy of the receipt or approval notice (Form I-797) for the applicant's SIJ petition (unless the applicant is filing the petition together with Form I-485);[37]
- Two passport-style photographs;
- Copy of government-issued identity document with photograph (if available);
- Copy of birth certificate or other evidence of birth;
- Copy of passport page with nonimmigrant visa (if applicable);
- Copy of passport page with admission or parole stamp (if applicable);
- Copy of Arrival/Departure Record (Form I-94) or copy of U.S. Customs and Border Protection (CBP) admission or parole stamp on the travel document (if applicable);[38]
- Report of Immigration Medical Examination and Vaccination Record (Form I-693);[39]
- Certified police and court records of juvenile delinquency findings, criminal charges, arrests, or convictions (if applicable);
- Application for Waiver of Grounds of Inadmissibility (Form I-601) or other form of relief (if applicable); and
- Documentation of past or present J-1 or J-2 nonimmigrant status, including proof of compliance with or waiver of the 2-year foreign residence requirement under INA 212(e) (if applicable).[40]

E. Adjudication[41]

1. Filing

An applicant seeking adjustment of status as a special immigrant juvenile may file his or her adjustment application with USCIS concurrently with the SIJ petition, while the SIJ petition is pending, or after USCIS approves the SIJ petition (as long as the petition is still valid), provided:

- USCIS has jurisdiction over the adjustment application;[42] and
- The visa availability requirements are met.[43]

2. Interview

Determining Necessity of Interview

USCIS recognizes the vulnerable nature of SIJ based applicants for adjustment of status and generally conducts interviews of SIJ based applicants for adjustment of status when an interview is deemed necessary. USCIS conducts a full review of the record and supporting evidence to determine whether an interview may be warranted.

USCIS will generally not require an interview if the record contains sufficient information and evidence to approve the adjustment application without an in-person assessment. However, USCIS retains the discretion to interview SIJ based adjustment applicants for the purposes of adjudicating the adjustment of status application, as applicable.[44]

Conducting the Interview

Given the vulnerable nature of SIJ based adjustment applicants and the hardships they may face because of the loss of parental support, USCIS takes special care to establish a child-friendly interview environment. During an interview, USCIS avoids questioning the applicant about the details of the abuse, neglect, or abandonment suffered because these issues are handled by the juvenile court. USCIS generally focuses the interview on resolving issues related to eligibility for adjustment of status.

The applicant may bring a trusted adult to the interview in addition to an attorney or representative. The trusted adult may serve as a familiar source of comfort to the applicant, but should not interfere with the interview process or coach the applicant during the interview. Given potential human trafficking and other concerns, USCIS assesses the appropriateness of the adult to attend the interview and is observant of the adult's interaction with the child. If USCIS has any concerns related to appropriateness of the adult's presence, USCIS may continue the interview without that adult present. Although USCIS may limit the number of persons present at the interview, such limitations do not extend to the petitioner's attorney or accredited representative of record.[45]

3. Age-Out Protections

There is no age limit for SIJ-based applicants for adjustment of status. In cases where an SIJ petitioner is under 21 years of age on the date of proper filing of the SIJ petition, USCIS does not deny an SIJ-based adjustment application solely because the applicant is older than 21 years of age at the time of filing or adjudication of Form I-485.[46]

4. Decision

Approval

The officer must determine that the applicant meets all the eligibility requirements and merits the favorable exercise of discretion[47] before approving the application to adjust status as an SIJ. If the application for adjustment of status is approvable, the officer must determine if a visa is available at the time of final adjudication.[48]

If approved, USCIS assigns the following code of admission to applicants adjusting under this category:

Class of Applicant and Code of Admission

Applicant	Code of Admission
Special Immigrant Juvenile	SL6

The applicant becomes an LPR as of the date of approval of the adjustment application.[49]

Denial

If the officer determines that the applicant is ineligible for adjustment, the officer must deny the adjustment application. The officer must provide the applicant a written reason for the denial.[50] Although there are no appeal rights for the denial of an adjustment application, the applicant may file a motion to reopen or reconsider, or renew the application in Immigration Court. The denial notice should include instructions for filing a Notice of Appeal or Motion (Form I-290B).

Footnotes

[^ 1] For more information on the legislative history of the SIJ classification, see Volume 6, Immigrants, Part J, Special Immigrant Juveniles [6 USCIS-PM J].

[^ 2] See Pub. L. 101-649 (PDF), 104 Stat. 4978 (November 29, 1990).

[^ 3] See Pub. L. 101-649 (PDF), 104 Stat. 4978, 5005 (November 29, 1990).

[^ 4] See Pub. L. 102-232 (PDF), 105 Stat. 1733, 1744 (December 12, 1991).

[^ 5] See Pub. L. 105-119 (PDF), 111 Stat. 2440, 2460 (November 26, 1997).

[^ 6] See Pub. L. 110-457 (PDF), 122 Stat. 5044, 5079 (December 23, 2008).

[^ 7] See INA 245(a) and (c). See 8 CFR 245. See 8 CFR 245.1(a). See 8 CFR 245.1(e)(3). See Instructions to Form I-485.

[^ 8] See INA 245(a). See 8 CFR 245.1(e)(3). See Part B, 245(a) Adjustment, Chapter 2, Eligibility Requirements, Section A, "Inspected and Admitted" or "Inspected and Paroled" [7 USCIS-PM B.2(A)].

[^ 9] See INA 245(h)(1). See 8 CFR 245.1(e)(3)(i).

[^ 10] See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6] and Part B, 245(a) Adjustment, Chapter 2, Eligibility Requirements, Section C, Eligible to Receive an Immigrant Visa [7 USCIS-PM B.2(C)].

[^ 11] See INA 245(a)(2).

[^ 12] To see what requirements applicants must meet to obtain such classification, see Volume 6, Immigrants, Part J, Special Immigrant Juveniles, Chapter 2, Eligibility Requirements [6 USCIS-PM J.2].

[^ 13] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6].

[^ 14] See 8 CFR 205.2(a).

[^ 15] See INA 205.

[^ 16] See 8 CFR 205.2(b).

[^ 17] See 8 CFR 204.11(j)(1).

[^ 18] Revocation will not occur, however, where the juvenile court places the petitioner with the parent who was not the subject of the nonviable reunification determination.

[^ 19] See 8 CFR 204.11(j)(1)(i).

[^ 20] See 8 CFR 204.11(j)(1)(ii).

[^ 21] See 8 CFR 205.1(b).

[^ 22] See 8 CFR 205.1(b).

[^ 23] See INA 245(c). See 8 CFR 245.1(e)(3)(ii). See Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 24] See INA 245(c)(6), which bars from adjustment any alien deportable due to involvement in a terrorist activity or group under INA 237(a)(4)(B). Special immigrant juveniles are exempt from INA 245(c)(2) and INA 245(c)(8). See 62 FR 39417, 39422 (PDF) (July 23, 1997). See 8 CFR 245.1(b)(5), 8 CFR 245.1(b)(6), and 8 CFR 245.1(b)(10). INA 245(c)(7) also does not apply. See 8 CFR 245.1(b)(9). See Part B, 245(a) Adjustment, Chapter 5, Employment-Based Applicant Not in Lawful Nonimmigrant Status (INA 245(c)(7)) [7 USCIS-PM B.5]. Finally, INA 245(c)(1), INA 245(c)(3), INA 245(c)(4), and INA 245(c)(5) do not apply since a special immigrant juvenile is considered to be paroled into the United States and, when reviewing these bars, USCIS focuses on the most recent admission. See INA 245(h)(1). See 8 CFR 245.1(a) and 8 CFR 245.1(e)(3). For more information on the bars to adjustment, see Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 25] For more information, see Volume 8, Admissibility [8 USCIS-PM] and Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM].

[^ 26] See INA 212(a) for the specific grounds of inadmissibility.

[^ 27] See Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM].

[^ 28] See INA 245(h)(2)(B). See 8 CFR 245.1(e)(3). Grounds of removal under INA 237(c) that correspond with exempted inadmissibility grounds are also waived for SIJs.

[^ 29] See INA 245(h)(2)(B). See 8 CFR 245.1(e)(3)(v).

[^ 30] However, an applicant found inadmissible based on one of the grounds of inadmissibility listed below may be eligible to obtain a waiver under other statutory authorities. For more information on other types of waivers, see Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM].

[^ 31] This table includes inadmissibility grounds that cannot be waived for humanitarian purposes, family unity, or when it is otherwise in the public interest. However, an SIJ-specific waiver is available for inadmissibility under INA 212(a)(2)(A), (B), or (C) for a single offense of simple possession of 30 grams or less of marijuana. See 8 CFR 245.1(e)(3)(v)(A).

[^ 32] For example, see INA 212(a)(2)(C) (inadmissibility based on reason to believe that the alien committed certain criminal acts).

[^ 33] For more information, see Part A, Adjustment of Status Policies and Procedures [7 USCIS-PM A] and Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 34] See IINA 101(a)(27)(J).

[^ 35] See INA 101(a)(27)(J)(iii)(II). See 8 CFR 245.1(e)(3)(vi).

[^ 36] For information about limitations on additional evidence, see Volume 6, Immigrants, Part J, Special Immigrant Juveniles, Chapter 3, Documentation and Evidence, Section B, Limitations on Additional Evidence [6 USCIS-PM J.3(B)].

[^ 37] USCIS may also require the applicant to provide additional evidence to show the applicant continues to be classified as an SIJ. See Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360).

[^ 38] Aliens admitted to the United States by CBP at an airport or seaport after April 30, 2013, may be issued an electronic Form I-94 by CBP instead of a paper Form I-94. Such aliens may visit the CBP website to obtain a paper version of an electronic Form I-94.

[^ 39] The applicant may submit Form I-693 together with Form I-485 or later at USCIS' request. See the USCIS website for more information. For more information on when to submit Form I-693, see Volume 8, Part B, Health-Related Grounds of Inadmissibility, Chapter 4, Review of Medical Examination Documentation [8 USCIS-PM B.4].

[^ 40] See Part A, Adjustment of Status Policies and Procedures, Chapter 2, Eligibility Requirements, Section B, Who is Not Eligible to Adjust Status, Subsection 3. Other Eligibility Requirements [7 USCIS-PM A.2(B.3)].

[^ 41] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6].

[^ 42] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section D, Jurisdiction [7 USCIS-PM A.3(D)].

[^ 43] The applicant must have an immigrant visa immediately available when he or she filed the adjustment of status application and at the time of final adjudication. See Section C, Eligibility Requirements [7 USCIS-PM F.7(C)].

[^ 44] See 8 CFR 103.2(b)(9).

[^ 45] See 8 CFR 204.11(f).

[^ 46] See INA 101(b)(1) (definition of child is an unmarried person under 21 years of age). See Section 235(d)(6) of the TVPRA, Pub. L. 110-457 (PDF), 122 Stat. 5044, 5080 (December 23, 2008) (provides age-out protection to SIJ petitioners). Although the SIJ definition at INA 101(a)(27)(J) does not use the term child, USCIS incorporated the child definition at INA 101(b)(1) into SIJ-related regulations. For more information on age-out protections for purposes of an SIJ classification, see Volume 6, Immigrants, Part J, Special Immigrant Juveniles, Chapter 2, Eligibility Requirements, Section B, Age-out Protections for Filing with USCIS [6 USCIS-PM J.2(B)].

[^ 47] See INA 245(a). For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 10, Legal Analysis and Appropriate Use of Discretion [7 USCIS-PM A.10].

[^ 48] For more information on visa availability and visa retrogression, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].

[^ 49] The date of approval is shown in the USCIS approval notice mailed to the applicant. That date is also shown on the actual Permanent Resident Card (Form I-551) the applicant receives after adjustment approval.

[^ 50] See 8 CFR 103.2(b)(19). See 8 CFR 103.3(a).

Chapter 8 - Members of the U.S. Armed Forces

A. Purpose and Background

Under special agreements that the United States maintained after World War II with several Pacific island nations, certain aliens residing outside of the United States were allowed to enlist in the U.S. military. During times of specific hostilities, these aliens could become naturalized U.S. citizens based upon their active duty service if they met certain qualifications. However, once American military action terminated in Vietnam in 1978, they no longer had this pathway to U.S. citizenship.

In the years that followed, Congress discovered that many of these aliens had served multiple tours of duty but were denied advancement in their military careers because they were not U.S. citizens and so were unable to receive security clearances or become officers. In 1991, Congress passed the Armed Forces Immigration Adjustment Act,[1] creating a special immigrant category for certain qualifying military members. This provision in essence recognized these alien military members for their years of service to the United States.

Congress intended the law to be comparable to the special immigrant status awarded to certain U.S. government workers in the Panama Canal and long-term employees of international organizations residing in the United States.[2]

Sometimes referred to as the “Six and Six program,” adjustment as a special immigrant armed forces member under this law requires either 12 years of honorable, active duty service in the U.S. armed forces or 6 years of honorable, active duty service, if the military member has re-enlisted to serve for an additional 6 years. In addition, these special immigrants may be eligible for immediate citizenship after acquiring lawful permanent resident status, through their service during a designated period of hostilities.[3]

Special immigrant military members eligible under treaties in effect on October 1, 1991, include nationals of the Philippines, the Federated States of Micronesia, the Republic of Palau, and the Republic of the Marshall Islands. While the treaty for Filipinos no longer exists, sailors from the Philippines who served during the Persian Gulf conflict may still qualify under these provisions; a more direct route to naturalization may also be available.

B. Legal Authorities

- INA 101(a)(27)(K) – Certain armed forces members
- INA 203(b)(4) – Certain special immigrants
- INA 245; 8 CFR 245 – Adjustment of status of nonimmigrant to that of person admitted for permanent residence
- INA 245(g) – Parole provision for special immigrant armed forces members seeking adjustment of status
- 8 CFR 245.8 – Adjustment of status as a special immigrant under Section 101(a)(27)(K) of the Act
- Armed Forces Immigration Adjustment Act of 1991[4]

C. Eligibility Requirements

To adjust to lawful permanent resident (LPR) status as a special immigrant member of the U.S. armed forces, an applicant must meet the eligibility requirements shown in the table below.[5]

Special Immigrant Armed Forces Members Adjustment of Status Eligibility Requirements
The applicant has been inspected and admitted or inspected and paroled into the United States.
The applicant is physically present in the United States at the time of filing and adjudication of an adjustment application.
The applicant is eligible to receive an immigrant visa.
The applicant had an immigrant visa immediately available when he or she filed the adjustment of status application[6] and at the time of final adjudication.[7]
The applicant is not subject to any applicable bars to adjustment of status.[8]
The applicant is admissible to the United States or eligible for a waiver of inadmissibility or other form of relief.[9]
The applicant merits the favorable exercise of discretion.[10]

1. Eligibility to Receive an Immigrant Visa[11]

An applicant must be eligible to receive an immigrant visa to adjust status.[12] An adjustment applicant typically establishes eligibility for an immigrant visa through an approved immigrant petition. A special immigrant armed forces member can establish eligibility for an immigrant visa by obtaining classification from USCIS by filing a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360).

Therefore, in order for a special immigrant armed forces member adjustment applicant to be eligible to receive an immigrant visa, he or she must be one of the following:

- The applicant is the beneficiary of an approved Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) classifying him or her as special immigrant armed forces member;
- The applicant has a pending Form I-360 (that is ultimately approved); or
- The applicant is filing the adjustment application concurrently with the Form I-360 (and the Form I-360 is ultimately approved).

The following provides information how a principal I-360 applicant qualifies for classification as a special immigrant armed forces member:

- The applicant must have been lawfully enlisted in the U.S. military outside the United States under a treaty or agreement that was in effect on October 1, 1991;
- The applicant must have either served honorably or was enlisted to serve in the U.S. armed forces after October 15, 1978, for a specific time period;
- The applicant must have served for an aggregate period of either (1) 12 years and received an honorable discharge, or (2) 6 years of honorable active duty service in the U.S. armed forces and have reenlisted for 6 more years of active duty to total at least 12 years of active duty at the time that enlistment ends; and
- The applicant must have been recommended for special immigrant classification by the executive department under which the immigrant served or is currently serving.

Once accorded special immigrant classification, these aliens could adjust to LPR status, provided they meet the other eligibility requirements for adjustment.

Treaties in Effect on October 1, 1991

Those eligible under treaties in effect on October 1, 1991, include nationals of:

- Philippines;
- Federated States of Micronesia;
- Republic of Palau; and
- Republic of the Marshall Islands.

Verifying the Underlying Basis to Adjust Status and Determining Ongoing Eligibility[13]

The special immigrant armed forces member petition should already be adjudicated and approved when the officer adjudicates the adjustment application. USCIS does not re-adjudicate the special immigrant armed forces member petition at the time of the adjudication of the adjustment application. However, the officer should ensure that the applicant remains classified as a special immigrant armed forces member and thus is eligible to adjust as a special immigrant armed forces member. As a result, there may be instances when USCIS may require the applicant to provide additional evidence to show he or she continues to be classified as a special immigrant armed forces member. In other words, the officer must verify the status of any underlying immigrant petition that forms the basis for adjustment.

2. Bars to Adjustment

Certain adjustment bars do not apply to special immigrant armed forces members and their derivatives.[14] Furthermore, since these special immigrants and their derivatives are deemed parolees for purposes of adjustment of status, there are other adjustment bars relating to certain immigration statuses that do not apply to them.[15] If these special immigrants fall under any other adjustment bar,[16] however, they are not eligible to adjust status.[17]

3. Admissibility and Waiver Requirements

In general, an applicant who is inadmissible to the United States may only obtain LPR status if he or she obtains a waiver or other form of relief, if available.[18] In general, if a ground of inadmissibility applies, an applicant must apply for a waiver or other form of relief to overcome that inadmissibility.[19] If a waiver or other form of relief is granted, USCIS may approve the application to adjust status if the applicant is otherwise eligible.

The following table specifies which grounds of inadmissibility apply and which do not apply to applicants seeking LPR status based on the armed forces member classification.

Applicability of Grounds of Inadmissibility: Members of the U.S. Armed Forces

Ground of Inadmissibility	Applies	Exempt or Not Applicable
INA 212(a)(1) – Health-Related	X	
INA 212(a)(2) – Crime-Related	X	
INA 212(a)(3) – Security-Related	X	
INA 212(a)(4) – Public Charge	X	
INA 212(a)(5) – Labor Certification and Qualifications for Certain Immigrants		X
INA 212(a)(6) – Illegal Entrants and Immigration Violators	X	

Ground of Inadmissibility	Applies	Exempt or Not Applicable
INA 212(a)(7)(A) – Documentation Requirements for Immigrants	X	
INA 212(a)(8) – Ineligibility for Citizenship	X	
INA 212(a)(9) – Aliens Previously Removed	X	
INA 212(a)(10) – Practicing Polygamists, Guardians Required to Accompany Helpless Persons, International Child Abductors, Unlawful Voters, and Former Citizens who Renounced Citizenship to Avoid Taxation	X	

4. Treatment of Family Members

The spouse or child (unmarried and under 21 years of age) of a special immigrant armed forces member may, if otherwise eligible, accompany or follow-to-join the principal applicant.[20] The spouse and child may, as derivative applicants, apply to adjust status under the same immigrant category and priority date as the principal applicant.

D. Documentation and Evidence

An applicant should submit the following documentation to adjust status as a special immigrant armed forces member:

- Application to Register Permanent Residence or Adjust Status (Form I-485);
- Copy of approval notice or receipt (Form I-797) for the principal applicant's special immigrant petition (unless the applicant is filing the petition together with Form I-485);[21]
- Proof of honorable discharge from the U.S. armed forces, if no longer serving;[22]
- Two passport-style photographs;
- Copy of government-issued identity document with photograph;
- Copy of birth certificate;
- Copy of passport page with nonimmigrant visa (if applicable);
- Copy of passport page with admission or parole stamp (if applicable);
- Copy of Arrival/Departure Record (Form I-94) or copy of U.S. Customs and Border Protection (CBP) admission or parole stamp on the travel document (if applicable);[23]
- Any other evidence, as needed, to show that an adjustment bar does not apply;[24]
- Report of Immigration Medical Examination and Vaccination Record (Form I-693);[25]
- Certified police and court records of criminal charges, arrests, or convictions (if applicable);
- Application for Waiver of Grounds of Inadmissibility (Form I-601) or other form of relief (if applicable); and
- Documentation of past or present J-1 or J-2 nonimmigrant status, including proof of compliance with or waiver of the 2-year foreign residence requirement under INA 212(e) (if applicable).

In addition, a spouse or child who is filing as a derivative applicant should submit the following:

- A copy of documentation showing relationship to the principal applicant, such as a marriage certificate or adoption decree (if applicable); and
- A copy of the approval or receipt notice (Form I-797) for the principal applicant's Form I-485 or a copy of the principal applicant's permanent resident card (Form I-551) (if applicable and not filing together with the principal applicant).

E. Adjudication[26]

1. Filing

An applicant seeking adjustment of status as a special immigrant armed forces member may file his or her adjustment application with USCIS concurrently with the Form I-360 petition, while the Form I-360 petition is pending, or after USCIS approves the Form I-360 petition (as long as the petition is still valid), provided:

- USCIS has jurisdiction over the adjustment application;[27] and
- The visa availability requirements are met.[28]

2. Interview

The officer must schedule the applicant for an in-person interview at the appropriate field office and transfer jurisdiction to that field office for final adjudication in cases where:

- The officer cannot make a decision based on the evidence of record; or
- The applicant does not meet the criteria for an interview waiver.[29]

If the application appears approvable at the conclusion of the adjustment of status interview, the officer should determine whether the special immigrant armed forces member may be eligible for naturalization benefits. The officer should advise the applicant if the applicant is immediately eligible for naturalization upon approval of the adjustment application.[30]

3. Decision

Approval

The officer must determine that the applicant meets all the eligibility requirements as well as merits the favorable exercise of discretion before approving the application to adjust status as a special immigrant armed forces member or family member.[31] If the application for adjustment of status is approvable, the officer must determine if a visa is available at the time of final adjudication.[32]

If approved, USCIS assigns the following codes of admission to applicants adjusting under this category:

Classes of Applicants and Codes of Admission

Applicant	Code of Admission
Special Immigrant Armed Forces Member	SM9
Spouse of Armed Forces Member (SM9)	SM0
Child of Armed Forces Member (SM9)	SM0

The applicant becomes an LPR as of the date of approval of the adjustment application.[33]

Denial

If the officer determines that the applicant is ineligible for adjustment, the officer must deny the adjustment application. The officer must provide the applicant a written reason for the denial.[34] Although there are no appeal rights for the denial of an employment-based adjustment application, the applicant may file a motion to reopen or reconsider. The denial notice should include instructions for filing a Notice of Appeal or Motion (Form I-290B).

F. Post-Adjudication Considerations

If a special immigrant armed forces member who has already been granted permanent residence fails to complete his or her total active duty service obligation for reasons other than an honorable discharge, the special immigrant may become subject to removal proceedings (if removable).[35] USCIS verifies whether a special immigrant armed forces member has failed to maintain eligibility by obtaining a current Certificate of Release or Discharge from Active Duty (Form DD-214) from the appropriate executive department.

Footnotes

[^ 1] See Pub. L. 102-110 (PDF), 105 Stat. 555 (October 1, 1991).

[^ 2] See INA 101(a)(27)(E), INA 101(a)(27)(F), INA 101(a)(27)(G), INA 101(a)(27)(I), and INA 101(a)(27)(L). See Chapter 4, Panama Canal Zone Employees [7 USCIS-PM F.4] and Chapter 6, Certain G-4 or NATO-6 Employees and their Family Members [7 USCIS-PM F.6].

[^ 3] See INA 329. See Volume 12, Citizenship and Naturalization, Part I, Military Members and their Families [12 USCIS-PM I].

[^ 4] See Pub. L. 102-110 (PDF), 105 Stat. 555 (October 1, 1991).

[^ 5] See INA 245(a) and (c). See 8 CFR 245. See Instructions to Form I-485.

[^ 6] See Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section B, Definition of Properly Filed [7 USCIS-PM A.3(B)].

[^ 7] See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)]. For information on Visa Availability and Priority Dates, see the DOS Visa Bulletin.

[^ 8] See INA 245(c). See Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 9] For more information, see Volume 8, Admissibility [8 USCIS-PM] and Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM].

[^ 10] See INA 245(a). For more information, see Part A, Adjustment of Status Policies and Procedures [7 USCIS-PM A] and Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 11] See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6] and Part B, 245(a) Adjustment, Chapter 2, Eligibility Requirements, Section C, Eligible to Receive an Immigrant Visa [7 USCIS-PM B.2(C)].

[^ 12] See INA 245(a)(2).

[^ 13] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6].

[^ 14] See INA 245(c)(2) and INA 245(c)(8).

[^ 15] See INA 245(g), providing that these special immigrants are considered parolees for purposes of adjustment under INA 245(a). As parolees, the adjustment bars under INA 245(c)(1), INA 245(c)(3), INA 245(c)(4), and INA 245(c)(5) do not apply.

[^ 16] See INA 245(c)(6) and 245(c)(7).

[^ 17] See INA 245(c). For more information on the bars to adjustment, see Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 18] See INA 212(a) for the specific grounds of inadmissibility.

[^ 19] See Volume 8, Admissibility [8 USCIS-PM] and Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM]. See Application for Waiver of Grounds of Inadmissibility (Form I-601) and Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212).

[^ 20] See INA 101(a)(27)(C) and INA 203(d). For the definition of child, see INA 101(b)(1).

[^ 21] See Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360).

[^ 22] The applicant may submit a Certificate of Release or Discharge from Active Duty (DD Form 214) for this purpose.

[^ 23] Aliens admitted to the United States by CBP at an airport or seaport after April 30, 2013 may be issued an electronic Form I-94 by CBP instead of a paper Form I-94. Such aliens may visit the CBP website to obtain a paper version of an electronic Form I-94.

[^ 24] Such as evidence that the INA 245(c)(2) adjustment bar does not apply because the applicant's failure to maintain status was through no fault of his or her own or for technical reasons. See 8 CFR 245.1(d)(2). See Part B, 245(a) Adjustment, Chapter 4, Status and Nonimmigrant Visa Violations – INA 245(c)(2) and INA 245(c)(8), Section E, Exceptions [7 USCIS-PM B.4(E)].

[^ 25] The applicant may submit Form I-693 together with Form I-485 or later at USCIS' request. See the USCIS website for more information. For more information on when to submit Form I-693, see Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility, Chapter 4, Review of Medical Examination Documentation [8 USCIS-PM B.4].

[^ 26] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6].

[^ 27] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section D, Jurisdiction [7 USCIS-PM A.3(D)].

[^ 28] The applicant must have an immigrant visa immediately available when he or she filed the adjustment of status application and at the time of final adjudication. See Section C, Eligibility Requirements [7 USCIS-PM F.8(C)].

[^ 29] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 5, Interview Guidelines [7 USCIS-PM A.5].

[^ 30] See INA 329. See Volume 12, Citizenship & Naturalization, Part I, Military Members and their Families, Chapter 3, Military Service during Hostilities (INA 329) [12 USCIS-PM I.3].

[^ 31] See INA 245(a). For more information, see Part A, Adjustment of Status Policies and Procedures [7 USCIS-PM A] and Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 32] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].

[^ 33] The date of approval is shown in the USCIS approval notice mailed to the applicant; that date is also shown on the actual Permanent Resident Card (Form I-551) the applicant receives after adjustment approval.

[^ 34] See 8 CFR 103.2(b)(19) and 8 CFR 103.3(a).

[^ 35] See INA 237.

Chapter 9 - Certain Broadcasters

A. Purpose and Background

Since the advent of the Cold War, the United States has sought to provide international broadcasting services to countries where the free flow of information is suppressed, undeveloped, or nonexistent. United States-funded radio and other media programs have since expanded to Europe, Asia, and the Middle East.

On November 22, 2000, Congress amended the Immigration and Nationality Act to create a special immigrant category for certain international broadcasters.[1] The law provides for up to 100 employment-based fourth preference special immigrant visas per fiscal year[2] for principal immigrants entering the United States to work for the International Broadcasting Bureau of the Broadcasting Board of Governors (BBG) or a grantee of the BBG.[3]

B. Legal Authorities

- INA 101(a)(27)(M) – Broadcaster employees
- INA 203(b)(4) – Certain special immigrants
- INA 245; 8 CFR 245 – Adjustment of status of nonimmigrant to that of person admitted for permanent residence
- 8 CFR 204.13 – How can the International Broadcasting Bureau of the United States Broadcasting Board of Governors petition for a fourth preference special immigrant broadcaster?

C. Eligibility Requirements[4]

To adjust to lawful permanent resident (LPR) status as a special immigrant broadcaster, an applicant must meet the eligibility requirements shown in the table below.[5]

Special Immigrant Broadcaster Adjustment of Status Eligibility Requirements
The applicant has been inspected and admitted or inspected and paroled into the United States.
The applicant is physically present in the United States at the time of filing and adjudication of an adjustment application.
The applicant is eligible to receive an immigrant visa because the applicant is the beneficiary of an approved Form I-360 classifying him or her as a special immigrant broadcaster.
The applicant had an immigrant visa immediately available when he or she filed the adjustment of status application[6] and at the time of final adjudication.[7]
The applicant is not subject to any applicable bars to adjustment of status.[8]
The applicant is admissible to the United States or eligible for a waiver of inadmissibility or other form of relief.[9]
The applicant merits the favorable exercise of discretion.[10]

1. Eligibility to Receive an Immigrant Visa[11]

To be eligible to receive an immigrant visa to adjust status as a special immigrant broadcaster working for the BBG or a BBG grantee, the principal applicant must obtain such classification from USCIS by filing a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360).[12]

A broadcaster in this context means:

- A reporter, writer, translator, editor, producer, or announcer for news broadcasts;
- A host for news broadcasts, news analysis, editorial, and other broadcast features; or
- A news analysis specialist.[13]

Aliens performing purely technical or support services for the BBG or a BBG grantee do not meet the regulatory definition of a "broadcaster" for immigration purposes and therefore may not obtain classification as special immigrant broadcasters.

The approved petition contains signed and dated supplemental attestation from the BBG or a BBG grantee, describing the prospective broadcaster and the position, including the job title and a full description of the job to be performed. The attestation also includes:

- The applicant's broadcasting expertise, including how long he or she has been performing the duties that relate to the prospective position; or
- A statement as to how the applicant possesses the necessary skills that make him or her qualified for the broadcasting-related position within the BBG or BBG grantee.

The alien may file an Application to Register Permanent Residence or Adjust Status (Form I-485) as an international broadcaster only after USCIS approves the special immigrant petition.[14] Special immigrant broadcasters may not file the adjustment application concurrently with the petition.

Verifying the Underlying Basis to Adjust Status and Determining Ongoing Eligibility[15]

The special immigrant broadcaster petition should already be adjudicated and approved when the officer adjudicates the adjustment application. USCIS does not re-adjudicate the special immigrant broadcaster petition at the time of the adjudication of the adjustment application. However, the officer should ensure that the applicant remains classified as a special immigrant broadcaster and thus is eligible to adjust as a special immigrant broadcaster. As a result, there may be instances when USCIS may require the applicant to provide additional evidence to show he or she continues to be classified as a special immigrant broadcaster. In other words, the officer must verify the status of any underlying immigrant petition that forms the basis for adjustment.

2. Bars to Adjustment

Special immigrant broadcasters and their dependents are ineligible for adjustment of status if any of the bars to adjustment of status apply.[16]

3. Admissibility and Waiver Requirements

In general, an applicant who is inadmissible to the United States may only obtain LPR status if he or she obtains a waiver or other form of relief, if available.[17] In general, if a ground of inadmissibility applies, an applicant must apply for a waiver or other form of relief to overcome that inadmissibility.[18] If a waiver or other form of relief is granted, USCIS may approve the application to adjust status if the applicant is otherwise eligible.

The following table specifies which grounds of inadmissibility apply and which do not apply to applicants seeking LPR status based on the special immigrant broadcaster classification.

Applicability of Grounds of Inadmissibility: Special Immigrant Broadcasters

Ground of Inadmissibility	Applies	Exempt or Not Applicable
INA 212(a)(1) – Health-Related	X	
INA 212(a)(2) – Crime-Related	X	
INA 212(a)(3) – Security-Related	X	
INA 212(a)(4) – Public Charge	X	
INA 212(a)(5) – Labor Certification and Qualifications for Certain Immigrants		X
INA 212(a)(6) – Illegal Entrants and Immigration Violators	X	
INA 212(a)(7)(A) – Documentation Requirements for Immigrants	X	
INA 212(a)(8) – Ineligibility for Citizenship	X	
INA 212(a)(9) – Aliens Previously Removed	X	
INA 212(a)(10) – Practicing Polygamists, Guardians Required to Accompany Helpless Persons, International Child Abductors, Unlawful Voters, and Former Citizens who Renounced Citizenship to Avoid Taxation	X	

In general, applicants for this special immigrant category are able to overcome any public charge concerns by submitting a valid letter or attestation of intended employment from the BBG or BBG-grantee. A separate affidavit of support is not required.[19]

4. Treatment of Family Members

The spouse or child (unmarried and under 21 years of age) of a special immigrant broadcaster may, if otherwise eligible, accompany or follow-to-join the principal applicant.[20] The spouse and child may, as derivative applicants, apply to adjust status under the same immigrant category and priority date as the principal applicant.

D. Documentation and Evidence

An applicant should submit the following documentation to adjust status as a special immigrant international broadcaster:

- Application to Register Permanent Residence or Adjust Status (Form I-485), with the correct fee;
- Copy of the Approval Notice or Receipt (Form I-797) for the principal applicant's special immigrant petition;[21]
- Employment letter from the applicant's Form I-360 employer-petitioner;[22]
- Two passport-style photographs;
- Copy of government-issued identity document with photograph;
- Copy of birth certificate;
- Copy of passport page with nonimmigrant visa (if applicable);
- Copy of passport page with admission or parole stamp (if applicable);
- Copy of Arrival/Departure Record (Form I-94) or copy of U.S. Customs and Border Protection (CBP) admission or parole stamp on the travel document (if applicable);[23]
- Evidence of continuously maintaining a lawful status since arrival in the United States;
- Any other evidence, as needed, to show that an adjustment bar does not apply;[24]
- Report of Immigration Medical Examination and Vaccination Record (Form I-693);[25]
- Certified police and court records of criminal charges, arrests, or convictions (if applicable);
- Application for Waiver of Grounds of Inadmissibility (Form I-601) or other form of relief (if applicable); and
- Documentation of past or present J-1 or J-2 nonimmigrant status, including proof of compliance with or waiver of the 2-year foreign residence requirement under INA 212(e) (if applicable).

In addition, a spouse or child who is filing as a derivative applicant should submit the following:

- A copy of documentation showing relationship to the principal applicant, such as a marriage certificate or adoption decree (if applicable); and
- A copy of the approval or receipt notice (Form I-797) for the principal applicant's Form I-485 or a copy of the principal applicant's permanent resident card (Form I-551) (if applicable and not filing together with the principal applicant).

E. Adjudication[26]

1. Filing

An applicant seeking adjustment of status as a special immigrant broadcaster may file his or her adjustment application with USCIS after USCIS approves the special immigrant petition[27] (as long as the petition is still valid), provided:

- USCIS has jurisdiction over the adjustment application;[28] and
- The visa availability requirements are met.[29]

These applicants may not file an adjustment application concurrently with Form I-360.

2. Interview

The officer must schedule the applicant for an in-person interview at the appropriate field office and transfer jurisdiction to that field office for final adjudication in cases where:

- The officer cannot make a decision based on the evidence of record; or
- The applicant does not meet the criteria for an interview waiver.[30]

3. Decision

Approval

The officer must determine that the applicant meets all the eligibility requirements as well as merits the favorable exercise of discretion before approving the application to adjust status as a special immigrant broadcaster.[31] If the adjustment application is approvable, the officer must determine if a visa is available at the time of final adjudication.[32]

If approved, USCIS assigns the following codes of admission to applicants under this category:

Classes of Applicants and Codes of Admission

Applicant	Code of Admission
Special immigrant international broadcaster	BC6
Spouse of special immigrant international broadcaster (BC6)	BC7
Child of special immigrant international broadcaster (BC6)	BC8

The applicant becomes an LPR as of the date of approval of the adjustment application.[33]

Denial

If the officer determines that the applicant is ineligible for adjustment, the officer must deny the adjustment application. The officer must provide the applicant a written reason for the denial.[34] Although there are no appeal rights for the denial of an adjustment application, the applicant may file a motion to reopen or reconsider. The denial notice should include instructions for filing a Notice of Appeal or Motion (Form I-290B).

Footnotes

[^ 1] See Pub. L. 106-536 (PDF), 114 Stat. 2560 (November 22, 2000).

[^ 2] This annual visa limit applies only to principal special immigrant broadcasters and not to any spouses and children who apply as derivative applicants. See Section 1(b)(1) of Pub. L. 106-536 (PDF), 114 Stat. 2560, 2560 (November 22, 2000). See INA 203(b)(4). See 8 CFR 204.13(b)(2).

[^ 3] BBG grantee means Radio Free Asia, Inc., Radio Free Europe/Radio Liberty, Inc., and Middle East Broadcasting Networks. See 8 CFR 204.13. See Emergency Wartime Supplemental Appropriations Act of 2003, Pub. L. 108-11 (PDF), 117 Stat. 559, 562 (April 16, 2003).

[^ 4] See 8 CFR 204.13.

[^ 5] See INA 245(a) and INA 245(c). See 8 CFR 245. See Instructions to Form I-485.

[^ 6] See Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section B, Definition of “Properly Filed” [7 USCIS-PM A.3(B)].

[^ 7] See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].For information on Visa Availability and Priority Dates, see the DOS Visa Bulletin.

[^ 8] See INA 245(c). See Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 9] For more information, see Volume 8, Admissibility [8 USCIS-PM] and Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM].

[10] See INA 245(a). For more information, see Part A, Adjustment of Status Policies and Procedures [7 USCIS-PM A] and Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 11] See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6] and Part B, 245(a) Adjustment, Chapter 2, Eligibility Requirements, Section C, Eligible to Receive an Immigrant Visa [7 USCIS-PM B.2(C)].

[^ 12] See Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360).

[^ 13] See 8 CFR 204.13(a).

[^ 14] See 8 CFR 245.2(a)(2)(i)(B).

[^ 15] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6].

[^ 16] See INA 245(c). For more information on the bars to adjustment, see Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 17] See INA 212(a) for the specific grounds of inadmissibility.

[^ 18] See Volume 8, Admissibility [8 USCIS-PM] and Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM]. See Application for Waiver of Grounds of Inadmissibility (Form I-601) and Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212).

[^ 19] See INA 213A.

[^ 20] See INA 101(a)(27)(C) and INA 203(d). For the definition of child, see INA 101(b)(1).

[^ 21] See Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360).

[^ 22] The letter should be on official business letterhead verifying the job offer, the job title or position, summary of duties, and wages or salary anticipated.

[^ 23] Aliens admitted to the United States by CBP at an airport or seaport after April 30, 2013, may be issued an electronic Form I-94 by CBP instead of a paper Form I-94. Such aliens may visit the CBP website to obtain a paper version of an electronic Form I-94.

[^ 24] Such as evidence that the INA 245(c)(2) adjustment bar does not apply because the applicant’s failure to maintain status was through no fault of his or her own or for technical reasons. See 8 CFR 245.1(d)(2). See Part B, 245(a) Adjustment, Chapter 4, Status and Nonimmigrant Visa Violations – INA 245(c)(2) and INA 245(c)(8), Section E, Exceptions [7 USCIS-PM B.4(E)].

[^ 25] The applicant may submit Form I-693 together with Form I-485 or later at USCIS’ request. See the USCIS website for more information. For more information on when to submit Form I-693, see Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility, Chapter 4, Review of Medical Examination Documentation [8 USCIS-PM B.4].

[^ 26] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6].

[^ 27] See Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360).

[^ 28] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section D, Jurisdiction [7 USCIS-PM A.3(D)].

[^ 29] The applicant must have an immigrant visa immediately available when he or she filed the adjustment of status application and at the time of final adjudication. See Section C, Eligibility Requirements [7 USCIS-PM F.7(C)].

[^ 30] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 5, Interview Guidelines [7 USCIS-PM A.5].

[^ 31] See INA 245(a). For more information, see Part A, Adjustment of Status Policies and Procedures [7 USCIS-PM A] and Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 32] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].

[^ 33] The date of approval is shown in the USCIS approval notice mailed to the applicant; that date is also shown on the actual Permanent Resident Card (Form I-551) the applicant receives after adjustment approval.

[^ 34] See 8 CFR 103.2(b)(19) and 8 CFR 103.3(a).

Chapter 10 - Certain Afghan and Iraqi Nationals

A. Purpose and Background

During the wars in Afghanistan and Iraq, the U.S. government employed many Afghans and Iraqis as interpreters, translators, and other roles to assist in the war effort. Some face ongoing, serious threats because of their employment with the U.S. government and the vital assistance they provided. As a result, Congress created three special immigrant programs to allow such qualified aliens to immigrate to the United States with their families.[1]

This special immigrant category applies to an:[2]

- Afghan or Iraqi national who worked with the U.S. armed forces as a translator;[3]
- Iraqi national who was employed by or on behalf of the U.S. government;[4] and
- Afghan national who was employed by or on behalf of the U.S. government or in the International Security Assistance Force (ISAF) (or any successor name for the ISAF) in Afghanistan.[5]

B. Legal Authorities

- INA 245; 8 CFR 245 – Adjustment of status of nonimmigrant to that of person admitted for permanent residence
- Section 1059 of the National Defense Authorization Act for Fiscal Year 2006, as amended – Special immigrant status for persons serving as translators with United States armed forces[6]
- Section 1244 of the National Defense Authorization Act for Fiscal Year 2008, as amended – Special immigrant status for certain Iraqis[7]
- Section 602(b) of the Afghan Allies Protection Act of 2009, as amended – Special immigrant status for certain Afghans[8]

C. Eligibility Requirements

To adjust to lawful permanent resident (LPR) status as a special immigrant for certain Afghan and Iraqi nationals, an applicant must meet the following eligibility requirements:[9]

Special Immigrant Afghan and Iraqi Nationals Adjustment of Status Eligibility Requirements
The applicant has been inspected and admitted as a nonimmigrant or inspected and paroled into the United States.
The applicant is physically present in the United States at the time of filing and adjudication of an adjustment application.
The applicant is eligible to receive an immigrant visa because the applicant is the beneficiary of either an approved Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) from USCIS or an approved Petition for Special Immigrant Classification for Afghan SIV Applicants Form (DS-157) from the U.S. Department of State (DOS) classifying the applicant as Afghan or Iraqi special immigrant.[10]
The applicant had an immigrant visa immediately available when the applicant filed the adjustment of status application[11] and at the time of final adjudication.[12]
The applicant is not subject to any applicable bars to adjustment of status.[13]
The applicant is admissible to the United States or eligible for a waiver of inadmissibility or other form of relief.[14]
The applicant merits the favorable exercise of discretion.[15]

1. Eligibility to Receive an Immigrant Visa[16]

To be eligible to receive an immigrant visa to adjust status as an Afghan or Iraqi special immigrant, the principal applicant must generally obtain such classification from USCIS by filing a Form I-360.[17] However, an Afghan national who was employed for or on behalf of the U.S. government or the ISAF (or any successor name for the ISAF) in Afghanistan must obtain classification by filing a Form DS-157 when applying for Chief of Mission (COM) approval with DOS, unless the Afghan national is in one of the limited circumstances where filing Form I-360 with USCIS is permitted.[18]

Verifying the Underlying Basis to Adjust Status and Determining Ongoing Eligibility[19]

The special immigrant petition should already be adjudicated and approved when the officer adjudicates the adjustment application. USCIS does not re-adjudicate the special immigrant petition at the time of the adjudication of the adjustment application. However, the officer should ensure that the applicant remains classified in one of the eligible special immigrant Afghan and Iraqi national categories and therefore is eligible to adjust as a special immigrant. In other words, the officer must verify the status of any underlying immigrant petition that forms the basis for adjustment.

2. Bars to Adjustment

Certain adjustment bars do not apply to Afghanistan and Iraq nationals and their dependents.[20] If these special immigrants fall under any other adjustment bar, however, they are not eligible to adjust status.[21]

3. Admissibility and Waiver Requirements

In general, an applicant who is inadmissible to the United States may only obtain LPR status if the applicant obtains a waiver or other form of relief, if available.[22] In general, if a ground of inadmissibility applies, an applicant must apply for a waiver or other form of relief to overcome that inadmissibility.[23] If a waiver or other form of relief is granted, USCIS may approve the application to adjust status if the applicant is otherwise eligible.

The following table specifies which grounds of inadmissibility apply and which do not apply to applicants seeking LPR status based on the Afghanistan and Iraq national classification.[24]

Applicability of Grounds of Inadmissibility: Special Immigrant Afghanistan and Iraq Nationals

Ground of Inadmissibility	Applies	Exempt or Not Applicable
INA 212(a)(1) – Health-Related	X	

Ground of Inadmissibility	Applies	Exempt or Not Applicable
INA 212(a)(2) – Crime-Related	X	
INA 212(a)(3) – Security-Related	X	
INA 212(a)(4) – Public Charge		X
INA 212(a)(5) – Labor Certification and Qualifications for Certain Immigrants		X
INA 212(a)(6) – Illegal Entrants and Immigration Violators	X	
INA 212(a)(7)(A) – Documentation Requirements for Immigrants	X	
INA 212(a)(8) – Ineligibility for Citizenship	X	
INA 212(a)(9) – Aliens Previously Removed	X	
INA 212(a)(10) – Practicing Polygamists, Guardians Required to Accompany Helpless Persons, International Child Abductors, Unlawful Voters, and Former Citizens who Renounced Citizenship to Avoid Taxation	X	

4. Treatment of Family Members

The derivative spouse or child(ren) (unmarried and under 21 years of age) of a principal special immigrant citizen or national from Afghanistan or Iraq may, if otherwise eligible, accompany or follow-to-join[25] the principal applicant and apply to adjust status under the same immigrant category and priority date.

Any derivative spouse and children are eligible to adjust status as long as they continue to maintain the requisite relationship with the principal special immigrant.[26] A surviving spouse or child may also adjust status as a special immigrant of a deceased principal special immigrant if eligible to receive a special immigrant visa.[27]

Unique to this special immigrant category, these family members do not count against the numerical limitations of the relevant program or against the general numerical limitations of the employment-based fourth preference category (EB-4).[28]

5. Potential for Conversion of Special Immigrant Petition from One Classification to Another

In some cases the underlying petition may have been approved as an Afghan or Iraq translator and converted to an approval as an Afghanistan or Iraq national who worked for, or on behalf of, the U.S. government. This conversion allows an applicant to obtain a visa from a program with a larger number of visas available. The conversion does not affect adjustment eligibility. The officer should ensure that the application is adjudicated under the correct program.

6. Applicants Admitted as Refugees

To be eligible for adjustment of status as an Afghanistan or Iraq national special immigrant, an alien must have been either paroled into the United States or admitted as a nonimmigrant.[29] An alien who last entered the United States as a refugee is not paroled and is admitted as a refugee, not a nonimmigrant. Thus, an alien admitted as a refugee cannot adjust status under any of the Afghanistan or Iraq programs as refugees have their own basis for adjusting status.[30]

D. Documentation and Evidence

An applicant should submit the following documentation to adjust status as a special immigrant Afghan or Iraqi national:

- Application to Register Permanent Residence or Adjust Status (Form I-485);
- Evidence of an approved petition on either a Form I-360 or Form DS-157 for the principal applicant's special immigrant petition;[31]
- Two passport-style photographs;
- Copy of a government-issued identity document with photograph;
- Copy of birth certificate;
- Copy of passport page with nonimmigrant visa (if applicable);
- Copy of passport page with admission or parole stamp (if applicable);
- Copy of Arrival/Departure Record (Form I-94) or copy of U.S. Customs and Border Protection (CBP) admission or parole stamp on the travel document (if applicable);[32]
- Evidence of continuously maintaining a lawful status since arrival in the United States;
- Any other evidence, as needed, to show that an adjustment bar does not apply;[33]
- Report of Immigration Medical Examination and Vaccination Record (Form I-693);[34]
- Certified police and court records of criminal charges, arrests, or convictions (if applicable);
- Application for Waiver of Grounds of Inadmissibility (Form I-601) or other form of relief (if applicable); and
- Documentation of past or present J-1 or J-2 nonimmigrant status, including proof of compliance with or waiver of the 2-year foreign residence requirement under INA 212(e) (if applicable).

In addition, a spouse or child who is filing as a derivative applicant should submit the following:

- A copy of documentation showing relationship to the principal applicant, such as a marriage certificate or adoption decree (if applicable); and
- A copy of the approval or receipt notice (Form I-797) for the principal applicant's Form I-485 or a copy of the principal applicant's permanent resident card (Form I-551) (if applicable and not filing together with the principal applicant).

E. Adjudication[35]

1. Filing

An applicant seeking adjustment of status as a special immigrant Afghan or Iraqi national may file the adjustment application with USCIS after USCIS approves the special immigrant petition[36] or, in the case of an Afghan national who obtained classification by filing a Petition for Special Immigrant Classification for Afghan SIV Applicants (Form DS-157) with DOS, when applying for COM approval (as long as the petition is still valid), provided:

- USCIS has jurisdiction over the adjustment application;[37] and
- The visa availability requirements are met.[38]

These applicants may not file an adjustment application concurrently with Form I-360.

2. Interview

All adjustment applications under these programs must be relocated to the appropriate field office for an interview. Relocation of the case occurs after USCIS has completed the required background and security checks.

3. Decision

Approval

The officer must determine that the applicant meets all the eligibility requirements as well as merits the favorable exercise of discretion before approving the application to adjust status as a special immigrant Afghan or Iraqi translator (or family member).[39] If the adjustment application is approvable, the officer must determine if a visa is available at the time of final adjudication.[40]

If approved, USCIS assigns the following codes of admission to applicants adjusting under this category:

Classes of Applicants and Codes of Admission

Applicant	Code of Admission
Special Immigrant Afghan or Iraqi Translator	SI6
Spouse of Translator (SI6)	SI7
Child of Translator (SI6)	SI8
Special Immigrant Afghanistan or Iraq U.S. Government Employee	SQ6
Spouse of Government Employee (SQ6)	SQ7
Child of Government Employee (SQ6)	SQ8

The applicant becomes an LPR as of the date of approval of the adjustment application.[41]

Denial

If the officer determines that the applicant is ineligible for adjustment, the officer must deny the adjustment application. The officer must provide the applicant a written reason for the denial.[42] If the adjustment application must be denied, an officer must provide the applicant a written reason for the denial.[43] Although there are no appeal rights for the denial of an adjustment application, the applicant may file a motion to reopen or reconsider. The denial notice should include instructions for filing a Notice of Appeal or Motion (Form I-290B).

Footnotes

[^ 1] For more information on special immigrants, see Volume 6, Immigrants, Part H, Designated and Special Immigrants [6 USCIS-PM H].

[^ 2] Only principal applicants are counted against the annual numerical limitations. Derivative spouses or children do not count against the visa cap in any of these programs.

[^ 3] See Volume 6, Immigrants, Part H, Designated and Special Immigrants, Chapter 10, Certain Iraqi and Afghan Translators and Interpreters [6 USCIS-PM H.10]. No more than 50 visas are allotted each year. The allotment was temporarily increased to 500 for Fiscal Years (FY) 2007 and 2008.

[^ 4] See Volume 6, Immigrants, Part H, Designated and Special Immigrants, Chapter 8, Certain Iraqi Nationals [6 USCIS-PM H.8]. The National Defense Authorization Act for Fiscal Year 2008 extended U.S. Department of State's (DOS) authority to issue special immigrant visas to Iraqi nationals. As of January 1, 2014, 2,500 visas may be issued to principal applicants under this program. This program will continue until all visas have been issued or all qualified applicants, if less than the number of visas allocated, have received visas.

[^ 5] See Volume 6, Immigrants, Part H, Designated and Special Immigrants, Chapter 9, Certain Afghan Nationals [6 USCIS-PM H.9]. DOS's authority to issue special immigrant visas (SIVs) to Afghan nationals under Section 602(b) of the Afghan Allies Protection Act of 2009, Title VI of Pub. L. 111-8 (PDF), 123 Stat. 807, 809 (March 11, 2009), has been amended and extended several times. The National Defense Authorization Act for Fiscal Year 2016, Pub. L. 114-92 (PDF) (November 25, 2015), expanded the Afghan SIV program to include certain Afghans who were employed by the ISAF or a successor mission to ISAF. Section 401 of the Emergency Security Supplemental Appropriations Act, 2021, Pub. L. 117-31 (PDF), 135 Stat. 309, 315 (July 30, 2021), extended the deadline to apply for Chief of Mission (COM) approval from December 31, 2022, to December 31, 2023; reduced the minimum length of required service from 2 years to 1 year for Afghans who were employed on or after October 7, 2001; and allocated an additional 8,000 special immigrant visas for a total of 34,500 since December 19, 2014. For current program extensions and visa number information, see the Green Card for an Afghan Who Was Employed by or on Behalf of the U.S. Government webpage or DOS's Special Immigrant Visas for Afghans – Who Were Employed by/on Behalf of the U.S. Government webpage. DOS updates its webpage periodically, but the webpage may not reflect the latest updates.

[^ 6] See Pub. L. 109-163 (PDF), 119 Stat. 3136, 3443 (January 6, 2006).

[^ 7] See Pub. L. 110-181 (PDF), 122 Stat. 3, 396 (January 28, 2008).

[^ 8] See Title VI of Pub. L. 111-8 (PDF), 123 Stat. 807, 807 (March 11, 2009).

[^ 9] See INA 245(a) and (c). See 8 CFR 245. See Instructions to Form I-485.

[^ 10] For more information, see Subsection 1, Eligibility to Receive an Immigrant Visa [7 USCIS-PM F.10(C)(1)].

[^ 11] See Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section B, Definition of Properly Filed [7 USCIS-PM A.3(B)].

[^ 12] See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)]. For information on Visa Availability and Priority Dates, see the DOS Visa Bulletin.

[^ 13] See INA 245(c). See Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 14] For more information, see Volume 8, Admissibility [8 USCIS-PM] and Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM].

[^ 15] See INA 245(a). For more information, see Part A, Adjustment of Status Policies and Procedures [7 USCIS-PM A] and Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 16] See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6] and Part B, 245(a) Adjustment, Chapter 2, Eligibility Requirements, Section C, Eligible to Receive an Immigrant Visa [7 USCIS-PM B.2(C)].

[^ 17] See Form I-360 instructions. There is no filing fee for a Form I-360 filed on behalf of a special immigrant Afghanistan or Iraq national. See 8 CFR 103.7(b)(1)(T)(4).

[^ 18] For more information, see Volume 6, Immigrants, Part H, Designated and Special Immigrants, Chapter 9, Certain Afghan Nationals, Section B, Filing [6 USCIS-PM H.9(B)].

[^ 19] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6].

[^ 20] See Section 602(b)(9) of the Afghan Allies Protection Act of 2009, Title VI of Pub. L. 111-8 (PDF), 123 Stat. 807, 809 (March 11, 2009) which states that INA 245(c)(2), INA 245(c)(7), and INA 245(c)(8) do not apply to special immigrant Iraq and Afghan nationals who were employed by or on behalf of the U.S. government (for Section 602(b) and 1244 adjustment applicants who were either paroled into the United States or admitted as nonimmigrants). See Section 1(c) of Pub. L. 110-36 (PDF), 121 Stat. 227, 227 (June 15, 2007), which amended Section 1059(d) of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-163 (PDF), 119 Stat. 3136, 3444 (January 6, 2006) to state that INA 245(c)(2), INA 245(c)(7), and INA 245(c)(8) do not apply to Iraq or Afghan translator adjustment applicants.

[^ 21] See INA 245(c). For more information on the bars to adjustment, see Part B, 245(a) Adjustment, Chapter 8, Inapplicability of Bars to Adjustment, Section C, Certain Special Immigrants [7 USCIS-PM B.8(C)].

[^ 22] See INA 212(a) for the specific grounds of inadmissibility.

[^ 23] See Volume 8, Admissibility [8 USCIS-PM] and Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM]. See Application for Waiver of Grounds of Inadmissibility (Form I-601) and Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212).

[^ 24] See Section 1244(a)(3) of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181 (PDF), 122 Stat. 3, 396 (January 28, 2008), as amended by Pub. L. 110-242 (PDF) (June 3, 2008). See Section 602(b)(1)(C) of the Afghan Allies Protection Act of 2009, Title VI of Pub. L. 111-8 (PDF), 123 Stat. 807, 807 (March 11, 2009).

[^ 25] Although INA 101(a)(27)(D), INA 101(a)(27)(E), INA 101(a)(27)(F), and INA 101(a)(27)(G) refer to the accompanying spouse and children, INA 203(d) encompasses following-to-join relatives as well and applies to all employment-based immigrants, including these special immigrants.

[^ 26] Generally, the qualifying relationship must exist at the time the adjustment application is filed and the time the application is adjudicated. For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section B, Determine Ongoing Eligibility, Subsection 2, Qualifying Family Relationship Continues to Exist [7 USCIS-PM A.6(B)(2)].

[^ 27] Section 403 of the Emergency Security Supplemental Appropriations Act of 2021, Pub. L. 117-31 (PDF), 135 Stat. 309, 318 (July 30, 2021) removed the requirement that, at the time of the principal alien's death, the deceased principal alien have a petition for Afghan or Iraqi SIV classification approved, in order for the surviving spouse or children of the deceased principal alien to remain eligible to apply to obtain special immigrant classification. Instead, as of July 30, 2021, the principal alien is required to have, at the time of the principal alien's death, submitted an application for COM approval under Section 1244 of Pub. L. 110-181 (PDF), 122 Stat. 3, 396 (January 28, 2008) or Section 1059 of the National Defense Authorization Act for FY 2006, Pub. L. 109-163 (PDF), 119 Stat. 3136, 3443 (January 6, 2006) that included the alien as an accompanying spouse or child. Alternatively, the surviving spouse and children may submit a new application for COM approval if the principal alien completed the employment requirements at the time of the alien's death. For more information, see Volume 6, Immigrants, Part H, Designated and Special Immigrants, Chapter 8, Certain Iraqi Nationals, Section E, Derivative Beneficiaries [6 USCIS-PM H.8(E)] and Chapter 9, Certain Afghan Nationals, Section E, Derivative Beneficiaries [6 USCIS-PM H.9(E)].

[^ 28] See Section 602(b)(3) of the Afghan Allies Protection Act of 2009, Title VI of Pub. L. 111-8 (PDF), 123 Stat. 807, 808 (March 11, 2009).

[^ 29] Section 602(b)(9) of the Afghan Allies Protection Act of 2009, Title VI of Pub. L. 111-8 (PDF), 123 Stat. 807, 809 (March 11, 2009).

[^ 30] See INA 209. For more information, see Part L, Refugee Adjustment [7 USCIS-PM L].

[^ 31] The principal applicant should submit a copy of the approval notice (Form I-797) of the Form I-360 from USCIS or evidence that DOS approved the Form DS-157. The notice of the approved Form DS-157 appears on the COM approval letter and states that the signed Form DS-157 submitted with the application for COM approval by the principal applicant is approved as a petition and the principal applicant is classified as a special immigrant under INA 203(b)(4).

[^ 32] Aliens admitted to the United States by CBP at an airport or seaport after April 30, 2013 may be issued an electronic Form I-94 by CBP instead of a paper Form I-94. Such aliens may visit the CBP website to obtain a paper version of an electronic Form I-94.

[^ 33] Such as evidence that the INA 245(c)(2) adjustment bar does not apply because the applicant's failure to maintain status was through no fault of the applicant's own or for technical reasons. See 8 CFR 245.1(d)(2). See Part B, 245(a) Adjustment, Chapter 4, Status and Nonimmigrant Visa Violations (INA 245(c)(2) and INA 245(c)(8)), Section E, Exceptions [7 USCIS-

PM B.4(E)].

[^ 34] The applicant may submit Form I-693 together with Form I-485 or later at USCIS' request. See the USCIS website for more information. For more information on when to submit Form I-693, see Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility, Chapter 4, Review of Medical Examination Documentation [8 USCIS-PM B.4].

[^ 35] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6].

[^ 36] See Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) or Petition for Special Immigrant Classification for Afghan SIV Applicants (Form DS-157).

[^ 37] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section D, Jurisdiction [7 USCIS-PM A.3(D)].

[^ 38] The applicant must have an immigrant visa immediately available when he or she filed the adjustment of status application and at the time of final adjudication. See Chapter 7, Special Immigrant Juveniles, Section C, Eligibility Requirements [7 USCIS-PM F.7(C)].

[^ 39] See INA 245(a). For more information, see Part A, Adjustment of Status Policies and Procedures [7 USCIS-PM A], and Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 40] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].

[^ 41] The date of approval is shown in the USCIS approval notice mailed to the applicant; that date is also shown on the actual Permanent Resident Card (Form I-551) the applicant receives after adjustment approval.

[^ 42] See 8 CFR 103.2(b)(19) and 8 CFR 103.3(a).

[^ 43] See 8 CFR 103.2(b)(19).

Part G - Diversity Immigrant-Based Adjustment

Chapter 1 - Purpose and Background

A. Purpose

As part of the Immigration Act of 1990, Congress established the Diversity Immigrant Visa (DV) Program.[1] In doing so, Congress created a new immigrant visa category specifically for aliens from countries with lower rates of admission as immigrants to the United States.[2]

B. Background

The DV Program allows aliens from countries with low immigration rates to the United States to submit an entry for a chance to apply for an immigrant visa in the next fiscal year. Congress established guidelines to distribute immigrant visas in the DV category based on the immigration rates of specific countries and regions to ensure a greater number of DVs are allocated to aliens from countries and regions with lower immigration rates to the United States.[3]

C. Legal Authorities

- INA 201(e) – Worldwide level of diversity immigrants
- INA 203(c) – Diversity immigrants
- INA 204(a) – Petitioning procedure
- INA 245; 8 CFR 245 – Adjustment of status of nonimmigrant to that of person admitted for permanent residence
- 22 CFR 42.33 – Diversity immigrants

Footnotes

[^ 1] See Immigration Act of 1990, Pub. L. 101-649 (PDF) (November 29, 1990). Before establishing the DV Program, Congress enacted more limited immigration programs, including the NP-5, OP-1, and AA-1 programs, for aliens from countries with lower rates of immigration to the United States. See Section 314 of the Immigration Reform and Control Act of 1986, Pub. L. 99-603 (PDF), 100 Stat. 3359, 3439 (November 6, 1986) and Immigration Amendments of 1988, Pub. L. 100-658 (PDF) (November 5, 1988).

[^ 2] See INA 203(c)(1)(E).

[^ 3] See INA 203(c).

Chapter 2 - Eligibility Requirements

A. General

To adjust to lawful permanent resident (LPR) status based on a Diversity Immigrant Visa (DV), an applicant must meet the eligibility requirements shown in the table below.[1]

DV-Based Adjustment of Status Eligibility Requirements
The applicant properly files an Application to Register Permanent Residence or Adjust Status (Form I-485).
The applicant has been inspected and admitted or inspected and paroled into the United States.[2]
The applicant is physically present in the United States at the time of filing the adjustment application.
The applicant is eligible to receive an immigrant visa because the applicant was selected for the DV Program.
The applicant has an immigrant visa number immediately available when the applicant files the adjustment of status application[3] and at the time of final adjudication.[4]
The applicant is not ineligible based on any applicable bars to adjustment of status.[5]
The applicant is admissible to the United States for lawful permanent residence or eligible for a waiver of inadmissibility or other form of relief.[6]

DV-Based Adjustment of Status Eligibility Requirements
The applicant merits the favorable exercise of discretion.[7]

B. Eligibility to Receive an Immigrant Visa

All applicants for adjustment of status must be eligible to receive an immigrant visa.[8] To be eligible to receive a DV, an alien must be selected by the U.S. Department of State (DOS) in its annual DV Program for the fiscal year in which the alien applies to adjust status.[9]

1. DV Program Eligibility

To be eligible to register with DOS for the DV Program,[10] an alien must be a native of an eligible low-admission foreign country[11] and have at least:

- A high school education[12] (or its equivalent); or
- 2 years of work experience within the last 5 years before applying for a visa in an occupation that requires at least 2 years of training or experience.[13]

Low-Admission Foreign Country

A low-admission foreign country is a country from which the United States admitted 50,000 or fewer immigrants during the prior 5 fiscal years as determined by DHS.[14]

Countries from which the United States admitted more than 50,000 immigrants during the previous 5 fiscal years are high-admission countries.[15] Natives of high-admission countries are ineligible for DVs.[16]

Each fiscal year, DHS uses historical immigration data to identify high-admission and low-admission foreign countries and regions.[17] DHS then applies a statutory formula to this historical information to determine the exact distribution of DVs across six geographic regions for the upcoming fiscal year:[18]

- Africa;
- Asia;
- Europe;
- North America;
- Oceania; and
- South America, Mexico, Central America, and the Caribbean.[19]

Approximately 55,000 DVs are available worldwide each fiscal year, and this number is subject to adjustment.[20] Regions whose admission total is greater than one-sixth of the worldwide total are high-admission regions.[21] A greater share of the available visa numbers goes to low-admission regions.[22]

Each year, DOS provides a list of eligible countries grouped by geographic region in the DV Program Instructions available on the Diversity Visa Instructions webpage.

Native and Cross-Chargeability

Native means someone born within a DV-eligible country.[23] An alien may still be able to participate in the DV Program if the alien is entitled[24] to be charged to (or counted toward) a country other than the one where the alien was born for visa allocation purposes.[25]

Some DV Program entrants may benefit from charging their visas to their spouse's or parents' countries of birth rather than their own, as outlined in the table below. This is known as cross-chargeability.[26]

Cross-Chargeability Scenarios

Scenario	Country of Chargeability
Charging Visa to Spouse's Country of Birth (Alien Born in Non-Qualifying Country)	An alien born in a non-qualifying country may submit a DV entry as the principal entrant if their spouse was born in a country eligible for DVs, as long as the qualifying relationship existed before submitting the DV entry.[27] In such instances, the spouse born in the non-qualifying country is the principal applicant for the purpose of conferring status, while the spouse born in the qualifying country confers chargeability. Both aliens must file to adjust status at the same time.[28]
Charging Visa to Spouse's Country of Birth (Alien Born in Qualifying Country)	An alien born in a qualifying country may derive a more favorable country of chargeability from an accompanying spouse. For example, an alien from a DV-eligible country in a high-admission region may claim a more favorable chargeability from a spouse who is from a DV-eligible country in a low-admission region, provided the relationship was established before submitting the DV entry. In such instances, if the spouse claiming the more favorable chargeability is selected, that spouse is the principal applicant for purposes of conferring status, while the spouse born in the more favorable country confers chargeability. Both aliens must file to adjust status at the same time.[29]
Charging Visa to a Parent's Country of Birth	An alien born in a non-qualifying country may submit a DV entry by claiming the birth country of a parent from a DV-eligible country, as long as neither parent was born in the alien's country of birth or was a resident of the alien's country of birth at the time the alien was born.[30]
Charging Visa to Parent's Country of Birth (Alien Child)	An alien child, when accompanied by or following to join either or both parents, may be charged to the country of either parent if necessary to prevent the separation of the child from the parent or parents.[31]
Charging Visa to Principal Applicant (Spouse)	A spouse may use the principal applicant's country of chargeability if necessary to prevent spousal separation if the spouse is accompanying or following to join the principal applicant.[32]

A DV Program entrant must properly identify the country of eligibility or chargeability in their entry.[33]

Education or Work Experience Requirement

For DV purposes, high school education or its equivalent means the successful completion of a 12-year course of elementary and secondary education in the United States or successful completion in another country of a formal course of elementary and secondary education comparable to a high school education in the United States.[34]

Evidence may consist of a certificate of completion equivalent to a U.S. diploma, original school transcripts, or other evidence issued by the person or organization responsible for maintaining such records, that specify the completed course of study.[35] Equivalency certificates (such as the General Educational Development (GED)) do not satisfy the education requirement.[36]

Aliens applying for a DV on the basis of work experience must, within the past 5 years, have 2 years of experience in an occupation requiring at least 2 years of training or experience.[37] Officers may use the U.S. Department of Labor's O*NET OnLine database, in combination with other relevant evidence, to determine qualifying work experience.[38] Qualifying occupations are classified in a Specific Vocational Preparation range of 7.0 or higher on O*NET OnLine.[39]

2. DV Program Selection

Selections for the DV Program are made by DOS through a two-step process:

- Aliens from DV-eligible countries enter an annual online registration for the DV Program held by DOS;[40] and
- DOS conducts a random drawing.

DOS hosts an online registration for the DV Program each year. The online registration period must be at least 30 days[41] and is usually held between October and November of the fiscal year before the fiscal year in which the DVs will be issued.[42] For example, the registration period for DVs to be issued in fiscal year 2023 took place between October 6 and November 9, 2021. Eligible aliens may submit only one entry per registration period.[43] If a person submits more than one entry during a single registration period, all entries submitted by that person are void.[44]

Once the online registration period closes, DOS uses a computer-generated, random drawing to determine which of the DV Program entrants may proceed with the next step in applying for a DV.[45] Generally, beginning the May after the registration period, entrants can check their status on the DOS's Electronic Diversity Visa Program webpage to see if they were selected to apply for a DV. Entrants selected to apply for DVs see a selection letter when they access the Electronic Diversity Visa Program webpage.[46] An entrant selected to apply for a DV is called a selectee. Selectees who are already in the United States may file applications with USCIS to adjust status, or they may apply for immigrant visas abroad if they plan to seek an immigrant visa from DOS and consular process.[47]

Selection for the DV Program does not guarantee issuance of a DV or admission into the United States. Selection for the DV Program also does not guarantee eligibility to apply for and be granted adjustment of status. Unused DVs cannot be carried over from one fiscal year to the next.[48] Therefore, a selectee applying for adjustment of status must be allocated a visa number by DOS and adjust status by September 30 (the last day) of the fiscal year for which the DV Program selection is valid.

For example, if the alien became a selectee for fiscal year 2021, they would need to become an LPR by September 30, 2021. After September 30, a selectee is no longer eligible for a DV and may not adjust status. Since some selectees will be ineligible for a DV or will not complete the DV process in the time allotted, DOS usually chooses more DV Program selectees than there are available visas. Consequently, not all selectees will have a visa number available.[49]

C. Visa Availability

An adjustment of status applicant must have an immigrant visa immediately available at the time of filing the adjustment application and at the time of final adjudication.[50]

1. Rank Numbers and the Visa Bulletin

For selectees present in the United States, a selectee's rank number determines when an immigrant visa number is immediately available both for purposes of filing for adjustment of status and for purposes of visa allocation.[51] DOS assigns each selectee a specific rank number, which is tied to a specific regional area, in the DV selection letter.[52] For example, a selectee who is a native of Albania receives a rank number for the Europe region.

DOS is responsible for allocating all numerically limited immigrant visas, including DVs. DOS publishes a monthly report of visa availability referred to as the Visa Bulletin. DOS, in coordination with USCIS, revises the Visa Bulletin each month to estimate immigrant visa availability for prospective immigrants. DOS publishes the Visa Bulletin before the beginning of the month it takes effect. For example, DOS publishes the Visa Bulletin for March in mid-February.[53]

The Visa Bulletin includes two charts concerning DV rank numbers and visa availability:[54]

- The current month's DV availability chart; and
- The advance notification chart with DV availability for the next month.

These two charts determine when a selectee may file for adjustment of status and when DOS may allocate an immigrant visa number so that USCIS may approve an otherwise eligible DV-based adjustment application.

2. When Selectees May File for Adjustment of Status

DV numbers are available for purposes of visa allocation only for selectees with rank numbers below the cut-off numbers in the current month's DV availability chart. The advance notification chart provides a preview of upcoming rank number cut-offs to help ensure timely filing and adjudication of DV adjustment applications.

A selectee may file an adjustment of status application when the selectee's rank number is below the appropriate regional rank number cut-off in either:

- The current month's DV availability chart; or
- The advance notification chart for the next month.[55]

Although a selectee may file an adjustment application based on the advance notification chart, USCIS cannot approve an adjustment application unless and until DOS allocates a DV based on the current month's chart.

3. When USCIS May Approve Adjustment of Status Applications

USCIS may only approve an otherwise eligible adjustment of status application if the selectee has a visa number immediately available and DOS allocates a visa number for the applicant's case. When a rank number is listed in the current month's DV availability chart of the Visa Bulletin, it means visa numbers are available for DOS to allocate to selectees with rank numbers below that month's specified cut-off number.

There may be months when one or more of the DV regions are listed as current on the Visa Bulletin. This means visas are currently (or immediately) available to all selectees for that region regardless of rank number. On the other hand, if the annual limit for DVs has been reached and no more DVs can be allocated, the category will become unavailable in the Visa Bulletin. If DVs become unavailable after the Visa Bulletin is published, it is not updated mid-month, but DOS notifies USCIS of the unavailability of DVs within a region or specific country of birth.

4. Reading the Visa Bulletin Charts for DV Adjustment of Status

This section provides examples of past Visa Bulletin DV allocation and advance notification charts to clarify the adjustment of status process for DV-based applicants.

DV Allocation and Advance Notification of DV Availability

The Visa Bulletin for March 2019 published the DV allocation chart for March 2019, which also included the advance notification chart for April 2019. The below table includes data from those two charts.

March 2019 Visa Bulletin

Region	**(Visa Allocation for March 2019)** **All DV Chargeability Areas Except Those Listed Separately**	**Region**	**(Advance Notification for April 2019)** **All DV Chargeability Areas Except Those Listed Separately**
AFRICA	15,300	AFRICA	18,900
ASIA	5,000	ASIA	6,400
EUROPE	13,500	EUROPE	18,500
NORTH AMERICA (BAHAMAS)	12	NORTH AMERICA (BAHAMAS)	12
OCEANIA	550	OCEANIA	725
SOUTH AMERICA, and the CARIBBEAN	750	SOUTH AMERICA, and the CARIBBEAN	875

The table below is an example of the cut-off number system. Only selectees with visas available and allocated are eligible to have their applications approved if they are otherwise eligible for adjustment. The Visa Bulletin for March 2019 states that the rank number cut-off for visa allocation in March for the Europe region is 13,500.[56] This means that as of March 2019, visas were available only for selectees in the Europe region with rank numbers 1 through 13,499.

Example: Current Visa Bulletin DV Rank Numbers (Europe Region) **Visa Bulletin for March 2019**	
DV rank number cut-off for the Europe region	13,500
Visas are available for DV selectees with rank numbers	1 – 13,499
When USCIS may approve adjustment of status applications	No earlier than March 1, 2019, and no later than September 30, 2019

The Visa Bulletin for March 2019 above shows that the advance notification cut-off for April 2019 for the Europe region would be 18,500. Selectees for the Europe region with rank numbers 13,500 through 18,499 (above the allocation rank number cut-off (13,500) and below the advance notification cut-off number (18,500)) were eligible to file their adjustment applications as soon as the Visa Bulletin for March 2019 was published, on or about February 8, 2019. However, USCIS could not approve those adjustment applications until April 1, 2019, when DOS allocated visa numbers.

Example: Advance Notification of DV Availability (Europe Region) **Visa Bulletin for March 2019**	
Month the DV advance notification cut-off numbers apply	April 2019
Current DV allocation rank number cut-off for Europe region (March 2019)	13,500
DV advance notification cut-off for Europe region	18,500
DV selectees who may file based on advance notification rank number	13,500-18,499
Date that DV selectees may file to adjust status based on advance notification	On or after February 8, 2019
Date that DV selectees may be allocated a visa and eligible to adjust status	April 1, 2019

Example: DV-Based Adjustment of Status Using the DV Allocation Chart

This table shows the DV allocation chart in the Visa Bulletin for March 2019:

Region	(Visa Allocation for March 2019) All DV Chargeability Areas Except Those Listed Separately	Exceptions
AFRICA	15,300	Except: Egypt 12,600
ASIA	5,000	Except: Iran 4,600 Nepal 3,400
EUROPE	13,500	
NORTH AMERICA (BAHAMAS)	12	
OCEANIA	550	
SOUTH AMERICA, and the CARIBBEAN	750	

The table below is an example of the timeline for a DV-based adjustment of status applicant whose visa is available in March 2019.

Date	Event
October 18, 2017	DOS opens the online registration period for DVs to be issued for fiscal year 2019 (FY 2019).
October 20, 2017	A native of Belgium, which is part of the Europe region, submits an online entry for the DV Program.
November 22, 2017	DOS closes the online registration period.
May 15, 2018	The Belgium native uses DOS's Electronic Diversity Visa Program webpage and learns of their selection for a DV for FY 2019. The selectee's rank number is 12,035.
February 8, 2019	The selectee checks the Visa Bulletin for March 2019. The March 2019 rank number cut-off for Europe is 13,500. The selectee's rank number (12,035) is below the cut-off number for Europe in March 2019. A visa is therefore available for allocation on March 1, 2019, and the selectee can file an Application to Register Permanent Residence or Adjust Status (Form I-485) now.
February 20, 2019	The selectee properly files Form I-485 with USCIS. However, USCIS cannot make a final decision on the adjustment application because DOS cannot issue a visa for the selectee's rank number yet.
March 1, 2019	First day that USCIS may make a final decision on the selectee's adjustment application as soon as DOS allocates a visa number (because selectee's rank number is below the March cut-off number).
September 30, 2019 (Last day of FY 2019)	Last day that DOS can allocate a DV for FY 2019 selectees, and last day for USCIS to make a final decision on the selectee's adjustment application, provided visa numbers remain available.

Example: DV-Based Adjustment of Status Using the Advance Notification Chart

This table shows the advance notification chart for April 2019 (in the Visa Bulletin for March 2019):

Region	(Advance Notification for April 2019) All DV Chargeability Areas Except Those Listed Separately	Exceptions
AFRICA	18,900	Except: Egypt 15,100
ASIA	6,400	Except: Nepal 4,200
EUROPE	18,500	
NORTH AMERICA (BAHAMAS)	12	
OCEANIA	725	
SOUTH AMERICA, and the CARIBBEAN	875	

The table below is an example of the timeline for a DV-based adjustment of status applicant who uses the advance notification chart.

Date	Event
October 18, 2017	DOS opens the online registration period for DVs to be issued for fiscal year 2019 (FY 2019).
October 20, 2017	A native of Finland, which is part of the Europe region, submits an online entry for the DV Program.
November 22, 2017	DOS closes the online registration period.
May 15, 2018	The Finland native uses DOS's Electronic Diversity Visa Program webpage and learns of their selection for a DV for FY 2019. The selectee's rank number is 14,001.
February 8, 2019	The selectee checks the Visa Bulletin for March 2019. The March 2019 rank number cut-off for Europe is 13,500, so a visa is not yet available for the selectee. The Visa Bulletin, however, shows that the selectee's rank number (14,001) will be below the cut-off number (18,500) for Europe in April 2019. The selectee can therefore file an Application to Register Permanent Residence or Adjust Status (Form I-485) now.
February 15, 2019	The selectee properly files Form I-485 with USCIS. However, USCIS cannot make a final decision on the adjustment application because DOS cannot issue a visa for the selectee's rank number yet.
April 1, 2019	First day that USCIS may make a final decision on the selectee's adjustment application as soon as DOS allocates a visa number (because selectee's rank number is below the April cut-off number).

Date	Event
September 30, 2019 (Last day of FY 2019)	Last day that DOS can allocate a DV for FY 2019 selectees, and last day for USCIS to make a final decision on the selectee's adjustment application, provided visa numbers remain available.

D. Bars to Adjustment

DV selectees are ineligible for adjustment of status if any of the bars to adjustment of status apply.[57]

E. Admissibility and Waiver Requirements

An adjustment applicant must be admissible to the United States as an immigrant at the time adjustment of status is granted. DV adjustment applicants are subject to all grounds of inadmissibility except the labor certification requirement.[58]

In general, an adjustment applicant who is inadmissible to the United States may only obtain LPR status if the applicant obtains a waiver or other form of relief, if available.[59] If a waiver or other form of relief is granted, USCIS may approve the application to adjust status if the applicant is otherwise eligible and warrants a favorable exercise of discretion.

F. Treatment of Family Members

1. Family Members

The spouse or child[60] of a principal DV applicant may accompany or follow-to-join the principal applicant if the spouse or child is otherwise eligible.[61] However, the principal applicant must include their spouse existing at the time of registration, and all natural-born children, adopted children, or stepchildren, existing at the time of registration in the principal applicant's online entry for the DV Program.[62] The principal applicant's spouse and children must be listed in the DV Program entry even if they do not reside with or do not intend to immigrate with the principal applicant.[63]

If a principal applicant did not include their spouse and child(ren) in the DV Program entry, as is required by DOS,[64] generally, USCIS denies the principal and any derivative applicant's DV-based adjustment application.[65]

If a principal applicant had a child after submitting an online entry for the DV Program, the natural born child is still eligible to accompany or follow-to-join the principal applicant if the child is born of a marriage that existed at the time of the principal's admission or adjustment to LPR status.[66]

If a principal applicant married, had a child, acquired a stepchild, or adopted a child after submitting an online entry for the DV Program but before becoming an LPR, the spouse and children are still eligible to accompany or follow to join the principal applicant. In addition, a child born into a marriage in existence at the time the principal becomes an LPR may also accompany or follow to join. Likewise, an adopted child who is not able to accompany the principal because the 2-year legal custody and joint residence requirements have not yet been met, may accompany or follow to join if those requirements are met before the end of the fiscal year.[67] If the principal applicant adjusted status before the marriage or adoption occurred, the principal applicant may petition for their spouse or children through the family-based petition process.

Spouses and children who derive status from a DV application can only obtain visas in the DV category during the same fiscal year in which the principal applicant was admitted or adjusted status. Derivative applicants cannot follow to join after the end of the fiscal year in which the principal applicant was admitted or adjusted status.[68]

2. Child Status Protection Act

The Child Status Protection Act (CSPA)[69] provides protections for certain children who turn 21 (age out) before they obtain lawful permanent residence.[70] DV derivatives are among the children who may be afforded age-out protection. To determine if a DV derivative adjustment applicant should be treated as a child for purposes of adjustment of status, the officer should:

- Determine the date on which an immigrant visa became immediately available for visa processing for the principal DV adjustment applicant;
- Determine the derivative DV adjustment applicant's biological age on the date the visa became available for visa processing;
- Calculate the pending time, that is, the number of days from the start of the DV Program registration period to the date of the DV selection letter; and
- Subtract the pending time from the derivative's biological age on the date the visa became available for visa processing.[71]

The calculation outlined above provides the child's CSPA age. If the CSPA age is under 21 years, the child may adjust as a derivative child.

CSPA Example	
October 1, 2017	Application period opens for DV-2019 Program.
May 1, 2018	DOS publishes selectee confirmations through the Electronic Diversity Visa Program webpage.
November 1, 2018	Visa becomes immediately available as indicated in the monthly Visa Bulletin based on the principal DV adjustment applicant's rank selection number (not the advance notification section). DV derivative is 21 years and 4 months old.

Age at time of visa availability – Pending time = CSPA Age

In the example above, the officer should subtract the 7 months that the DV Program entry was considered pending (October 1, 2017, through May 1, 2018) from the derivative child's age on November 1, 2018.

21 years and 4 months – 7 months = 20 years and 9 months

Therefore, the DV derivative's CSPA age is under 21 years.

3. Death of a DV Selectee

If a selectee dies before they adjust status, the spouse and any children of the deceased selectee are not eligible to adjust status.[72] The Immigration and Nationality Act (INA) provides protections for some applicants who are surviving family members of deceased petitioners or principal beneficiaries of visa petitions, but these protections do not apply to DV adjustment of status cases.[73]

Footnotes

[^ 1] See INA 245(a) and INA 245(c). See 8 CFR 245. See the instructions for the Application to Register Permanent Residence or Adjust Status (Form I-485).

[^ 2] See Part B, 245(a) Adjustment, Chapter 2, Eligibility Requirements, Section A, “Inspected and Admitted” or “Inspected and Paroled” [7 USCIS-PM B.2(A)].

[^ 3] See Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section B, Definition of Properly Filed [7 USCIS-PM A.3(B)].

[^ 4] See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].

[^ 5] See INA 245(c). For more information on the bars to adjustment, see Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 6] For more information, see Volume 8, Admissibility [8 USCIS-PM] and Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM].

[^ 7] See INA 245(a). For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 10, Legal Analysis and Use of Discretion [7 USCIS-PM A.10] and Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 8] See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6] and Part B, 245(a) Adjustment, Chapter 2, Eligibility Requirements, Section C, Eligible to Receive an Immigrant Visa [7 USCIS-PM B.2(C)].

[^ 9] DOS is responsible for administering the DV registration and selection process. See INA 204(a)(1)(I).

[^ 10] An alien’s eligibility for a DV is only confirmed by a USCIS officer at the time USCIS adjudicates the adjustment application (or by a consular officer if the alien applies for a DV outside the United States). See 22 CFR 42.33(g). See 9 FAM 502.6-3, Diversity Visa Eligibility.

[^ 11] See INA 203(c)(1)(E). See 22 CFR 42.33(a)(1).

[^ 12] See 22 CFR 42.33(a)(2).

[^ 13] See INA 203(c)(2).

[^ 14] See INA 203(c)(1)(A) and INA 203(c)(1)(B)(ii)(II).

[^ 15] See INA 203(c)(1)(A) and INA 203(c)(1)(B)(ii)(I).

[^ 16] See INA 203(c)(1)(E)(i).

[^ 17] As defined in INA 203(c)(1)(A) and INA 203(c)(1)(B).

[^ 18] See INA 203(c)(1)(E). See 22 CFR 42.33(f). No single country may receive more than 7 percent of the DVs available in any fiscal year. See INA 203(c)(1)(E)(v).

[^ 19] See INA 203(c)(1)(F).

[^ 20] The Immigration Act of 1990 (IMMACT 90) provided for 55,000 DVs each fiscal year. See IMMACT 90, Pub. L. 101-649 (PDF) (November 29, 1990). See INA 201(e). However, starting in fiscal year 1999, Congress temporarily reduced the number of DVs worldwide by allocating some of the 55,000 DVs available every fiscal year to immigrants admitted to the United States under the Nicaraguan Adjustment and Central American Relief Act (NACARA). See Section 203(d) of the NACARA, Pub. L. 105-100 (PDF), 111 Stat. 2160, 2199 (November 19, 1997), as amended by Section 5104(c) of the National Defense Authorization Act for Fiscal Year 2024, Pub. L. 118-31 (PDF) (December 22, 2023). While this temporary offset has been approaching zero, it is still in place and, as amended, some of the immigrant visas set aside under NACARA may be allocated to certain special immigrants. See Section 5104(c) of the National Defense Authorization Act for Fiscal Year 2024, Pub. L. 118-31 (PDF) (December 22, 2023).

[^ 21] See INA 203(c)(1)(B)(i)(I).

[^ 22] See INA 203(c)(1)(E).

[^ 23] See 9 FAM 502.6-3(b)(3), Native.

[^ 24] See INA 202(b).

[^ 25] See 9 FAM 502.6-3(b)(3), Native. DOS must track how many DVs are counted or charged to a specific country so that country does not use more visas than were allocated to that country. See 9 FAM 502.6-3(b)(1)(b), Formula for Identifying Qualifying DV Countries.

[^ 26] See INA 202(b). See 9 FAM 502.6-4(a)(2), DV Chargeability. For general information about cross-chargeability rules, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability, Subsection 7, Cross-Chargeability [7 USCIS-PM A.6(C)(7)]. All members of a DV family are charged to the same DV region as the principal applicant.

[^ 27] See 9 FAM 502.6-4(a)(2)(c), DV Chargeability.

[^ 28] See 9 FAM 502.6-4(a)(2)(c), DV Chargeability.

[^ 29] See 9 FAM 502.6-4(a)(2)(d), DV Chargeability.

[^ 30] See INA 202(b)(4).

[^ 31] See INA 202(b)(1).

[^ 32] See INA 202(b)(2). See 9 FAM 502.6-4(a)(2)(a), DV Chargeability. For more on accompanying and following to join, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability, Subsection 6, Derivatives [7 USCIS-PM A.6(C)(6)].

[^ 33] See 22 CFR 42.33(b)(1)(iv).

[^ 34] See INA 203(c)(2)(A). See 22 CFR 42.33(a)(2).

[^ 35] See 9 FAM 502.6-3(c)(3), Education Requirements. Diplomas must be certified, and original academic transcripts must be translated.

[^ 36] See 9 FAM 502.6-3(c)(3), Education Requirements.

[^ 37] See INA 203(c)(2)(B).

[^ 38] See 9 FAM 502.6-3(d)(2), Work Experience Evaluation.

[^ 39] See 9 FAM 502.6-3(d)(2), Work Experience Evaluation.

[^ 40] See 22 CFR 42.33(b). See DOS's Diversity Visa Instructions webpage for more information.

[^ 41] See 22 CFR 42.33(b)(3).

[^ 42] The federal fiscal year is October 1 through September 30.

[^ 43] See 22 CFR 42.33(a)(4).

[^ 44] See INA 204(a)(1)(I)(i). See 22 CFR 42.33(a)(4).

[^ 45] See 22 CFR 42.33(c).

[^ 46] DOS does not notify successful entrants by hardcopy letter or email. Entrants should beware of potentially fraudulent emails and letters indicating selection for the DV Program. For more information, see DOS's Fraud Warning webpage.

[^ 47] This Part G primarily addresses adjustment of status. For more information about adjustment of status as an alternative to consular processing, see Part A, Adjustment of Status Policies and Procedures, Chapter 1, Purpose and Background [7 USCIS-PM A.1]. For more information on consular processing, see DOS's Immigrate webpage.

[^ 48] See INA 204(a)(1)(I)(ii)(II). See 22 CFR 42.33(d).

[^ 49] For example, there were more than 14.6 million qualified entries for the fiscal year 2018 DV Program. DOS selected approximately 115,968 DV entrants for the 50,000 DVs available. The larger pool of selectees ensures that all 50,000 DV numbers are used each fiscal year. See DOS's DV 2018 – Selected Entrants webpage.

[^ 50] See INA 245(a)(3).

[^ 51] The term visa allocation as used here refers to the actual issuance of a visa number for purposes of adjudicating an adjustment of status application to completion rather than to advance notification. Note that for selectees outside the United States, a rank number determines when a selectee may file their application for a DV and when a visa number can be allocated.

[^ 52] See 22 CFR 42.33(c).

[^ 53] The allocations in the Visa Bulletin charts for numerically limited visa categories are based, to the extent possible, on demand for visas as reported by DOS and USCIS. See Section A, Statutory Numbers for Preference Immigrant Visas, in the Visa Bulletin. For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability, Subsection 4, Department of State Visa Bulletin [7 USCIS-PM A.6(C)(4)].

[^ 54] The Visa Bulletin charts are used by selectees in the United States applying for adjustment of status and selectees outside the United States who need to obtain visas and apply for admission through consular processing.

[^ 55] The advance notification system also means that some selectees may file for adjustment of status before the beginning of the relevant fiscal year. Specifically, September Visa Bulletins provide advance notification for October in the next fiscal year, which means that a selectee could file for adjustment of status before the fiscal year begins based on the advance notification chart. For example, the Visa Bulletin for September 2017 (which is the last month in fiscal year 2017) had an advance notification chart for October 2017 (which is the first month in fiscal year 2018).

[^ 56] Sometimes DOS assigns a different cut-off number to one or more individual countries in a region. For example, in the March 2019 Visa Bulletin, Egypt, which is in the Africa region, had a cut-off number of 12,600, while the cut-off number for the rest of the Africa region was 15,300.

[^ 57] See INA 245(c). For more information on the bars to adjustment, see Part B, 245(a) Adjustment [7 USCIS-PM B]. The adjustment bars only apply to those seeking adjustment under INA 245(a). In some cases, certain aliens barred from adjusting under INA 245(a) may still be eligible to adjust under INA 245(i). For more information, see Part C, 245(i) Adjustment [7 USCIS-PM C].

[^ 58] See INA 212(a)(5)(D). DV adjustment applicants are subject to the public charge ground of inadmissibility but diversity visas are issued under INA 203(c), which does not fall under INA 212(a)(4)(C) or INA 212(a)(4)(D). DV adjustment applicants are not required to submit an Affidavit of Support Under Section 213A of the INA (Form I-864). See Volume 8, Admissibility, Part G, Public Charge Ground of Inadmissibility, Chapter 6, Affidavit of Support Under Section 213A of the INA, Section C, Applicants Not Required to File Form I-864, Subsection 3, Other Categories of Applicants Not Required to File Form I-864 [8 USCIS-PM G.6(C)(3)].

[^ 59] See INA 212(a) for the specific grounds of inadmissibility. See Volume 8, Admissibility [8 USCIS-PM] and Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM].

[^ 60] See INA 101(b)(1) (defining a child as an unmarried person under 21 years of age).

[^ 61] See INA 101(a)(27)(C) and INA 203(d). Even if a spouse or child is born in a non-qualifying country, the spouse or child may still immigrate based on a DV if eligible to accompany or follow to join a principal DV adjustment applicant. See INA 202(b)(1) and INA 202(b)(2). See 9 FAM 502.6-4(a)(2)(a), DV Chargeability. For more information on accompanying and

following to join, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability, Subsection 6, Derivatives [7 USCIS-PM A.6(C)(6)]. Derivative spouses and children are counted against the annual numerical DV limit. See INA 201(e), INA 203(d), and INA 245(b).

[^ 62] See 22 CFR 42.33(b)(1)(v). See 9 FAM 502.6-4(b)(2)(c), Derivatives. DV Program entrants do not need to list spouses or children who are already U.S. citizens or lawful permanent residents in their online registration entries.

[^ 63] See 22 CFR 42.33(b)(1)(v). See 9 FAM 502.6-4(b)(2)(c)(i), Derivatives.

[^ 64] See 22 CFR 42.33(b)(1)(v). See 9 FAM 502.6-4(b)(2)(c)(iii), Derivatives.

[^ 65] The DOS instructions to submit an entry for the DV Program specifically direct that entries must include the name, date, place of birth, and photographs of the applicant's spouse and all natural children. If the principal applicant does not include the information as required by DOS, the principal and derivatives are not qualified as DV immigrants and therefore USCIS denies these DV-based adjustment applications. See 22 CFR 42.33(b)(1)(v). See 9 FAM 502.6-4(b), Diversity Visa Entries and Applications. See DOS's Diversity Visa Instructions webpage. See INA 204(a)(1)(I)(iii) and INA 245(a)(2).

[^ 66] See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability, Subsection 6, Derivatives [7 USCIS-PM A.6(C)(6)]. See 22 CFR 42.53(c). See 9 FAM 502.6-4(b)(2)(c)(iii), Derivatives.

[^ 67] See 9 FAM 502.6-4(b)(2)(c)(iii), Derivatives. An adopted child who was not able to accompany the principal because the 2-year legal custody and joint residence requirements had not yet been met when the principal immigrated may become eligible to follow-to-join the principal. This may apply in cases where the child still qualifies as a "child" once the legal custody and joint residence requirements are met. See *Matter of Y- K- W-* (PDF), 9 I&N Dec. 176 (A.G. 1961). See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability, Subsection 6, Derivatives [7 USCIS-PM A.6(C)(6)]. See INA 204(a)(1)(I)(ii)(II).

[^ 68] See 9 FAM 502.6-4(h), Following-to-Join Applicants.

[^ 69] See Pub. L. 107-208 (PDF) (August 6, 2002).

[^ 70] See INA 203(h). A derivative child must continue to be unmarried to be classified as a child for immigration purposes. For more information on the CSPA, see Part A, Adjustment of Status Policies and Procedures, Chapter 7, Child Status Protection Act [7 USCIS-PM A.7].

[^ 71] See 9 FAM 502.1-1(D)(4), Calculation of CSPA Age.

[^ 72] See 9 FAM 502.6-4(b)(3)(b), Death of Principal Entrant.

[^ 73] See INA 204(l)(2).

Chapter 3 - Documentation and Evidence

A principal applicant should submit the following documentation and evidence to adjust status as a Diversity Immigrant Visa (DV) Program selectee:[1]

- Application to Register Permanent Residence or Adjust Status (Form I-485), with the correct fee;
- Copy of the selection letter from the U.S. Department of State's (DOS) Electronic Diversity Visa Program webpage;
- Copy of the receipt from DOS for the DV Program processing fee;[2]
- Evidence the applicant meets the education or work experience requirement for a DV;
- Two passport-style photographs;
- Copy of government-issued identity document with photograph;
- Copy of the applicant's birth certificate;
- Copy of passport page with nonimmigrant visa (if applicable);
- Copy of passport page with admission or parole stamp (if applicable);
- Copy of Arrival/Departure Record (Form I-94) or copy of U.S. Customs and Border Protection (CBP) admission or parole stamp on the travel document (if applicable);[3]
- Evidence of continuously maintaining a lawful status since arriving in the United States;
- Any other evidence, as needed, to show that an adjustment bar does not apply or that the applicant qualifies for an exemption;
- Report of Immigration Medical Examination and Vaccination Record (Form I-693);
- Certified police and court records of criminal charges, arrests, or convictions (if applicable);
- Application for Waiver of Grounds of Inadmissibility (Form I-601), or other form of relief (if applicable);
- Documentation of past or present J-1 or J-2 nonimmigrant status, including proof of compliance with or waiver of the 2-year foreign residence requirement under INA 212(e) (if applicable);
- Request for Waiver of Certain Rights, Privileges, Exemptions, and Immunities (Form I-508) (only if the applicant currently holds A, G, or E nonimmigrant status and has certain diplomatic privileges and immunities because of that status); and
- Interagency Record of Request – A, G or NATO Dependent Employment Authorization or Change/Adjustment to/from A, G or NATO Status (Form I-566) (only if the applicant has A, G, or NATO nonimmigrant status).

Although DV adjustment applicants do not need to file an Affidavit of Support Under Section 213A of the INA (Form I-864), the public charge ground of inadmissibility still applies. Therefore, officers should still review whether the applicant is likely to become a public charge.[4]

In addition to the above documentation and evidence, a spouse or child who is filing as a derivative adjustment applicant should submit the following evidence:

- A copy of documentation showing the relationship to the principal applicant, such as a marriage certificate, birth certificate, or adoption decree (if applicable); and
- A copy of documentation showing that the principal applicant included the derivative applicant(s) in their DV entry for the current fiscal year (if the relationship existed before the date of the DV entry).

Footnotes

[^ 1] For more information, see Part A, Adjustment of Status Policies and Procedures, Chapter 4, Documentation [7 USCIS-PM A.4]. See instructions to Application to Register Permanent Residence or Adjust Status (Form I-485).

[^ 2] See 22 CFR 42.33(i).

[^ 3] Aliens admitted to the United States by CBP at an airport or seaport after April 30, 2013, may be issued an electronic Form I-94 by CBP instead of a paper Form I-94. Aliens may visit CBP's Arrival/Departure Forms: I-94 and I-94W webpage to obtain a paper version of their electronic Form I-94. CBP does not charge a fee for this service.

[^ 4] See INA 212(a)(4)(B). For information on public charge inadmissibility determinations, see Volume 8, Admissibility, Part G, Public Charge Ground of Inadmissibility [8 USCIS-PM G].

Chapter 4 - Adjudication

A. Determine Eligibility for Diversity Immigrant Visa

To adjust status, a selectee must be eligible to receive a Diversity Immigrant Visa (DV). Becoming a selectee does not guarantee eligibility for a DV. USCIS officers must still confirm that selectees applying to adjust status meet the statutory education or work requirements for a DV and that they are natives of or properly chargeable to eligible low-admission countries.[1] If an officer determines a selectee is not statutorily eligible for a DV, the officer denies the Application to Register Permanent Residence or Adjust Status (Form I-485).

B. Filing and Fiscal Year Deadline

DV Program selectees and their spouses and children are eligible to receive and use a DV number only through the end of the specific fiscal year for which they were selected.[2] Therefore, USCIS cannot approve DV adjustment applications after September 30 of the relevant fiscal year.[3]

Beginning October 1, USCIS must deny any DV adjustment application that remains pending from the prior fiscal year, even if the U.S. Department of State (DOS) has already allocated the visa number. This is true whether the applicant is the principal DV adjustment applicant or a spouse or child accompanying or following to join the DV principal.[4]

The statutorily limited number of DVs may also be exhausted before September 30, the last day of the fiscal year, as a whole or for specific regions or countries. Therefore, USCIS encourages adjustment applicants to file as soon as they are eligible to file based on the DOS Visa Bulletin.[5]

Example

An alien living in the United States enters the DV Program's online registration on October 2, 2018. The alien checks DOS's Electronic Diversity Visa Program webpage on May 1, 2019, and finds out they have been selected for a DV for fiscal year 2020. On August 1, 2020, the selectee properly files an adjustment application based on being a DV selectee with a current rank number according to the DOS Visa Bulletin. On August 15, 2020, the officer adjudicating the application determines some required evidence is missing and sends a Request for Evidence to the adjustment applicant. The adjustment applicant submits the requested evidence on October 1, 2020.

Even if the adjustment applicant meets all other eligibility criteria to adjust status, USCIS cannot approve the adjustment application because it is past the September 30 fiscal year deadline and there are no more DV numbers for DOS to allocate.[6]

Availability of Visa at Time of Final Adjudication

A visa must be immediately available at the time the DV Program selectee files the adjustment application with USCIS and at the time of final adjudication of the application.[7] Therefore, before approving a DV adjustment application, the officer should consult the DOS Visa Bulletin to determine if:

- The applicant filed the DV-based adjustment application at the appropriate time (based on the current visa availability chart at the time of filing or the advance notification chart); and
- A visa number is immediately available at the time of final adjudication and approval.

C. Interview

All adjustment of status applicants must be interviewed by a USCIS officer unless USCIS determines that the interview is unnecessary.[8] If an interview is necessary, USCIS schedules the applicant for an in-person interview at the appropriate field office with jurisdiction.

D. Decision

1. Approval

The officer must determine that the applicant meets all the eligibility requirements and merits the favorable exercise of discretion before approving the application to adjust status based on a DV.[9] If the adjustment application is otherwise approvable, the officer must determine if a visa is immediately available at the time of final adjudication and request a visa number from DOS. Once DOS allocates the visa number, the officer may approve the adjustment application.[10]

If an officer approves a DV adjustment application, the following admission codes apply.

Classes of Applicants and Codes of Admission

Applicant Type	Code of Admission
Principal DV	DV6
Spouse of principal DV	DV7
Child of principal DV	DV8

The effective date of lawful permanent residence for all DV adjustment applicants is the approval date of the application.

2. Denial

If the officer determines that the applicant is ineligible for adjustment, the officer must deny the adjustment application. The officer must provide the applicant a written reason for the denial.[11] While there is no appeal right for the denial, the applicant may file a motion to reopen or motion to reconsider using the Notice of Appeal or Motion (Form I-290B). The denial

notice should include instructions for how to file Form I-290B.

If placed in removal proceedings, an applicant may also renew the adjustment application before an immigration judge if there are still available DV numbers and there is still time left in the fiscal year to allocate a DV number.

Neither USCIS nor a court has authority to grant adjustment of status based on a DV selection after the relevant fiscal year deadline, even if DOS has already allocated a visa number.[12] Therefore, USCIS denies any motion to reopen or motion to reconsider received or pending after September 30, the last day of the fiscal year. Even if a motion is granted before the end of the fiscal year, USCIS denies the DV adjustment application if USCIS does not adjudicate the adjustment application before the end of the fiscal year.[13]

Footnotes

[^ 1] See INA 203(c)(1)(E) and INA 203(c)(2). See 22 CFR 42.33(a)(1). For more information, see Chapter 2, Eligibility Requirements, Section B, Eligibility to Receive an Immigrant Visa, Subsection 1, DV Program Eligibility [7 USCIS-PM G.2(B)(1)]. For general information about cross-chargeability rules, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability, Subsection 7, Cross-Chargeability [7 USCIS-PM A.6(C)(7)].

[^ 2] See INA 204(a)(1)(I)(ii)(II). See 22 CFR 42.33(d).

[^ 3] In some cases, USCIS may issue a Request for Evidence to obtain additional information related to a final adjudication. USCIS may not approve DV adjustment applications after September 30 of the relevant fiscal year, so USCIS may not approve a DV adjustment application if all requested information is not received on or before that date even if the information submitted otherwise establishes an applicant's eligibility.

[^ 4] Selectees and their derivatives, if any, who received a DV through consular processing before the September 30 deadline may continue to the United States after that date, provided the visa remains valid.

[^ 5] For more information on eligibility to file the adjustment application, see Chapter 2, Eligibility Requirements, Section C, Visa Availability [7 USCIS-PM G.2(C)]. For more information on jurisdiction, see Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section D, Jurisdiction [7 USCIS-PM A.3(D)].

[^ 6] See 22 CFR 42.33(f).

[^ 7] See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].

[^ 8] See 8 CFR 245.6. For more information on interviews, see Part A, Adjustment of Status Policies and Procedures, Chapter 5, Interview Guidelines [7 USCIS-PM A.5].

[^ 9] See INA 245(a). For more information, see Part A, Adjustment of Status Policies and Procedures [7 USCIS-PM A] and Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 10] For more information, see Section B, Filing and Fiscal Year Deadline [7 USCIS-PM G.4(B)].

[^ 11] See 8 CFR 103.3(a)(1)(i).

[^ 12] See *Ahmed v. DHS*, 328 F.3d 383 (7th Cir. 2003). See *Coraggioso v. Ashcroft*, 355 F.3d 730 (3rd Cir. 2004). See *Iddir v. INS*, 301 F.3d 492 (7th Cir. 2002). See *Nyaga v. Ashcroft*, 323 F.3d 906 (11th Cir. 2003).

[^ 13] See INA 204(a)(1)(I)(ii)(II). See 22 CFR 42.33(f).

Part H - Reserved

Part I - Adjustment Based on Violence Against Women Act

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures.

See more

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures. We are working quickly to update and incorporate all of the AFM content into the USCIS Policy Manual, the agency's centralized online repository for immigration policies. Until then, we have moved any remaining AFM content to its corresponding Policy Manual Part. To the extent that a provision in the Policy Manual conflicts with remaining AFM content or Policy Memoranda, the updated information in the Policy Manual prevails. If you have questions or concerns about any discrepancies among these resources, contact PolicyFeedback@uscis.dhs.gov.

AFM Chapter 23 - Adjustment of Status to Lawful Permanent Resident (External) (PDF)

Part J - Trafficking Victim-Based Adjustment

Chapter 1 - Purpose and Background

A. Purpose

Human trafficking (also known as trafficking in persons) involves the exploitation of persons in order to compel labor, services, or commercial sex acts.[1]

T nonimmigrant status allows eligible victims of a severe form of trafficking in persons[2] to remain in the United States on a temporary basis, receive employment authorization, and qualify for public benefits and services to the same extent as a refugee.[3] It also allows victims to apply for T nonimmigrant status for certain family members.[4] Additionally, eligible T nonimmigrants may apply to adjust status to lawful permanent residence.[5]

B. Background

Since the initial creation of the T nonimmigrant classification and the related adjustment of status provisions in 2000, Congress has amended the program requirements several times, including amending the provisions regarding adjustment of status.[6]

C. Legal Authorities

- INA 101(a)(15)(T) – Definition of T nonimmigrant classification
- 8 CFR 214.201 – T nonimmigrant status eligibility
- INA 214(o) – Nonimmigrants guilty of trafficking in persons
- INA 245(l); 8 CFR 245.23; 8 CFR 212.18 – Adjustment of status for victims of trafficking

Footnotes

[^ 1] See the Trafficking and Violence Protection Act (TVPA) of 2000, Pub. L. 106-386 (PDF), 114 Stat. 1464, 1470 (October 28, 2000), codified at 22 U.S.C. 7101.

[^ 2] The term “severe form of trafficking in persons” is a legal term defined in the TVPA, as amended. The term is often referred to as trafficking, human trafficking, or acts of trafficking.

[^ 3] See the TVPA, Pub. L. 106-386 (PDF), 114 Stat. 1464, 1475 (October 28, 2000) (stating that such persons “shall be eligible for benefits and services…to the same extent as an alien who is admitted to the United States as a refugee under section 207 of the [INA]”). See INA 101(i)(2) (mandating employment authorization for principal T nonimmigrants).

[^ 4] See INA 101(a)(15)(T).

[^ 5] See INA 245(l).

[^ 6] For more information on the specific amendments made regarding trafficking victim-based adjustment of status, see Volume 3, Humanitarian Protection and Parole, Part B, Victims of Trafficking, Chapter 1, Purpose and Background, Section C, Legislative History [3 USCIS-PM B.1(C)].

Chapter 2 - Eligibility Requirements

Adjustment of status is available both to victims of trafficking who received T nonimmigrant status as a principal applicant and their eligible family members who received derivative T nonimmigrant status; however, the eligibility requirements differ. This chapter discusses the eligibility requirements for principal applicants and their derivative family members.

There are some eligibility requirements that apply to both principal applicants and derivative applicants. Both principal and derivative applicants must establish that they:

- Were lawfully admitted to the United States as a T nonimmigrant and continue to hold such status;[1] and
- Are admissible to the United States or have been granted a waiver by USCIS of any applicable ground of inadmissibility at the time of adjudication of the adjustment application for any grounds not already waived in connection with the underlying application for T nonimmigrant status.[2]

A. Principal Applicants

1. Overview of Eligibility Requirements

To be eligible for adjustment of status based on T nonimmigrant status, a principal T-1 nonimmigrant[3] must meet all of the following eligibility requirements[4] at the time of filing their Application to Register Permanent Residence or Adjust Status (Form I-485) through final adjudication of the adjustment application.[5] The principal T-1 nonimmigrant must demonstrate that they:

- Were lawfully admitted to the United States as a T-1 nonimmigrant and continue to hold such status;[6]
- Have been continuously physically present[7] in the United States for either:
  - At least 3 years since the date of lawful admission as a T-1 nonimmigrant and through adjudication of the adjustment application;[8] or
  - The duration of the investigation or prosecution of acts of trafficking in cases where the Attorney General has determined that the investigation or prosecution is complete, if less than 3 years;[9]
- Have been a person of good moral character since first being lawfully admitted as a T-1 nonimmigrant through the time that USCIS completes the adjudication of the adjustment application;[10]
- Meet one of the following:
  - Have, since first being lawfully admitted as a T-1 nonimmigrant and through the conclusion of adjudication of the adjustment application, complied with any reasonable request for assistance in the detection, investigation, or prosecution of acts of trafficking;[11]
  - Would suffer extreme hardship involving unusual and severe harm upon removal from the United States;[12]
  - Were under 18 years of age at the time at least one of the acts of trafficking occurred;[13] or
  - Established they were unable to cooperate with a reasonable request for assistance at the time they were granted T-1 nonimmigrant status, due to physical or psychological trauma;[14]
- Are admissible to the United States or have been granted a waiver by USCIS of any applicable ground of inadmissibility at the time of adjudication of the adjustment application;[15] and
- In addition to the above eligibility requirements, applicants for adjustment of status based on T nonimmigrant status must demonstrate that they merit a favorable exercise of discretion.[16]

2. Continuous Physical Presence

To maintain continuous physical presence in the United States for the required period,[17] a T-1 nonimmigrant must not depart from the United States for any single period in excess of 90 days or for any periods exceeding 180 days in the aggregate.[18] However, a single departure for any period more than 90 days or multiple departures for periods exceeding 180 days in the aggregate do not break continuous physical presence if the T-1 nonimmigrant can demonstrate one of the following:

- The absence was necessary to assist in the investigation or prosecution of the acts of trafficking;[19] or
- An official involved in the investigation or prosecution of the acts of trafficking certifies that the absence was otherwise justified.[20]

If a T-1 nonimmigrant breaks the period of continuous physical presence because of a single departure from the United States for any period of more than 90 days or multiple departures for more than 180 days in the aggregate and then re-enters the United States after receiving advance parole under INA 212(d)(5), the T-1 nonimmigrant may again begin to accrue

physical presence in order to meet the 3-year physical presence requirement.[21]

Additionally, a T-1 nonimmigrant can accrue continuous physical presence beginning from any admission in T nonimmigrant status, including admissions made after departures that broke a prior period of continuous presence. The physical presence time period starts over upon the applicant's return, and they must accrue 3 years from the date of their return to the United States.

3. Good Moral Character

T nonimmigrant applicants seeking to adjust status must establish that they have been a person of good moral character (GMC) during the continuous period of at least 3 years since the date of T admission or during the period of investigation or prosecution of the acts of trafficking, whichever period is less.[22] In either case, GMC must be maintained until USCIS completes the adjudication of the application for adjustment of status.[23]

Therefore, in evaluating GMC, USCIS only considers an applicant's conduct since first being lawfully admitted as a T-1 nonimmigrant through the time that USCIS completes the adjudication of the application for adjustment of status. USCIS does not consider an applicant's conduct before the applicant was lawfully admitted as a T-1 nonimmigrant as part of the GMC analysis.

In the context of a T nonimmigrant applying for adjustment of status, USCIS evaluates claims of GMC on a case-by-case basis, taking into account persons who are unable to establish GMC by the law and the standards of the community.[24] By law, certain types of criminal conduct automatically prevent applicants from establishing GMC.[25] An officer may also find, depending on the facts of the case, that an applicant for adjustment of status lacks GMC for other types of criminal conduct or unlawful acts not included in the statute.[26]

USCIS may waive the disqualification of an applicant for adjustment of status based on a lack of GMC, including for acts or offenses described in the law, if the disqualification was caused by, or incident to, the acts of trafficking that formed the basis of the underlying application for T nonimmigrant status.[27] Officers use a victim-centered approach in making this determination.

4. Reasonable Requests for Assistance

An applicant must generally establish that they complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking.[28] A "request for assistance" is defined as a request made by a law enforcement agency (LEA) to a victim to assist in the detection, investigation, or prosecution of the acts of trafficking in persons or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime.[29]

Applicants are not required to submit a document issued by the Attorney General or their designee certifying that the applicant has complied with any reasonable requests for assistance.[30] USCIS examines relevant evidence in the record to determine whether the applicant met the statutory requirement to comply with any reasonable request for assistance.

USCIS has sole jurisdiction over the entire T nonimmigrant adjustment of status process, including the determination of whether an applicant complied with any reasonable requests for assistance in the investigation or prosecution. USCIS consults the Attorney General as it deems appropriate.[31]

In determining whether an LEA request for assistance is reasonable, USCIS examines the totality of the circumstances.[32]

Alternatives to Complying with Reasonable Requests for Assistance

There are three alternatives to the requirement that the applicant comply with any reasonable request for assistance from an LEA in the investigation or prosecution of acts of trafficking. Applicants who are unable to establish that they complied with any reasonable request for assistance only need to establish that they meet one of these alternatives.

Extreme Hardship

T-1 nonimmigrants who cannot demonstrate continued compliance with reasonable requests for assistance may instead establish that they would suffer extreme hardship involving unusual and severe harm upon removal from the United States.[33] Officers make hardship determinations on a case-by-case basis using the same factors and standard for extreme hardship that apply to the initial Application for T Nonimmigrant Status (Form I-914).[34]

Where the basis for the hardship claim represents a continuation of the hardship claimed in the underlying application for T nonimmigrant status, the applicant does not need to re-document the entire claim, but may submit evidence to establish that the previously established hardship is ongoing. However, in reaching a decision regarding hardship for adjustment of status, USCIS is not bound by its previous hardship determination made at the adjudication of the underlying application for T nonimmigrant status.

Previously Established Age Exemption

If the applicant was younger than 18 years of age at the time of victimization qualifying the applicant for T nonimmigrant status, compliance with reasonable requests for assistance from law enforcement agencies is not required for purposes of establishing eligibility for adjustment of status.[35]

A T nonimmigrant who qualifies for an exemption from the cooperation requirement due to age does not need to also demonstrate extreme hardship.[36]

Previously Established Trauma Exception

If the applicant established that they were unable to cooperate with reasonable requests for assistance from law enforcement based on physical or psychological trauma at the time the application for T nonimmigrant status was approved, compliance with reasonable requests for assistance from law enforcement agencies is not required for purposes of establishing eligibility for adjustment of status.

A T nonimmigrant who qualified for an exception from the cooperation requirement at the time of adjudication of the application for T nonimmigrant status due to trauma is also not required to demonstrate extreme hardship.[37]

B. Derivative Family Members

1. Overview of Eligibility Requirements

A derivative family member of a T-1 nonimmigrant is eligible to apply for adjustment of status to that of a lawful permanent resident, provided:

- The T-1 principal nonimmigrant meets the eligibility requirements and has applied for adjustment of status;[38]
- The derivative family member was lawfully admitted to the United States in T-2, T-3, T-4, T-5, or T-6 nonimmigrant status as the derivative beneficiary of a T-1 nonimmigrant, and continues to hold such status at the time of their adjustment application;[39] and
- The derivative family member is admissible to the United States or USCIS has granted a waiver of any applicable ground of inadmissibility at the time of adjudication of the adjustment application.[40]

The derivative family member does not have to satisfy the other eligibility requirements applicable to T-1 principal applicants, including the 3-year continuous physical presence requirement and good moral character requirement.

2. Effect of Adjustment of Principal T-1 Nonimmigrant's Status

A derivative T nonimmigrant is eligible for adjustment of status only if the principal T-1 nonimmigrant is also eligible. USCIS cannot approve a derivative's adjustment application if the principal's application for adjustment has not been approved.[41]

A derivative does not lose their derivative T nonimmigrant status when the principal adjusts status and becomes a lawful permanent resident, so long as the derivative has been initially admitted to the United States as a T nonimmigrant before the principal T-1 nonimmigrant adjusts status, and continues to hold T nonimmigrant status at the time of the principal's adjustment.[42]

Therefore, a T derivative remains eligible for adjustment of status even if the principal T-1 nonimmigrant has already adjusted status as a T nonimmigrant under INA 245(l), as long as the derivative has been admitted to the United States as a T nonimmigrant before the principal's adjustment of status. However, a derivative is not eligible for adjustment of status under INA 245(l) as a derivative T nonimmigrant if the T-1 nonimmigrant adjusted status under any other basis, such as INA 245(a).

If, under a previous policy,[43] USCIS denied a derivative T nonimmigrant's application to adjust status solely because the principal had already adjusted status under INA 245(l), the derivative should file a motion to reopen under 8 CFR 103.5 using a Notice of Appeal or Motion (Form I-290B) in accordance with the instructions, include a copy of the previous denial, and ask that USCIS excuse the late filing.

3. Effect of Death of Principal T-1 Nonimmigrant

If a principal T-1 nonimmigrant dies, a surviving derivative family member admitted to the United States in T nonimmigrant status may apply for adjustment of status, notwithstanding the death of the principal, if certain requirements are met.[44]

The applicant must still establish eligibility for adjustment. Further, USCIS may deny an application that is otherwise approvable despite the principal's death if USCIS finds, as a matter of discretion, that approval would not be in the public interest.[45]

Footnotes

[^ 1] See INA 245(l)(1). See 8 CFR 245.23(a)(2) and 8 CFR 245.23(a)(3). For more information regarding duration and extensions of T nonimmigrant status, see Volume 3, Humanitarian Protection and Parole, Part B, Victims of Trafficking, Chapter 10, Duration and Extensions of Status [3 USCIS-PM B.10]. If a T-1 principal or derivative family member fails to apply for adjustment of status prior to expiration of the T nonimmigrant status validity period or fails to obtain an extension of T nonimmigrant status, the T nonimmigrant status is terminated. See 8 CFR 214.203(c).

[^ 2] See INA 245(l)(2). See 8 CFR 245.23(a)(5) and 8 CFR 245.23(b)(4). See Volume 9, Waivers and Other Forms of Relief, Part O, Victims of Trafficking, Chapter 5, Waivers for T Nonimmigrants Applying for Adjustment of Status [9 USCIS-PM O.5] for guidance on waivers of inadmissibility.

[^ 3] This part refers to trafficking victims with principal T nonimmigrant status and derivative family members with T nonimmigrant status in several ways. Principal nonimmigrants may be referred to as "T-1 principal nonimmigrants," "T-1 nonimmigrants," or "principals." Derivative nonimmigrants may be referred to as "T-2, T-3, T-4, T-5, or T-6 derivative nonimmigrants" or as "derivatives." See Volume 3, Humanitarian Protection and Parole, Part B, Victims of Trafficking, Chapter 4, Family Members [3 USCIS-PM B.4] for a description of codes of admission for derivatives.

[^ 4] See INA 245(l)(1).

[^ 5] See 8 CFR 103.2(b)(1).

[^ 6] See INA 245(l)(1). See 8 CFR 245.23(a)(2) and 8 CFR 245.23(a)(3). For more information regarding duration and extensions of T nonimmigrant status, see Volume 3, Humanitarian Protection and Parole, Part B, Victims of Trafficking, Chapter 10, Duration and Extensions of Status [3 USCIS-PM B.10]. If a T-1 principal or derivative family member fails to apply for adjustment of status prior to expiration of the T nonimmigrant status validity period or fails to obtain an extension of T nonimmigrant status, the T nonimmigrant status is terminated. See 8 CFR 214.203(c).

[^ 7] See INA 245(l)(1)(A). See 8 CFR 245.23(a)(4). This requirement must be met at the time of filing through the time of adjudication.

[^ 8] See INA 245(l)(1)(A). See 8 CFR 245.23(a)(4). For purposes of establishing physical presence for a continuous period of at least 3 years as of the time of filing, the statutes and regulations permit T nonimmigrants to restart the clock after a break in continuous physical presence after their first admission as a T nonimmigrant (including, but not limited to, restarting after a subsequent admission as a T nonimmigrant, or restarting after returning with advance parole after a break in continuous physical presence).

[^ 9] See INA 245(l)(1)(A). See 8 CFR 245.23(a)(4). The evidence must clearly indicate that an investigation or prosecution occurred, and that such investigation or prosecution is now complete.

[^ 10] See INA 245(l)(1)(B) and INA 245(l)(6). See 8 CFR 245.23(a)(6).

[^ 11] See INA 245(l)(1)(C)(i). See 8 CFR 245.23(a)(7)(i).

[^ 12] See INA 245(l)(1)(C)(ii). See 8 CFR 245.23(a)(7)(ii).

[^ 13] See INA 245(l)(1)(C)(iii). See 8 CFR 245.23(a)(7)(iii).

[^ 14] See 8 CFR 245.23(a)(7)(iv).

[^ 15] See INA 245(l)(2). See 8 CFR 245.23(a)(5).

[^ 16] See INA 245(l)(1). See 8 CFR 245.23(e)(3).

[^ 17] This continuous physical presence requirement must be met at the time of filing and continue through the time of adjudication of Form I-485.

[^ 18] See INA 245(l)(3). See 8 CFR 245.23(a)(4)(i).

[^ 19] See INA 245(l)(3)(A).

[^ 20] See INA 245(l)(3)(B).

[^ 21] See 8 CFR 245.23(a)(4).

[^ 22] See INA 245(l)(1)(B).

[^ 23] See 8 CFR 245.23(a)(6).

[^ 24] See 8 CFR 245.23(g).

[^ 25] See INA 101(f). For a discussion of permanent and conditional bars to establishing good moral character and assessing criminal conduct, see Volume 12, Citizenship and Naturalization, Part F, Good Moral Character, Chapter 2, Adjudicative Factors [12 USCIS-PM F.2]; Chapter 4, Permanent Bars to Good Moral Character [12 USCIS-PM F.4]; and Chapter 5, Conditional Bars for Acts in Statutory Period [12 USCIS-PM F.5].

[^ 26] See INA 101(f) ("The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.").

[^ 27] See INA 245(l)(6). An applicant does not need to file a separate form for USCIS to waive a lack of good moral character. Where the record contains sufficient evidence to demonstrate that the disqualifying acts were caused by or incident to a trafficking, the officer may waive the disqualification. If there is insufficient evidence in the record for an officer to determine whether the disqualifying acts were caused by or incident to a trafficking, or if the record does not establish that favorable discretion is appropriate, officers may issue a Request for Evidence or may deny the application, where appropriate.

[^ 28] See 8 CFR 245.23(a)(7)(i).

[^ 29] See 8 CFR 214.201.

[^ 30] See 8 CFR 245.23(d) and 8 CFR 245.23(f). See 89 FR 34864, 34867 (PDF) (Apr. 30, 2024).

[^ 31] See INA 245(l)(1)(c).

[^ 32] See 8 CFR 214.208(c). For a discussion of the factors and the comparably-situated crime victim standard that USCIS uses, see Volume 3, Humanitarian Protection and Parole, Part B, Victims of Trafficking, Chapter 2, Eligibility Requirements, Section D, Requests for Law Enforcement Assistance [3 USCIS-PM B.2(D)].

[^ 33] See 8 CFR 245.23(a)(7)(ii).

[^ 34] See 8 CFR 214.209. See Volume 3, Humanitarian Protection and Parole, Part B, Victims of Trafficking, Chapter 2, Eligibility Requirements, Section E, Extreme Hardship [3 USCIS-PM B.2(E)] for guidance on applying this standard.

[^ 35] See INA 245(l)(1)(C)(iii).

[^ 36] See 8 CFR 245.23(a)(7)(iii).

[^ 37] See 8 CFR 245.23(a)(7)(iv).

[^ 38] See 8 CFR 245.23(b)(1).

[^ 39] A derivative child or sibling does not lose their ability to adjust status under 8 CFR 245.23 if they marry after their grant of T nonimmigrant status but before adjusting to lawful permanent residence.

[^ 40] See INA 245(l). See 8 CFR 245.23(b)(4).

[^ 41] See INA 245(l)(1).

[^ 42] See 8 CFR 245.23(b)(1), 8 CFR 245.23(b)(2), and 8 CFR 245.23(b)(5).

[^ 43] Before October 4, 2016, USCIS policy did not permit a derivative T nonimmigrant to adjust status after the principal had adjusted status. See Extension of Status for T and U Nonimmigrants; Revisions to Adjudicator's Field Manual (AFM) Chapter 39.1(g)(3) and Chapter 39.2(g)(3) (AFM Update AD11-28), PM-602-0032.1, issued April 19, 2011.

[^ 44] See INA 204(l). For additional information about these requirements, see Part A, Adjustment of Status Policies and Procedures, Chapter 9, Death of Petitioner or Principal Beneficiary [7 USCIS-PM A.9].

[^ 45] See INA 204(l)(1).

Chapter 3 - Documentation and Evidence

A. Overview of Evidentiary Requirements

The evidentiary requirements for T-1 principal applicants for adjustment of status are more extensive than the requirements for T-2, T-3, T-4, T-5, and T-6 derivative adjustment applicants because of the additional eligibility requirements applicable to T-1 principal applicants.

The following table summarizes the evidentiary and other filing requirements, which are discussed in further detail throughout this chapter.

Summary of Required Documentation and Evidence

Nonimmigrant Classification	Required Documentation and Evidence
All T Nonimmigrants	• Application to Register Permanent Residence or Adjust Status (Form I-485); • Two passport-style photographs; • Copy of all pages of applicant's most recent passport or explanation of why they do not have a passport; • Report of Immigration Medical Examination and Vaccination Record (Form I-693); • Application for Waiver of Grounds of Inadmissibility (Form I-601), if applicable; • Evidence of lawful admission as a T nonimmigrant; • Birth certificate; • Evidence the applicant continues to be in valid T nonimmigrant status; • Evidence of positive discretionary factors; and • Evidence of valid marriage, such as a marriage certificate or divorce decree, if applicable (for T-2 applicants only).
T-1 Principal Nonimmigrant	• All evidence listed above, as required for all T nonimmigrants; • Evidence of continuous physical presence in the United States for the requisite period; • Evidence of good moral character; and • Evidence of compliance with reasonable law enforcement requests or evidence that the applicant established an age exemption, trauma exception, or extreme hardship.

B. Evidence Required of All Applicants

All T nonimmigrant applicants for adjustment of status must submit all required initial evidence with the Application to Register Permanent Residence or Adjust Status (Form I-485).[1]

Initial evidence required of all T nonimmigrant applicants for adjustment of status includes the following:

- Application to Register Permanent Residence or Adjust Status (Form I-485);
- Evidence of lawful admission into the United States in T nonimmigrant status, such as:
  - Copy of Notice of Action (Form I-797) granting T nonimmigrant status;
  - Copy of Arrival/Departure Record (Form I-94); or
  - Copy of applicant's passport with a T nonimmigrant visa and an admission stamp[2] evidencing that U.S. Customs and Border Protection admitted the applicant as a T nonimmigrant;
- Copy of the applicant's birth certificate and a certified translation if the document is in a foreign language (or secondary evidence of birth if an applicant is unable to obtain their birth certificate);[3]
- Two passport-style photographs;[4]
- Biometrics submission (generally after receiving an appointment notice and attending an appointment at an Application Support Center);
- Copy of all pages of the applicant's most recent passport[5] (or an explanation of the reason the applicant does not have a passport);
- Report of Immigration Medical Examination and Vaccination Record (Form I-693);[6] and
- Application for Waiver of Grounds of Inadmissibility (Form I-601), if applicable.
- All applicants should also include evidence that USCIS should exercise discretion in their favor in granting their application for adjustment of status.[7] If there are adverse factors, applicants may submit information regarding any mitigating factors they wish USCIS to consider.[8]

C. Evidence Required of Principal Applicants Only

In addition to the evidence and documentation listed above, principal T-1 nonimmigrant applicants for adjustment of status must include with their adjustment application evidence establishing that they meet each of the eligibility requirements specific to principal applicants.

The following subsections discuss the evidence required to establish the eligibility requirements of continuous physical presence, good moral character, and compliance with reasonable law enforcement requests.

1. Continuous Physical Presence in the United States

A T-1 applicant must submit sufficient evidence to establish that the applicant has been physically present in the United States for a continuous period of either:

- At least 3 years since the date of admission as a T-1 nonimmigrant; or
- The duration of the investigation or prosecution of the acts of trafficking, in cases where the Attorney General has determined the investigation or prosecution is complete, if less than 3 years.

Required Evidence

To establish continuous physical presence during the requisite time period, T-1 principal nonimmigrant applicants for adjustment of status must submit:

- An affidavit stating that they have been continuously physically present in the United States for the requisite period;[9]

- Copies of all pages of all the applicant's passports or equivalent travel document valid during the required period (or a valid[10] explanation of why the applicant does not have a passport);[11]
- A list of any departures from the United States or other evidence of such departures, (see below for necessary details regarding departures);[12] and
- Evidence of continuous physical presence in the United States.[13]

Evidence of Departures from the United States

If an applicant has departed the United States, they must submit documentation of any departure from, and return to, the United States, while in T-1 nonimmigrant status. Such documentation must show:

- Date of departure;
- Place of departure;
- Length of departure;
- Manner of departure (such as plane or boat);
- Date of return; and
- Place of return.

Specific Types of Evidence to Demonstrate Continuous Physical Presence

Evidence of continuous physical presence may include:

- Evidence the applicant worked in the United States, such as pay stubs or other employment records;
- Evidence that the applicant filed federal or state income tax returns;
- Evidence that the applicant or their children[14] attended school in the United States, including educational records (such as transcripts, report cards, letters) from a United States institution;
- Hospital or medical records;
- Documents showing installment periods, such as a series of monthly rent receipts or utility bills;
- Money orders, deeds, contracts, automobile license receipts, vehicle registrations, mortgage payments, or similar evidence;
- Officially registered and issued birth certificates of children born in the United States; and
- Documentation issued by any governmental or nongovernmental authority that contains the signature, seal, or other authenticating instrument of the authorized representative of the issuing authority if the document would normally contain such authentication.[15]

In addition to the above evidence, an applicant may submit copies of documentation found in their DHS file to establish physical presence, if applicable and available. Such documentation may include, but is not limited to:

- Copy of sworn statement given to a DHS officer;
- Attestation from law enforcement agency that the applicant has continued to comply with requests for assistance;
- Transcript of a formal hearing; and
- Record of Deportable/Inadmissible Alien (Form I-213).

General Principles for Evidence of Continuous Physical Presence

Any absence from the United States, even for 24 hours, can be significant for purposes of eligibility because of the aggregate 180-day restriction on absences from the United States.[16] Travel outside the United States for less than 24 hours does not count toward the 90-day or the 180-day periods.

Evidence submitted relating to continuous physical presence should generally contain the applicant or their family member's name, address (if applicable), and relevant dates.

An applicant does not need to submit documentation to show presence on every single day of the requisite continuous physical presence period, but there should be no significant chronological gaps in documentation.

A signed statement from the T-1 applicant attesting to continuous physical presence alone is not sufficient to establish this eligibility requirement.[17] If documentation to establish continuous physical presence is not available, the applicant must explain why in their affidavit and provide additional affidavits from others with firsthand knowledge attesting to the applicant's physical presence with specific facts.

Determining the Date of Admission as a T-1 Nonimmigrant

For purposes of determining whether the applicant has satisfied the requisite physical presence period, an applicant's date of admission as a T-1 nonimmigrant is generally the date that the applicant was first granted T-1 nonimmigrant status upon approval of their Application for T Nonimmigrant Status (Form I-914). USCIS generally uses this initial admission date to calculate an applicant's physical presence.

If the applicant traveled outside of the United States since being admitted as a T-1 nonimmigrant, did not break continuous physical presence by departing for a single period of 90 days or multiple departures for 180 days in the aggregate, and reentered using an advance parole document, the date that the applicant was first admitted as a T-1 nonimmigrant is still the date of initial admission as a T-1 nonimmigrant, regardless of how the applicant's Arrival/Departure Record (Form I-94) is annotated upon their reentry using an advance parole document.

However, if the Form I-94 is annotated with another nonimmigrant status other than T nonimmigrant status, USCIS may consider the applicant to have been admitted into another nonimmigrant classification, depending on the circumstances. Because an alien cannot hold more than one nonimmigrant status at a time, if the applicant was admitted into another classification, the applicant would no longer hold T nonimmigrant status and would not accrue continuous physical presence as a T-1 nonimmigrant.

If the T-1 nonimmigrant traveled outside the United States and upon return there was an error on their Form I-94 as to the status of the T nonimmigrant through no fault of the T nonimmigrant, they may contact U.S. Customs and Border Protection and request to have the error corrected.[18] If the error on the Form I-94 may prevent an individual from being able to apply for adjustment of status before their T nonimmigrant status expires, they should file a request for extension of status using the Application to Extend/Change Nonimmigrant Status (Form I-539) and include an explanation of the circumstances.

If the T-1 nonimmigrant traveled outside of the United States since being admitted as T-1 nonimmigrant, and broke continuous physical presence by departing the United States for a period of 90 days or 180 days in the aggregate, they may restart the continuous physical presence period and again begin accruing physical presence after any subsequent admission as a T-1 nonimmigrant or after being paroled after presenting an advance parole document granted under INA 212(d)(5).

Evidence of Excused Departure

An applicant who has traveled outside of the United States for a single period in excess of 90 days or 180 days in the aggregate while in T nonimmigrant status and seeks to demonstrate that their absence from the United States was necessary to assist in the investigation or prosecution of the acts trafficking[19] must submit:

- A statement from law enforcement;
- A personal statement; or
- Any other documentation that establishes the departure was necessary to assist in the investigation or prosecution.

Alternatively, where an applicant traveled outside of the United States for a single period in excess of 90 days or 180 days in the aggregate while in T nonimmigrant status, and they seek to establish that an absence was otherwise justified,[20] they must submit documentation from a law enforcement official who was involved in the investigation or prosecution of the acts of trafficking. If the letter is authentic, USCIS generally does not question the law enforcement official's conclusions in the letter. However, USCIS may request additional information if needed to confirm this eligibility requirement is met.

Evidence of Completed Investigation or Prosecution

Applicants seeking to meet the alternative continuous physical presence requirement (less than 3 years while in T-1 nonimmigrant status if the investigation or prosecution is complete) must submit a document signed by the Attorney General, or their designee, stating that an investigation or prosecution occurred and that the investigation or prosecution is complete. The signed document must be from the U.S. Department of Justice (DOJ) or the U.S. Attorney's Office.[21]

USCIS generally defers to DOJ's determination that the investigation or prosecution is complete; however, the letters must state that an investigation or prosecution occurred, and in the opinion of the Attorney General, the investigation or prosecution is complete.[22]

T nonimmigrants who qualified for an age exemption or trauma exception[23] to the cooperation requirement at the T nonimmigrant application stage may nonetheless qualify for early adjustment of status[24] so long as they can establish that an investigation or prosecution occurred, and that such investigation or prosecution is now complete. They must still submit a document signed by the Attorney General, or their designee, stating that an investigation or prosecution occurred and is complete, as discussed above.

2. Good Moral Character

For a T-1 nonimmigrant applicant for adjustment of status to establish that they have been a person of good moral character (GMC) since they were first admitted as a T-1 nonimmigrant and through the time that USCIS completes the adjudication of their application for adjustment, the applicant must provide the following evidence:

- Affidavit attesting to their good moral character; and
- Police clearance letter or a state-issued criminal background check from each locality or state in the United States in which the applicant has resided for 6 months or more since being admitted as a T-1 nonimmigrant.[25]

If police clearances, criminal background checks, or similar reports are not available for some or all locations, the applicant may submit a detailed statement explaining the reasons they could not obtain the clearances and why the absence of a police clearance does not adversely reflect upon their GMC.[26] The applicant may also submit other evidence with their affidavit, including credible evidence of GMC, such as affidavits from responsible persons who can knowledgeably attest to the applicant's GMC.[27]

Criminal History

If a T-1 nonimmigrant applying for adjustment of status has ever been arrested, charged with, or convicted of a crime or offense, the applicant must submit police and court records as outlined in the instructions for Form I-485.

If a T-1 nonimmigrant applying for adjustment has committed acts that would otherwise prevent USCIS from making a finding of GMC, and the acts were caused by or incident to the acts of trafficking, the applicant may submit an affirmative statement or other evidence explaining the relationship between the acts that reflect adversely on their moral character and the acts of trafficking.

Special Considerations due to Age

USCIS generally presumes that an applicant who is under 14 years of age is a person of GMC and is not required to submit evidence of GMC. However, if there is reason to believe that an applicant who is under 14 years of age may lack GMC, USCIS may require the applicant to submit evidence of GMC.[28]

3. Compliance with Reasonable Law Enforcement Requests

To establish their compliance with any reasonable requests for assistance in the investigation or prosecution of acts of trafficking, the T-1 nonimmigrant applicant must submit one of the following types of evidence:

- A statement, letter, or newly signed Declaration for Trafficking Victim (Form I-914, Supplement B) from law enforcement;
- A signed personal statement detailing how the applicant meets the eligibility requirement; or
- Any other documentation that establishes compliance with any reasonable request for assistance since their last admission as a T-1 nonimmigrant.

Alternatively, an applicant may instead submit evidence that they qualify for an age-based exemption or trauma-based exception to the requirement to comply with reasonable requests for assistance from law enforcement, or that they would suffer extreme hardship involving unusual and severe harm if removed from the United States.[29]

Extreme Hardship

A T-1 nonimmigrant applicant for adjustment of status who seeks to establish that they will suffer extreme hardship involving unusual and severe harm if removed from the United States, as an alternative to the reasonable request for assistance requirement, may provide evidence related to traditional extreme hardship factors or factors associated with having been a victim of a severe form of trafficking in persons.[30] Such evidence may include:

- A signed personal statement detailing how the applicant will suffer extreme hardship involving unusual and severe harm if removed from the United States;
- Evidence from relevant country condition reports; and
- Any other public or private sources of information such as letters from service providers, medical professionals, or affidavits of persons with knowledge of the applicant's circumstances.

When the basis for the hardship claim represents a continuation of the hardship claimed in the previously approved application for T nonimmigrant status, the applicant does not need to resubmit the previously submitted documentation. Instead, the applicant may submit evidence demonstrating that the previously established hardship is ongoing.[31] However, USCIS is not bound by its previous hardship determination made on the initial T nonimmigrant application.[32]

Under Age 18 at Time of Victimization

An applicant who is under the age of 18 at the time of victimization[33] does not need to submit evidence to establish compliance with any reasonable request for assistance or that they would suffer extreme hardship upon removal.[34] The applicant instead must submit evidence of their age.

Unable to Cooperate Based on Trauma

An applicant who established they were unable to cooperate with a reasonable request for assistance at the time of adjudication of their application for T-1 nonimmigrant status based on physical or psychological trauma[35] does not have to submit evidence to establish compliance with any reasonable request for assistance or that they would suffer extreme hardship upon removal at the adjustment stage.[36]

The applicant may include an affidavit or personal statement explaining that they were unable to cooperate due to trauma at the time of adjudication of their Application for T Nonimmigrant Status (Form I-914).

Footnotes

[^ 1] See 8 CFR 103.2(b)(1). If any initial evidence is missing, USCIS generally issues a Request for Evidence (RFE) or Notice of Intent to Deny (NOID). For further discussion on USCIS' procedures regarding evidence and decision making, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence [1 USCIS-PM E.6] and Chapter 9, Rendering a Decision [1 USCIS-PM E.9].

[^ 2] The stamp should clearly show the applicant's date, duration, and class of admission.

[^ 3] For further discussion of this requirement, see Part A, Adjustment of Status Policies and Procedures, Chapter 4, Documentation, Section A, Initial Evidence, Subsection 4, Evidence of Admission or Parole [7 USCIS-PM A.4(A)(4)].

[^ 4] For photograph requirements, see Part A, Adjustment of Status Policies and Procedures, Chapter 4, Documentation, Section A, Initial Evidence, Subsection 1, Photographs [7 USCIS-PM A.4(A)(1)].

[^ 5] There are two distinct passport requirements applicable for T nonimmigrant applicants for adjustment of status. The first is found at 8 CFR 245.23(e)(1)(iii), which applies to both principal and derivative T nonimmigrants, and requires submission of all pages of the most recent passport, or an explanation of why the individual does not have a passport. The second is found at 8 CFR 245.23(e)(2)(i), which applies to principal T nonimmigrants only, and is used to evaluate whether the continuous physical presence requirement is met. Under this second passport requirement, the applicant must submit copies of all pages of all passports valid during the required continuous physical presence period, or a valid explanation of why the applicant does not have a passport.

[^ 6] See 8 CFR 245.5. See Part A, Adjustment of Status Policies and Procedures, Chapter 4, Documentation, Section A, Initial Evidence, Subsection 6, Report of Immigration Medical Examination and Vaccination Record (Form I-693) [7 USCIS-PM A.4(A)(6)].

[^ 7] See 8 CFR 245.23(e)(3).

[^ 8] See 8 CFR 245.23(e)(3).

[^ 9] See 8 CFR 245.23(e)(2)(i).

[^ 10] A valid explanation must reasonably describe why the applicant does not have a passport.

[^ 11] See 8 CFR 245.23(e)(2)(i).

[^ 12] See 8 CFR 245.23(e)(2)(i)(a).

[^ 13] See 8 CFR 245.22.

[^ 14] If an applicant is using evidence of their children's school attendance as proof of the applicant's physical presence, the record must make it clear that the applicant was also physically present in the United States. For example, the record should contain evidence that the applicant is the custodial parent, and the documentation indicates that the applicant enrolled their child or children in school. Evidence of the child's attendance alone, without evidence of the applicant's presence, will not suffice.

[^ 15] See 8 CFR 245.22.

[^ 16] See 73 FR 75540, 75543 (PDF) (Dec. 12, 2008) (discussion of evidence of physical presence).

[^ 17] See 8 CFR 245.23(e)(2)(i).

[^ 18] See U.S. Customs and Border Protection's Contact Us webpage for more information.

[^ 19] See INA 245(l)(3)(A).

[^ 20] See INA 245(l)(3)(B).

[^ 21] For more information about requesting a letter, see the Green Card for a Victim of Trafficking (T Nonimmigrant) webpage.

[^ 22] See INA 245(l)(1)(A). See 8 CFR 245.23(a)(4).

[^ 23] See Chapter 2, Eligibility Requirements, Section A, Principal Applicants, Subsection 4, Reasonable Requests for Assistance [7 USCIS-PM J.2(A)(4)].

[^ 24] See 8 CFR 245.23(a)(4) and 8 CFR 245.23(a)(3).

[^ 25] See 8 CFR 245.23(g)(1).

[^ 26] See 8 CFR 245.23(g)(2).

[^ 27] See 8 CFR 245.23(g)(3).

[^ 28] See 8 CFR 245.23(g)(4).

[^ 29] See Chapter 2, Eligibility Requirements, Section A, Principal Applicants, Subsection 4, Reasonable Requests for Assistance [7 USCIS-PM J.2(A)(4)].

[^ 30] For a discussion of the factors, see Volume 3, Humanitarian Protection and Parole, Part B, Victims of Trafficking, Chapter 2, Eligibility Requirements, Section E, Extreme Hardship [3 USCIS-PM B.2(E)].

[^ 31] See 8 CFR 245.23(f)(2).

[^ 32] For additional information about extreme hardship in the context of the T nonimmigrant application, see Volume 3, Humanitarian Protection and Parole, Part B, Victims of Trafficking, Chapter 2, Eligibility Requirements, Section E, Extreme Hardship [3 USCIS-PM B.2(E)].

[^ 33] See INA 245(l)(1)(C)(iii).

[^ 34] See Chapter 2, Eligibility Requirements, Section A, Principal Applicants, Subsection 4, Reasonable Requests for Assistance [7 USCIS-PM J.2(A)(4)].

[^ 35] See 8 CFR 245.23(a)(7)(iv).

[^ 36] See Chapter 2, Eligibility Requirements, Section A, Principal Applicants, Subsection 4, Reasonable Requests for Assistance [7 USCIS-PM J.2(A)(4)].

Chapter 4 - Filing

A. Timing of Filing

Applicants who are applying for adjustment of status based on having been physically present in the United States for a continuous period of at least 3 years since the date of their lawful admission as a T-1 nonimmigrant may not file an Application to Register Permanent Residence or Adjust Status (Form I-485) until they have met the 3-year continuous physical presence requirement, but must file before the expiration of their T nonimmigrant status.[1] USCIS rejects or denies any Form I-485 filed before the principal T nonimmigrant accrues 3 years in T nonimmigrant status.

Applicants who are applying for adjustment of status based on having been physically present in the United States for the duration of the investigation or prosecution of the acts of trafficking (if the duration is less than 3 years), may file Form I-485 any time after the Attorney General has determined that the investigation or prosecution is complete.

A derivative T nonimmigrant may not apply for adjustment of status before the principal T-1 nonimmigrant applicant has applied for adjustment of status. A derivative may only file concurrently with or after the principal has applied for adjustment of status.[2] For ease of processing, derivative T nonimmigrants are encouraged, but not required, to file for adjustment of status concurrently with the principal T-1 nonimmigrant.

B. Extension of Nonimmigrant Status

Upon receipt of a properly filed[3] Form I-485, USCIS issues a receipt notice (Notice of Action, Form I-797) that includes a notice of extension of the applicant's T nonimmigrant status.

If USCIS rejects the application because it was not properly filed in accordance with the form instructions, USCIS sends the applicant a rejection notice, and the applicant's status is not extended. USCIS does not send the applicant a receipt notice.

If the T nonimmigrant properly files the adjustment of status application while still in valid T nonimmigrant status, there is no need to file the Application to Extend/Change Nonimmigrant Status (Form I-539). If a T nonimmigrant does not file an adjustment of status application before their T nonimmigrant status expires, they must file the Form I-539 in order to extend their status.

C. Employment Authorization

Principal T-1 nonimmigrants who timely file a Form I-485 before their T-1 nonimmigrant status expires are authorized to work incident to status[4] while their Form I-485 is pending.

USCIS issues a receipt notice (Form I-797) to applicants who properly file Form I-485, which includes notice of an extension of the applicant's T nonimmigrant status. The Form I-797, Notice of Action, combined with the applicant's Arrival/Departure Record (Form I-94) reflecting the grant of T-1 nonimmigrant status, is acceptable evidence of employment authorization for purposes of Employment Eligibility Verification (Form I-9).[5]

Employment is authorized for 2 years from the expiration date of the applicant's previous period of T nonimmigrant status reflected on Form I-94, or until the date the Form I-485 is denied or withdrawn, whichever is earlier.

T-1 nonimmigrants with a pending Form I-485 may also apply for an Employment Authorization Document (EAD) as evidence of their employment authorization by filing an Application for Employment Authorization (Form I-765). An applicant may file an application for an EAD concurrently with the adjustment of status application or separately. USCIS issues any EAD based on the pending adjustment application, including a renewal, under the (c)(9) eligibility code.

Although T-2, T-3, T-4, T-5, and T-6 derivative nonimmigrants who timely file a Form I-485 before their derivative T nonimmigrant status expires receive an extension of status while their Form I-485 remains pending, they must submit a Form I-765 to request employment authorization and obtain an EAD. Unlike the principal T-1 nonimmigrant, derivative family members

are not employment authorized incident to status and therefore may not use their Form I-797 and Form I-94 as evidence for Form I-9 purposes to show employment authorization.[6]

D. Travel

T nonimmigrants with a pending adjustment of status application who seek to travel outside the United States must obtain an advance parole document from USCIS before departure.[7]

To request an advance parole document, the T nonimmigrant must file an Application for Travel Documents, Parole Documents, and Arrival/Departure Records (Form I-131) in accordance with the form instructions and obtain the advance parole document before departing the United States.[8]

If an applicant fails to obtain an advance parole document before departure, USCIS deems the application for adjustment of status abandoned as of the moment of departure from the United States and denies the application. If the adjustment of status application is denied, the T nonimmigrant is treated as an applicant for admission upon their return.[9] USCIS does not approve an adjustment of status application while a T nonimmigrant is outside the United States.

If a T nonimmigrant applying for adjustment of status is in removal, exclusion, or deportation proceedings, USCIS deems the application for adjustment of status abandoned as of the moment of the applicant's departure from the United States.[10]

Footnotes

[^ 1] See 8 CFR 245.23(a)(4). If an applicant has not accrued 3 years of continuous physical presence before the expiration of their T nonimmigrant status, they should file an Application to Extend/Change Nonimmigrant Status (Form I-539) so that they may continue to accrue physical presence before applying for adjustment of status.

[^ 2] See 8 CFR 245.23(b)(1).

[^ 3] See 8 CFR 103.2(a)(7). Form I-485 is properly filed if it contains a complete, properly executed form, with a valid signature and the required initial evidence, as directed by the form instructions.

[^ 4] See INA 214(o)(7)(C).

[^ 5] See Volume 10, Employment Authorization, Part A, Employment Authorization Policies and Procedures, Chapter 2, Eligibility Requirements, Section A, Authorized to Work for Any Employer Based on Status or Circumstances, Subsection 2, Aliens Who Do Not Need to Apply for Documentation of Employment Authorization [10 USCIS-PM A.2(A)(2)].

[^ 6] See Volume 10, Employment Authorization, Part A, Employment Authorization Policies and Procedures, Chapter 2, Eligibility Requirements, Section C, Aliens Required to Apply for Employment Authorization [10 USCIS-PM A.2(C)].

[^ 7] See 8 CFR 245.23(j) and 8 CFR 245.2(a)(4)(ii)(B).

[^ 8] See 8 CFR 245.23(j) and 8 CFR 245.2(a)(4)(ii)(B).

[^ 9] See 8 CFR 245.23(j)(3) and 8 CFR 245.2(a)(4)(ii)(B).

[^ 10] See 8 CFR 245.23(j)(3) and 8 CFR 245.2(a)(4)(ii)(A).

Chapter 5 - Adjudication

A. Burden and Standard of Proof

The applicant has the burden of establishing eligibility for adjustment of status by a preponderance of the evidence.[1]

B. General

1. Confidentiality Protections

Applicants for adjustment of status based on T nonimmigrant status are entitled to certain confidentiality protections that prohibit DHS from disclosing any information about them to third parties, except in limited circumstances.[2] DHS is also prohibited from using adverse information provided solely by the trafficker in the adjudication of a protected individual's application or petition.[3]

2. Verify Underlying Basis to Adjust Status and Ongoing Eligibility

Officers should review the adjustment application and the underlying approved application for T nonimmigrant status to ensure that the applicant meets the eligibility criteria. In processing T nonimmigrant-based adjustment of status applications, officers follow general guidelines for determining ongoing eligibility for adjustment of status cases.[4]

3. Determine Admissibility and Conduct Security Checks

Officers must confirm that the applicant is admissible to the United States or that any inadmissibility grounds were waived during adjudication of the T nonimmigrant status application. The officer must address any inadmissibility grounds not previously waived before making a final determination on an adjustment application.[5] Inadmissibility grounds that were already waived at the T nonimmigrant status stage are considered waived for purposes of adjustment as a T nonimmigrant and do not require a new waiver on Application for Waiver of Grounds of Inadmissibility (Form I-601).

Officers must ensure that all required security checks are completed and unexpired and that any derogatory information is resolved, as necessary, before adjudicating an adjustment application. Officers must also address any national security concerns that may be present in a case.[6]

4. Interview

USCIS may require T nonimmigrant applicants for adjustment of status to attend an in-person interview if USCIS decides an interview is necessary.[7]

5. Numerical Limitation on Adjustments

Only 5,000 T-1 principal nonimmigrants may adjust status in a given fiscal year.[8] This numerical limitation does not apply to derivative T nonimmigrants who seek to adjust status. The 5,000 cap is an overall cap, and there are no limitations on individual countries.

If USCIS receives additional adjustment applications after the yearly limit is reached, USCIS reviews the applications in the order in which they were received to determine whether the application is approvable but for the numerical cap. Applications determined to be approvable after the numerical cap has been reached are placed on a waiting list. USCIS notifies the applicants in writing of their placement on the waiting list.

Priority on the waiting list is based upon the date on which the application was filed, with the oldest applications receiving the highest priority. At the beginning of the next fiscal year, USCIS approves applications on the waiting list in order of highest priority, so long as the applicant remains admissible and eligible for adjustment of status, and continues to merit a favorable exercise of discretion.

C. Discretionary Analysis

If the applicant has demonstrated that they meet the eligibility requirements, and USCIS has waived any applicable grounds of inadmissibility, the officer must also determine that approval of the application for adjustment of status is warranted as a matter of discretion.[9]

Depending on the nature of an applicant's adverse factors, the applicant may be required to demonstrate that the denial of adjustment of status would result in exceptional and extremely unusual hardship.[10] Moreover, depending on the gravity of the adverse factors, such a showing might still be insufficient.[11]

In general, USCIS does not exercise favorable discretion when an applicant for adjustment of status has an unexecuted exclusion, deportation, or removal order that has not been rescinded or cancelled.

However, because approval of an application for T nonimmigrant status cancels, by operation of law, a previous order of removal, deportation, or exclusion issued by DHS, as of the date of the approval,[12] officers should not consider such cancelled orders an adverse factor in their discretionary analysis.[13] Likewise, if a prior order of removal, deportation, or exclusion issued by an immigration judge or the Board of Immigration Appeals has been reopened and terminated,[14] officers should not consider such cancelled orders as an adverse factor in their discretionary analysis.

D. Decision

1. Approvals

An officer may approve the Application to Register Permanent Residence or Adjust Status (Form I-485) if:

- The adjustment application is properly filed;
- The applicant meets all eligibility requirements;
- USCIS has not yet reached the numerical limit on T-1 adjustments of status for the fiscal year;
- The applicant is admissible to the United States (or has had any grounds of inadmissibility waived as required); and
- The applicant warrants a favorable exercise of discretion.

A derivative T nonimmigrant is eligible for adjustment of status only if the principal T-1 nonimmigrant is also eligible. USCIS cannot approve a derivative's adjustment application if the principal's application for adjustment has not been approved.[15]

When an officer approves a T nonimmigrant's adjustment of status application, the adjustment of status date is the date the adjustment application is approved. USCIS issues the following documents to the applicant upon approval:

- Notice of Action (Form I-797) to communicate approval of the application; and
- Permanent Resident Card (Form I-551), with a validity period of 10 years.

The officer assigns the applicant's code of admission as outlined in the table below:

Codes of Admission for T Nonimmigrant Adjustment

Applicant's Status	Code of Admission	Description
T-1	ST6	Victim of a severe form of trafficking in persons
T-2	ST7	Spouse of ST6
T-3	ST8	Child of ST6
T-4	ST0	Parent of ST6
T-5	ST9	Sibling of ST6
T-6	ST1	Adult or minor child of ST7, ST8, ST0, ST9

Once a T-1 principal nonimmigrant adjusts status to that of a lawful permanent resident, any family members without derivative T nonimmigrant status will be unable to receive T nonimmigrant status based on their relationship to the T-1 principal.

For example, if a family member residing abroad is the beneficiary of an approved derivative T nonimmigrant application and is not initially admitted to the United States as a T nonimmigrant before the T-1 principal nonimmigrant adjusts status, the family member is no longer eligible to be admitted as a T nonimmigrant.

Additionally, unlike U-1 nonimmigrants, there is no process by which a T-1 principal who has adjusted status to that of a lawful permanent resident can apply for their derivative family members to adjust status or receive an immigrant visa if they were not previously granted derivative T nonimmigrant status.[16]

2. Requests for Evidence

USCIS generally issues a Request for Evidence (RFE) or Notice of Intent to Deny (NOID), as appropriate, if the application does not contain sufficient evidence to establish that the applicant has met all requirements or required evidence is missing.[17]

3. Denials and Revocations

Denials

Before denying an application, officers should issue an RFE if more information is needed or a NOID (where appropriate) if a decision to deny an application would be based on information of which the applicant is unaware or could not reasonably be expected to be aware.[18]

If the principal or derivative applicant is ineligible for adjustment of status, the officer denies the application. The officer may also deny the application for discretionary reasons, if applicable.

If the application is denied, USCIS provides written notification of the reasons for denial and notifies the applicant of their appeal rights.[19]

The denial of a principal T nonimmigrant's application for adjustment of status results in denial of the derivative T nonimmigrant's application for adjustment of status, including any adjustment application filed by a derivative after the denial of the principal's application for adjustment of status.[20]

Revocations of Applications for T Nonimmigrant Status

While officers do not re-adjudicate the underlying application during the adjustment of status adjudication, USCIS may consider possible revocation of the approval of the underlying T nonimmigrant status if:

- The record contains new evidence or information that could impact the underlying decision; or
- The officer has identified an error in the approval, or other basis for revocation set forth in 8 CFR 214.213.[21]

If USCIS revokes T nonimmigrant status or denies the adjustment of status application for an individual who was in removal proceedings that were terminated or cancelled, DHS may file a new Notice to Appear.[22]

4. Appeals and Motions to Reopen

An applicant may appeal the denial of an adjustment application based on T nonimmigrant status to the Administrative Appeals Office (AAO).[23] The denial is not final until the time for filing an appeal has passed or the AAO makes a decision on the appeal.[24]

If USCIS denies an Application for Waiver of Grounds of Inadmissibility (Form I-601) associated with a T-based adjustment application, the applicant may also appeal the decision on the Form I-601 to the AAO.

Applicants may also file a motion to reopen[25] or a motion to reconsider[26] for a T-based adjustment application or a Form I-601 that has been denied.[27]

Footnotes

[^ 1] See Part A, Adjustment of Status Policies and Procedures, Chapter 10, Legal Analysis and Use of Discretion, Section A, Burden of Proof and Standard of Proof [7 USCIS-PM A.10(A)].

[^ 2] See 8 U.S.C. 1367(a)(2). Disclosure is permitted to sworn officers and employees of DHS, the U.S. Department of Justice (DOJ), and the U.S. Department of State (DOS) (including any bureau or agency of DHS, DOJ, or DOS) for legitimate department, bureau, or agency purposes, as they are not considered third parties. See 8 U.S.C. 1367(b) for exceptions when disclosure is otherwise permitted.

[^ 3] See 8 U.S.C. 1367(a)(1)(F) and 8 U.S.C. 1367(a)(2). For additional information, see Volume 1, General Policies and Procedures, Part A, Public Services, Chapter 7, Privacy and Confidentiality, Section E, VAWA, T, and U Cases [1 USCIS-PM A.7(E)].

[^ 4] See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section B, Determine Ongoing Eligibility [7 USCIS-PM A.6(B)].

[^ 5] See INA 245(l)(2).

[^ 6] See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section E, Security Checks and National Security Concerns [7 USCIS-PM A.6(E)].

[^ 7] See 8 CFR 245.6.

[^ 8] See 8 CFR 245.23(l).

[^ 9] See 8 CFR 245.23(e)(3). See *Matter of Arai* (PDF), 13 I&N Dec. 494 (BIA 1970). See *Matter of Ortiz-Prieto* (PDF), 11 I&N Dec. 317 (BIA 1965). For additional information on discretionary determinations for adjustment applications, see Part A, Adjustment of Status Policies and Procedures, Chapter 10, Legal Analysis and Use of Discretion [7 USCIS-PM A.10].

[^ 10] See 8 CFR 245.23(e)(3).

[^ 11] See 8 CFR 245.23(e)(3). See *Matter of Jean* (PDF), 23 I&N Dec. 373, 383-84 (A.G. 2002). See *Pimentel v. Mukasey*, 530 F.3d 321 (5th Cir. 2008). See *Mejia v. Gonzales*, 499 F.3d 991 (9th Cir. 2007).

[^ 12] See 8 CFR 214.204(o)(1).

[^ 13] For more guidance relating to discretion, see Part A, Adjustment of Status Policies and Procedures, Chapter 10, Legal Analysis and Use of Discretion, Section B, Adjustment of Status Applications Involving Discretion [7 USCIS-PM A.10(B)] and Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis [1 USCIS-PM E.8].

[^ 14] See 8 CFR 214.204(o)(2).

[^ 15] See 8 CFR 245.23(h).

[^ 16] T-1 principals who have adjusted status may file immigrant visa petitions for certain eligible family members through the regular immigrant visa petition process. See INA 203 and INA 204.

[^ 17] See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 18] See 8 CFR 103.2(b)(16)(i).

[^ 19] See 8 CFR 245.23(i). For a discussion of procedures used when denying an adjustment of status application, see Part A, Adjustment of Status Policies and Procedures, Chapter 11, Decision Procedures, Section C, Denials [7 USCIS-PM A.11(C)].

[^ 20] See 8 CFR 245.23(i).

[^ 21] See 8 CFR 214.213(b). For more information regarding revocation of T nonimmigrant status, see Volume 3, Humanitarian Protection and Parole, Part B, Victims of Trafficking, Chapter 13, Revocation of Status [3 USCIS-PM B.13].

[^ 22] See INA 239.

[^ 23] See 8 CFR 103.3(a).

[^ 24] See 8 CFR 214.204(q).

[^ 25] See 8 CFR 103.5.

[^ 26] See 8 CFR 103.5.

[^ 27] The applicant may appeal the denial to the AAO or may file a motion to reopen or reconsider by filing a Notice of Appeal or Motion (Form I-290B).

Part K - Crime Victim-Based Adjustment

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures.

See more

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures. We are working quickly to update and incorporate all of the AFM content into the USCIS Policy Manual, the agency's centralized online repository for immigration policies. Until then, we have moved any remaining AFM content to its corresponding Policy Manual Part. To the extent that a provision in the Policy Manual conflicts with remaining AFM content or Policy Memoranda, the updated information in the Policy Manual prevails. If you have questions or concerns about any discrepancies among these resources, contact PolicyFeedback@uscis.dhs.gov.

AFM Chapter 23 - Adjustment of Status to Lawful Permanent Resident (External)

Part L - Refugee Adjustment

Chapter 1 - Purpose and Background

A. Purpose

USCIS seeks to:

- Resolve the refugee's status after admission by ultimately determining whether the refugee is admissible to the United States as an immigrant; and
- Provide qualified refugees a pathway to permanent residence as persons of special humanitarian concern to the United States.

B. Background

Before the Refugee Act of 1980, refugee admission policy was reactive and piecemeal as it grew in response to humanitarian crises and ethnic conflicts. The result was an assortment of laws and regulations that classified persons as refugees, conditional entrants, parolees, pre-parolees, escapees, evacuees, or asylum grantees. In many cases, the long-term resolution of these classifications was unclear. The Refugee Act of 1980 addressed these issues by providing a systematic procedure for the admission and permanent resettlement of refugees of special humanitarian concern to the United States.

Prior to the passage of the Refugee Act, a refugee in the United States had to wait two years to apply for adjustment of status. The refugee also had to show that he or she had fled (or stayed away from) any communist-dominated country or country within the Middle East and was unwilling or unable to return due to fear of persecution.

Although the refugee was not required to show that he or she continued to meet the definition of a refugee, he or she adjusted status under section 245 of the Immigration and Nationality Act (INA), meaning that all of the inadmissibility grounds and bars to adjustment applied. The Refugee Act established, among other things, a uniform basis for permanent resettlement by amending the INA with the creation of section 209.

Refugees are now required to apply to adjust status one year after being admitted as a refugee in order for USCIS to determine their admissibility to the United States as an immigrant.[1] Recognizing the unique and tenuous position of this population, Congress determined that certain grounds of inadmissibility would not apply at time of adjustment, while allowing for the possible waiver of other grounds.

C. Legal Authorities

- INA 209(a); 8 CFR 209.1 – Adjustment of status of refugees
- Pub. L. 96-212 (PDF) – Refugee Act of 1980
- INA 101(a)(42) – Definition of "refugee"

Footnote

[^ 1] See INA 209.

Chapter 2 - Eligibility Requirements

By applying for adjustment of status, refugees are considered to be applying for inspection and admission to the United States as an immigrant. A refugee may adjust status to a lawful permanent resident if the refugee meets the following four requirements:

- Admitted as a refugee under INA 207;
- Physically present in the United States as a refugee for at least 1 year;
- Refugee status has not been terminated; and
- Permanent resident status has not already been acquired in the United States.

Applicants who fail to meet any of these requirements are statutorily ineligible for adjustment of status as a refugee.

A. Admitted as a Refugee under INA 207

Only applicants classified as refugees are eligible to adjust status as a refugee. Aliens are generally classified as refugees through an approved Registration for Classification as Refugee (Form I-590), or an approved Asylee/Refugee Relative Petition (Form I-730) filed by a principal refugee.

Refugees who are admitted to the United States through an approved Form I-590 are granted refugee status on the date they are admitted. Derivative refugees already in the United States when their relative petition (Form I-730) is approved are granted refugee status on the date the relative petition is approved. Derivative refugees outside the United States when their relative petition is approved are granted refugee status on the date they are admitted to the United States.

Immigrants Often Mistaken as Refugees:

Several classifications of immigrants are often mistaken for refugees. Many of these aliens apply for adjustment of status as a refugee because they are not aware of the difference between their status and refugee status and may genuinely think they are refugees. These applicants are not eligible for adjustment of status under the refugee adjustment of status provisions. The most commonly encountered non-refugees are:

Asylees

Asylum may be granted to persons who are already in the United States and meet the definition of a refugee. Asylees are similar to refugees in many ways and in some cases may be confused with refugees. However, asylees gain status through either an Application for Asylum and for Withholding of Removal (Form I-589) approved by an Asylum Office, Immigration Judge or the Board of Immigration Appeals, or by obtaining a visa through an approved relative petition for derivative asylees not included on the original asylum application. Asylees also may apply for adjustment of status under INA 209, but through a process separate from the refugee adjustment process.[1]

Lautenberg Parolees

As part of a program under the Lautenberg Amendment first introduced in 1990, certain aliens from the former Soviet Union found to be ineligible for refugee status and whose applications are denied can be offered parole into the United States. These persons include, but are not necessarily limited to: Jews, Evangelical Christians, and Ukrainian Christians of the Orthodox and Roman Catholic denominations. Prior to mid-1994, Lautenberg parolees also included certain Vietnamese, Cambodians, and Laotians. Lautenberg parolees will usually have a denied Form I-590 and a travel letter, or an Arrival/Departure Record (Form I-94)showing that they were paroled into the United States. Lautenberg parolees may adjust status under Section 599E of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990.[2]

Cuban Entrants

Since 1959, thousands of Cuban nationals have been paroled or admitted into the United States, many for humanitarian reasons but not as refugees. Although Cubans from the port of Mariel, Cuba, entered the United States shortly after the enactment of the Refugee Act of 1980 and may have documentation that seems to indicate refugee status, they do not adjust status as refugees. Such persons who have been physically present in the United States for 1 year can adjust status under the Cuban Adjustment Act of 1966.

Indochinese Parolees

Throughout the 1980s and 1990s, thousands of citizens of Vietnam, Cambodia, and Laos were paroled into the United States under the Orderly Departure Program. Those who were paroled into the United States before October 1, 1997 and who were in the United States on that day may adjust status under Section 586 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 2001.[3]

Humanitarian Parolees

Persons throughout the world who are facing a humanitarian crisis may be paroled into the United States. Sometimes these are extended family members of refugees or asylees who cannot be approved on a relative petition. They may be similar to Lautenberg parolees in that they do not qualify for refugee status but are facing some type of hardship. These aliens generally have no means to adjust status based on their parole.

Illegal Entrants

Some illegal entrants may consider themselves to be refugees because they are fleeing someone or some place. They may have applied for asylum status and been denied, entered the United States without inspection or overstayed their nonimmigrant visa.

Iraqi and Afghan Translators

While some Iraqi and Afghan nationals are admitted as refugees, others may be admitted into the United States based on their service to the United States Armed Forces as a translator or interpreter (SI-1 classification). These aliens are not refugees. The holder of a SI-1 classification will have an approved Petition for Amerasian, Widow(er), Or Special Immigrant (Form I-360) in order to apply for adjustment of status. Iraqi nationals and citizens with an approved Form I-360 do not adjust status as a refugee but rather as employment-based 4th preference special immigrants.

Iraqi Employees Who Worked On or Behalf of the U.S. Government

Section 1244 of the National Defense Authorization Act for Fiscal Year 2008[4] authorizes special immigrant status (SQ-1 classification) for Iraqi nationals who worked for or on behalf of the U.S. government in Iraq on or after March 20, 2003 to be admitted to the United States or adjust to immigrant status. These aliens are not refugees. The holder of a SQ-1 classification must have an approved Form I-360 in order to apply for adjustment of status. Iraqi nationals and citizens with an approved Form I-360 do not adjust status as a refugee but rather as employment-based 4th preference special immigrants.

Afghan Allies

The Afghan Allies Protection Act of 2009 authorizes special immigrant status (SQ-1 classification) for Afghan nationals who worked for or on behalf of the U.S. government to be admitted to the United States or adjust to immigrant status. These aliens are not refugees. The holder of the SQ-1 classification must have an approved Form I-360 in order to apply for adjustment of status. Afghan nationals and citizens with an approved Form I-360 do not adjust status as a refugee but rather as employment-based 4th preference special immigrants.

Aliens Erroneously Admitted to the United States as Refugees

Sometimes an alien may be erroneously admitted as a refugee as indicated on their admission document (Form I-94). This is most common with derivative asylees, humanitarian parolees, and sometimes Lautenberg parolees. The fact that a person was admitted erroneously as a refugee does not make that person eligible to adjust status under the refugee adjustment of status provisions.[5] As is the case in all adjustment of status applications, an officer must determine if the person was indeed admitted under the proper classification prior to making a decision on the adjustment application.[6]

B. Physical Presence in the United States for at Least 1 Year

Refugees are required to have 1 year of physical presence in the United States at time of adjudication of the adjustment of status application.[7] Principal and derivative refugees start accruing physical presence on the date they are admitted as refugees to the United States. For derivative refugees who gained derivative refugee status through an approved Form I-730 and who were in the United States when the petition was approved, the 1 year period begins on the date the relative petition was approved.

Because the requirement is 1 year of physical presence and not just 1 year from the date of admission as a refugee, only time spent in the United States counts toward this requirement. Refugees who travel outside the United States within their first year of residence as a refugee will not meet this requirement until the cumulative amount of time spent in the United States is at least 1 year.

The officer reviews the refugee's Application to Register Permanent Residence or Adjust Status (Form I-485), the record, and USCIS systems to determine the amount of time the refugee has been present in the United States since the date of the refugee's admission as a refugee (or the date of approval as a derivative refugee for Form I-730 beneficiaries processed in the United States). The officer may request additional information from the refugee to demonstrate physical presence in the United States if the officer is unable to determine it based on a review of the record and USCIS systems.[8]

C. Refugee Status Has Not Been Terminated

An applicant whose refugee status has been terminated is not eligible to adjust status. Evidence of termination of status in the applicant's A-file will generally include a notice of termination of status, a Notice To Appear, and EOIR court records. Other evidence may include a notice of intent to terminate status, interview notes, and assessment notes.[9]

D. Permanent Resident Status Has Not Already Been Acquired in the United States

Refugees who have already acquired permanent resident status are not eligible to adjust status. Evidence of permanent resident status will most often be an approved adjustment application already in the applicant's A-file.

Refugees who sought adjustment of status prior to July 1998 applied through the local field office. These refugees will usually have only an approved Memorandum of Creation of Record of Lawful Permanent Residence (Form I-181) in their A-file as evidence of their adjustment of status. Refugees who adjusted status between 1998 and 2005 will usually have both an approved adjustment of status application (Form I-485) and an approved Form I-181 in their A-file.

Refugees who adjusted status from 2005 to the present will usually have only an approved adjustment of status application in their A-file. The Form I-181 is no longer in use.

E. Others Allowed to Apply for Adjustment under INA 209 by Statute or Regulation

Historically, USCIS has granted other aliens' status that is similar to the current refugee and asylee categories. Although most of these persons have already applied for adjustment of status due to the passage of time, an officer may occasionally encounter such cases. These applicants are eligible to apply for adjustment of status under INA 209 once certain conditions have been met.

1. Pre-April 1, 1980 Conditional Entrants

Prior to April 1, 1980, the Immigration and Nationality Act (INA) allowed persons from communist or communist-dominated countries and persons from countries in the general area of the Middle East to be admitted as "conditional entrants" under what was then known as the seventh preference category. Conditional entrants were allowed to become permanent residents after a specified period (initially 2 years, later reduced to 1 year) in the United States.

The conditional entrant provisions were generally repealed by the Refugee Act of 1980, except that the repeal did not apply to persons who were granted conditional entry prior to April 1, 1980. Accordingly, any conditional entrant encountered today who is seeking LPR status should be treated in the same fashion as a refugee seeking permanent residence, except that the correct adjustment code is "P7-5."

2. Persons Paroled as Refugees Prior to April 1, 1980

The Refugee Act also allowed aliens paroled into the United States as refugees prior to April 1, 1980 to adjust their status if they were eligible for the benefits of Section 5 of Pub. L. 95-412 (PDF).[10] The law states in part that "Notwithstanding any other provision of law, any refugee, not otherwise eligible for retroactive adjustment of status, who was or is paroled into the United States by the Attorney General pursuant to INA 212(d)(5) before April 1, 1980, shall have his status adjusted pursuant to the provisions of INA 203(g) and (h) of the Act."

Therefore, a person paroled into the United States as a refugee prior to April 1, 1980, may have his or her status adjusted to lawful permanent resident, if otherwise eligible.

3. Persons Paroled as Refugees Between April 1, 1980 and May 18, 1980

Some aliens continued to be paroled into the United States for a few weeks after April 1, 1980. They are to be treated the same as persons admitted under the former seventh preference (conditional entrant) category.[11] Even though conditional entrance or parole of refugees was not permitted after passage of the Refugee Act, legacy Immigration and Naturalization Service (INS) may have done so in error. Since the adjustment of status of such a person is not covered by the INA or current regulations, the officer should contact the International and Refugee Affairs Division at the Refugee, Asylum, and International Operations Directorate (RAIO) for further guidance.

F. Special Considerations for Refugee Adjustment of Status Applicants

Certain special considerations may apply to refugees seeking adjustment of status:

- Refugees do not have to continue to meet the definition of “refugee” within the meaning of the INA after admission and may still adjust status as a refugee.
- Derivative refugees accompanying or following to join the principal refugee do not have to wait until the principal refugee has adjusted status to adjust their own status. They are considered refugees in their own right once admitted to the United States.
- Derivative refugees do not have to maintain their familial relationship to the principal refugee after admission to the United States to be eligible to adjust status.
- There is no bar to adjustment of status for refugees who have firmly resettled in a foreign country subsequent to being admitted to the United States as refugees.
- There is no bar to adjustment of status for a refugee who previously had the status of an exchange visitor (J-1 and J-2 nonimmigrant),[12] and who is subject to the 2-year foreign residence requirement under INA 212(e), even if the applicant never met the foreign residence requirement. The applicant is not required to show proof of compliance with or obtain a waiver of the foreign residence requirement if applying to adjust status under INA 209.[13]

1. Relationship Issues

While reviewing a case, an officer may become aware that, at the time a derivative refugee was admitted to the United States, he or she did not possess the requisite relationship to the principal refugee and as such was not entitled to derivative refugee status at time of admission. In certain instances, these applicants may be found inadmissible for fraud or misrepresentation because they were questioned about their marital status and familial relationships during the Form I-590 interview or interview for Form I-730 derivative refugee status, or at the port of entry.

Although the derivative refugees in each of the following examples have been admitted to the United States as refugees, they were not eligible for that status when they were admitted because their status was dependent upon their relationship to the principal, and the relationship did not exist or no longer existed at the time of admission.[14] The most common scenarios are:

Pre-Departure Marriages

It is not uncommon for some derivative refugee children to marry prior to admission as a refugee to the United States. The marriage severs their familial relationship to the principal refugee. In February 2003, USCIS officers began requiring derivative children of the principal refugee (RE-3 classification) to sign an RE-3 Notice on Pre-Departure Marriage and Declaration statement.

By signing the notice, RE-3 derivatives acknowledge that they will be ineligible for admission as a derivative refugee if they marry prior to being admitted to the United States. Refugee derivatives who sign this notice and who marry prior to being admitted to the United States as a refugee may also be found inadmissible for fraud or misrepresentation should they present themselves as unmarried children. A pre-departure change to marital status will render the applicant ineligible for admission as a derivative refugee regardless of whether the alien signs an RE-3 Notice.

Pre-Departure Divorces

A derivative spouse (RE-2 classification) of a refugee who divorces the principal refugee prior to seeking admission as a refugee to the United States is ineligible for admission as a derivative refugee. Officers should note that if USCIS did not ask the derivative spouse about their marital status or eligibility at the time of admission, the derivative spouse may not have committed an act of fraud or misrepresentation.

Non-Existent or Fraudulent Relationships

Some derivative refugees may be untruthful on the refugee application about their marital status. A derivative spouse (RE-2) may not have been legally married to the principal applicant when the refugee application was filed, although they may have publicly presented themselves as husband and wife. A derivative child (RE-3) may have been married when the application was filed but claimed to be single. Additionally, applicants who have no relationship to the principal could claim a relationship as either a spouse or child, and likewise the principal may claim a relationship to them in order to gain access to the U.S. Refugee Admissions Program.

In all three scenarios, refugee adjustment allows most grounds of inadmissibility to be waived for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. Many applicants who may be found inadmissible due to relationship fraud or ineligibility due to not having the requisite relationship at time of admission may be deserving of a waiver of that ground, especially those who have or had a legitimate familial relationship or common law relationship to the principal. An officer should use their discretion when granting these waivers and should consider the totality of the circumstances, including whether or not the derivative has had an actual relationship to the principal.

2. Child Status Protection Act Provisions

As of August 6, 2002, any derivative refugee child who had a pending relative petition (Form I-730), adjustment application (Form I-485), or refugee application (Form I-590) on or after that date has had his or her age “frozen” as of the date the petition or application was filed. This was to allow the derivative refugee’s continued classification as a child for purposes of both refugee classification and adjustment of status. Any person who aged out prior to that date is not eligible for continuing classification as a child unless one of these applications was pending on August 6, 2002.

An unmarried child who is under 21 on the day the principal refugee files the refugee application will remain eligible to be classified as a child as long as he or she was listed on the parent’s refugee application prior to adjudication. In determining continuing eligibility as a derivative refugee child for adjustment, the officer need only verify that the derivative applicant’s age was under 21 at the time the refugee application or the relative petition was filed, whichever form first listed the child.

Footnotes

[^ 1] See Part M, Asylee Adjustment [7 USCIS-PM M] for details on adjustment of status for asylees.

[^ 2] See Pub. L. 101-167 (PDF), 103 Stat. 1195, 1263 (November 21, 1989).

[^ 3] See Pub. L. 106-429 (PDF), 114 Stat. 1900, 1900A-57 (November 6, 2000).

[^ 4] See Pub. L. 110-181 (PDF), 122 Stat. 3, 396 (January 28, 2008).

[^ 5] See INA 209(a).

[^ 6] See *Matter of Khan (PDF)*, 14 I&N Dec. 122 (BIA 1972). This applies in general to any immigrant who was admitted under the wrong status or was ineligible for admission under that status.

[^ 7] Because USCIS' practice and policy has varied with regard to whether the 1 year of physical presence was required at the time of filing or at the time of adjudication of the application, USCIS considers a refugee who was adjusted to lawful permanent residence despite not having accrued 1 year of physical presence at the time of filing their application for adjustment to have been lawfully admitted for permanent residence if the applicant had accrued 1 year of physical presence by the time of adjudication and the admission was otherwise lawful.

[^ 8] For more information, see Chapter 4, Documentation and Evidence, Section A, Required Documentation and Evidence [7 USCIS-PM L.4(A)].

[^ 9] For more information, see Chapter 6, Termination of Status and Notice to Appear Considerations [7 USCIS-PM L.6].

[^ 10] See 92 Stat. 907, 909 (October 5, 1978).

[^ 11] See 8 CFR 209.1(a)(2).

[^ 12] See INA 101(a)(15)(J).

[^ 13] The foreign residency exemption in 8 CFR 209.2(b) extends to refugee and asylum-based adjustment of status. The Immigration Benefits Business Transformation, Increment I Final Rule revised 8 CFR 209.2(b) by adding the language "under this part" to exempt both asylee and refugee adjustment applicants from the 2-year foreign residence requirement in INA 212(e) if they were previously nonimmigrant exchange visitors (J-nonimmigrants) and therefore subject to this requirement. The final rule also added 8 CFR 209.1(f) as a waiver of inadmissibility provision for refugee adjustment applications, matching the existing provision for asylee adjustment applications at 8 CFR 209.2(b). See 76 FR 53764, 53785 (PDF) (Aug. 29, 2011).

[^ 14] See *Matter of Khan (PDF)*, 14 I&N Dec. 122 (BIA 1972).

Chapter 3 - Admissibility and Waiver Requirements

Refugees must be admissible to the United States as an immigrant at the time adjustment of status is granted. However, an officer must remember that applicants who were admitted to the United States as refugees were subject to grounds of inadmissibility at the time of admission.

Therefore, any information contained in the A-file known to the refugee officer, consular officer, or inspections officer at the time of admission is generally not used to find the refugee inadmissible at the time of adjustment, unless the law or interpretation of the law has changed subsequent to admission, or a clear error was made by the original adjudicating officer.[1]

An officer makes a determination regarding the refugee's admissibility at the time of admission and the officer adjudicating the adjustment of status application should give deference to this prior determination.

A. Exemptions

The following grounds of inadmissibility do not apply to refugees adjusting status:

- Public Charge – INA 212(a)(4)
- Labor Certification and Qualifications for Certain Immigrants – INA 212(a)(5)
- Documentation Requirements for Immigrants – INA 212(a)(7)(A)

B. Applicable Inadmissibility Grounds

The following grounds of inadmissibility apply to refugees adjusting status:

- Health-Related – INA 212(a)(1)
- Crime-Related – INA 212(a)(2)
- Security-Related – INA 212(a)(3)
- Illegal Entrants and Immigration Violators – INA 212(a)(6)
- Ineligibility for Citizenship – INA 212(a)(8)
- Aliens Previously Removed – INA 212(a)(9)
- Practicing Polygamists, Guardians Required to Accompany Helpless Persons, International Child Abductors, Unlawful Voters, and Former Citizens who Renounced Citizenship to Avoid Taxation – INA 212(a)(10)

Health-Related Considerations

Generally, if an officer waives the grounds of inadmissibility at the time of the refugee admission, the waiver carries forward to the adjustment application. A notable exception would be for waivers of medical inadmissibility for Class A medical conditions. In these instances, the waiver does not carry through to adjustment and the applicant must submit to a new medical

exam to determine whether the Class A medical condition has been resolved.

C. Inadmissibility Grounds that May Not Be Waived

While waivers are generally available for most of the grounds listed in Section B, Applicable Inadmissibility Grounds,[2] the following grounds of inadmissibility cannot be waived:

- Controlled Substance Traffickers – INA 212(a)(2)(C)
- Espionage; Sabotage; Illegal Export of Goods, Technology, or Sensitive Information; Unlawful Overthrow or Opposition to U.S. Government – INA 212(a)(3)(A)
- Terrorist Activities – INA 212(a)(3)(B)
- Adverse Foreign Policy Impact – INA 212(a)(3)(C)
- Participants in Nazi Persecutions or Genocide – INA 212(a)(3)(E)

An officer should deny the adjustment application if no waiver is available due to the type of inadmissibility found.

National Security Issues

In the event that an adjudicating officer identifies at any stage one or more national security indicator(s) or concerns unknown at the time of the refugee grant, an officer should refer to USCIS guidance on disposition of national security cases. An officer should also follow current USCIS instructions on cases that involve Terrorist Related Inadmissibility Ground (TRIG) issues for disposition of the case or see their supervisor for questions on material support to terrorism.

Unless sent specifically to a field office for resolution of a TRIG issue, an officer should return any refugee adjustment case with unresolved TRIG issues to the Nebraska Service Center for resolution.

D. Waivers[3]

All grounds of inadmissibility listed at Section B, Applicable Inadmissibility Grounds[4] are subject to waiver, if the applicant can establish he or she qualifies for a waiver. An officer may have waived a refugee adjustment applicant's ground of inadmissibility for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. This is a more generous waiver provision than what is used for general adjustments, which typically require an applicant to prove extreme hardship.

In adjudicating a discretionary waiver application for refugee adjustment, an officer must balance the humanitarian, family unity, or public interest considerations with the seriousness of the offense that rendered the applicant inadmissible. In making this determination, an officer should recognize that the applicant has already established either past persecution or a well-founded fear of future persecution, which is an extremely strong positive discretionary factor. Therefore, unless there are even stronger negative factors that outweigh the positive ones, the waiver application should generally be approved.

Often, waiver applications for refugees are handled overseas before the applicant is approved for the refugee classification. However, if a ground of inadmissibility arose after the applicant's approval for the refugee classification, or if it was not known to the officer who approved the refugee classification, the applicant may seek a waiver. The officer should adjudicate the waiver as a part of the refugee adjustment process. The applicant generally seeks a waiver through the filing of an Application by Refugee for Waiver of Grounds of Excludability (Form I-602).

When an officer determines that an applicant is inadmissible and a waiver is available, an officer may grant the waiver without requiring submission of a Form I-602, if:

- The applicant is inadmissible under a ground of inadmissibility that may be waived (other than health related grounds);[5]
- USCIS records and other information available to an officer contain sufficient information to assess eligibility for a waiver;
- There is no evidence to suggest that negative factors would adversely impact the exercise of discretion; and
- It is appropriate to grant a waiver.

If an officer determines that the applicant does not need to file a Form I-602, the officer should indicate that they have waived the inadmissibility by annotating the adjustment application to reflect this action. An officer may use a written annotation, stamp, or pre-printed label to indicate the specific inadmissibility ground that they are waiving.

The officer's signature and approval stamp on the adjustment application also serves as the signature and approval of the waiver. Waivers granted because the vaccinations were not medically appropriate do not require a waiver annotation on the adjustment application or the medical record on Report of Immigration Medical Examination and Vaccination Record (Form I-693).[6] All others do require an annotation.

In cases that require a Form I-602, there is no need for a separate waiver approval notice because the approval of the adjustment application indicates the approval of the waiver application.

If the applicant is statutorily ineligible for a waiver (that is, the applicant is inadmissible under a ground of inadmissibility that cannot be waived) or if there are sufficient negative factors to warrant a discretionary denial of the waiver application, the officer denies the waiver application and specifies the reason(s) for denying the waiver in the written denial notice of the adjustment application.

While there is no appeal from the denial of the Form I-602, the applicant is notified in the denial notice of the right to renew the adjustment application before an immigration judge during removal proceedings.[7] The applicant has the opportunity to again seek a waiver of inadmissibility in conjunction with that application.

Footnotes

[^ 1] For example, a ground of inadmissibility was waived for which no waiver was available, or a national security issue was not properly addressed.

[^ 2] See Section B, Applicable Inadmissibility Grounds [7 USCIS-PM L.3(B)].

[^ 3] For more information on waiver policies and procedures, see Volume 9, Waivers and Other Forms of Relief, Part A, Waiver Policies and Procedures [9 USCIS-PM A].

[^ 4] See Section B, Applicable Inadmissibility Grounds [7 USCIS-PM L.3(B)].

[^ 5] See Health Related Considerations in Section B, Applicable Inadmissibility Grounds [7 USCIS-PM L.3(B)].

[^ 6] See INA 212(g)(2)(B).

[^ 7] See 8 CFR 209.1(e).

Chapter 4 - Documentation and Evidence

The officer should review the following documentation or evidence to determine the refugee's eligibility for adjustment:

A. Required Documentation and Evidence

- Application to Register Permanent Residence or Adjust Status (Form I-485)

Each applicant must file a separate application regardless of whether he or she is a principal or a derivative refugee. There is no fee required for refugees to file this form.

The officer must check the Form I-485 for additional aliases requiring a systems query.

- Proof of refugee status

An officer must review the contents of the A-file for proof of refugee status. The A-file should contain an approved Registration for Classification as Refugee (Form I-590) with proper endorsement, or an approved Refugee/Asylee Relative Petition (Form I-730). Although applicants may submit an Arrival/Departure Record (Form I-94), or a notice showing an approved relative petition with their application, these documents must always be cross-checked with the evidence in the A-file to confirm the applicant's refugee status.

- Evidence of 1-year physical presence in the United States

An officer can generally verify physical presence by reviewing the date of last arrival, place of last entry into the United States, and address history on the Form I-485, and by the admission information within USCIS' systems.

In addition, the officer should review the date of admission on either a Form I-94 or Form I-590, travel documents, and government systems to determine if the refugee meets the physical presence requirement. If the evidence shows that the applicant has not been physically present for a cumulative total period of at least 1 year in the United States, the officer may request additional information to determine physical presence. This may include, but is not limited to, pay stubs or employment records, school or medical records, rental and utility bill receipts, or any other documentation that supports proof of physical presence.

- Two (2) passport-style photos, taken no earlier than 30 days prior to filing

- Report of Immigration Medical Examination and Vaccination Record (Form I-693)

Typically a complete medical examination record is not needed by refugees. A refugee who already received a medical examination prior to admission does not need to repeat the entire medical examination unless the original examination revealed a Class A medical condition. However, the refugee must establish compliance with the vaccination requirements at the time of adjustment of status. The refugee must submit the vaccination record portion completed by a designated civil surgeon. State and local health departments may qualify for a blanket designation as civil surgeons for the purpose of completing the vaccination record for refugees applying for adjustment of status.[1]

- Certified copies of arrest/court records (if applicable)

An applicant must submit an original official statement by the arresting agency or a certified court order for all arrests, detentions or convictions, regardless of whether the arrest, detention or conviction occurred in the United States or elsewhere in the world.

- Application by Refugee for Waiver of Grounds of Excludability (Form I-602) (if applicable)

B. Supplemental Documentation

Supplemental documentation is often submitted by the applicant but is not required. This may include the following:

- Arrival/Departure Document (Form I-94), with appropriate endorsement
- Birth certificate, when obtainable

See the Department of State Reciprocity Tables for information on the availability of identity documents in particular countries and during specific time periods. There may be other instances in which a birth certificate is unobtainable because of country conditions or personal circumstances.

In these instances, affidavits may be submitted to establish the applicant's identity. An officer may also review the A-file to check for a birth certificate that the applicant may have submitted with the refugee application or for other evidence submitted at the time of the interview to establish the applicant's identity.

- Copy of passport(s), when obtainable

In most instances a refugee will be unable to produce of copy of his or her passport. There may be other instances in which a passport is unobtainable due to country conditions, personal circumstances, or the fact that the applicant may have never possessed a passport. In these cases, a copy of a passport is not required and an officer may use evidence in the A-file to verify the applicant's identity.

An officer should review any supplemental documentation submitted to ensure it is consistent with the documentation contained in the A-file. Since identity is already established during the adjudication of the refugee application, a birth certificate or passport is not required at the time of adjustment.

Nevertheless, if the applicant submits any of these documents, the officer must address and resolve any discrepancies at the time of adjudication. In all cases, an officer should give considerable weight to the documentation contained in the refugee application or with the relative petition, as this information was previously vetted at the time of the refugee status

interview or relative petition approval.

C. Documentation Already Contained in the A-File

The refugee application, (generally referred to as the “refugee travel packet”), should already be included in the applicant’s A-file, including all of the forms, evidence, and officer notes that were part of the original application for refugee status. The most important document for an officer to review is either the refugee application or the relative petition, which provides proof of status and establishes identity (with attached photo) as well as citizenship, since most refugees will not have a birth certificate or a passport.

Another important document in the refugee travel packet is the Medical Examination of Applicants for United States Visas (Form DS-2054, formerly numbered OF-157). An officer does not need to be aware of the overseas medical examination requirements, but should realize that the overseas medical examination requirements are not the same as the requirements for medical examinations performed in the United States. Refugees are generally not required to complete a new medical exam in the United States if a medical exam was performed overseas and there were no Class A conditions.

D. Unavailable or Missing Documentation

When a refugee flees the country of persecution, he or she may not be able to obtain any documentation issued by a civil authority as proof of identity or of a familial relationship. At the time of the refugee status interview, an officer reviews many documents and affidavits and solicits testimony when seeking to establish a refugee’s personal and family identity. Any available documents submitted at the time of the refugee status interview should be contained within the A-file.

An officer may rely on the documents contained in the original refugee travel packet to verify identity at the time of adjustment. While it is not necessary to request the applicant’s birth certificate or passport as proof of identity, an officer should review any documentation establishing identity submitted with the adjustment application.

Additionally, an officer should compare photos submitted with the application to the photos in the refugee packet. If an officer is unable to establish an applicant’s identity due to discrepancies between the documentation the applicant submitted and information contained in the original refugee packet, then the officer should forward the file to the field office with jurisdiction over the case for interview and resolution.

Footnote

[^ 1] For more information, see Volume 8, Admissibility, Part C, Civil Surgeon Designation and Revocation, Chapter 3, Blanket Civil Surgeon Designation, Section A, Blanket Designation of State and Local Health Departments [8 USCIS-PM C.3(A)].

Chapter 5 - Adjudication Procedures

A. Record of Proceedings Review and Underlying Basis

The officer should place all documents in the A-file according to the established record of proceedings order, including the filing of any documents the alien submitted in response to a Request for Evidence (RFE).

When the officer reviews the application for adjustment of status of a refugee, the officer should also review the refugee travel packet to verify the alien's identity, refugee status and admission, completion of the overseas medical exam and to ensure consistency with the adjustment application. There are several forms that may be found in the A-file that may be of particular importance:

- Registration for Classification as Refugee (Form I-590)

This form documents the alien's identity, marital status, number of children, military service, organizational memberships and any violations of law. A photo of the alien should be attached to the upper left hand corner. In addition, the Port of Admission Block at the bottom of the second page should be stamped. This indicates the alien's particular port of entry and date of admission.

- Sworn Statement of Refugee Applying for Admission into the United States (G-646)

This form documents the alien's testimony regarding possible persecutory acts and the inadmissibility provisions that pertain to refugees.

- Refugee Assessment

This document, completed by a USCIS officer, contains the testimony given by the principal refugee to establish his or her claim for refugee status during an interview with a USCIS officer and includes the officer’s legal analysis including an assessment of the alien's eligibility under the refugee definition, admissibility, and credibility.

- Case History/Persecution Story

This document details the key material aspects of the principal refugee’s life from birth up to the time of refugee processing. It is completed by Resettlement Support Center (RSC) staff under cooperative agreement with the U.S. Department of State (DOS).

- Family Tree

This document contains the biographic information and family relationships for the principal refugee and each alien included in the case of the principal refugee. The family tree is completed by RSC staff under cooperative agreement with the DOS.

- Referrals from the Office of the United Nations High Commissioner for Refugees (UNHCR), the U.S. Embassy, or Nongovernmental Organization (NGO)

These documents contain biographical information, family relationships, organizational memberships, political/social/religious affiliations, any detentions or imprisonments, the refugee claim, and inadmissibility issues. This document is completed by UNHCR, the U.S. Embassy, or the referring NGO.

- Record of Medical Examination

This form documents the pre-departure medical examination of the alien. Any Class A conditions would be noted, as would any recommendations for follow-up treatment.

B. Interview Criteria

The decision to interview an alien for a refugee-based adjustment of status application is made on a case-by-case basis.[1] Interviews are generally required when an officer is unable to verify identity or determine admissibility based solely on the immigration records, USCIS records and systems, or other agency records or background checks available to the officer. Although the decision to conduct an interview is made on a case-by-case basis, an officer should generally refer a case for interview if it meets one or more of the following criteria:

- The officer cannot verify the identity of the alien through the information in the A-file, other USCIS records and systems, or other agency records or background checks;[2]
- The officer can verify the identity of the alien through the information in the A-file, other USCIS records and systems, or other agency records or background checks, but he or she is claiming a new identity;
- Immigration records are insufficient for the officer to determine whether the alien has refugee status;
- The alien is a beneficiary of an approved Refugee/Asylee Relative Petition (Form I-730), but, the petition was approved when the alien was outside the United States, and he or she was not interviewed before his or her arrival to the United States[3] or the petition was approved when the alien was in the United States and was not interviewed before the petition was approved;
- The alien's Federal Bureau of Investigation (FBI) fingerprint check results indicate a record that may cause the alien to be inadmissible, or the alien has had two unclassifiable fingerprint responses;
- Additional information is required from the alien to address potential admissibility issues or assess potential inadmissibility waiver considerations;
- The alien has an articulable national security or terrorism-related ground of inadmissibility concern;
- There is evidence that suggests that at the time of admission as a refugee, the alien's refugee status may have been obtained through fraud or misrepresentation;[4]
- The alien has conflicting or multiple identities, other than properly documented by legal name changes;
- A sworn statement is required to address the alien's admissibility;
- An interview would yield clarifying information, such as with an unclear response to an RFE concerning the alien's admissibility;
- The officer articulates an inadmissibility concern regarding that the alien is a citizen of, or last habitually resided in, a country that is now, or was at the time of last residence, a state sponsor of terrorism;[5] or
- The officer articulates a concern regarding identity, inadmissibility, national security, public safety, or fraud, and recommends an interview to resolve that concern.

These interview criteria may be modified in response to developing circumstances and concerns. These criteria for adjustment of status applications filed by aliens who are refugees with specific characteristics help ensure program integrity and enhance screening and vetting to better detect fraud, misrepresentation, national security threats, and public safety risks.[6]

C. Requests to Change Name or Date of Birth

The officer must address and reconcile any discrepancy in biographical information found in the A-file, USCIS records or data systems, or other agency records or background checks at the time of adjudication of the adjustment of status application. During the overseas interview, the alien reviewed their refugee application, relative petition, and biographical information and had the opportunity to correct any errors or resolve any identity issues at that time. An officer may not accept an affidavit as proof of a changed name or erroneous date of birth.

The officer should be aware that name changes may occur after the refugee interview, such as in the case of a legal adoption, marriage, or divorce. Aliens requesting a name change at time of adjustment of status need to submit one of the following documents issued by a civil authority (whether by a foreign state or U.S. authority):

- Legal name change decree – lists former and new legal name;
- Marriage certificate – listing maiden name/last name of spouse;
- Divorce decree – showing restoration of maiden name; or
- Adoption decree – lists adopted child's birth name and the names of the adoptive parents.

While there may be a reasonable explanation for an alien to change his or her name after arrival, an officer should consider whether such a change raises the possibility that the alien either used an alias or committed fraud or misrepresentation at the time of the overseas interview.

D. Spelling of Names and Naming Convention Issues

From time to time, aliens may complete an adjustment application by filling out their name in some variation of what was listed on the refugee application or relative petition. Although some aliens may be permitted on other local or federal government-issued documents to anglicize their name or to use a slightly different spelling, aliens are not permitted to change the spelling of their names from what was listed on their refugee application or relative petition or to use an anglicized version at time of adjustment of status. This is prohibited in order to preserve the continuity and integrity of immigration records on the alien.

Occasionally, the refugee application or relative petition may contain an error in the spelling or the order of an alien's name. If, based on a review of underlying documents in the refugee packet, the officer clearly recognizes such an error, he or she may correct the error by amending the name of the alien on the adjustment application accordingly. If the alien is approved for permanent resident status, the name must also be amended in the appropriate electronic systems.

E. Detained Refugees

In certain circumstances, U.S. Immigration and Customs Enforcement (ICE) may encounter an alien who has failed to timely file for adjustment of status under INA 209(a). This most often occurs when the alien has been apprehended by other law enforcement agencies for suspected criminal activity. If ICE determines that the alien should be placed in removal proceedings, the local Enforcement and Removal Operations (ERO) field office promptly reaches out to its corresponding USCIS Field Office Director or designated point-of-contact to begin the adjustment of status process.

The ERO field office informs the alien of the requirement by law to file for adjustment of status to determine admissibility and provides the alien with an adjustment of status application and waiver application (if required)[7] to fill out prior to the refugee's release from custody. If the alien refuses, ICE personnel fills out Part 1 of the adjustment application and signs as completed by ICE, and sends the original application to the USCIS Field Office Director or designee for expedited processing and adjudication.

F. Decision

1. Approval

If the adjustment application is properly filed, the alien meets all eligibility requirements, and the alien satisfies admissibility and waiver requirements, then the officer must approve the application. Unlike most applications for adjustment of status, refugee-based adjustments are not discretionary, and the application may only be denied if the alien is found to be ineligible, inadmissible, or if the application was improperly filed.

Effective Date of Residence

If the adjustment application is approved, the effective date of permanent residence is the date the alien was first admitted to the United States as a refugee.

The effective date of permanent residence for aliens who are derivative refugees, gained their status through an approved relative petition, and were already in the United States when the petition was approved is the date the relative petition was approved.

Code of Admission

An alien who has been granted refugee status in his or her own right (RE-1, classification as a principal) is adjusted using the code “RE-6.” The RE-6 code should not be used for an alien who is the former spouse or child of a principal refugee where that relationship terminated after the alien was granted refugee status. The RE-6 code is reserved solely for the principal refugee to ensure there is no confusion regarding the eligibility to file a relative petition.

An alien who was admitted as a spouse of a refugee (RE-2 classification) and either remains the spouse or becomes a former spouse of the principal refugee at time of adjustment is given the code “RE-7.” An alien who was admitted as a child of a refugee (RE-3 classification) is given the code “RE-8,” regardless of the alien’s marital status or current age at time of adjustment.

In cases of nonexistent or fraudulent derivative refugee relationships in which a waiver was granted, aliens should be given an adjustment code of RE-7 or RE-8, depending on the original admission code given, even though they are not technically the derivative spouse or child of the principal refugee.

Classes of Aliens and Corresponding Codes of Admission

Alien	Code of Admission
Refugee (Principal)	RE6
Spouse of a Principal Refugee (RE6)	RE7
Child of a Principal Refugee (RE6)	RE8

The officer must ensure that the alien's new Class of Admission (COA) information is updated in the appropriate electronic systems, so that the alien receives a Permanent Resident Card. After completion, A-files are routed to the National Records Center.

2. Denial

If the adjustment application is denied based on inadmissibility, the alien should be placed into removal proceedings, provided there are applicable grounds of deportability under INA 237.[8]

If the adjustment application is denied based on improper filing, abandonment, or ineligibility, the alien has not been inspected for admission and should not be placed into removal proceedings because no determination of admissibility has been made. The alien continues to have refugee status until such time that the alien is inspected and an admissibility determination is made.

The officer should write a denial notice explaining the reasons for denial in clear language that the alien can understand. There is no appeal from the denial, but the alien may renew the application for adjustment while in removal proceedings before the immigration judge.[9]

Footnotes

[^ 1] See 8 CFR 209.1(d).

[^ 2] For more information on Third-Party Information, see Volume 1, General Policies and Procedures, Part A, Public Services, Chapter 7, Privacy and Confidentiality, Section D, Case-Specific Inquires [1 USCIS-PM A.7(D)].

[^ 3] For more information on following-to-join refugees, see 9 FAM 203.6.

[^ 4] The sole basis for an officer to terminate the status of an alien admitted to the United States as a refugee is if the officer determines that the alien was not a refugee within the meaning of the Immigration and Nationality Act (INA) at the time of his or her admission to the United States. This determination standard applies solely to aliens who are principal refugees and never to derivative refugees. However, an officer may terminate an alien with derivative refugee status if the principal’s status is terminated. For more information on termination of refugee status, see 8 CFR 207.9 and Chapter 6, Termination of Status and Notice to Appear Considerations [7 USCIS-PM L.6].

[^ 5] For a list of countries the Secretary of State has designated to be state sponsors of terrorism, see the U.S. Department of State’s State Sponsors of Terrorism website.

[^ 6] These criteria are well within the parameters of 8 CFR 209.1(d), as they retain an officer’s discretion, and each is reasonably related to the admissibility of the alien. Additionally, officers must continue to make each determination to require an interview on a case-by-case basis.

[^ 7] See Chapter 3, Admissibility and Waiver Requirements [7 USCIS-PM L.3].

[^ 8] See *Matter of D-K- (PDF)*, 25 I&N Dec. 761 (BIA 2012). The alien “must be charged in the notice to appear under section 237 of the [INA] rather than section 212 of the Act.” See *Matter of D-K- (PDF)*, 25 I&N Dec. 761, 761 (BIA 2012).

[^ 9] See 8 CFR 209.1(e).

Chapter 6 - Termination of Status and Notice to Appear Considerations

A. Basis

Changed country conditions in the refugee’s country of nationality do not justify termination of refugee status. The sole basis for an officer to terminate the status of an alien admitted to the United States as a refugee is if the officer determines that the alien was not a refugee within the meaning of the Immigration and Nationality Act (INA) at the time of his or her admission to the United States. In order to make this determination, an officer must be familiar with how the term “refugee” is defined.[1]

This determination standard applies solely to principal refugees and never to derivative refugees. Derivative refugees are not required to prove past persecution or a well-founded fear of future persecution. However, an officer may terminate a derivative refugee's status if the principal's status is terminated.

The statute and regulations do not require the formal termination of refugee status prior to removal proceedings where the refugee has been inspected and examined for adjustment of status, has been found inadmissible, and has not been granted a waiver of inadmissibility. Prior to being placed in removal proceedings, the applicant may first be given an opportunity to apply for a discretionary waiver of inadmissibility grounds.

If USCIS denies the adjustment application and/or waiver application, the applicant may also renew his or her application for adjustment or waiver of inadmissibility before an Immigration Judge (IJ). The applicant may also apply for asylum or any other relief from removal before an IJ.

The officer should prepare a Notice To Appear (NTA) if the refugee is inadmissible. Upon written notice of the adjustment application's denial, the applicant is no longer considered an admitted alien and should be charged with inadmissibility grounds under INA 212(a). However, if the officer is denying the adjustment application on other grounds (e.g., abandonment), the officer should not issue a NTA, since the applicant has not been found inadmissible.

Alternatively, USCIS may place a person who was admitted as a refugee directly in removal proceedings, without termination of refugee status, on the basis of any applicable charges under INA 237 without the adjudication of an adjustment application.

B. Procedures

USCIS conducts terminations of refugee status.[2] If an officer concludes after reviewing a refugee's A-file that the facts merit termination of the principal refugee's status, the officer will follow the procedures below, depending on where the case is located:

1. Cases Located at Service Centers

All evidence relevant to a possible termination of refugee status should be reviewed by a supervisor and then scanned and forwarded to the International and Refugee Affairs Division (IRAD) within the Refugee, Asylum, and International Operations Directorate (RAIO) for review. IRAD will review the information and send a response back with a recommendation on how to proceed. If IRAD recommends relocation of the case for possible termination, the principal's file and all derivative files, along with a copy of IRAD's recommendation, should be relocated to the district or field office to interview the refugee for possible termination of status.

2. Cases Located at Field Offices

All evidence relevant to a possible termination of refugee status should be reviewed by a supervisor and then scanned and forwarded along with an explanation detailing why the officer believes termination may be appropriate to the Field Operations Directorate at headquarters through appropriate channels. This evidence will be forwarded for review to the International and Refugee Affairs Division (IRAD). IRAD will review the information and send a response back with a recommendation on how to proceed.

If IRAD recommends possible termination, all family members' files should be requested. Once all family files have been received, the field office should interview the refugee for possible termination of status. If IRAD does not recommend termination, no interview is needed for Notice of Intent to Terminate purposes and the officer should resume adjudication of the adjustment application.

Footnotes

[^ 1] See INA 207(c)(4) and 8 CFR 207.9.

[^ 2] See 8 CFR 207.9.

Part M - Asylee Adjustment

Chapter 1 - Purpose and Background

A. Purpose

U.S. Citizenship and Immigration Services (USCIS) seeks to:

- Resolve the asylee's status by ultimately determining whether he or she is admissible to the United States as an immigrant; and
- Provide qualified asylees a pathway to permanent residence as persons of special humanitarian concern to the United States.

B. Background

The Refugee Act of 1980 not only provided for the admission and adjustment of status of refugees but also established procedures for aliens to seek asylum. Prior to the Refugee Act, there was no mechanism for someone in the United States to apply for protection under the Refugee Convention. The Refugee Act required the establishment of a procedure for an alien who meets the definition of a refugee to apply for and be granted asylum if physically present in the United States regardless of the person's immigration status.

The Refugee Act provided for the adjustment of status of asylees to permanent residents. Unlike refugees, asylees are not required to apply for adjustment of status 1 year after receiving asylum. Instead, an asylee may apply for adjustment of status after accruing 1 year of physical presence after receiving asylum status. The asylee is not required to apply within a specific time frame.

Although the Refugee Act exempted asylees from the worldwide annual limitations on immigrants, the law placed a ceiling of 5,000 on the number of asylees who could adjust to permanent resident status each year. The Immigration Act of 1990 increased the annual ceiling to 10,000 and waived the annual limit for those asylees who met the required 1-year physical presence requirement and filed for adjustment of status on or before June 1, 1990. In 2005, the REAL ID Act[1] permanently eliminated the annual cap on the number of asylees allowed to adjust status.

C. Legal Authorities

- INA 209(b) – Adjustment of status of refugees
- 8 CFR 209.2 – Adjustment of status of alien granted asylum

- Pub. L. 96-212 (PDF) – Refugee Act of 1980

Footnote

[^ 1] See the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. 109-13 (May 11, 2005).

Chapter 2 - Eligibility Requirements

An asylee may adjust status to a lawful permanent resident if the asylee meets the following four requirements:

- The asylee has been physically present in the United States for at least 1 year after being granted asylum.
- The principal asylee continues to meet the definition of a refugee, or the derivative asylee continues to be the spouse or child of the principal asylee.
- The asylee has not firmly resettled in any foreign country.
- The asylee is admissible to the United States as an immigrant at the time of examination for adjustment of status, subject to various exceptions and waivers.

Applicants who fail to meet any of these requirements are statutorily ineligible for adjustment of status as an asylee.

The Immigration Act of 1990 (IMMACT 90) added additional eligibility requirements to applicants granted asylum who wish to adjust status. USCIS issued regulations[1]to clarify that persons granted asylum status prior to enactment of IMMACT 90 would not be subject to these additional requirements at time of adjustment.

Therefore, applicants who were granted asylum prior to November 29, 1990 may have their status adjusted to permanent residents even if they no longer are a refugee due to a change in circumstance, no longer meet the definition of a refugee, or have failed to meet the required 1 year of physical presence in the United States after being granted asylum. These applicants need only apply for adjustment and establish that they have not been resettled in another country and are not inadmissible to the United States.

Although it is unlikely that any of these cases still remain pending, an officer should be aware of these special provisions that apply to any asylum adjustment applicant whose grant of asylum was prior to November 29, 1990.

A. Physical Presence in the United States of at Least 1 Year

Asylees may adjust status to a lawful permanent resident after being physically present in the United States for at least 1 year at the time of adjudication of the adjustment of status application.[2] A principal asylee's physical presence starts accruing on the date the asylee is granted asylum.

If a derivative asylee was physically present in the United States when USCIS approved their Refugee/Asylee Relative Petition (Form I-730) or the principal asylee's Application for Asylum and for Withholding of Removal (Form I-589), whichever is applicable, then the derivative asylee may start accruing physical presence on the approval date of the petition or application. If the derivative asylee is living abroad when USCIS approves the Form I-730 petition, then the derivative asylee's physical presence begins accruing on the date of admission as an asylee.

Only time spent in the United States counts towards the 1-year physical presence requirement. An asylee who travels outside the United States as an asylee will not meet the physical presence requirement until the cumulative amount of time spent in the United States is at least 1 year. The officer should review the asylee's adjustment application and the documentation in the record to determine the amount of time the asylee has been present in the United States since the date of the asylum grant (or admission as a derivative asylee for Form I-730 beneficiaries processed abroad). The officer may request additional information from the asylee to demonstrate physical presence in the United States if the officer is unable to determine it from the evidence.[3]

B. Principal Asylee Continues to Meet the Definition of a Refugee

In order to be eligible for asylee status, the principal asylee had to show a well-founded fear of persecution based on at least one of five statutory grounds:

- Race;
- Religion;
- Nationality;
- Membership in a particular social group; or
- Political opinion.

If an applicant no longer meets the definition of a refugee,[4] he or she is not eligible to adjust status as an asylee. In general, at the time of adjustment, an officer will not readjudicate the asylum claim. However, if there is new evidence that the asylee may not have met the definition of a refugee at the time of the asylum grant, the officer should refer the case to the Asylum Division within the Refugee, Asylum, and International Operations Directorate or to an immigration judge for termination of status.[5]

C. Derivative Asylee Continues to be the Spouse or Child of the Principal Asylee

A derivative asylee must continue to meet the definition of a spouse or child of a refugee both at the time of filing and final adjudication of the adjustment application. A derivative asylee spouse fails to meet this eligibility requirement if the marital relationship has ended. A derivative child fails to meet this requirement if he or she marries or no longer meets the definition of a child.[6] Likewise, if the principal is no longer a refugee or adjusted asylee at the time a derivative seeks to adjust status, then the derivative asylee will no longer qualify.

A derivative asylee who fails to meet this requirement does not lose his or her asylum status when the relationship to the principal asylee ends or when the principal asylee naturalizes. A derivative asylee only loses the ability to adjust status as a derivative asylee, but may adjust status under another category if he or she can establish eligibility.

1. Surviving Spouse or Child of a Deceased Principal Asylee

The Immigration and Nationality Act (INA) was amended by the addition of Section 204(l) which allows USCIS to approve an adjustment of status application for the derivative spouse or child of a deceased qualifying relative, including a derivative spouse or child of a deceased principal asylee. Therefore, an applicant that meets all the requirements of this new law will remain a derivative spouse or child of an asylee for purposes of adjustment of status even after the principal asylee's death.

This applies to an adjustment of status application adjudicated on or after October 28, 2009, even if the qualifying relative died before October 28, 2009. If a petition or application was denied on or after October 28, 2009, without considering the effect of this section, and the section could have permitted approval, USCIS must, on its own motion, reopen the case for a new decision in light of this new law.[7]

2. Derivative Asylees Ineligible for Adjustment of Status

Divorced Spouse

A spouse who is divorced from the principal asylee is no longer a spouse of the principal and is no longer eligible to adjust status as a derivative asylee.

Married Child

A child who is married either at the time of filing or at the time of adjudication of the adjustment of status application is no longer considered a child of the principal and is no longer eligible to adjust status as a derivative asylee. However, a child who was married after his or her grant of derivative asylum status, but has since divorced (and is therefore unmarried at the time of filing for adjustment of status) may qualify once again as the derivative child of the principal asylee, provided the child is under 21 or eligible for the benefits of the Child Status Protection Act (CSPA).

Child 21 or Older and Not Eligible for Benefits under the Child Status Protection Act (CSPA)

Certain derivative children who have turned 21 years old and are not protected by the CSPA are no longer eligible to adjust status as a derivative asylee. This is generally only seen in cases that were filed prior to August 6, 2002.

As of August 6, 2002, any derivative asylee child who had a pending refugee/asylee relative petition (Form I-730), adjustment application (Form I-485) or principal's asylum application (Form I-589) on or after that date had his or her age "frozen" as of the date the application was filed. This allows the alien's continued classification as a child for purposes of both asylum and adjustment of status. Any person who aged out prior to August 6, 2002 is not eligible for continuing classification as a child unless one of these applications was pending on August 6, 2002.

As a result of CSPA provisions, an unmarried child who is under 21 on the day the principal asylee files the asylum application will remain eligible to be classified as a child as long as he or she was eligible to be listed on the parent's asylum application prior to adjudication and is unmarried at the time of adjudication. In determining continuing eligibility as a child for adjustment, the officer need only verify that the derivative applicant's age was under 21 at the time the principal's asylum application was filed and that the child is currently unmarried.

Principal Asylee has Naturalized

A principal asylee who has naturalized no longer meets the definition of a refugee.[8] Therefore, once the principal has naturalized, a spouse or child is no longer eligible to adjust status as a derivative asylee because they no longer qualify as the spouse or child of a refugee.

Principal Asylee Who No Longer Meets Definition of Refugee and has Asylum Status Terminated

If a principal asylee no longer meets the definition of a refugee and his or her asylum status is terminated, then a derivative asylee is also no longer eligible to adjust status.

3. Nunc Pro Tunc Asylum Cases

"Nunc pro tunc," meaning "now for then," refers to cases where a derivative asylee who is ineligible to adjust status as a derivative asylee may file for and be granted asylum in his or her own right and the grant may be dated as of the date of the original principal's asylum grant. Any alien who is physically present in the United States regardless of status may apply for asylum. In certain cases, the nunc pro tunc process may enable a derivative asylee who is ineligible to adjust as a derivative to become a principal asylee and eligible to adjust status.

Like any other asylum application filed with USCIS, these cases are handled by the Asylum Division of the Refugee, Asylum and International Operations (RAIO) Directorate. New asylum applications can be filed by derivative asylees requesting to be considered as principal applicants.

If an officer encounters a case in which the applicant is not eligible for adjustment of status as a derivative asylee, the adjustment application should be denied.

4. Pre-Departure Marriages and Divorces

Occasionally, derivative asylees who are admitted to the United States based on a refugee/asylee relative petition (Form I-730) will end their relationship to the principal asylee through either divorce or marriage after the grant of the petition, but before being admitted to the United States. In these cases, if the derivative asylee was admitted to the United States, he or she was not eligible for that status at time of admission because the status was dependent upon the relationship to the principal, which no longer existed at time of admission.[9]

While USCIS may pursue termination of status on these applicants, the actual relationship of the derivative to the principal may be a consideration in the determination. In cases in which the officer makes an initial determination that termination may be appropriate, he or she should return the file to the asylum office for further review and potential termination of status.

Derivatives who end their relationship with the principal asylee at any time are not eligible to adjust status in their own right, but may be eligible to file for asylum as a principal applicant.

5. Non-Existent or Fraudulent Relationships

At times, an officer may discover that a derivative asylee never had a bona fide relationship to the principal asylee. Examples would include a claimed spouse who was never legally married to the principal although they may have cohabitated or other relatives who are claimed as children. Those derivatives will be ineligible to adjust status.

Additionally, applicants who have no relationship to the principal asylee could claim a relationship as either a spouse or child, and likewise the principal asylee could claim a relationship to them, in order to be granted asylum. These applicants are ineligible for admission as derivative asylees and may be found removable for fraud or misrepresentation.

Although they were admitted as derivative asylees, they were not eligible for that status when they were admitted because their status was dependent upon their relationship to the principal, which did not exist at the time of admission. USCIS may decide to pursue termination of status on these persons; however, the actual relationship of the derivative to the principal should be a factor when considering possible termination of status.

In cases in which the adjustment officer makes an initial determination that termination may be appropriate, he or she should return the file to the asylum office for further review and potential termination of status.

D. Not Firmly Resettled in Any Foreign Country

An applicant who has firmly resettled in another country is not eligible to obtain either asylum or adjustment of status as an asylee in the United States. A person is considered firmly resettled in another country if he or she has been offered resident status, citizenship, or some other type of permanent resettlement in another country.

The asylum officer would have considered whether the application was firmly resettled prior to arriving in the United States so an officer considering the adjustment of status application would rarely need to reconsider the prior determination. However, any evidence in the file that suggests resettlement in another country subsequent to the granting of asylum status will need to be considered.

Footnotes

[^ 1] See 8 CFR 209.2(a)(2).

[^ 2] Because USCIS' practice and policy has varied with regard to whether the 1 year of physical presence was required at the time of filing or at the time of adjudication of the application, USCIS considers an asylee who was adjusted to lawful permanent residence despite not having accrued 1 year of physical presence at the time of filing their application for adjustment to have been lawfully admitted for permanent residence if the applicant had accrued 1 year of physical presence by the time of adjudication and the admission was otherwise lawful.

[^ 3] For more information, see Chapter 4, Documentation and Evidence, Section A, Required Documentation and Evidence [7 USCIS-PM M.4(A)].

[^ 4] See INA 101(a)(42).

[^ 5] For more information, see Chapter 6, Termination of Status and Notice to Appear Considerations [7 USCIS-PM M.6].

[^ 6] See INA 101(b)(1).

[^ 7] See INA 204(l).

[^ 8] See INA 101(a)(42).

[^ 9] See *Matter of Khan (PDF)*, 14 I&N Dec. 122 (BIA 1972).

Chapter 3 - Admissibility and Waiver Requirements

An asylee adjustment applicant must be admissible at the time USCIS grants the adjustment of status. Because an asylee is not subject to admissibility grounds at the time of the asylum grant, the adjudication of the adjustment application may be the first instance that inadmissibility grounds are considered. The applicants may be found inadmissible based on any information in the A-file or submitted with the adjustment application or through security checks.

A. Exemptions

The following grounds of inadmissibility do not apply to asylees adjusting status:

- Public Charge – INA 212(a)(4)
- Labor Certification and Qualifications for Certain Immigrants – INA 212(a)(5)
- Documentation Requirements for Immigrants – INA 212(a)(7)(A)

B. Applicable Inadmissibility Grounds

The following grounds of inadmissibility apply to asylees adjusting status:

- Health-Related – INA 212(a)(1)
- Crime-Related – INA 212(a)(2)
- Security-Related – INA 212(a)(3)
- Illegal Entrants and Immigration Violators – INA 212(a)(6)
- Ineligibility for Citizenship – INA 212(a)(8)
- Aliens Previously Removed – INA 212(a)(9)
- Practicing Polygamists, Guardians Required to Accompany Helpless Persons, International Child Abductors, Unlawful Voters, and Former Citizens who Renounced Citizenship to Avoid Taxation – INA 212(a)(10)

1. Health-Related Considerations

In some cases, a derivative asylee who had a Refugee/Asylee Relative Petition (Form I-730) processed overseas may have had a Class A medical condition that was waived for purposes of admission as an asylee. In these instances, the waiver does not carry through to adjustment and the applicant must submit to a new medical examination to determine whether the Class A medical condition has been resolved.

2. Unlawful Presence Considerations

An unlawful presence exception applies during the period of time in which the asylee had a bona fide, pending asylum application. The time period that the applicant's bona fide asylum application was pending should not be included in any unlawful presence calculation,[1] provided the applicant was not employed without authorization during such time period. Unauthorized employment would disqualify the asylee from this exception.[2]

While departures from the United States may trigger an unlawful presence bar, an officer may consider a waiver for unlawful presence either through submission of a waiver application (Form I-602), or in conjunction with the adjustment of status application, in instances in which a waiver application is not requested. If the officer does not request a waiver application, the officer should notate any waiver granted on the adjustment of status application. However, the Board of Immigration Appeals held on April 17, 2012 that travel on advance parole for a pending adjustment applicant will not trigger the unlawful presence bar.[3]

C. Inadmissibility Grounds that May Not Be Waived

While waivers are generally available for most of the grounds listed in Section B, Applicable Inadmissibility Grounds,[4] the following grounds of inadmissibility cannot be waived:

- Controlled Substance Traffickers – INA 212(a)(2)(C)
- Espionage; Sabotage; Illegal Export of Goods, Technology, or Sensitive Information; Unlawful Overthrow or Opposition to U.S. Government – INA 212(a)(3)(A)
- Terrorist Activities – INA 212 (a)(3)(B) (Note: Exemptions for some of these grounds exist)
- Adverse Foreign Policy Impact – INA 212(a)(3)(C)
- Participants in Nazi Persecutions or Genocide – INA 212(a)(3)(E)

An officer should deny the adjustment application where no waiver or exemption is available due to the type of inadmissibility found.

National Security Issues

In the event that the adjudicating officer identifies at any stage one or more national security indicator(s) or concerns unknown at the time of the grant of asylum, the officer should refer to USCIS guidance on disposition of national security cases. The officer should also follow current USCIS instructions on cases that involve terrorist related grounds of inadmissibility for disposition of the case or see their supervisor for questions.

Unless a case is sent specifically to a field office for resolution of Terrorist Related Inadmissibility Ground (TRIG) issues and final adjudication of the adjustment application, an officer should return any asylee adjustment case with unresolved TRIG issues to the originating service center for resolution.

D. Waivers[5]

All grounds of inadmissibility listed at Section B, Applicable Inadmissibility Grounds[6] are subject to waiver, if the applicant can establish he or she qualifies for a waiver.

An asylee adjustment applicant may have a ground of inadmissibility waived for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. This type of waiver does not require the applicant to prove extreme hardship.

In adjudicating a discretionary waiver application for asylee adjustment, an officer must balance the humanitarian, family unity, or public interest considerations with the seriousness of the offense or conduct that rendered the applicant inadmissible. In making this determination, an officer should recognize that the applicant has already established past or a well-founded fear of future persecution, which is an extremely strong positive discretionary factor.

Exchange Visitors (J-1 and J-2 Nonimmigrants)[7]

An asylee adjustment applicant who previously held the status of an exchange visitor (J-1 or J-2 nonimmigrant) and is therefore subject to the 2-year foreign residence requirement[8] is eligible to adjust status without regard to this requirement.[9] The applicant is not required to show proof of compliance with or obtain a waiver of the foreign residence requirement if applying to adjust status under INA 209.

Footnotes

[^ 1] See INA 212(a)(9)(B).

[^ 2] See INA 212(a)(9)(B)(iii)(II).

[^ 3] See *Matter of Arrabally and Yerrabelly (PDF)*, 25 I&N Dec. 771 (BIA 2012).

[^ 4] See Section B, Applicable Inadmissibility Grounds [7 USCIS-PM M.3(B)].

[^ 5] For more information on waiver policies and procedures, see Volume 9, Waivers and Other Forms of Relief, Part A, Waiver Policies and Procedures [9 USCIS-PM A]

[^ 6] See Section B, Applicable Inadmissibility Grounds [7 USCIS-PM M.3(B)].

[^ 7] See INA 101(a)(15)(J).

[^ 8] See INA 212(e).

[^ 9] See 8 CFR 209.2(b) (foreign residency exemption).

Chapter 4 - Documentation and Evidence

Officers should review the following documentation to determine an asylee's eligibility to adjust status.

A. Required Documentation and Evidence

- Application to Register Permanent Residence or Adjust Status (Form I-485)

Each applicant must file a separate application with fee (unless granted a fee waiver), regardless of whether the applicant is a principal or derivative asylee.

The officer must check the Form I-485 for additional aliases requiring a systems query. Also, the officer should review the applicant's address history information.

If the applicant lists a country in their address history other than the applicant's country of persecution, the officer should consider this as potential evidence of resettlement in a country other than the United States by the applicant. However, an applicant is only considered firmly resettled in another country if they have been offered resident status, citizenship, or some other type of permanent resettlement in another country.

- Proof of asylum status

An officer must review the contents of the A-file for proof of asylum status. The A-file should contain an approved Application for Asylum and for Withholding of Removal (Form I-589) or an approved Refugee/Asylee Relative Petition (Form I-730). Although an applicant may submit an Arrival/Departure Record (Form I-94) or an approval notice of the relative petition with their application, these documents must always be cross-checked with evidence in the A-file and in USCIS' systems to confirm the applicant's asylum status.

- Evidence of 1-year physical presence in the United States

An officer can verify physical presence for a principal asylee by reviewing the date the Form I-589 was approved, as indicated either on the approval letter from the asylum office or on the order from the immigration judge, the Board of Immigration Appeals, or a federal court. Officers may also check for information within government systems.

An officer can generally verify physical presence for a derivative asylee by reviewing the date and place of last arrival into the United States and address history on the Form I-485 and admission information contained in government systems.

The officer should also review the date of admission of an asylee found on an Arrival/Departure Record (Form I-94), travel documents, and in government systems to determine if the asylee meets the physical presence requirement.

If evidence shows that the asylee has not been physically present for a cumulative total period of at least 1 year in the United States, the officer may request additional information to determine physical presence. This may include but is not limited to pay stubs or employment records, school or medical records, rental and utility bill receipts, or any other documentation that supports proof of physical presence.

- Two (2) passport-style photos taken no earlier than 30 days prior to filing
- Report of Immigration Medical Examination and Vaccination Record (Form I-693)

A principal asylee is required to submit a complete medical examination and vaccination record. The examination must be completed by a USCIS designated civil surgeon, meet the standards of the medical examination, and include all required vaccinations as of the date of the examination. A complete medical examination is not required of all derivative asylees at time of adjustment.

Derivative asylees that had a medical examination conducted overseas will not be required to undergo a new medical examination at the time of applying for adjustment of status if:

- The results of the overseas medical examination are contained in the A-file and no Class A condition was reported;
- The asylee has applied for adjustment of status within 1 year of filing eligibility (for example, within 2 years of the date of admission as an asylee derivative); and
- There is no evidence in the A-file or testimony given at an interview to suggest that the asylee has acquired a Class A condition subsequent to his or her entry into the United States.

Even if a complete new medical examination is not required, the applicant must still establish compliance with the vaccination requirements and submit the vaccination record portion of the medical examination record with the adjustment application. Unlike refugees, derivative asylees may not have their vaccination records completed by a health department with a blanket waiver as a civil surgeon. Blanket waivers for civil surgeons only extend to refugee vaccination certifications.[1]

- Certified Copies of Arrest/Court Records (if applicable)

An applicant must submit an original official statement by the arresting agency or certified court order for all arrests, detentions or convictions.

- Application by Refugee for Waiver of Grounds of Excludability (Form I-602) (if applicable)

B. Supplemental Documentation and Evidence

Applicants often submit supplemental documentation although not required to do so. This may include:

- Arrival/Departure Document (Form I-94), with appropriate endorsement
- Birth certificate, when obtainable

See the Department of State Reciprocity Tables for identity documents that cannot be obtained in particular countries and during specific time periods. There may be other instances in which a birth certificate is unobtainable because of country conditions or personal circumstances. In these instances, an applicant may submit affidavits to establish his or her identity. The officer may also review the A-file to check for a birth certificate that the applicant submitted with the asylum application or other evidence the applicant submitted at the time of the interview to establish his or her identity.

- Copy of passport(s), when obtainable

In many instances, an asylee will be unable to produce a copy of his or her passport. There may be other instances in which a passport is unobtainable due to country conditions, personal circumstances or the simple fact that the applicant never possessed a passport. In these cases, a copy of a passport is not required and the officer may use evidence in the applicant's A-file to verify his or her identity. The asylee's date of birth and nationality are established during the asylum application or relative petition process.

The officer should review any supplemental documentation submitted by the applicant to ensure it is consistent with the documentation contained in the A-file. Since identity is already established during the asylum proceedings, a birth certificate or passport is not required at the time of adjustment. Nevertheless, if the applicant submits any of these documents, the officer must address and resolve any discrepancies at the time of adjudication. In all cases, considerable weight is given to the documentation contained in the asylum packet or with the relative petition.

C. Documentation Already Contained in the A-File

The original asylum application should already be in a principal applicant's A-file. A copy of the asylum application should also be found in the A-file of each derivative asylee who was in the United States at the time of asylum adjudication and was included on the asylum application. The relative petition should be in a derivative asylee's A-file if the derivative asylee followed to join the principal and was not included on the original asylum application.

Each case file will contain all of the forms, evidence, and officer notes that were part of the application for asylum. The most important document for an officer to review is either the asylum application (Form I-589) or the relative petition (Form I-730). Both provide proof of status and establish identity (with attached photo) as well as citizenship, since many asylees will not have a birth certificate or passport.

D. Unavailable or Missing Documentation

When an asylee flees the country of persecution, they may have been unable to obtain any documentation issued by a civil authority as proof of identity or of a familial relationship. At the time of the asylum interview, the asylum officer reviews a myriad of documents and affidavits and solicits testimony when seeking to establish an asylum-seeker's personal and family identity. Any available documents submitted at the time of the asylum interview should be contained within the A-file.

An officer may rely on the documents contained in the A-file to verify the applicant's identity at the time of adjustment. While it is not necessary to request the applicant's birth certificate or passport as proof of identity, officers should review any documentation the applicant submits to establish identity. Additionally, photos the applicant submits should be compared to the photos in the A-file. If an officer is unable to establish an applicant's identity due to discrepancies between the documentation the applicant submitted and the information contained in the A-file, then the file should be forwarded to the field office having jurisdiction over the case for interview and resolution.

Footnote

[^ 1] This is a determination made by the Department of Health and Human Services, Centers for Disease Control and Prevention.

Chapter 5 - Adjudication Procedures

A. Record of Proceedings Review and Underlying Basis

The officer should place all documents in the A-file according to the established record of proceedings order, including the filing of any documents the alien submitted in response to a Request for Evidence (RFE).

In determining eligibility for adjustment of status of an alien with asylum status, the officer should review the underlying application (either Form I-589 or Form I-730) that provided the alien with asylum status. The application establishes identity, family relationships, and date of grant of asylum status (if a principal asylee or a derivative asylee was within the United States at time of grant).

B. Interview Criteria

Officers make the decision to interview an alien for an asylum-based adjustment of status on a case-by-case basis.[1] Interviews are generally required when an officer is unable to verify identity or eligibility or determine admissibility based solely on the available immigration records, USCIS records and systems, or other agency records or background checks available to the officer. Although the decision to conduct an interview is made on a case-by-case basis, an officer should generally refer a case for interview if it meets one or more of the following criteria:

- The officer cannot verify the identity of the alien through the information in the A-file, other USCIS records and systems, or other agency records or background checks;
- The officer can verify the identity of the alien through the information in the A-file, other USCIS records and systems, or other agency records or background checks, but the alien is claiming a new identity;
- Immigration records are insufficient for the officer to determine whether or not the alien has asylum status;
- The alien is a beneficiary of an approved Refugee/Asylee Relative Petition (Form I-730) but, the petition was approved when the alien was outside the United States, and he or she was not interviewed before his or her arrival to the United States or, the petition was approved when the alien was in the United States and was not interviewed prior to the approval of the petition;
- The alien's Federal Bureau of Investigation (FBI) fingerprint check results indicate a record that may cause the alien to be inadmissible, or the alien has had two unclassifiable fingerprint responses;
- Additional information is required from the alien to address potential eligibility or admissibility issues or assess potential inadmissibility waiver considerations;
- The alien has an articulable national security or terrorism-related ground of inadmissibility concern;
- There is evidence that suggests that the original grant of asylum may have been obtained through fraud or misrepresentation;[2]
- There is evidence that suggests that the derivative asylee no longer has the requisite relationship to adjust status as a derivative spouse or child;[3]
- The alien has conflicting or multiple identities, other than properly documented by legal name changes;
- A sworn statement is required to address the alien's admissibility;
- An interview would yield clarifying information, such as with an unclear response to an RFE concerning the alien's admissibility;
- The officer articulates an inadmissibility concern regarding that the alien is a citizen of, or last habitually resided in, a country that is now, or was at the time of last residence, a state sponsor of terrorism;[4] or
- The officer articulates a concern regarding identity, inadmissibility, national security, public safety, or fraud, and recommends an interview to help to resolve that concern.

These interview criteria may be modified in response to developing circumstances and concerns. The additional criteria for adjustment of status applications filed by aliens who are asylees with specific characteristics help ensure program integrity and improve the detection of fraud, misrepresentation, national security threats, and public safety risks.[5]

C. Waiver Instructions

When the officer determines that an alien is inadmissible and a waiver is available, the officer may grant the waiver without requiring submission of an Application by Refugee for Waiver of Inadmissibility Grounds (Form I-602) if:

- The alien is inadmissible under a ground of inadmissibility that may be waived (other than health-related grounds);
- USCIS records and other information available to the officer contain sufficient information to assess eligibility for a waiver;
- There is no evidence to suggest that negative factors would adversely impact the exercise of discretion; and
- It is appropriate to grant a waiver.

If the adjudicating officer determines that a waiver application (Form I-602) is not required, the officer should indicate that the waiver has been granted by annotating on the adjustment of status application the particular inadmissibility that has been waived. The officer may use a written annotation, stamp, or pre-printed label to indicate the specific inadmissibility ground

that is being waived in any open space on the face of the adjustment application.

An officer's signature and approval stamp on the adjustment application also serves as the signature and approval of the waiver for any waived grounds of inadmissibility specified on the face of the adjustment application. Waivers granted because the vaccinations were not medically appropriate or other blanket waivers for medical grounds do not require a waiver annotation on the adjustment application or the Report of Immigration Medical Examination and Vaccination Record (Form I-693). All others require an annotation.

When a waiver application is required, the officer should stamp the waiver application approved, check the block labeled "Waiver of Grounds of Inadmissibility is Granted," and make the appropriate endorsements in the space provided.

In both instances, there is no need for a separate approval notice since the approval of the adjustment of status application also indicates the approval of the waiver or the waiver application.

If the alien is statutorily ineligible for a waiver (that is, the alien is inadmissible under a ground of inadmissibility that cannot be waived) or if there are sufficient negative factors to warrant a discretionary denial of the waiver application, the officer denies the waiver application and specifies the reason(s) for denying the waiver in the denial of the adjustment of status application.

While there is no appeal from the denial of the waiver application, the alien is notified in the denial notice of the right to renew the adjustment application before an immigration judge during removal proceedings.[6] The alien has the opportunity to again seek a waiver of inadmissibility in conjunction with that application.

D. Requests to Change Name or Date of Birth

Aliens sometimes enter the United States with fraudulent documentation. This fraudulent biographical information may be entered into the agency's information systems as an alias. The alien will have to address and reconcile any outstanding discrepancies in biographical information found in A-file, other USCIS records and data systems, or other agency records or background checks at the time of adjudication of the adjustment of status application.

While an alien who is a principal asylee would have had his or her identity confirmed at the time asylum status was granted, this may not be true for aliens who are derivative asylees who had neither an overseas interview nor an interview by a USCIS officer as a part of the Form I-730 adjudication process.

In this case, the alien who is a derivative asylee may have to provide documentation as proof of his or her true identity if the biographical information contained on the Form I-730 does not match the information contained on the adjustment of status application. Additionally, the alien would need to provide a reasonable explanation for why his or her true identity, including name and date of birth, was not properly established with the Form I-730.

During the asylum or overseas interview, aliens reviewed their asylum application or relative petition and biographical information and had the opportunity to correct any errors or resolve any identity issues at that time. Therefore, an officer should be cautious in reviewing any documents that now assert a change to the alien's name or date of birth, as it raises the possibility that the person either used an alias or committed fraud or misrepresentation at the time of the asylum or overseas interview. An officer may not accept an affidavit as proof of a changed name or date of birth.

An officer should be aware that name changes may legitimately occur after the asylum or overseas interview, such as in the case of a legal adoption, marriage, or divorce. Aliens requesting a name change at the time of adjustment need to submit one of the following civil-issued documents:

- Legal name change decree – lists former and new legal name;
- Marriage certificate – lists maiden name/last name of spouse;
- Divorce decree – shows restoration of maiden name; or
- Adoption decree – lists adopted child's birth name and the names of the adoptive parents.

E. Spelling of Names and Naming Convention Issues

From time to time, aliens may complete an adjustment application by filling out their name in some variation of that which was listed on the Form I-589 or Form I-730. Although aliens may be permitted on other local or federal government-issued documents to change their name or use a slightly different spelling, aliens are not permitted to change the spelling of their names from that listed on their asylum application or relative petition or to use another version of their name at time of adjustment of status, unless the alien provides documentation of a legal name change. This is prohibited in order to preserve the continuity and integrity of immigration records on the alien.

The asylum application or relative petition might contain an error in the spelling or the order of an alien's name. If an officer, based on a review of underlying documents in the A-file, recognizes that the original application or petition clearly had an error and the alien is requesting the corrected name on the adjustment of status application, the officer may correct the error by amending the name on the application. If the alien is granted permanent resident status, the name must also be corrected in the appropriate electronic immigration systems.

F. Decision

1. Approvals

If the application is properly filed, the alien meets the eligibility requirements, satisfies admissibility or waiver requirements, and warrants a favorable exercise of discretion, then the officer may approve the adjustment application.

Effective Date of Residence

The date of adjustment for aliens with an approved asylum-based adjustment applications is 1 year before the date of being approved for permanent residence.

For example, an alien is granted asylum status on January 1, 2007. The alien files for adjustment of status on March 15, 2009, and the application is approved on July 1, 2009. The date of adjustment of status is rolled back 1 year to July 1, 2008. This is the date that appears on the alien's Permanent Resident Card and in USCIS systems. Additionally, the 1-year roll back is counted toward physical presence for naturalization purposes.

Code of Admission

An alien who has been granted asylum status as a principal asylee is adjusted using the code "AS-6." The AS-6 code is reserved for the principal asylee to ensure there is no confusion regarding the eligibility to file a relative petition. The AS-6 code also applies to aliens who were granted asylum through the nunc pro tunc process. An alien who adjusts status as a spouse of an asylee (AS-2 classification) is given the code "AS-7." An alien who adjusts status as a child of a principal asylee (AS-3 classification) is given the code "AS-8."

Classes of Aliens and Corresponding Codes of Admission

Alien	Code of Admission
Asylee (Principal)	AS6
Spouse of a Principal Asylee (AS6)	AS7
Child of a Principal Asylee (AS6)	AS8

The officer must ensure that the alien's new Class of Admission (COA) information is updated in the appropriate electronic systems, so that the alien receives a Permanent Resident Card. After completion, cases are routed to the National Records Center.

2. Denials

If an alien fails to establish eligibility for adjustment under this section, the application is denied. The officer must provide the alien with a written notice specifying the reasons for denial in clear language the alien can understand. While there is no appeal from denial of this type of case,[7] a motion to reopen may be considered if timely filed within 30 days of the date of the denial and received before removal proceedings are instituted.

An alien may also renew the application for adjustment while in removal proceedings before an immigration judge.[8] If a motion includes a waiver, and the motion to reopen is granted, the officer must adjudicate the waiver before a final decision can be made on the adjustment of status application.

If an officer denies the adjustment of status application due to ineligibility for adjustment of status, improper filing, or abandonment of the application, the alien should not be placed into removal proceedings and the alien still keeps his or her asylum status. In certain instances, if the officer denies the adjustment of status application because the alien is inadmissible, the alien may be placed into removal proceedings.

Footnotes

[^ 1] See 8 CFR 209.2(e).

[^ 2] If evidence demonstrates an articulable ground for possible termination of asylum status, such as a showing of fraud in the alien's application such that he or she was not eligible for asylum at the time it was granted, or that the alien no longer meets the definition of a refugee under INA 101(a)(42), the officer should refer the file for further review and action on potential termination of asylum status. For more information on the grounds of asylum termination and procedures, see 8 CFR 208.24 and Chapter 6, Termination of Status and Notice to Appear Considerations [7 USCIS-PM M.6].

[^ 3] For more information on derivative asylees ineligible for adjustment of status, see Chapter 2, Eligibility Requirements, Section C, Derivative Asylee Continues to be the Spouse or Child of the Principal Asylee, Subsection 2, Derivative Asylees Ineligible for Adjustment of Status [7 USCIS-PM M.2(C)(2)].

[^ 4] For a list of countries the Secretary of State has designated to be state sponsors of terrorism, see the U.S. Department of State's State Sponsors of Terrorism website.

[^ 5] These criteria are well within the parameters of 8 CFR 209.2(e), as they retain an officer's discretion, and each is reasonably related to the admissibility and eligibility of the alien. Additionally, officers must continue to make each determination to require an interview on a case-by-case basis.

[^ 6] See 8 CFR 209.2(f).

[^ 7] See 8 CFR 209.2(f).

[^ 8] See 8 CFR 209.2(f).

Chapter 6 - Termination of Status and Notice to Appear Considerations

On occasion, an officer reviewing the adjustment application will discover evidence that indicates the applicant was not eligible for asylum status at the time of asylum grant or is otherwise no longer eligible for asylum status. The officer should return the file to the asylum office for further review and potential termination of status.

A. Basis

A grant of asylum does not convey a right to remain permanently in the United States and may be terminated.[1] The date of the asylum grant guides the termination procedures.

Fraud in the application pertaining to eligibility for asylum at the time it was granted is grounds for termination regardless of the filing date.

1. Asylum Application Filed on or after April 1, 1997

USCIS may terminate asylum if USCIS determines that the applicant:

- No longer meets the definition of a refugee;
- Ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;
- Constitutes a danger to the community of the United States, if convicted of a particularly serious crime;
- Committed a serious nonpolitical crime outside the United States prior to arriving in the United States;
- Is a danger to the security of the United States, including terrorist activity;
- May be removed, to a country (other than the country of the applicant's nationality or last habitual residence) in which the applicant's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, where the applicant is eligible to receive asylum or equivalent temporary protection;
- Has voluntarily availed himself or herself of the protection of the country of nationality or last habitual residence by returning to such country with permanent resident status or the reasonable possibility of obtaining such status with the same rights and obligations pertaining to other permanent residents of that country; or
- Has acquired a new nationality and enjoys the protection of the country of his new nationality.

2. Asylum Application Filed before April 1, 1997

USCIS may terminate the approval of asylum if USCIS determines that the applicant:

- No longer has a well-founded fear of persecution due to changed country conditions;
- Was convicted of a particularly serious crime or an aggravated felony;
- Was firmly resettled in a third country;
- Can reasonably be regarded as a danger to the security of the United States; or
- Is a persecutor or has engaged in terrorist activity.

B. Procedures

1. Asylum Granted by USCIS or INS

Termination Before Decision on Adjustment Application

USCIS may initiate termination of asylum status if USCIS or legacy Immigration and Naturalization Services (INS) initially granted the status. USCIS may not terminate asylum status granted by an immigration judge (IJ) or the Board of Immigration Appeals (BIA). If an officer determines that termination may be appropriate in a case where USCIS or legacy INS granted asylum, the officer should forward the case to the asylum office with jurisdiction before adjudicating the adjustment of status application. Jurisdiction is based on the current residence of the applicant, regardless of which USCIS office or legacy INS office originally granted asylum status.

In all but the Ninth Circuit (discussed below), the asylum office must provide the asylee with written notice before USCIS terminates the asylee's asylum status and any related employment authorization. The written notice is called a Notice of Intent to Terminate (NOIT). The NOIT presents the termination ground(s) under consideration, provides a brief summary of the evidence supporting the grounds for termination, and notifies the asylee that he or she will have an opportunity to rebut the termination grounds during a scheduled termination interview at an asylum office or a hearing before an IJ. The NOIT must contain prima facie evidence supporting the termination ground(s).

The asylee must be given at least 30 days to respond to the NOIT and present evidence that he or she is still eligible for asylum. After considering the evidence, including the asylee's response, lack of a response, or failure to appear, if the asylum office determines that one or more grounds of termination have been established by a preponderance of the evidence, the asylum office issues a Notice of Termination (NOT) and a Notice to Appear (NTA).

Upon termination of asylum status, USCIS denies the pending adjustment application. The adjustment of status denial must set forth the reason(s) for the denial. There is no appeal from the denial of the adjustment of status application, but the applicant may renew the application for adjustment in his or her removal proceedings before the immigration court.[2]

Alternatively, at the discretion of an Asylum Office Director, the asylum office may issue a NOIT with an NTA, referring the termination of asylum status to U.S. Immigration and Customs Enforcement (ICE) to pursue in removal proceedings. At any time after the applicant is issued a NOIT and an NTA, an IJ may terminate asylum granted by USCIS or legacy INS at a termination hearing held in conjunction with removal proceedings. When a NOIT and NTA have been filed with the immigration court before the adjustment of status application is adjudicated, USCIS may deny the pending adjustment application for lack of jurisdiction. The applicant may file an adjustment application in removal proceedings.

Asylees Residing in the Ninth Circuit

In *Nijjar v. Holder*, the Ninth Circuit Court of Appeals determined that USCIS cannot terminate asylum[3] for asylees residing within the jurisdiction of the Ninth Circuit.[4] Rather, the asylum office issues a NOIT with an NTA, referring the termination of asylum status to ICE to pursue in removal proceedings. If the applicant does not reside in the Ninth Circuit, the officer should forward the case to the asylum office with jurisdiction over the applicant's current residential address for termination review.

Derivative Asylees

Termination of asylum status for a principal asylee also results in termination of any derivative's asylum status, if the derivative asylee[5] has not yet adjusted to lawful permanent resident (LPR) status.[6] If USCIS issues a NOIT to a principal asylee, the NOIT also includes any derivative asylees who have not yet adjusted status.

USCIS may terminate the asylum status of a derivative asylee who has not adjusted status and whose asylum status was granted by USCIS,[7] even if the principal asylee was granted asylum by an IJ or the BIA, so long as there is an independent ground to terminate the derivative's asylum status. If it is a derivative asylee who is subject to termination, and not the principal asylee, USCIS includes only the derivative asylee in the NOIT. When the grounds for termination apply to only a derivative asylee, the derivative asylum status is terminated without effect on the principal asylee's status.

Post-Adjustment Actions

If a person adjusted to LPR status and an officer later determines there is evidence that an asylum termination ground or related inadmissibility ground applied before the adjustment occurred, USCIS may take steps to rescind the person's permanent resident status (if within 5 years of adjustment)[8] or issue an NTA.

2. Asylum Granted by Immigration Court

USCIS may not terminate asylum status granted by an IJ since jurisdiction rests with the immigration court.[9] To initiate termination of asylum in these cases, ICE must file a motion to reopen proceedings before the U.S. Department of Justice's Executive Office for Immigration Review (EOIR).

Footnotes

[^ 1] See INA 208(c)(2).

[^ 2] For general information on decisions on adjustment applications, see Part A, Adjustment of Status Policies and Procedures, Chapter 11, Decision Procedures [7 USCIS-PM A.11].

[^ 3] See *Nijjar v. Holder*, 689 F.3d 1077 (9th Cir. 2012).

[^ 4] The Ninth Circuit covers Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, as well as Guam and the Commonwealth of the Northern Mariana Islands.

[^ 5] Derivative asylee includes family members included on the principal asylee's Application for Asylum and for Withholding of Removal (Form I-589) or who followed to join as asylee beneficiaries of a Refugee/Asylee Relative Petition (Form I-730).

[^ 6] In these circumstances, the termination does not preclude the former derivative from applying for asylum or withholding of removal on his or her own as a principal asylee.

[^ 7] USCIS does not have jurisdiction to terminate derivative asylees' asylum status where such status was granted by the immigration court. For more information, see Subsection 2, Asylum Granted by Immigration Court [7 USCIS-PM M.6(B)(2)].

[^ 8] See INA 246.

[^ 9] EOIR's jurisdiction includes principal and derivative asylees granted asylum by the IJ. See 8 CFR 208.24(f).

Part N - Legalization

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures.

See more

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures. We are working quickly to update and incorporate all of the AFM content into the USCIS Policy Manual, the agency's centralized online repository for immigration policies. Until then, we have moved any remaining AFM content to its corresponding Policy Manual Part. To the extent that a provision in the Policy Manual conflicts with remaining AFM content or Policy Memoranda, the updated information in the Policy Manual prevails. If you have questions or concerns about any discrepancies among these resources, contact PolicyFeedback@uscis.dhs.gov.

AFM Chapter 24 - Legalization (External)

Part O - Registration

Chapter 1 - Presumption of Lawful Admission

A. Purpose

USCIS may recognize certain classes of immigrants who entered the United States during specific time periods as having been lawfully admitted for permanent residence even though a record of their admission cannot be found. Such immigrants who have not abandoned status or been ordered excluded, deported, or removed may be eligible for a creation of record of their lawful permanent residence. This process is called "presumption of lawful admission" and is essentially a verification of status, rather than an adjustment of status.

B. Background

As U.S. immigration laws were codified, certain groups of aliens were unable to prove their entry, admission, or immigration status in the United States based on records or other evidence. Various provisions grandfathered these aliens into existing law by allowing for the recording of their lawful admission for permanent residence.

C. Legal Authority

- 8 CFR 101.1 – Presumption of lawful admission
- 8 CFR 264.2 – Application for creation of record of permanent residence

D. Eligibility Requirements

An immigrant is presumed to be a lawful permanent resident of the United States if he or she can show presence in the United States under any of the standards in 8 CFR 101.1. There are more than 30 situations when an immigrant is entitled to presumption of lawful admission for permanent residence. Some merely require that the applicant establish that he or she entered the United States before a certain date. Others require a particular nationality, entry at a particular location, entry by a certain manner, or other requirements. An officer should review the regulation to ensure an applicant is in fact eligible to register his or her lawful permanent residence.

Eligibility to register permanent resident status based on a presumption of lawful admission requires an immigrant to establish that he or she has not abandoned his or her residence in the United States. One of the tests for retention of permanent resident status is continuous residence in the United States.[1] The applicant must also be physically present in the United States at the time he or she files the application.[2]

All presumption of lawful admission cases require an admission to the United States in 1957 or earlier. It is the applicants' responsibility to establish their admission through documentation, testimony, or affidavits.[3] However, an officer should consider the passage of time since the events in question and the difficulties inherent in documenting events that may have occurred decades ago.

The following table provides a list of eligible classes for presumption of lawful admission and whether evidence of admission is required.

Presumption of Lawful Admission

Eligible Class of Aliens	Regulation	Evidence of Admission Required?
Entered prior to June 30, 1906.	8 CFR 101.1(a)	No
Citizen of Canada or Newfoundland who entered the United States across the Canadian border prior to October 1, 1906.	8 CFR 101.1(b)	No
Citizen of Mexico who entered the United States across the Mexican border prior to July 1, 1908.	8 CFR 101.1(b)	No
Citizen of Mexico who entered the United States at the port of Presidio, TX, prior to October 21, 1918.	8 CFR 101.1(b)	No
An alien who establishes he or she gained admission to the United States prior to July 1, 1924 based on a pre-examination at a U.S. immigration station in Canada.	8 CFR 101.1(b)	No

Eligible Class of Aliens	Regulation	Evidence of Admission Required?
An alien who entered the U.S. Virgin Islands prior to July 1, 1938 even if there is a record of admission as a nonimmigrant.	8 CFR 101.1(c)	Yes
An alien who established that he or she is indigenous to and native of a country within the Asiatic zone[4] who is: • Exempted from exclusion; and • Entered the United States prior to July 1, 1924.	8 CFR 101.1(d)	Yes
Certain Chinese aliens with record of admission prior to July 1, 1924 under laws and regulations formerly applicable to Chinese aliens.	8 CFR 101.1(e)(1)	Yes
Certain Chinese or Japanese aliens who were admitted or readmitted on or after July 1, 1924, including certain aliens admitted under specific provisions of the Nationality Act of 1940. [Note: Most admissions under this provision took place between July 1, 1924 and December 23, 1952.]	8 CFR 101.1(e)(2)	Yes
Philippine citizen who entered the United States prior to May 1, 1934.[5]	8 CFR 101.1(f)(1)	Yes
Philippine citizen who entered Hawaii between May 1, 1934 and July 3, 1946 (inclusive) under the provisions of the last sentence of Section 8(a)(1) of the Act of March 24, 1934.[6]	8 CFR 101.1(f)(2)	Yes
Aliens when admitted, expressed an intention to remain temporarily or pass in transit through the United States, but who remained in the United States, including those admitted prior to June 3, 1921 or admitted pursuant to the Act of May 19, 1921.[7]	8 CFR 101.1(g)	Yes
Citizens of the Trust Territory of the Pacific Islands who entered Guam prior to December 24, 1952 and were residing in Guam on December 24, 1952.	8 CFR 101.1(h)	Yes
Aliens admitted to Guam prior to December 24, 1952, as established by records, who was: • Not excludable under the Act of February 5, 1917;[8] • Continued to reside in Guam until December 24, 1952; and • Not admitted or readmitted into Guam as a nonimmigrant.[9]	8 CFR 101.1(i)	Yes
An alien erroneously admitted as a U.S. citizen or as a child of a U.S. citizen prior to September 11, 1957 who maintained a residence in the United States since date of admission.[10]	8 CFR 101.1(j)(1)	Yes
An alien erroneously admitted to the United States prior to July 1, 1948 in possession of a Section 4(a) 1924 Act[11] nonquota immigration visa.	8 CFR 101.1(j)(2)	Yes

E. Documentation and Evidence

An immigrant should submit the following to establish eligibility for presumption of lawful admission for permanent residence:

- Application to Register Permanent Residence or Adjust Status (Form I-485), with the correct fee;
- Two passport-style photographs;
- Copy of government-issued identity document with photograph;
- Copy of birth certificate;
- Evidence of the applicant's examination, entry, or admission to the United States (if applicable);
- A list of all the applicant's arrivals into and departures from the United States;
- Evidence substantiating the applicant's claim to presumption of lawful admission for permanent residence, including proof of maintenance of residence, where required, or any other requirements as specified by regulation;
- A statement by the applicant indicating his or her basis for a claim to presumption of lawful admission for permanent residence; and
- Any other requirements or evidence as specified by regulation.

F. Adjudication

This process does not involve a grant of adjustment of status, but rather, recognition of an applicant's status. A decision on presumption of admission does not involve any consideration of admissibility or discretion. If an applicant meets the eligibility requirements provided in the regulation,[12] an officer must approve the application.

If an applicant is unable to establish the criteria necessary for presumption of lawful admission, an officer should determine whether the applicant has submitted sufficient evidence to establish eligibility for registry, and if so, adjudicate the application as a request to register lawful permanent residence under INA 249.[13]

If approved, USCIS assigns the following code of admission:

Classes of Applicants and Corresponding Codes of Admission

Applicant	Code of Admission

Applicant	Code of Admission
Presumption of Lawful Admission	XB3

The effective date of permanent residence is not the date the application is approved, but rather the date the applicant arrived in the United States under the conditions that created the presumption of lawful admission for permanent residence.[14]

Footnotes

[^ 1] Continuous residence is distinct from continuous physical presence. Although continuous residence and continuous physical presence are related, they have different meanings. Continuous residence refers to maintaining a permanent dwelling place in the United States during the period of time required. In contrast, continuous physical presence refers to the required number of days physically present in the United States during the period of time required. See Volume 12, Citizenship and Naturalization, Part D, General Naturalization Requirements, Chapter 3, Continuous Residence [12 USCIS-PM D.3] and Chapter 4, Physical Presence [12 USCIS-PM D.4].

[^ 2] See 8 CFR 264.2(a).

[^ 3] See 8 CFR 103.2(b)(1).

[^ 4] The Asiatic zone was defined in the Act of February 5, 1917 and covered much of the Middle East and Asia, including countries such as India, China, and the Philippines. See Section 3 of Pub. L. 64-301, 39 Stat. 874, 876.

[^ 5] Registrants under this section are not regarded as permanent residents for naturalization unless they were a citizen of the Commonwealth of the Philippines on July 2, 1946.

[^ 6] See Pub. L. 73-127, 48 Stat. 456, 462.

[^ 7] See Pub. L. 67-5.

[^ 8] See Pub. L. 64-301.

[^ 9] See *Matter of C-Y-L- (PDF)*, 8 I&N Dec. 371 (BIA 1959) (aliens not classifiable as contract laborers under the Immigration Act of 1917 are eligible for presumption of lawful permanent residence). See *Matter of L- (PDF)*, 9 I&N Dec. 82 (BIA 1960) and *Matter of A- (PDF)*, 9 I&N Dec. 85 (BIA 1960) (admission prior to December 24, 1952 as a contract laborer cannot be cured by an admission subsequent to that date as a higher level of employee). See *Matter of Antolin (PDF)*, 12 I&N Dec. 127 (BIA 1967) (8-year residence outside Guam after 1952 nullified eligibility for presumption of lawful permanent residence).

[^ 10] See *Matter of M-Y-C- (PDF)*, 8 I&N Dec. 313 (BIA 1959) (an alien who was not in fact the child of a U.S. citizen at the time of his or her admission does not qualify). See *Matter of K-B-W- (PDF)*, 9 I&N Dec. 610 (BIA 1962) (alleged adoptive child of a U.S. citizen who is not within the definition at INA 101(b)(1)(E) does not qualify). See *Matter of Cruz-Gastelum (PDF)*, 12 I&N Dec. 704 (BIA 1968) (an alien does not qualify in the absence of a record of claimed admission).

[^ 11] See Pub. L. 68-139, 43 Stat. 153, 155 (May 26, 1924).

[^ 12] See 8 CFR 101.1. See 8 CFR 264.2.

[^ 13] See Chapter 4, Aliens Who Entered the United States Prior to January 1, 1972 [7 USCIS-PM O.4].

[^ 14] See 8 CFR 264.2(h)(1).

Chapter 2 - Presumption of Lawful Admission Despite Certain Errors Occurring at Entry

Under certain circumstances, immigrants and nonimmigrants may still be considered as having been lawfully admitted even if the following errors occurred at the time of their admission:

- Entry was made and recorded under a name other than the immigrant’s or nonimmigrant's full true and correct name; or
- Entry record contains errors in sex, names of relatives, or names of foreign places of birth or residence.[1]

As long as the applicant proves by clear, unequivocal, and convincing evidence that the record of the claimed admission relates to him or herself, the admissions record can be corrected and the applicant considered lawfully admitted.[2]

If correcting an error in name that occurred as part of an entry on or after May 22, 1918, then the applicant must also establish that the name used was not adopted for the purpose of concealing identity when obtaining a passport or visa, or otherwise evading immigration law. Additionally, the name used at the time of entry must have been one the applicant was known by for a sufficient length of time before applying for a passport or visa so true identity could have been established.[3]

If the error took place during admission at a port of entry, the applicant should go to the nearest port of entry or U.S. Customs and Border Protection (CBP) deferred inspection office in person to correct the error.[4] If USCIS made an error on the Arrival/Departure Record (Form I-94), the applicant should file an Application for Replacement/Initial Nonimmigrant Arrival-Departure Document (Form I-102) for correction.

Footnotes

[^ 1] See 8 CFR 101.2. See 8 CFR 264.2.

[^ 2] See 8 CFR 101.2.

[^ 3] See 8 CFR 101.2.

[^ 4] To locate a port of entry, go to cbp.gov/contact/ports. To locate a deferred inspection site, go to cbp.gov/about/contact/ports/deferred-inspection-sites.

Chapter 3 - Children Born in the United States to Accredited Diplomats

A. Purpose

The child of a foreign diplomatic officer accredited by the U.S. Department of State who is born in the United States may voluntarily register for lawful permanent residence.[1]

B. Background

Foreign diplomats enjoy certain immunities under international law. The spouse and child of a diplomat generally enjoy similar immunities. Children born in the United States to accredited foreign diplomatic officers do not acquire citizenship under the 14th Amendment since they are not "born . . . subject to the jurisdiction of the United States."[2] DHS regulations, however, have long allowed these children to choose to be considered lawful permanent residents (LPRs) from the time of birth.[3]

Registration as a permanent resident under this provision is entirely voluntary, but it does involve an application process.

This registration process is necessary and available only if both parents were foreign diplomats when the child was born. If one parent was an accredited diplomat, but the other was a U.S. citizen or national (but not citizen) of the United States, then the child was "born . . . subject to the jurisdiction of the United States," and is a citizen.

C. Legal Authority

- 8 CFR 101.3 – Creation of record of lawful permanent resident status for person born under diplomatic status in the United States
- 8 CFR 264.2 – Application for creation of record of permanent residence

D. Eligibility Requirements

To register permanent residence as a child born in the United States to a foreign diplomatic officer accredited by the Department of State, the applicant must meet the following eligibility requirements:

Eligibility Requirements: Children Born in the United States to Accredited Diplomats
The applicant voluntarily seeks to register permanent residence.
The applicant was born in the United States.
The applicant maintained continuous residence in the United States since birth.
The applicant is physically present in the United States at the time he or she files the application.
The applicant had a parent who was listed on the Department of State's Diplomatic List, also known as the Blue List, at the time of the applicant's birth.
The applicant lost or waived his or her diplomatic immunity.

1. Voluntarily Seeking the Benefit

This is automatically established by the applicant applying to register permanent resident status in the United States.

2. Born in the United States

The applicant must establish birth in the United States.

3. Continuous Residence in the United States[4]

Generally, absences that would not affect the status of any other LPR do not break the continuous residence of an applicant under this program. Some additional guidelines are applicable to this particular type of case:

- Temporary or extended absences from the United States do not break continuous residence if the diplomatic parent remained accredited to the United States during the applicant's absence. For example, many children of diplomats attend school in their parents' home country while the parents are on diplomatic assignment. An absence for this purpose, even if it extended for a year or longer, would not be considered a break in the applicant's continuous residence.
- Readmission to the United States as an A or G nonimmigrant[5] at the end of an absence does not break an applicant's continuous residence.
- Departure of the applicant's diplomatic parent does not break the applicant's residence if the applicant remains in the United States. However, if the applicant permanently departs with his or her diplomat parent, continuous residence is broken.[6]

4. Parent with Full Diplomatic Immunity at Time of the Applicant's Birth

Diplomats accredited to the United States and having full diplomatic immunity are listed on the Department of State's Diplomatic List (Blue List).[7] If either parent was listed on the Blue List when the applicant was born, the applicant is eligible to apply for this benefit. Both parents do not have to be listed for the applicant to be eligible.[8]

Not all diplomats or employees of certain designated international organizations admitted to the United States as an A or G nonimmigrant have full diplomatic immunity and appear on the Blue List. For example, the immunities that apply to a foreign consular officer are not the same as those that apply to diplomats. In order to determine eligibility to register for permanent residence based on being born in the United States in diplomatic status, the applicant must submit official confirmation of the diplomatic classification and occupational title of his or her parent at the time of birth.

USCIS confirms with the Department of State whether the applicant's parent(s) was on the Blue List at the time of the child's birth. If an applicant did not have a parent on the Blue List at the time of his or her birth in the United States, then the applicant is a U.S. citizen because the applicant did not have full diplomatic immunity and was therefore subject to U.S. jurisdiction at the time of birth.

5. Applicant Lost or Waived Diplomatic Immunity

Because an LPR cannot be immune to the laws of the United States, applicants who retain diplomatic immunity at the time they apply to register permanent residence must submit with their application a completed and signed Request for Waiver of Certain Rights, Privileges, Exemptions, and Immunities (Form I-508).

However, if, at the time an applicant applies to register lawful permanent residence, the applicant has lost diplomatic immunity as verified by USCIS through the Department of State, then the applicant does not need to submit Form I-508 with the application.

E. Documentation and Evidence

An applicant should submit the following to establish eligibility for lawful permanent residence as a person born in the United States to an accredited foreign diplomatic officer:

- Application to Register Permanent Residence or Adjust Status (Form I-485), with the correct fee;
- Request for Waiver of Certain Rights, Privileges, Exemptions, and Immunities (Form I-508);
- Two passport-style photographs;
- Copy of government-issued identity document with photograph;
- Copy of birth certificate;
- A list of all the applicant's arrivals into and departures from the United States;
- Proof of continuous residence in the United States; and
- Official confirmation of the diplomatic classification and occupational title of the applicant's parent(s) at the time of the applicant's birth.

F. Adjudication

A decision on registration of those born in the United States in diplomatic status does not involve any consideration of admissibility or discretion. If the applicant meets all eligibility requirements,[9] an officer must approve the application. USCIS may require the applicant to appear in person for an interview, if needed.[10]

If approved, USCIS assigns the following code of admission:

Classes of Applicants and Corresponding Codes of Admission

Applicant	Code of Admission
Born Under Diplomatic Status in the United States	DS1

The effective date of permanent residence is the applicant's date of birth.[11]

Footnotes

[^ 1] See 8 CFR 101.3(a).

[^ 2] See 8 CFR 101.3(a)(1).

[^ 3] See *Matter of Huang (PDF)*, 11 I&N Dec. 190 (Reg. Comm. 1965) and *Matter of Chu (PDF)*, 14 I&N Dec. 241 (Reg. Comm. 1972).

[^ 4] See 8 CFR 101.3(d).

[^ 5] See INA 101(a)(15)(A) or INA 101(a)(15)(G).

[^ 6] See *Nikoi v. Attorney General of the United States*, 939 F.2d 1065 (D.C. Cir. 1991).

[^ 7] See 8 CFR 101.3(a)(2).

[^ 8] However, this registration process is necessary and available only if both parents were foreign diplomats when the child was born. If one parent was an accredited diplomat, but the other was a U.S. citizen or national (but not citizen) of the United States, then the child was born subject to U.S. jurisdiction and is a citizen.

[^ 9] See 8 CFR 101.3. See 8 CFR 264.2.

[^ 10] If it appears that the applicant is subject to removal, approval of registration does not bar issuance of a notice to appear.

[^ 11] See 8 CFR 264.2(h)(2).

Chapter 4 - Aliens Who Entered the United States Prior to January 1, 1972

A. Purpose

USCIS has the discretionary authority to create a record of lawful admission for and to adjust to lawful permanent resident status eligible aliens who entered the United States prior to January 1, 1972. This process is called registry.

B. Background

The statutory provision on registry, which originated in the Act of March 2, 1929,[1] enables certain unauthorized aliens in the United States to acquire permanent resident status. The provision has been reviewed and amended periodically since 1929, most commonly to advance the required date from which continuous residence must be established:

Registry Program – Legislative Background

Legislation	Effect on Registry Provision
Nationality Act of 1940[2]	• Codified the registry provision • Advanced the registry date to July 1, 1924

Legislation	Effect on Registry Provision
Immigration and Nationality Act of 1952[3]	• Rephrased registry provision • Created INA 249
Immigration and Nationality Act Amendments of 1958[4]	• Eliminated requirement that applicant not be deportable[5] • Created requirement that applicant may not be inadmissible "as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotics laws or smugglers of aliens"[6] • Advanced the registry date to June 28, 1940
Immigration and Nationality Act Amendments of 1965[7]	• Advanced the registry date to June 30, 1948
Immigration Reform and Control Act of 1986[8]	• Advanced the registry date to January 1, 1972
Immigration Technical Corrections Act of 1988[9]	• Added requirement that registry applicants must not be inadmissible as participants in Nazi persecution or genocide
Immigration Act of 1990(IMMACT 90)[10]	• Made registry unavailable for 5 years to applicants who, despite proper notice, failed to appear for deportation, asylum, or other immigration proceedings
Illegal Immigration Reform and Immigrant Responsibility Act of 1996[11]	• Lengthened IMMACT 90's 5-year bar to 10 years • Precluded aliens from registry if deportable for engaging in terrorist activities

C. Legal Authority

- INA 249; 8 CFR 249 – Record of admission for permanent residence in the case of certain aliens who entered the United States prior to January 1, 1972

D. Eligibility Requirements

To qualify for registry, the applicant must meet the following eligibility requirements:[12]

Eligibility Requirements: Registry
The applicant entered the United States prior to January 1, 1972.
The applicant maintained continuous residence in the United States since his or her entry.
The applicant is physically present in the United States at the time he or she files the application.
The applicant is a person of good moral character.
The applicant is admissible to the United States or eligible for a waiver of inadmissibility or other form of relief.
The applicant is not deportable under terrorist-related grounds.[13]
The applicant merits the favorable exercise of discretion.

1. Entered the United States prior to January 1, 1972

In general, entry pertains to any type of entry, whether legal or illegal, including entry in any immigrant, nonimmigrant, or parole classification.

Current Exchange Visitors

Although not listed as a basis for ineligibility for registry, nonimmigrants who entered as an exchange visitor (J nonimmigrant) subject to the 2-year foreign residency requirement are precluded from applying for permanent residence unless a waiver is granted.[14] Any applicant subject to the foreign residency requirement must be eligible for and obtain a waiver of the requirement since compliance with such requirement would break the continuous residence after entry.

2. Maintained Continuous Residence in the United States Since Entry

An applicant may prove continuous residence[15] in the United States since entry without regard to numerous brief departures from the United States.[16]

Establishing continuity of residence is normally done through the submission of a number of documents covering the period of time since the claimed admission date. While there is no fixed number of documents an applicant must submit to cover the period, it must be enough to satisfy an officer making the determination. An officer should take into account the length of time since the entry, the applicant's circumstances, and other similar factors when determining how much evidence is necessary to establish continuous residence.

The burden remains on the applicant to prove eligibility for this benefit.[17] Exact, complete proof of continuous residence is not required. However, the applicant should submit evidence to show a pattern of continuous residence in the United States for the time period necessary. The officer should consider the proof of residence submitted in light of any relevant periods of time when large numbers of aliens were leaving the United States, such as periods of war or economic recessions.[18]

Establishing Entry and Continuous Residence

The applicant may show evidence of entry by submitting at least one document showing presence in the United States prior to January 1, 1972. An applicant may submit as many documents as necessary to establish the entry date and continuous residence in the United States. The officer should document the record to reflect the evidence used to establish

eligibility.

Examples of the types of evidence an applicant may submit include copies of:

- Passport page(s) with nonimmigrant visa, admission, or parole stamp(s);
- Arrival/Departure Record (Form I-94);
- Income tax records;
- Mortgage deeds or leases;
- Insurance premiums and policies;
- Birth, marriage, and death certificates of immediate family members;
- Medical records;
- Bank records;
- School records;
- All types of receipts that contain identifying information about the applicant;
- Census records;
- Social Security records;
- Newspaper articles concerning the applicant;
- Employment records;
- Military records;
- Draft records;
- Car registrations;
- Union membership records; and
- Affidavits from credible witnesses having a personal knowledge of the applicant's residence in the United States, submitted with the affiant's contact information.

Although affidavits may be submitted and should be considered, an applicant should be able to provide some type of additional evidence to support the application. Additionally, affidavits must be convincing and verifiable and affiants must be credible witnesses.[19]

3. Good Moral Character

The good moral character[20] requirement for the registry should be treated in a similar manner to the good moral character requirement in the naturalization process except that registry does not require good moral character over a specified period of time. The applicant is required to establish good moral character during the period encompassed by the registry application. If an applicant is not within any of the specific classes of aliens ineligible for visas or admission under INA 212, an officer may find the applicant does not possess good moral character for other reasons.[21]

4. Admissibility and Waiver Requirements

Only certain grounds of inadmissibility are relevant to registry applications.[22] The following table specifies which grounds of inadmissibility apply and which do not apply to applicants for registry.

Applicability of Grounds of Inadmissibility: Registry Applicants

Ground of Inadmissibility	Applies	Exempt or Not Applicable
INA 212(a)(1) – Health-Related		X
INA 212(a)(2)(A) – Conviction (or Commission) of Certain Crimes	X	
INA 212(a)(2)(B) – Multiple Criminal Conviction	X	
INA 212(a)(2)(C) – Controlled Substance Traffickers	X	
INA 212(a)(2)(D) – Prostitution and Commercialized Vice	X	
INA 212(a)(2)(E) – Asserted Immunity from Prosecution		X
INA 212(a)(2)(G) – Foreign Government Officials who have Committed Severe Violations of Religious Freedom		X
INA 212(a)(2)(H) – Significant Traffickers in Persons		X
INA 212(a)(2)(I) – Money Laundering		X
INA 212(a)(3)(E) – Security-Related	X	

Ground of Inadmissibility	Applies	Exempt or Not Applicable
INA 212(a)(4) – Public Charge		X
INA 212(a)(5) – Labor Certification and Qualifications for Certain Immigrants		X
INA 212(a)(6)(A) – Present Without Admission or Parole		X
INA 212(a)(6)(B) – Failure to Attend Removal Proceedings		X
INA 212(a)(6)(C) – Misrepresentation		X
INA 212(a)(6)(D) – Stowaways		X
INA 212(a)(6)(E) – Smugglers	X	
INA 212(a)(6)(F) – Subject to Civil Penalty		X
INA 212(a)(6)(G) – Student Visa Abusers		X
INA 212(a)(7)(A) – Documentation Requirements for Immigrants		X
INA 212(a)(8) – Ineligibility for Citizenship	X	
INA 212(a)(9) – Aliens Previously Removed		X
INA 212(a)(10) – Practicing Polygamists, Guardians Required to Accompany Helpless Persons, International Child Abductors, Unlawful Voters, and Former Citizens who Renounced Citizenship to Avoid Taxation		X

Criminal acts may be waived if the applicant meets the criteria for a waiver of the ground.[23] An applicant may file a waiver application for the applicable grounds of inadmissibility and it should be adjudicated to the standards of any other waiver.[24]

5. Discretion

Even if a registry applicant meets all other statutory eligibility criteria, the application must still warrant a favorable exercise of discretion to be approved.

In most registry cases, a favorable exercise of discretion is warranted because the positive factor of having lived in the United States for such a long period of time and having created ties to the country outweigh all but the most negative discretionary factors.[25]

6. Treatment of Family Members

Dependents of registry applicants cannot file as derivative applicants. Each applicant must qualify on his or her own. An applicant may petition for eligible family members in an appropriate family-based category once he or she obtains permanent resident status through registry.

E. Documentation and Evidence

An applicant should submit the following to establish eligibility for registry:

- Application to Register Permanent Residence or Adjust Status (Form I-485), with the correct fee;
- Two passport-style photographs;
- Copy of government-issued identity document with photograph;
- Copy of birth certificate;
- Evidence of entry into the United States prior to January 1, 1972;
- Evidence of continuous physical presence in the United States since entry; and
- Certified police and court records of criminal charges, arrests, or convictions (if applicable).

An applicant does not have to submit a Report of Immigration Medical Examination and Vaccination Record (Form I-693) or Affidavit of Support Under Section 213A of the Act (Form I-864), because the medical and public charge grounds of inadmissibility are not applicable.

F. Adjudication

1. Jurisdiction

An application for registry must be filed according to the form instructions. USCIS generally has jurisdiction to adjudicate the application unless the applicant has been served with a Notice to Appear or warrant of arrest.[26] If the applicant has been served with a Notice to Appear, an Immigration Judge generally has jurisdiction over the application. If an Immigration Judge has jurisdiction, an officer completes only preliminary processing and closing actions on the case once the judge has made a final decision.

2. Interview

If USCIS has jurisdiction, the applicant is interviewed to determine eligibility. At the interview, the officer places the applicant under oath and proceeds to review the application.

Name

The officer should closely question the applicant regarding all variations of names used, including foreign variations of any Anglicized names. An officer should pay particular attention to the name the applicant used upon arrival in the United States. Information gathered concerning the applicant's name may provide data that an officer can use to search relevant systems for information on the applicant's entry.

Date of Last Arrival in the United States

If the applicant has been absent from the United States on at least one occasion since the entry claimed on the application for registry, an officer should question the applicant to obtain all the facts regarding the date, place, manner of departure and reentry, and the purpose of each absence. An officer may need to verify each departure and reentry from USCIS records if the applicant's file does not contain the information. A temporary absence does not necessarily break the continuity of the applicant's residence. Therefore, an officer must determine whether the evidence establishes that the applicant's absence did or did not break the continuity of residence. In any case where the applicant departed under an order of exclusion or deportation, continuity of residence is considered broken.

Membership in Organizations

If other evidence of the applicant's continuity of residence is missing, an applicant's organizational membership or association records may be helpful regarding the period of the applicant's membership. Membership in organizations includes unions, clubs, and religious or community entities.

An officer should question the applicant about the nature of any organization in which the applicant has been involved. When appropriate, an officer should check against the list of Foreign Terrorist Organizations designated by the Secretary of State.[27]

Violations of Law

The statute specifically bars from registry those applicants who are found to be inadmissible "as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotics laws or smugglers of aliens."[28] Therefore, an officer should elicit information from the applicant about any criminal history to determine if the applicant meets the eligibility requirements and ensure the applicant is admissible to the United States.

Request for Exemption or Discharge from Training or Service in the U.S. Armed Forces

An applicant who is ineligible to citizenship is barred from registry.[29] For this reason, an officer should review any information in the Selective Service System to determine if the applicant is eligible for registry.

If the applicant was classified as "4-C – Alien or Dual National - Sometimes Exempt from Military Service" by the Selective Service System, the officer should further inquire to determine if the applicant was granted exemption or discharge from training or service in the U.S. armed forces due to alienage.[30] If the applicant avoided conscripted military service by requesting and being granted exemption or discharge from training or service in the U.S. military due to alienage, the applicant is considered "ineligible to citizenship" and therefore ineligible for registry.

Deportation Proceedings

An officer should verify the applicant's statements regarding deportation or removal proceedings. The applicant's continuity of residence is considered broken by a departure due to, or following, an order of removal, deportation, or exclusion. However, an applicant who leaves under an order of voluntary departure does not automatically break the continuity of residence.[31]

Eligibility for Presumption of Lawful Admission

If examination of an applicant's file and supporting documents and information establishes the applicant is eligible for presumption of lawful admission[32] even though the applicant sought permanent residence through registry, an officer should advise the applicant that the registry application filed on Form I-485 will be converted to one for presumption of lawful admission.

The officer should only transfer the Form I-485 from one basis to another in clear cases in which the application can be immediately granted.

3. Approvals

If the applicant can establish eligibility for registry and that the application warrants a favorable exercise of discretion, then the officer should approve the application and provide the applicant with a permanent resident card.

Effective Date of Permanent Residence

The date the applicant is able to establish entry for registry purposes is important because it determines the code of admission as well as the effective date of the applicant's permanent residence, as outlined in the table below.

Classes of Applicants and Corresponding Codes of Admission

Date of Established Entry	Effective Date of Permanent Residence	Code of Admission
Prior to July 1, 1924	Date of Entry into the United States	Z33
On or After July 1, 1924 and Prior to June 28, 1940	Date Application is Approved	Z03

Date of Established Entry	Effective Date of Permanent Residence	Code of Admission
On or After June 28, 1940 and Prior to January 1, 1972	Date Application is Approved	Z66

An applicant who claims entry prior to July 1, 1924, but is only able to establish presence at some point after that date and before January 1, 1972 can only be granted permanent residence as of the date of the application's approval. If the applicant is able to establish presence prior to July 1, 1924 after a decision has already been made, the application should be reopened on a Service motion and a new decision issued.[33]

4. Denials

If no record is found of the applicant's entry and the applicant is unable to establish eligibility for registry, an officer must deny the application and provide a written explanation of the reasons the application was denied.[34] There is no appeal of a denied registry application. If removal proceedings are initiated against the applicant, then the applicant may renew the registry application in removal proceedings.[35]

Footnotes

[^ 1] See 45 Stat. 1512.

[^ 2] See Pub. L. 76-853 (October 14, 1940).

[^ 3] See Pub. L. 82-414 (PDF) (June 27, 1952).

[^ 4] See Pub. L. 85-616 (PDF) (August 8, 1958). See Pub. L. 85-700 (PDF) (August 21, 1958).

[^ 5] By eliminating deportability as a bar, registry became available to applicants who had entered the country without inspection, or who had overstayed or violated the terms of a temporary period of entry.

[^ 6] See INA 249.

[^ 7] See Pub. L. 89-236 (PDF) (October 3, 1965).

[^ 8] See Pub. L. 99-603 (PDF) (November 6, 1986).

[^ 9] See Pub. L. 100-525 (PDF) (October 24, 1988).

[^ 10] See Pub. L. 101-649 (PDF) (November 29, 1990).

[^ 11] See Pub. L. 104-208 (PDF) (September 30, 1996).

[^ 12] See INA 249.

[^ 13] See INA 237(a)(4)(B) (aliens inadmissible under INA 212(a)(3)(B) and INA 212(a)(3)(F) are deportable).

[^ 14] See INA 212(e).

[^ 15] See INA 101(a)(33).

[^ 16] See *Matter of Outin (PDF)*, 14 I&N Dec. 6 (BIA 1972), but see *Matter of Lettman (PDF)*, 11 I&N Dec. 878 (Reg. Comm. 1966). A departure as a result of exclusion or expulsion proceedings may break the continuity of residence regardless of the period of time outside the United States. See *Matter of P- (PDF)*, 8 I&N Dec. 167 (BIA 1958), but see *Matter of Young (PDF)*, 11 I&N Dec. 38 (BIA 1965) (voluntary departure does not break continuity of residence).

[^ 17] See 8 CFR 103.2(b)(1).

[^ 18] For a further discussion on the issue of continuity of residence, see *Matter of P- (PDF)*, 8 I&N Dec. 167 (Reg. Comm. 1958); *Matter of S-J-S- (PDF)*, 8 I&N Dec. 463 (Asst. Comm'r 1959); *Matter of Lee (PDF)*, 11 I&N Dec. 34 (BIA 1965); *Matter of Young (PDF)*, 11 I&N Dec. 38 (BIA 1965); *Matter of Ting (PDF)*, 11 I&N Dec. 849 (BIA 1966); *Matter of Lettman (PDF)*, 11 I&N Dec. 878 (Reg. Comm. 1966); *Matter of Benitez-Saenz (PDF)*, 12 I&N Dec. 593 (BIA 1967); *Matter of Contreras-Sotelo (PDF)*, 12 I&N Dec. 596 (BIA 1967); *Matter of Harrison (PDF)*, 13 I&N Dec. 540 (BIA 1970); and *Matter of Jalil (PDF)*, 19 I&N Dec. 679 (Comm. 1988).

[^ 19] See 8 CFR 103.2(b)(2)(i). See 8 CFR 245a.2(d)(3) for examples of documents that may establish proof of continuous residence. Although this list was created for legalization provisions, it provides common examples of evidence that USCIS will accept to establish continuous residency under any statutory provision.

[^ 20] See INA 101(f). See *Matter of P- (PDF)*, 8 I&N Dec. 167 (BIA 1958).

[^ 21] For further discussion on good moral character, see Volume 12, Citizenship and Naturalization, Part F, Good Moral Character [12 USCIS-PM F]. See *Matter of Carbajal (PDF)*, 17 I&N Dec. 272 (Comm. 1978). See *Matter of Piroglu (PDF)*, 17 I&N Dec. 578 (BIA 1980). See *Matter of Sanchez-Linn (PDF)*, 20 I&N Dec. 362 (BIA 1991).

[^ 22] The statute only requires that a registry applicant establish that he or she is not inadmissible under INA 212(a)(3)(E) or INA 212(a) insofar as it relates to "criminals, procurers and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens" and that he or she is not ineligible to citizenship and is not deportable under INA 237(a)(4)(B). See INA 249. For more information on the grounds of inadmissibility, see Volume 8, Admissibility [8 USCIS-PM].

[^ 23] See INA 212(h).

[^ 24] For more information on waivers, see Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM].

[^ 25] For more information on discretion, see Part A, Adjustment of Status Policies and Procedures, Chapter 10, Legal Analysis and Use of Discretion [7 USCIS-PM A.10]. For a discussion of discretion in registry applications, see *Matter of L-F-Y- (PDF)*, 8 I&N Dec. 601 (Asst. Comm. 1960); *Matter of R-E- (PDF)*, 9 I&N Dec. 103 (Asst. Comm. 1960); and *Matter of De Lucia (PDF)*, 11 I&N Dec. 565 (BIA 1966).

[^ 26] See 8 CFR 249.2(a).

[^ 27] Applicants must not be deportable under terrorist-related grounds to be eligible for registry. See Section D, Eligibility Requirements [7 USCIS-PM O.4(D)].

[^ 28] See INA 249. See INA 212(a)(2)(A)-(D) and INA 212(a)(6)(E). See Section D, Eligibility Requirements, Subsection 4, Admissibility and Waiver Requirements [7 USCIS-PM O.4(D)(4)].

[^ 29] See INA 249(d). See INA 212(a)(8) (ground of inadmissibility) and INA 101(a)(19) (definition of ineligible to citizenship). See Section D, Eligibility Requirements, Subsection 4, Admissibility and Waiver Requirements [7 USCIS-PM O.4(D)(4)].

[^ 30] See Volume 12, Citizenship and Naturalization, Part I, Military Members and their Families, Chapter 4, Permanent Bars to Naturalization [12 USCIS-PM I.4]. An applicant who requested, applied for, and obtained a discharge or exemption from military service from the U.S. armed forces on the ground that he or she is an "alien" (“alienage discharge”) is permanently ineligible for naturalization unless he or she qualifies for an exception.

[^ 31] See *Matter of Young (PDF)*, 11 I&N Dec. 38 (BIA 1965). See *Matter of Benitez-Saenz (PDF)*, 12 I&N Dec. 593 (BIA 1967). See *Matter of Contreras-Sotelo (PDF)*, 12 I&N Dec. 596 (BIA 1967).

[^ 32] See Chapter 1, Presumption of Lawful Admission [7 USCIS-PM O.1].

[^ 33] See 8 CFR 249.3.

[^ 34] See 8 CFR 103.3.

[^ 35] See 8 CFR 249.2(b).

Chapter 5 - Other Special Laws

A. American Indians Born in Canada

1. Purpose and Background

Section 289 of the Immigration and Nationality Act (INA) provides that American Indians who are born in Canada cannot be denied admission into the United States if they possess at least 50 percent American Indian blood. By regulation, American Indians born in Canada who are eligible for INA 289 status may also become lawful permanent residents (LPRs) if they have maintained residence in the United States since their last entry.[1]

Texas Band of Kickapoo Indians

Certain members of the Texas Band of Kickapoo Indians, which is a subgroup of the Kickapoo Tribe of Oklahoma, also cannot be denied admission to the United States. However, INA 289 is not the statutory basis for the treatment of members of the Texas Band of Kickapoo Indians which is authorized by a separate statute.[2]

2. Legal Authorities

- INA 289; 8 CFR 289 – American Indians born in Canada

3. Eligibility Requirements

An alien who proves that he or she is an American Indian born in Canada, with at least 50 percent American Indian blood, cannot be denied admission to the United States at a port of entry. If an alien with at least 50 percent American Indian blood lives outside the United States and seeks to enter the United States, he or she must tell the Customs and Border Protection officer that he or she is an American Indian born in Canada and provide documentation to support that claim.

Aliens who live in the United States and are American Indians born in Canada who possess at least 50 percent American Indian blood are entitled to evidence of LPR status if they can establish that they have maintained residence in the United States since their last entry.[3] They may obtain a Permanent Resident Card (PRC)[4] by requesting a creation of record at a USCIS Field Office. As with presumption of lawful admission cases,[5] USCIS is not adjudicating an application to become an LPR, but verifying a status which the person already has and issuing documentation accordingly.

4. Documentation and Evidence

To obtain a PRC, claimants must demonstrate:

- 50 percent or more of blood of the American Indian race;
- Birth in Canada; and
- Residence in the United States since last entry.[6]

Claimants must have proof of ancestry based on familial blood relationship to parents, grandparents, or great-grand parents who are or were registered members of a recognized Canadian Indian Band or U.S. Indian tribe. Usually, eligibility is established by presenting identification such as a tribal certification that is based on reliable tribal records, birth certificates, and other documents establishing the requisite percentage of Indian blood.

The Canadian Certificate of Indian Status (Form IA-1395) issued by the Canadian government[7] specifies the tribal affiliation but does not indicate percentage of Indian blood. Membership in an Indian tribe or First Nation in Canada does not necessarily require Indian blood.

An alien is not eligible for permanent residence if tribal membership comes through marriage or adoption.

For additional information on how to request creation of a record and proof of permanent residence, see the Green Card for an American Indian Born in Canada web page.

5. Decision

Approval

Upon establishing that the claimant is an American Indian born in Canada, with at least 50 percent American Indian blood, who has maintained residence in the United States since his or her last entry, the claimant is entitled to creation of a record of admission for lawful permanent residence, even if technically inadmissible or previously deported.[8] USCIS issues a PRC accordingly. A claimant is not required to file any application or pay any fees as part of this process.

If DHS records show that the claimant has already been accorded creation of a record of admission for lawful permanent residence and issued a PRC, an officer should advise the applicant that he or she must file an Application to Replace Permanent Resident Card (Form I-90), and pay the filing fee required.[9]

Denial

If the claimant is unable to prove that he or she is an American Indian born in Canada, with at least 50 percent American Indian blood, or prove residency since the last entry, the officer must deny the request and provide a written explanation of the reasons of the denial.[10] There is no appeal from the decision, although the claimant may renew his or her request if and when he or she is able to overcome the basis of the decision. Depending on the circumstances, such a claimant may be referred for consideration of initiation of removal proceedings.

B. Reserved

[Reserved]

Footnotes

[^ 1] See 8 CFR 289.2.

[^ 2] Members of the Texas Band of Kickapoo Indians typically present themselves for admission at a port of entry. See Texas Band of Kickapoo Act, Pub. L. 97-429 (PDF), 96 Stat. 2269 (January 8, 1983).

[^ 3] See INA 289 and 8 CFR 289.2.

[^ 4] A Permanent Resident Card is also called a Form I-551 or a green card.

[^ 5] See 8 CFR 101.1 and 8 CFR 101.3.

[^ 6] See 8 CFR 289.2.

[^ 7] Since August 2017, the certificates (also known as “INAC cards” or “status cards”) are issued by Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC). For more information, see the CIRNAC webpage.

[^ 8] See *Matter of Yellowquill* (PDF), 16 I&N Dec. 576 (BIA 1979).

[^ 9] See Fee Schedule (Form G-1055).

[^ 10] See 8 CFR 103.3.

Part P - Other Adjustment Programs

In May 2020, USCIS retired its Adjudicator’s Field Manual (AFM), a collection of our immigration policies and procedures.

See more

In May 2020, USCIS retired its Adjudicator’s Field Manual (AFM), a collection of our immigration policies and procedures. We are working quickly to update and incorporate all of the AFM content into the USCIS Policy Manual, the agency’s centralized online repository for immigration policies. Until then, we have moved any remaining AFM content to its corresponding Policy Manual Part. To the extent that a provision in the Policy Manual conflicts with remaining AFM content or Policy Memoranda, the updated information in the Policy Manual prevails. If you have questions or concerns about any discrepancies among these resources, contact PolicyFeedback@uscis.dhs.gov.

AFM Chapter 21 - Family-based Petitions and Applications (External)

AFM Chapter 23 - Adjustment of Status to Lawful Permanent Resident (External)

Chapter 1 - Reserved

Chapter 2 - Reserved

Chapter 3 - Reserved

Chapter 4 - Reserved

Chapter 5 - Liberian Refugee Immigration Fairness

A. Purpose and Background[1]

Enacted on December 20, 2019, the National Defense Authorization Act for Fiscal Year 2020 included a provision, Liberian Refugee Immigration Fairness (LRIF), which provides an opportunity for certain Liberian nationals and their eligible family members to obtain lawful permanent resident (LPR) status.[2] After adjusting to LPR status under LRIF, some aliens would then immediately become eligible to apply for naturalization.

As initially enacted, the filing deadline for LRIF applications was December 20, 2020. Congress later extended the filing period for LRIF applications to December 20, 2021.[3] Applications must be received on or by December 20, 2021.

B. Legal Authority

- Section 7611 of the National Defense Authorization Act for Fiscal Year 2020 – Liberian Refugee Immigration Fairness[4]

C. Eligibility Requirements

To adjust to LPR status based on LRIF a Liberian principal applicant must meet the eligibility requirements shown in the table below.[5]

LRIF-Based Adjustment of Status Eligibility Requirements
The applicant must properly file an Application to Register Permanent Residence or Adjust Status (Form I-485) which is received on or by December 20, 2021.[6]
The applicant is a national of Liberia.
The applicant has been continuously physically present in the United States since November 20, 2014, through the date he or she properly files the adjustment application.[7]
The applicant is admissible to the United States for lawful permanent residence or eligible for a waiver of inadmissibility or other form of relief.

1. Ineligible Aliens

An alien is not eligible for adjustment of status based on LRIF if he or she has:

- Been convicted of any aggravated felony;[8]
- Been convicted of two or more crimes involving moral turpitude (other than a purely political offense); or
- Ordered, incited, assisted, or otherwise participated in the persecution of any other person on account of race, religion, nationality, membership in a particular social group, or political opinion.[9]

2. Continuous Physical Presence Requirement

To qualify for adjustment of status based on LRIF, a Liberian principal applicant must establish that he or she has been continuously physically present in the United States during the period beginning on November 20, 2014, and ending on the date he or she properly files an adjustment application based on LRIF.[10]

USCIS considers an applicant who was absent from the United States for one or more periods amounting to more than 180 days in the aggregate (total) to have failed to have maintained continuous physical presence.[11]

3. Admissibility and Waiver Requirements

An applicant must be admissible to the United States in order to be eligible for adjustment of status under LRIF.[12] In general, if an applicant is inadmissible based on an applicable ground of inadmissibility, he or she must apply for a waiver or other form of relief, if eligible, to overcome that inadmissibility.[13] If USCIS grants a waiver or other form of relief in its discretion, USCIS may approve the application to adjust status if the applicant is otherwise eligible.

LRIF applicants are subject to all grounds of inadmissibility except:

- INA 212(a)(4) – Public charge;
- INA 212(a)(5) – Labor certification and qualifications for certain immigrants;
- INA 212(a)(6)(A) – Aliens present without admission or parole; and
- INA 212(a)(7) – Documentation requirements for immigrants.[14]

4. Eligibility of Family Members

The spouse, child,[15] and unmarried son or daughter of a Liberian principal applicant who is LRIF-eligible may also seek adjustment based on LRIF regardless of their nationality.[16]

To adjust based on LRIF, eligible family members must:

- Properly file an Application to Register Permanent Residence or Adjust Status (Form I-485) which is received on or by December 20, 2021; and
- Be admissible to the United States for lawful permanent residence or eligible for a waiver of inadmissibility or other form of relief.

The same ineligibility criteria and inadmissibility grounds that apply to Liberian principal applicants apply to eligible family members seeking adjustment based on LRIF.

However, the continuous physical presence requirement that applies to Liberian principal applicants does not apply to those seeking to adjust based on LRIF as an eligible family member.

When Eligible Family Members May File the Adjustment Application

Each applicant must properly file his or her own adjustment application, which must be received by USCIS on or by December 20, 2021.

Eligible family members may file their adjustment application:

- Together with the Liberian principal applicant's LRIF-based adjustment application; or
- After the Liberian principal applicant filed an LRIF-based adjustment application that remains pending a final decision or was approved by USCIS.

An eligible family member may not adjust status before the qualifying Liberian principal applicant. Adjustment of family members must be concurrent with or subsequent to the Liberian principal applicant's adjustment to LPR status.[17]

The qualifying relationship may have been created before or after the Liberian principal applicant's adjustment. Provided that the applicant meets the burden of proof to demonstrate a bona fide family relationship, USCIS may adjust the spouse (or child or unmarried son or daughter) of a Liberian principal applicant to that of an LPR regardless of the duration of the relationship; however, the relationship must exist on the date of filing and the date of adjudication of the family member's adjustment application.

The spouse, child, or unmarried son or daughter remains eligible for LRIF-based adjustment only so long as the qualifying Liberian national remains an LPR. If the Liberian national loses LPR status or naturalizes, the family members' eligibility to adjust to LPR status under LRIF also ends.[18]

5. Sunset Date

Applicants must properly file their adjustment application, which is received by USCIS on or by December 20, 2021, in order to be eligible for adjustment of status under LRIF.[19] Each applicant must file his or her own adjustment application.

6. Aliens in Removal Proceedings[20]

Aliens, including eligible family members, currently in exclusion, deportation, or removal proceedings may file an adjustment application with USCIS based on LRIF.[21] Aliens present in the United States with an existing order of exclusion, deportation, removal, or voluntary departure may also file an adjustment application with USCIS based on LRIF.[22] Such aliens must meet the eligibility requirements of LRIF in order to adjust status based on LRIF.

7. Jurisdiction

USCIS has sole authority to adjudicate an adjustment application based on LRIF.[23] USCIS may adjudicate an adjustment application filed under LRIF for an alien in removal, exclusion, or deportation proceedings or with a final order of removal, exclusion, or deportation, notwithstanding those proceedings or final order.

D. Documentation and Evidence

A Liberian national applicant should submit the following documentation to seek adjustment of status based on LRIF:

- A properly filed Application to Register Permanent Residence or Adjust Status (Form I-485), with the correct fee;
- Two identical color photographs of the applicant taken recently;[24]
- A copy of a government-issued identity document with photograph;
- A copy of the birth certificate;
- A copy of the passport page with admission or parole stamp (if applicable);
- A copy of the Arrival/Departure Record (Form I-94) or copy of U.S. Customs and Border Protection (CBP) admission or parole stamp on the travel document (if applicable);[25]
- A properly completed Report of Immigration Medical Examination and Vaccination Record (Form I-693);[26]
- Evidence of being a Liberian national;
- A list and any evidence of all arrivals to and departures from the United States;
- Evidence of continuous physical presence in the United States beginning on November 20, 2014, and ending on the date the applicant properly files an LRIF-based adjustment application; and
- A completed Application for Waiver of Grounds of Inadmissibility (Form I-601), if applicable.

1. Liberian Nationality

To demonstrate eligibility for adjustment of status under LRIF, a Liberian principal applicant must provide evidence to prove Liberian nationality.[27] USCIS considers any and all evidence provided by the applicant, including the applicant's testimony during an interview, to evaluate the applicant's eligibility for adjustment of status.

USCIS does not require the following documents but provides them as examples of primary evidence that applicants may submit to demonstrate Liberian nationality.

Primary evidence is currently available.[28] Examples of primary evidence that may demonstrate Liberian nationality include, but are not limited to:

- Unexpired Liberian passport; and
- Liberian certificate of naturalization.

If an applicant is not able to submit primary evidence, the applicant must demonstrate this. The best way to demonstrate this is by submitting a written and signed statement from the applicant that explains all attempts to acquire primary evidence and includes accompanying records that demonstrate these attempts (as examples, accompanying records may include proof of an application for a Liberian passport, proof of an application to renew an expired Liberian passport, proof of communication with the relevant Liberian government authorities that issue primary evidence, or receipts of transactions to obtain or replace primary evidence).

In addition to this statement (and any evidence supporting this statement), the applicant must submit secondary evidence of Liberian nationality. Examples of secondary evidence that may support an applicant's claim of Liberian nationality include, but are not limited to:

- Expired Liberian passports;
- Liberian baptismal records or other religious documents;
- Liberian school records; and
- Liberian medical records.

Applicants should submit all evidence available to them. All forms of secondary evidence may support an applicant's claim of Liberian nationality as part of the totality of the evidence.

2. Continuous Physical Presence

A Liberian principal applicant must submit evidence that he or she was physically present in the United States for a continuous period beginning on November 20, 2014, and ending on the date he or she properly files the LRIF-based adjustment application. For purposes of LRIF, USCIS considers an applicant who left the United States for one or more periods amounting to more than 180 days in the aggregate (total) to have failed to have maintained continuous physical presence.

An applicant must submit probative evidence to establish continuous physical presence since November 20, 2014. Examples of the types of evidence may include, but are not limited to:

- Copy of passport pages with nonimmigrant visa, admission, or parole stamps;
- Arrival/Departure Record (Form I-94);
- Income tax records;
- Utility bills;
- Mortgage deeds or leases;
- Insurance premiums and policies;

- Birth, marriage, and death certificates for immediate family members;
- Medical records;
- Bank records;
- School records;
- All types of receipts that contain identifying information about the applicant;
- Census records;
- Social Security records;
- Employment records;
- Military records;
- Draft records;
- Car registrations; and
- Union membership records.

3. Evidence of Arrivals to and Departures from the United States

Liberian principal applicants must provide a list of all arrivals to and departures from the United States. All applicants also should submit any evidence of all arrivals to and departures from the United States. Applicants should also submit any evidence showing residence from the date of his or her first arrival where residence was established until the filing of the applicant's LRIF-based adjustment application. USCIS uses this information to determine the date of lawful permanent residence for approved LRIF-based adjustment applicants.[29]

Residence means the applicant's place of general abode; the place of general abode means his or her principal, actual dwelling place in fact, without regard to intent.[30]

4. Family Members

In addition to the documentation listed above, an eligible family member applying to adjust based on LRIF must submit:

- Evidence of his or her relationship to a Liberian principal applicant (for example, marriage certificate or birth certificate);
- Evidence of termination of any prior marriages, and any prior marriages of the Liberian principal applicant, if applying as the eligible spouse of a Liberian principal applicant; and
- Evidence that the Liberian principal applicant obtained LPR status or has a pending application for adjustment of status under LRIF (for example, an Approval or Receipt Notice (Form I-797) for the Liberian national's adjustment application), if the eligible family member is not filing concurrently with the Liberian principal applicant.

Only the Liberian principal applicant must show Liberian nationality and continuous physical presence in the United States to be eligible to adjust based on LRIF.

Evidence of Arrivals to and Departures from the United States

LRIF applicants applying as family members must provide a list of all arrivals to and departures from the United States. Applicants should submit evidence of all arrivals to and departures from the United States. Applicants should also submit any evidence showing residence from the date of his or her first arrival where residence was established until the filing of the applicant's LRIF-based adjustment application. USCIS uses this information to determine the date of lawful permanent residence for approved LRIF-based adjustment applicants.[31]

E. Adjudication

1. Interview

USCIS may require any applicant filing a benefit request to appear for an interview.[32]

2. Approvals

USCIS must approve the adjustment application if the applicant meets all the eligibility requirements under LRIF. Adjustment under LRIF is not discretionary. If USCIS approves the application for adjustment, USCIS assigns the codes of admission as shown in the table below.

Classes of Applicants and Codes of Admission	
Liberian national as described in Section 7611(c)(1)(A) of the National Defense Authorization Act for Fiscal Year 2020 (NDAA 2020) who has adjusted status under LRIF	LR6
Spouse of Liberian national as described in Section 7611(c)(1)(A) of NDAA 2020 who has adjusted status under LRIF	LR7
Child of Liberian national as described in Section 7611(c)(1)(A) of NDAA 2020 who has adjusted status under LRIF	LR8
Unmarried son or daughter of Liberian national as described in Section 7611(c)(1)(A) of NDAA 2020 who has adjusted status under LRIF	LR9

Rollback Provisions

An officer should record the applicant's admission date for permanent residence as follows.

The Liberian principal applicant's admission date is either:

- The earliest arrival date in the United States from which the applicant establishes residence in the United States; or
- November 20, 2014 (if the applicant cannot establish residence earlier).[33]

An eligible family member's admission is either:

- The earliest arrival date in the United States from which the applicant establishes residence in the United States; or
- The receipt date of the applicant's adjustment application (if the applicant cannot establish residence earlier).[34]

Family members receive the full rollback provision, even if the date precedes the date of the qualifying marriage or the Liberian principal applicant's date of admission.

For both Liberian principal applicants and eligible family members, officers should review the nature of all arrivals and departures and absences from the United States to determine if the applicant abandoned residence in the United States. For example, an applicant who first arrived as a nonimmigrant tourist (B-2) and timely departed the United States would not have begun a period of residence but a subsequent arrival may begin a period of residence. Similarly, an applicant who first arrived as a nonimmigrant tourist (B-2) and never departed could

have begun a period of residence. In such a case, any subsequent long absences from the United States (after the applicant's first arrival) may indicate that the applicant no longer intended to live in the United States, so the applicant's admission date for permanent residence might not roll back to the applicant's earliest arrival date. The applicant bears the burden to establish the earliest arrival date from which he or she established residency in the United States.

Rollback Provision and Rescission

In the case of an applicant who adjusts under LRIF and received an admission date for permanent residence pursuant to the LRIF "rollback" provision, the 5 year time period for any rescission proceedings is measured from the actual date on which the adjustment was granted, not on the date to which the adjustment was rolled back.[35]

3. Denials

USCIS must deny the adjustment application if the applicant does not meet all the eligibility requirements outlined in LRIF. Although there are no appeal rights for the denial of an adjustment application, the applicant may file a motion to reopen or reconsider. The denial notice should include instructions for filing a Notice of Appeal or Motion (Form I-290B).[36]

F. Employment Authorization While Adjustment Application is Pending

Applicants with a pending adjustment application based on LRIF are eligible to apply for employment authorization.[37] Applicants must file an Application for Employment Authorization (Form I-765) to request an employment authorization document.[38] Applicants may file a Form I-765 concurrently with their adjustment application or while the adjustment application is pending with USCIS. If an LRIF applicant's adjustment application has been pending for more than 180 days and it has not been denied, USCIS must approve the applicant's Form I-765 on such basis.[39]

Footnotes

[^ 1] This chapter does not address issues related to Deferred Enforced Departure (DED) for Liberians. For information on the reinstatement of DED for Liberians, see the DED Granted Country - Liberia webpage.

[^ 2] See Section 7611 of the National Defense Authorization Act for Fiscal Year 2020 (NDAA 2020), Pub. L. 116-92 (PDF), 113 Stat. 1198, 2309 (December 20, 2019).

[^ 3] See Section 901 of Division O, Title IX of the Consolidated Appropriations Act, 2021, Pub. L. 116-260 (PDF) (December 27, 2020).

[^ 4] See Pub. L. 116-92 (PDF), 113 Stat. 1198, 2309 (December 20, 2019), as amended by Section 901 of Division O, Title IX of the Consolidated Appropriations Act, 2021, Pub. L. 116-260 (PDF) (December 27, 2020).

[^ 5] A Liberian principal applicant is a Liberian national described in Section 7611(c)(1)(A) of NDAA 2020, Pub. L. 116-92 (PDF), 113 Stat. 1198, 2310 (December 20, 2019).

[^ 6] Each benefit request must be properly completed, submitted, and executed in accordance with the form instructions. See 8 CFR 103.2(a)(1) and 8 CFR 103.2(b)(1).

[^ 7] A Liberian national who does not meet the continuous physical presence requirement may still be eligible to apply for adjustment under LRIF if he or she qualifies as a family member. For more information, see Subsection 4, Eligibility of Family Members [7 USCIS-PM P.5(C)(4)].

[^ 8] See INA 101(a)(43) (definition of aggravated felony).

[^ 9] See Section 7611(b)(3) of NDAA 2020, Pub. L. 116-92 (PDF), 113 Stat. 1198, 2309 (December 20, 2019).

[^ 10] See Section 7611(c)(1)(A)(ii) of NDAA 2020, Pub. L. 116-92 (PDF), 113 Stat. 1198, 2310 (December 20, 2019).

[^ 11] See Section 7611(c)(2) of NDAA 2020, Pub. L. 116-92 (PDF), 113 Stat. 1198, 2310 (December 20, 2019).

[^ 12] While the adjustment bars at INA 245(c) do not apply to LRIF applicants and an LRIF applicant who has been at any time in unlawful status in the United States is not barred from seeking adjustment under LRIF, the unlawful presence grounds of inadmissibility at INA 212(a)(9) still apply to LRIF applicants. See *Matter of Briones (PDF)*, 24 I&N Dec. 355 (BIA 2007).

[^ 13] See Volume 8, Admissibility [8 USCIS-PM] and Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM]. See Application for Waiver of Grounds of Inadmissibility (Form I-601) and Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212).

[^ 14] See Section 7611(b)(2) of NDAA 2020, Pub. L. 116-92 (PDF), 113 Stat. 1198, 2310 (December 20, 2019).

[^ 15] Unmarried and under 21 years old, as defined in INA 101(b)(1).

[^ 16] See Section 7611(c)(1)(B) of NDAA 2020, Pub. L. 116-92 (PDF), 113 Stat. 1198, 2310 (December 20, 2019).

[^ 17] Under Section 7611(c)(1)(B) of NDAA 2020, Pub. L. 116-92 (PDF), 113 Stat. 1198, 2310 (December 20, 2019), a family member is eligible to adjust if he or she is the spouse, child, or unmarried son or daughter of an alien described in Section 7611(c)(1)(A). Section 7611(c)(1)(A)(ii) requires that the Liberian national submit an application under Section 7611(b) and the most reasonable interpretation is that the application filed by the Liberian national must meet all of the requirements of Section 7611(b) in its entirety.

[^ 18] While any such family members would no longer be eligible to adjust status under LRIF if the Liberian principal applicant naturalizes (and is no longer an alien), nothing would preclude the Liberian principal applicant who naturalizes from filing a petition for any eligible family members by filing a Petition for Alien Relative (Form I-130).

[^ 19] The applicant's adjustment application must be receipted by a USCIS Lockbox on or before December 20, 2021. See 8 CFR 103.2(a)(7)(i) (discussing when USCIS considers a benefit to be received). See Section 7611(b)(1)(A) of NDAA 2020, Pub. L. 116-92 (PDF), 113 Stat. 1198, 2309 (December 20, 2019), as amended by Section 901 of Division O, Title IX of the Consolidated Appropriations Act, 2021, Pub. L. 116-260 (PDF) (December 27, 2020).

[^ 20] The Executive Office for Immigration Review (EOIR) published guidance on how LRIF affects aliens in proceedings before immigration courts and the Board of Immigration Appeals. See EOIR, Section 7611 of the National Defense Authorization Act for 2020, Public Law 116-92, PM 20-06, issued January 13, 2020.

[^ 21] See Section 7611(b)(4)(A) of NDAA 2020, Pub. L. 116-92 (PDF), 113 Stat. 1198, 2310 (December 20, 2019).

[^ 22] See Section 7611(b)(4)(A) of NDAA 2020, Pub. L. 116-92 (PDF), 113 Stat. 1198, 2310 (December 20, 2019).

[^ 23] See Sections 7611(a)(3) and 7611(b)(1) of the NDAA 2020, Pub. L. 116-92 (PDF), 113 Stat. 1198, 2309 (December 20, 2019). See EOIR, Section 7611 of the National Defense Authorization Act for 2020, Public Law 116-92, PM 20-06, issued January 13, 2020.

[^ 24] The photos must be 2- by 2-inches, in color with full face, frontal view on a white to off-white background, printed on thin paper with a glossy finish, and be unmounted and unretouched. Head must be bare unless wearing headwear as required by a religious denomination of which the applicant is a member.

[^ 25] Aliens admitted to the United States by CBP at an airport or seaport after April 30, 2013, may be issued an electronic Form I-94 by CBP instead of a paper Form I-94. Such aliens may visit the CBP website to obtain a paper version of an electronic Form I-94.

[^ 26] For more information, see Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility [8 USCIS-PM B].

[^ 27] The term national means a person owing permanent allegiance to a state. See INA 101(a)(21).

[^ 28] As of October 29, 2021, the date USCIS updated this section of the policy guidance, primary evidence is available according to the U.S. Department of State's Reciprocity and Civil Documents by Country for Liberia webpage. The officer should reference this resource on the date of adjudication to verify availability of documents.

[^ 29] For more information, see Section E, Adjudication, Subsection 2, Approvals [7 USCIS-PM P.5(E)(2)].

[^ 30] See INA 101(a)(33).

[^ 31] For more information, see Section E, Adjudication, Subsection 2, Approvals [7 USCIS-PM P.5(E)(2)].

[^ 32] See 8 CFR 103.2(b)(9).

[^ 33] This is because at this stage of adjudication, the applicant will have already proven he or she was physically present in the United States since at least November 20, 2014. If the applicant cannot demonstrate that he or she arrived in the United States and established a residence prior to November 20, 2014, the date of admission will default to November 20, 2014.

[^ 34] A family member applying to adjust status based on LRIF must be physically present in the United States at the time he or she files for adjustment. If the applicant cannot demonstrate that he or she arrived in the United States and established a residence prior to the date he or she filed an adjustment application, the date of admission will default to the date of filing for adjustment. This is because the applicant already proved that he or she had arrived by that date.

[^ 35] See *Matter of Carrillo-Gutierrez*, 16 I&N Dec. 429 (BIA 1977).

[^ 36] See 8 CFR 103.3.

[^ 37] See Section 7611(d)(3) of NDAA 2020, Pub. L. 116-92 (PDF), 113 Stat. 1198, 2311 (December 20, 2019).

[^ 38] Applicants filing Form I-765 based on a pending LRIF-based adjustment application should write "(c)(9)" as their eligibility category in Part 2, Item Number 27 on their Form I-765.

[^ 39] See Section 7611(d)(3)(B) of NDAA 2020, Pub. L. 116-92 (PDF), 113 Stat. 1198, 2311 (December 20, 2019). If the adjustment application has been pending for more than 180 days, the applicant should contact the USCIS Contact Center to request that USCIS expedite adjudication of the applicant's Form I-765. See the Expedite Requests webpage for further information.

Chapter 6 - Reserved

Chapter 7 - Reserved

Chapter 8 - Reserved

Chapter 9 - Amerasian Immigrants

A. Purpose and Background

During the Korean and Vietnam Wars, some U.S. military personnel fathered children with Asian nationals while stationed in Asia. Congress enacted legislation for humanitarian reasons to allow for the admission and immigration of certain Amerasian children fathered by U.S. citizens.

Congress enacted the Amerasian Act[1] on October 22, 1982 to allow a person born in Korea, Vietnam, Laos, Kampuchea (Cambodia), or Thailand after December 31, 1950 and before October 22, 1982, and fathered by a U.S. citizen, to seek admission to the United States and adjustment of status to lawful permanent resident (LPR).

Congress later passed the Amerasian Homecoming Act[2] in 1987, which allowed mothers and other immediate family members of certain Vietnamese Amerasians to relocate to the United States with their Amerasian children. Unlike the original Amerasian program, only a person born in Vietnam is eligible as a principal applicant under the Amerasian Homecoming Act.[3] Persons fathered by a U.S. citizen could be granted admission to the United States provided they were born in Vietnam after January 1, 1962 and before January 1, 1976, if they were residing in Vietnam on or after March 22, 1988. Although the program was originally limited to 2 years, subsequent amendments removed the time limitation and left the program with no end date.

While most qualified Amerasian immigrants have now been admitted or adjusted to LPR status, officers may still encounter an Amerasian case since the programs are open indefinitely. This chapter covers both the petition and adjustment of status application process for eligible Amerasians.

B. Legal Authorities

- The Amerasian Act of 1982[4]
- Section 584 of the Amerasian Homecoming Act of 1987[5]
- INA 204(f) – Preferential treatment for children fathered by United States citizens and born in Korea, Vietnam, Laos, Kampuchea, or Thailand after 1950 and before October 22, 1982
- 8 CFR 204.4 – Amerasian child of a United States citizen

C. Eligibility Requirements

1. General Eligibility Requirements

There are two separate programs relating to Amerasians. The first is the original Amerasian Act program.[6] The second is the Amerasian Homecoming Act program.[7] Each has its own requirements.

Amerasian Act Applicants

An Amerasian Act applicant must:

- Demonstrate that there is reason to believe that he or she was born in Korea, Vietnam, Laos, Kampuchea, or Thailand after December 30, 1950 and before October 22, 1982;
- Demonstrate that there is reason to believe that he or she was fathered by a U.S. citizen;
- Have a financial sponsor in the United States who is 21 years of age or older, of good moral character, and is either a U.S. citizen or LPR;
- Be admissible to the United States (for adjustment applicants); and
- Have an immigrant visa immediately available to him or her (for adjustment applicants).[8]

USCIS no longer requires applicants to submit an Affidavit of Financial Support and Intent to Petition for Legal Custody (Form I-361)[9] because any remaining qualified applicants are now adults. Instead, sponsors must submit an Affidavit of Support (Form I-134) and agree to provide 5 years of support to an Amerasian immigrant.

Amerasian Homecoming Act Applicants

An Amerasian Homecoming Act principal applicant must:

- Have been born in Vietnam after January 1, 1962 and before January 1, 1976;
- Have been fathered by a U.S. citizen;
- Be admissible to the United States (for adjustment applicants); and
- Have an immigrant visa immediately available to him or her (for adjustment applicants).[10]

The Amerasian Homecoming Act allows certain relatives of the principal applicant to accompany or follow to join the principal applicant as derivatives. Relatives of the principal applicant who may qualify as derivatives include:

- The principal applicant's spouse;
- The principal applicant's child(ren); and
- One of the following:
  - The applicant's birth mother (and her spouse and other children, if any); or
  - An alien who acted in effect as the principal applicant's mother, father, or next of kin (and that person's spouse or child(ren), if any).[11]

The officer, in his or her discretion, must determine that the alien who acted in effect as the principal applicant's mother, father, or next of kin:

- Has a bona fide relationship with the principal applicant similar to that which exists between close family members; and
- The admission of such alien is necessary for humanitarian purposes or to assure family unity.[12]

Also, if an alien who acted in effect as the principal applicant's mother, father, or next of kin is admitted to the United States, the principal applicant's natural mother may not be accorded any right, privilege, or status under the Immigration and Nationality Act (INA) based on that parent-child relationship.[13]

2. Bars to Adjustment

Unless exempt, applicants seeking adjustment of status based on either the Amerasian Act or the Amerasian Homecoming Act are ineligible to adjust if any of the bars to adjustment apply.[14]

3. Admissibility and Waiver Requirements

Amerasian Act Applicants

Amerasian Act applicants seeking adjustment of status are subject to all grounds of inadmissibility.[15] In general, an applicant who is inadmissible to the United States may only obtain LPR status if he or she obtains a waiver or other form of relief, if available.[16] If a ground of inadmissibility applies, an applicant must apply for a waiver or other form of relief to overcome the inadmissibility as described under INA 212(a).[17] Applicants requesting a waiver must file an Application for Waiver of Grounds of Inadmissibility (Form I-601). If a waiver or other form of relief is granted, USCIS may approve the adjustment application if the applicant is otherwise eligible.

Amerasian Homecoming Act Applicants

Amerasian Homecoming Act adjustment applicants are subject to all grounds of inadmissibility, except:

- Public Charge – INA 212(a)(4);
- Labor Certification – INA 212(a)(5); and
- Documentation Requirements – INA 212(a)(7)(A).

Like other adjustment applicants, an applicant seeking to adjust based on the Amerasian Homecoming Act who is inadmissible to the United States may only obtain LPR status if he or she obtains a waiver or other form of relief, if available.[18] If a ground of inadmissibility applies, an applicant must apply for a waiver or other form of relief to overcome the inadmissibility.[19]

The Amerasian Homecoming Act has its own waiver provisions. USCIS may waive grounds of inadmissibility on an individual basis for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. Applicants requesting a waiver must file an Application for Waiver of Grounds of Inadmissibility (Form I-601).

D. Petition for Amerasian

Filing a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) is the first step for an Amerasian beneficiary to become an LPR. However, the filing or approval of the petition does not give the beneficiary any immigration status or benefit. Generally, if the petition is approved, the beneficiary can file an Application to Register Permanent Residence or Adjust Status (Form I-485) to apply to become an LPR. Applicants are not eligible to file the adjustment application concurrently with the Form I-360 petition.

1. Documentation and Evidence

The petitioner must file the Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) in accordance with the form instructions.[20] The petition may be filed by:

- A person claiming to be eligible for Amerasian classification (the beneficiary);
- Any person who is 18 years of age or older (or an emancipated minor) who is filing on behalf of the beneficiary; or
- A corporation in the United States that is filing on behalf of the beneficiary.[21]

The petitioner should submit all required evidence[22] in accordance with the form instructions.[23] The officer must carefully evaluate the evidence submitted to determine whether there is sufficient evidence to demonstrate that there is reason to believe that the beneficiary was fathered by a U.S. citizen.[24] USCIS may ask the claimed father and the beneficiary to submit DNA tests.

2. Adjudication

Expeditious Processing

To the extent possible, for humanitarian reasons, officers should expedite the processing of petitions for Amerasian classification.

Two-Step Process

USCIS generally adjudicates Amerasian petitions in two steps, as outlined in the table below.

Two-Step Amerasian Petition Process

Step	USCIS Determination
Step One	The officer determines whether there is reason to believe that the beneficiary was born in a qualifying country within a time period that meets eligibility requirements and was fathered by a U.S. citizen.
Step Two	The officer determines if the beneficiary has met other requirements.

USCIS generally conducts a two-step adjudication so that the petitioner does not have to meet the more complex requirements relating to the second step unless USCIS finds the beneficiary to be tentatively eligible in the first step.

However, if all required evidence[25] is available when the petition is initially filed, the petitioner may submit it at that time. In that case, USCIS considers all evidence at the same time.

First Step Processing

In the first step, the officer examines the required evidence for preliminary processing submitted by the petitioner,[26] including evidence of the beneficiary's date and place of birth and evidence that the beneficiary was fathered by a U.S. citizen.

If the first step is completed in a satisfactory manner, the officer sends the petitioner a notification, accompanied by a blank Form I-134 (if the sponsor has not already submitted one). If the sponsor has not already appeared for a biometrics capture, USCIS also sends the sponsor a notice of a biometrics appointment.

Second Step Processing

Second step processing requirements include:

- Financial sponsorship;[27]
- Placement and legal custody in the case of a beneficiary under 18 years of age;[28]
- A fingerprint background check of the sponsor to determine whether he or she is of good moral character;[29] and
- An overseas investigation to confirm that the beneficiary is eligible for the benefit sought, when necessary.[30]

Upon completion of all requirements for second step processing, the officer determines whether the beneficiary qualifies for the benefit.[31] If the petitioner does not submit all required documents within 1 year of the date the petition was filed, USCIS advises the petitioner in writing that the petition is considered abandoned.

3. Decision

Approvals

If there is no adverse information and the petitioner has demonstrated that the beneficiary is eligible for the benefit sought, the officer approves the petition. If the officer approves the petition, USCIS sends an approval notice[32] to the petitioner and the petitioner's legal representative, if any.[33]

If the beneficiary intends to apply for an immigrant visa from outside of the United States, the officer forwards the approved petition and supporting evidence to the National Visa Center. If the beneficiary is in the United States and is eligible for adjustment of status, the officer retains the approved petition in the beneficiary's file and invites the beneficiary to apply for adjustment of status.[34]

Denials

If the petitioner fails to establish that the beneficiary is eligible for the benefit sought, the officer denies the petition and notifies the petitioner and any representative (if any) of the reasons in writing.[35] The officer must include in the decision information about appeal rights and the opportunity to file a motion to reopen or reconsider.

Revocation

If adverse information becomes known after USCIS approves the petition, USCIS may revoke the approved petition. USCIS sends a revocation notice, as applicable, that provides the petitioner notice of the derogatory information and the petitioner's options.[36]

E. Adjustment Application

1. Documentation and Evidence

If USCIS approves the petition, the beneficiary may seek adjustment of status. An applicant applying to adjust based on either the Amerasian Act or the Amerasian Homecoming Act should submit the following documentation:

- Application to Register Permanent Residence or Adjust Status (Form I-485);
- Copy of the approval notice (Form I-797) for the principal applicant's Petition for Amerasian, Widow, or Special Immigrant (Form I-360);
- Two passport-style photos;
- Copy of government-issued identity document with photograph;
- Copy of birth certificate;
- Copy of passport page with nonimmigrant visa (if applicable);
- Copy of passport page with admission or parole stamp (if applicable);
- Copy of Arrival/Departure Record (Form I-94) or copy of U.S. Customs and Border Protection (CBP) admission or parole stamp on the travel document (if applicable);
- Report of Immigration Medical Examination and Vaccination Record (Form I-693);
- Certified police and court records of criminal charges, arrests, or convictions (if applicable); and
- Application for Waiver of Grounds of Inadmissibility (Form I-601) or other form of relief (if applicable).

In addition, a family member who is filing as a derivative applicant should submit the following:

- Copy of documentation showing relationship to the principal applicant, such as a marriage or birth certificate;
- Copy of the receipt or approval notice (Form I-797) for the principal applicant's Form I-360; and
- Copy of the receipt or approval notice (Form I-797) for the principal applicant's Form I-485 or a copy of the principal applicant's Permanent Resident Card (Form I-551) (if applicable and not filing together with the principal applicant).

2. Decision

Approvals

The officer must determine that the applicant meets all the eligibility requirements as well as merits the favorable exercise of discretion before approving the adjustment application. As part of the adjudication process, USCIS may also schedule an interview for the adjustment applicant.

USCIS assigns the following codes of admission to applicants adjusting under this category as shown in the table below.

Codes of Admission	
Unmarried Amerasian son or daughter of a U.S. citizen born in Cambodia, Korea, Laos, Thailand, or Vietnam	A16
Child of an A11[37] or A16	A17
Married Amerasian son or daughter of a U.S. citizen born in Cambodia, Korea, Laos, Thailand, or Vietnam	A36
Spouse of an A31[38] or A36	A37
Child of an A31 or A36	A38
Amerasian born in Vietnam after January 1, 1962 and before January 1, 1976 who was fathered by a U.S. citizen	AM6
Spouse or child of an AM1[39] or AM6	AM7
Mother, guardian, or next-of-kin of an AM1 or AM6, and spouse or child of the mother, guardian, or next-of-kin	AM8
Amerasian child of a U.S. citizen born in Cambodia, Korea, Laos, Thailand, or Vietnam (immediate relative child)	AR6

Denials

If an officer determines that the applicant is ineligible for adjustment, the officer denies the adjustment application. The officer must provide the applicant a written reason for the denial.[40] Although there are no appeal rights for the denial of an Amerasian-based adjustment application, the applicant may file a motion to reopen or reconsider. The officer should include in the denial notice information on filing a Notice of Appeal or Motion (Form I-290B).

Footnotes

[^ 1] See Pub. L. 97-359 (PDF), 96 Stat. 1716 (October 22, 1982).

[^ 2] See Section 584 of Pub. L. 100-202 (PDF), 101 Stat. 1329, 1329-183 (December 22, 1987).

[^ 3] See Section 584 of Pub. L. 100-202 (PDF), 101 Stat. 1329, 1329-183 (December 22, 1987).

[^ 4] See Pub. L. 97-359, 96 Stat. 1716 (October 22, 1982). The Amerasian Act of 1982 amended INA 204(f) and the regulations at 8 CFR 204.3.

[^ 5] See Pub. L. 100-202 (PDF), 101 Stat. 1329, 1329-183 (December 22, 1987), as amended by Pub. L. 101-167 (PDF), 103 Stat. 1211 (November 21, 1989); Pub. L. 101-513 (PDF), 104 Stat. 1979 (November 5, 1990); Pub. L. 101-649 (PDF), 104 Stat. 4978 (November 29, 1990); and Pub. L. 102-232 (PDF), 105 Stat. 1733 (December 12, 1991). The Amerasian Homecoming Act of 1987 and its requirements are only found in the public law and not the Immigration and Nationality Act (INA) or Title 8 of the Code of Federal Regulations (CFR).

[^ 6] See Pub. L. 97-359 (PDF), 96 Stat. 1716 (October 22, 1982).

[^ 7] See Section 584 of Pub. L. 100-202 (PDF), 101 Stat. 1329, 1329-183 (December 22, 1987).

[^ 8] See Pub. L. 97-359, 96 Stat. 1716 (October 22, 1982).

[^ 9] See 8 CFR 204.4(f)(1)(ii)(A).

[^ 10] See Pub. L. 100-202 (PDF), 101 Stat. 1329 (December 22, 1987).

[^ 11] See Section 584(b)(1)(B)-(C) of Pub. L. 100-202 (PDF), 101 Stat. 1329, 1329-183 (December 22, 1987).

[^ 12] See Section 584(b)(2) of Pub. L. 100-202 (PDF), 101 Stat. 1329, 1329-183 (December 22, 1987).

[^ 13] See Section 584(b)(2) of Pub. L. 100-202 (PDF), 101 Stat. 1329, 1329-183 (December 22, 1987).

[^ 14] See INA 245(c). For more information, see Part B, 245(a) Adjustment, Chapter 3, Unlawful Immigration Status at Time of Filing (INA 245(c)(2)) [7 USCIS-PM B.3] through Chapter 6, Unauthorized Employment (INA 245(c)(2) and INA 245(c)(8)) [7 USCIS-PM B.6].

[^ 15] Under INA 212(a). For more information, see Volume 8, Admissibility [8 USCIS-PM].

[^ 16] See INA 212(a) for the specific grounds of inadmissibility. For more information on waivers and other forms of relief, see Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM].

[^ 17] See Volume 8, Admissibility [8 USCIS-PM] and Volume 9, Waivers [9 USCIS-PM]. See Application for Waiver of Grounds of Inadmissibility (Form I-601) and Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212).

[^ 18] See INA 212(a) for the specific grounds of inadmissibility. For more information on waivers and other forms of relief, see Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM].

[^ 19] As described in INA 212(a). See Volume 8, Admissibility [8 USCIS-PM] and Volume 9, Waivers [9 USCIS-PM]. See Application for Waiver of Grounds of Inadmissibility (Form I-601) and Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212).

[^ 20] See instructions for Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360).

[^ 21] See 8 CFR 204.4(b).

[^ 22] See 8 CFR 204.4(f).

[^ 23] See instructions for Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360).

[^ 24] See INA 204(f).

[^ 25] See 8 CFR 204.4(f)(1)(i)-(ii).

[^ 26] See 8 CFR 204.4(f)(1)(i).

[^ 27] In every case, a U.S. citizen or LPR sponsor at least 21 years of age must sign a guarantee of financial responsibility. The sponsor must agree to support the beneficiary for 5 years or until the beneficiary becomes 21 years of age, whichever period of time is longer. See INA 204(f)(4)(A). See 8 CFR 204.4(f)(1)(ii)(A). See INA 204(f)(4)(B).

[^ 28] See INA 204(f)(4)(A)(ii). See INA 204(f)(2)(C). See 8 CFR 204.4(f)(1)(i)(D). See 8 CFR 204.4(f)(1)(ii)(A). See 8 CFR 204.4(f)(1)(ii)(C). See 8 CFR 204.4(f)(1)(iii).

[^ 29] See 8 CFR 204.4(f)(1)(ii)(A).

[^ 30] See INA 204(f)(3). USCIS may, in its discretion, accept certifications from agencies and foundations as all or part of the evidence if these certifications are convincing, without requesting overseas investigations. On the other hand, USCIS may request an investigation if warranted.

[^ 31] See INA 204(f). To determine eligibility, USCIS consults with appropriate governmental officials and officials of private voluntary organizations in the country of the beneficiary's birth and considers any evidence provided by the petitioner, amongst other adjudicative actions.

[^ 32] See the Notice of Action (Form I-797).

[^ 33] See 8 CFR 103.2(b)(19). For additional information on approvals, see Volume 1, General Policies and Procedures, Part E, Adjudications [1 USCIS-PM E].

[^ 34] See Part A, Adjustment of Status Policies and Procedures [7 USCIS-PM A].

[^ 35] See 8 CFR 103.2(b)(19) and 8 CFR 103.3(a). For additional information on denials, see Volume 1, General Policies and Procedures, Part E, Adjudications [1 USCIS-PM E].

[^ 36] See 8 CFR 205.1(a)(3)(ii).

[^ 37] The A11 code is assigned to those admitted as LPRs at a U.S. port of entry (after consular processing abroad) based on their classification as an unmarried Amerasian son or daughter of a U.S. citizen.

[^ 38] The A31 code is assigned to those admitted as LPRs at a U.S. port of entry (after consular processing abroad) based on their classification as a married Amerasian son or daughter of a U.S. citizen.

[^ 39] The AM1 code is assigned to those admitted as LPRs at a U.S. port of entry (after consular processing abroad) based on their classification as an Amerasian, born in Vietnam after January 1, 1962 and before January 1, 1976 and fathered by a U.S. citizen.

[^ 40] See 8 CFR 103.2(b)(19) and 8 CFR 103.3(a).

Chapter 10 - Reserved

Part Q - Rescission of Lawful Permanent Residence

Chapter 1 - Purpose and Background

A. Purpose

Rescission proceedings serve the goal of removing a person's lawful permanent resident (LPR) status when USCIS determines that he or she was not eligible for adjustment of status at the time LPR status was granted. Rescission places the person in the same standing that he or she would have been in if USCIS had never granted adjustment of status. In certain limited circumstances, this can result in the person being in a period of authorized stay or having some form of lawful immigration status even after rescission. In most instances, however, it results in the person having no lawful status and not being in a period of authorized stay, and therefore subject to removal proceedings. A contested rescission proceeding requires a hearing before an immigration judge (IJ), so most cases subject to possible rescission are placed in removal proceedings instead of rescission proceedings.

B. Background

Rescission is a cumbersome process that was once required before the initiation of removal proceedings against certain LPRs.[1] Rescission is now an option that USCIS uses only in limited instances. In most cases, USCIS can and should place the person into removal proceedings under INA 240 with a Notice to Appear.[2] Any subsequent order of removal issued by an IJ is now sufficient to rescind the LPR's status. Because most cases that used to require rescission (for example, adjustment obtained by fraud) now may be resolved in the context of removal proceedings under INA 240, rescission should be an infrequent process.[3]

C. Legal Authorities

- INA 246 – Rescission of adjustment of status; effect upon naturalized citizen; 8 CFR 246 – Rescission of adjustment of status

Footnotes

[^ 1] See *Matter of Saunders (PDF)*, 16 I&N Dec. 326 (BIA 1977) (lawful permanent resident who (1) obtained his or her status through adjustment of status and (2) was subject to the rescission provisions of INA 246 could not be placed into deportation proceedings prior to rescission of his or her status by legacy Immigration and Naturalization Service (INS)).

[^ 2] See INA 246.

[^ 3] See *Garcia v. Att'y Gen., 553 F.3d 724 (3d Cir. 2009) (PDF)*. In 2009, the U.S. Court of Appeals for the Third Circuit issued *Garcia v. Attorney General*, which held that the U.S. Government must initiate either rescission or removal proceedings within 5 years or else is barred from initiating removal proceedings. The Third Circuit relied on *Bamidele v. INS*, a Third Circuit pre-Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) case that interpreted the time limitation of INA 246 to apply to removal proceedings as well as rescissions. The decision only applies to cases that fall within the jurisdiction of the Third Circuit.

Chapter 2 - Eligibility

A person who has adjusted status to that of a person lawfully admitted for permanent residence under INA 210, 240A, (the former) 244, 245, 245A, or 249, or under any other provision of law may be placed into rescission proceedings at any time during the first 5 years after the granting of permanent residence, if:

- USCIS determines that the person was not eligible for adjustment of status at the time that permanent residence was granted; and
- The person would have not been eligible for adjustment under any other provision of law.[1]

A determination that a person is not subject to rescission proceedings does not necessarily mean that no further action may be taken. A person who is not subject to rescission may still be subject to removal proceedings.[2]

Footnotes

[^ 1] See INA 246.

[^ 2] For more information on NTA issuance, see Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens, PM-602-0187, issued February 28, 2025.

Chapter 3 - Rescission Process

In order to rescind a person's adjustment to lawful permanent resident (LPR) status, USCIS must serve the person through personal service[1] a Notice of Intent to Rescind (NOIR) within 5 years of the date of his or her adjustment.[2] Once the NOIR has been served, rescission action may proceed even beyond the 5-year time limit (in other words, the serving of the NOIR "stops the clock"). In the case of a person whose adjustment contained a "rollback" provision (for example, a Cuban who adjusted under the Cuban Adjustment Act), the 5-year time period is calculated from the actual date on which the adjustment was granted, not on the date to which the adjustment was rolled back.[3]

A. Jurisdiction

In general, any USCIS field office has jurisdiction over the initiation of rescission of adjustment of status proceedings if it appears that the alien was not, in fact, eligible for the adjustment at the time of approval for LPR status.[4] However, if an alien adjusted status after a USCIS grant of suspension of deportation or special rule cancellation of removal pursuant to Section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA),[5] the asylum office that issued the grant initiates rescission proceedings and coordinates with the asylum office that has jurisdiction over the place of residence to determine next steps in the rescission process.[6] As a matter of policy, USCIS does not initiate rescission proceedings if adjustment was granted by an immigration judge.

B. Rescission of Adjustment of a Conditional Permanent Resident

With regards to conditional permanent residents (CPRs), the period of time that he or she is in CPR status counts as part of the 5-year limitation under INA 246. However, USCIS generally does not use the rescission authority of INA 246 for those who are CPRs.

1. Certain Spouses and Sons and Daughters Defined in INA 216

If USCIS determines that a person's CPR status should be terminated for the reasons set forth in INA 216, then USCIS generally does not use the rescission authority of INA 246.

In general, USCIS terminates a person's CPR status if USCIS determines, before the second anniversary of obtaining CPR status, that the qualifying marriage was improper because:

- The qualifying marriage was entered into for the purpose of procuring a person's admission as an immigrant;[7]
- The qualifying marriage has been judicially annulled or terminated, other than through the death of a spouse;[8] or
- A fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for filing of a petition under INA 204(a) or INA 214(d) or (p) with respect to the alien.[9]

In general, USCIS also terminates CPR status if:

- The CPR does not file a Petition to Remove Conditions on Residence (Form I-751) which requests the removal of the conditions on his or her permanent resident status.[10]
- The CPR and petitioning spouse fail to appear for their interview in connection with a jointly filed Form I-751, or the CPR fails to appear for his or her interview in connection with Form I-751 filed based on hardship waiver;[11] or
- USCIS makes an adverse determination and denies Form I-751.[12]

If USCIS discovers the CPR was not eligible for adjustment of status, but the person's CPR status should not be terminated pursuant to INA 216, then USCIS may use the rescission authority of INA 246.

2. Certain Entrepreneurs, Spouses, and Children Defined in INA 216A [Reserved]

[Reserved]

C. Deportability Based on Events Arising After Adjustment

If a person becomes removable as a result of an event that occurred after adjustment of status to lawful permanent residence, he or she is not subject to rescission as a result of the event. However, the officer may refer the case for possible initiation of removal proceedings if the person is deemed removable.[13]

D. Rescission of Adjustment After Naturalization

In general, naturalization is revoked before the rescission of adjustment of status.[14]

Footnotes

[^ 1] See 8 CFR 103.8(a)(2).

[^ 2] See 8 CFR 246.1.

[^ 3] See *Matter of Carrillo-Gutierrez (PDF)*, 16 I&N Dec. 429 (BIA 1977).

[^ 4] See 8 CFR 246.1, which does not limit the jurisdiction of USCIS field offices to initiate rescission proceedings for persons residing outside of a USCIS field office's district.

[^ 5] See Title II of Pub. L. 105-100 (PDF), 111 Stat. 2160, 2196 (November 19, 1997).

[^ 6] The applicant's residence refers to the applicant's principal, actual dwelling place in fact, without regard to intent. See INA 101(a)(33).

[^ 7] See INA 216(b)(1)(A)(i). See 8 CFR 216.3.

[^ 8] See INA 216(b)(1)(A)(ii).

[^ 9] See INA 216(b)(1)(B). See 8 CFR 216.3.

[^ 10] See INA 216(c)(2)(A)(i) and INA 216(c)(4). See 8 CFR 216.4(a)(6).

[^ 11] See INA 216(c)(2)(A)(ii). See 8 CFR 216.4(b)(3) and 8 CFR 216.5(d).

[^ 12] See INA 216(c)(3)(C). See 8 CFR 216.4(d)(2) and 8 CFR 216.5(f).

[^ 13] See Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens, PM-602-0187, issued February 28, 2025.

[^ 14] INA 246(b) provides that a person whose adjustment of status has been rescinded is subject to revocation of naturalization under INA 340. For additional information, see Volume 12, Citizenship and Naturalization, Part L, Revocation of Naturalization [12 USCIS-PM L].

Chapter 4 - Effective Date of Rescission

A rescission of lawful permanent resident (LPR) status is effective as of the date of the approval of the Application to Register Permanent Residence or Adjust Status (Form I-485). In the case of a person who received a "rollback," the residence period acquired by the rollback is likewise rescinded.

A. Effect of Rescission on Other Benefits Derived from LPR Status

Because rescission voids LPR status from the time of approval, any third parties who acquired rights based on the LPR status may have been ineligible for those rights when they were obtained.[1] Third parties include relatives for whom the person petitioned on the basis of their relationship to the LPR and relatives who obtained status as derivatives of the LPR.

For example, if a spouse obtains LPR status through marriage to a person whose LPR status is later rescinded, the person is then considered not to have been an LPR at the time of petitioning for the spouse. The spouse was therefore not eligible for classification as the spouse of an LPR at the time of adjustment and was ineligible for adjustment of status under INA 245 on that basis. In such cases, USCIS issues the spouse a Notice of Intent to Rescind his or her LPR status.

Footnote

[^ 1] Rescission results in an LPR's status being voided "ab initio," a Latin term used in legal decisions meaning "from the beginning." See *Matter of Valiyee (PDF)*, 14 I&N Dec. 710 (BIA 1974).

Chapter 5 - Adjudication Procedures

USCIS officers review the evidence in the record to determine whether the evidence supports the initiation of rescission of lawful permanent resident (LPR) status.

The central issue in rescission proceedings is whether the person was ineligible for adjustment of status at the time LPR status was granted.

A. Notice of Intent to Rescind

Once USCIS determines that an LPR's status should be rescinded, USCIS issues a Notice of Intent to Rescind (NOIR).[1] The NOIR must include why the person was not eligible for adjustment of status at the time LPR status was granted and all of the person's rights and options during rescission proceedings.

The NOIR must be sent by certified mail, with return receipt requested, or delivered in person.[2] It must include the following:

- The background of the case, including the basic facts pertaining to the person's adjustment;
- The information that has arisen indicating that the person was not eligible for adjustment of status. If the file does not establish that he or she is already aware of this information, the notice must also inform the person of his or her right to review the information;
- The various steps of the person's immigration history that led to his or her ineligibility for LPR status;
- Any and all pertinent information in order to give the person the opportunity to respond or rebut the allegations;
- All the grounds of inadmissibility applicable to the person and the reasons that these grounds of inadmissibility apply, as well as ineligibility for any other preference classification;[3]
- USCIS' statutory and regulatory authority to rescind the adjustment and intent to do so; and
- The person's options should he or she decide to contest the NOIR.

If fraud of any kind was involved, the NOIR must specifically define the fraud. For example, in order to deny or to subsequently rescind LPR status based on a marriage, the evidence must establish that the marriage was a sham or fraudulent, or that it was legally dissolved at the time of the adjustment. A marriage which was non-viable at the time of adjustment (for example, where the couple has separated without chance of reconciling), but not necessarily fraudulent, may not support a rescission.[4]

The person must be informed and permitted to rebut all allegations contained in the NOIR. A rescission proceeding is invalid if the NOIR does not advise the person of:

- The right to rebut the allegations;
- The right to counsel (at no expense to the government); and
- The right to request a hearing before an immigration judge (IJ).

The NOIR must advise the person that the response must be in writing, under oath, and submitted to USCIS within 30 days of the receipt of the NOIR.[5] USCIS must give the person an opportunity to respond to the NOIR before proceeding to the next stage.[6]

B. Response to Notice of Intent to Rescind

Upon receipt of the NOIR, the person may:

- Fail to respond to the notice;
- Admit all allegations, surrender his or her permanent resident card (Form I-551) (commonly called a green card), and depart the United States, if necessary;
- Submit a written answer to the allegations contained in the NOIR, under oath, to contest any allegation; or
- Request a hearing before the IJ.

C. Action Following Response to Notice of Intent to Rescind

The next stage of the process is dependent on which option the person chose upon receipt of the NOIR.

1. Admits All Allegations or Fails to Respond

If the person fails to respond to the NOIR or responds to the NOIR by admitting all allegations, the rescission becomes final. USCIS sends the person a letter by certified mail, return receipt requested, informing them that his or her LPR status has been rescinded pursuant to INA 246 and instructing the person to surrender his or her permanent resident card to the nearest USCIS office. The person may not appeal that decision.[7]

2. Contests the Allegations or Requests Hearing Before Immigration Judge

If the person contests any of the allegations in the NOIR or specifically requests a hearing before an IJ, then USCIS refers the case for a rescission hearing before an IJ.[8] The respondent can appeal the IJ's decision.[9]

D. Final Action After Adjustment Has Been Rescinded

Upon rescission, USCIS places the person into removal proceedings under INA 240 with a Notice to Appear, unless he or she is otherwise in a lawful status or in a period of stay authorized by the secretary.[10]

In addition, USCIS requests the person surrender his or her permanent resident card (Form I-551) to the district director with administrative jurisdiction over the office where the person obtained LPR status.[11]

Footnotes

[^ 1] See 8 CFR 246.1.

[^ 2] See 8 CFR 103.8(a)(2).

[^ 3] For example, if the alien had already obtained a permanent labor certification, and a visa number was available to the alien, but the alien then married a U.S. citizen and adjusted status on the basis of that marriage, rescission proceedings due to ineligibility for adjustment of status based on that marriage would be appropriate only if the alien would also have been ineligible for adjustment under an employment-based preference classification.

[^ 4] See *Matter of Boromand (PDF)*, 17 I&N Dec. 450 (BIA 1980). For information regarding termination of status of CPRs whose status was obtained based on a marriage, see Chapter 3, Rescission Process, Section B, Rescission of Adjustment of a Conditional Permanent Resident, Subsection 1, Certain Spouses and Sons and Daughters Defined in INA 216 [7 USCIS-PM Q.3(B)(1)].

[^ 5] See 8 CFR 103.8(b). For more information on timeframes for Notices of Intent to Rescind, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 10, Post-Decision Actions, Section D, Revocation, Rescission, or Termination [1 USCIS-PM E.10(D)].

[^ 6] See 8 CFR 246.1.

[^ 7] See 8 CFR 246.2.

[^ 8] See 8 CFR 246.3.

[^ 9] See 8 CFR 246.7.

[^ 10] For more information on NTA issuance, see Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens, PM-602-0187, issued February 28, 2025.

[^ 11] See 8 CFR 246.9.

Part R - Abandonment of Lawful Permanent Residence

Volume 8 - Admissibility

Part A - Admissibility Policies and Procedures

Part B - Health-Related Grounds of Inadmissibility

Chapter 1 - Purpose and Background

A. Purpose

The medical grounds of inadmissibility, the medical examination of aliens, and the vaccinations administered to aliens are designed to protect the health of the United States population. The immigration medical examination, the resulting medical examination report, and the vaccination record provide the information USCIS uses to determine if an applicant meets the health-related standards for admissibility.

Four basic medical conditions may make an applicant inadmissible on health-related grounds:

- Communicable disease of public health significance,
- Failure to show proof of required vaccinations,
- Physical or mental disorder with associated harmful behavior, and
- Drug abuse or addiction.

B. Background

Public health concerns have been reflected in U.S. immigration law since the Immigration Act of 1882.[1] Among others, “persons suffering from a loathsome or a dangerous contagious disease” were not allowed to enter the United States.[2] In 1990, Congress revised and consolidated all of the grounds of inadmissibility. It narrowed health-related grounds of inadmissibility to include only aliens with communicable diseases, physical or mental disorders with associated harmful behavior, or those with drug abuse or addiction problems.[3]

As of 1996, Congress requires all immigrant visa and adjustment of status applicants to establish that they have been vaccinated against certain vaccine-preventable diseases.[4]

C. Role of the Department of Health and Human Services (HHS)

Because medical knowledge and public health concerns can and do change over time, Congress gave the Department of Health and Human Services (HHS) the authority to designate by regulations which conditions make an alien inadmissible on health-related grounds.

The HHS component charged with defining these medical conditions is the Centers for Disease Control and Prevention (CDC). CDC’s responsibilities include:

- Publishing regulations addressing health-related conditions that render an applicant inadmissible;
- Establishing the medical examination requirements in its Technical Instructions for Medical Examination of Aliens (Technical Instructions) that are binding on civil surgeons in the United States, panel physicians overseas, USCIS officers, and State Department consular officers;[5]
- Responding to medical questions that officers, civil surgeons, and panel physicians may have based on the Technical Instructions;[6] and
- Advising USCIS on the adjudication of medical waivers.

D. Role of the Department of Homeland Security (DHS)

Congress authorizes the Department of Homeland Security (DHS) to determine an alien's admissibility to the United States, which includes determinations based on health reasons.[7] DHS must follow HHS regulations and instructions when determining whether an applicant is inadmissible on health-related grounds.[8]

Congress also empowers DHS to designate qualified physicians as civil surgeons who conduct medical examinations of aliens physically present in the United States.[9]

E. Making a Health-Related Inadmissibility Determination

To make a health-related inadmissibility determination, the officer should follow the steps outlined below:

Overview of Process of Making a Health-Related Inadmissibility Determination

Step of Adjudication	Where can I find information on this step?
Step 1: Is the applicant subject to the health-related grounds of inadmissibility or is there another reason that requires the applicant to undergo an immigration medical examination?	Chapter 3, Applicability of Medical Examination and Vaccination Requirement [8 USCIS-PM B.3]
Step 2: If required, has the applicant been medically examined by the appropriate physician and is the appropriate medical documentation in the file?	Chapter 3, Applicability of Medical Examination and Vaccination Requirement [8 USCIS-PM B.3]
Step 3: Was the medical documentation[10] properly completed and is it still valid?	Chapter 4, Review of Medical Examination Documentation [8 USCIS-PM B.4] through Chapter 10, Other Medical Conditions [8 USCIS-PM B.10]
Step 4: Is the applicant inadmissible based on the health-related grounds?	Chapter 11, Inadmissibility Determination [8 USCIS-PM B.11]
Step 5: Is the applicant inadmissible based on grounds other than the health-related grounds, as evidenced by the medical documentation?	Chapter 11, Inadmissibility Determination, Section D, Other Grounds of Inadmissibility [8 USCIS-PM B.11(D)]

F. Legal Authorities

- INA 212(a)(1) – Health-related grounds
- INA 221(d) – Physical examination
- INA 232; 8 CFR 232 – Detention of aliens for physical and mental examination
- 42 U.S.C. 252 – Medical examination of aliens
- 42 CFR 34 – Medical examination of aliens
- Technical Instructions for Civil Surgeons (Technical Instructions), and updates[11]

Footnotes

[^ 1] See the Immigration Act of 1882, 22 Stat. 214 (August 3, 1882).

[^ 2] See the Immigration Act of 1891, 26 Stat. 1084 (March 3, 1891).

[^ 3] See the Immigration Act of 1990 (IMMACT 90), Pub. L. 101-649 (PDF) (November 29, 1990).

[^ 4] See the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Division C of Pub. L. 104-208 (PDF) (September 30, 1996). See INA 212(a)(1)(A)(ii).

[^ 5] Officers and designated physicians must obtain the Technical Instructions from CDC's website at cdc.gov/immigrant-refugee-health/index.html. Updates to the Technical Instructions must also be followed.

[^ 6] CDC can be reached at cdcqap@cdc.gov. Officers should identify themselves as an immigration officer in the e-mail. This e-mail address is not for inquiries from the public. It is only for inquiries from immigration officers and civil surgeons. Inquiries from the public should be submitted to CDC INFO at cdc.gov/dcs/ContactUs/Form.

[^ 7] See INA 212(a).

[^ 8] See INA 212(a)(1)(A).

[^ 9] See INA 232.

[^ 10] Medical documentation refers to the following: Report of Immigration Medical Examination and Vaccination Record (Form I-693), Report of Medical Examination by Panel Physician (Form DS-2054), and any other related worksheets.

[^ 11] Available online at cdc.gov/immigrant-refugee-health/hcp/civil-surgeons/index.html.

Chapter 2 - Medical Examination and Vaccination Record

A. Purpose of the Medical Examination and Vaccination Report

The results of the medical examination and vaccination record determine whether an applicant is inadmissible on health-related grounds. The medical examination documentation indicates whether the applicant has either a Class A or Class B medical condition and the vaccination record shows whether the applicant has complied with all vaccination requirements.

B. Class A and B Conditions and Their Impact on Admissibility

Class A and B conditions are defined in Department of Health and Human Services (HHS)regulations.[1]

Class A conditions are medical conditions that render an alien inadmissible and ineligible for a visa or adjustment of status.[2] A Class A medical condition is a:

- Communicable disease of public health significance per HHS regulation;
- A failure to present documentation of having received vaccinations against vaccine-preventable diseases;[3]
- Present or past physical or mental disorder with associated harmful behavior or harmful behavior that is likely to recur; and
- Drug abuse or addiction.

Class B conditions are defined as physical or mental health conditions, diseases, or disability serious in degree or permanent in nature.[4] This may be a medical condition that, although not rendering an applicant inadmissible, represents a departure from normal health or well-being that may be significant enough to:

- Interfere with the applicant's ability to care for himself or herself, to attend school, or to work; or
- Require extensive medical treatment or institutionalization in the future.

C. Completion of a Medical Examination

When a medical examination is required to determine the applicant's admissibility, the alien must be examined by a physician who is designated to perform this examination.

By statute, any medical officer in the U.S. Public Health Service may conduct the examination. However, this rarely occurs. Most medical examinations are conducted by a physician designated as a civil surgeon by USCIS[5] or designated as a panel physician abroad by the U.S. Department of State (DOS). Civil surgeons complete medical examinations for applicants in the United States, while panel physicians complete medical examinations for immigrant visa and refugee applicants seeking immigration benefits from outside the United States.

Footnotes

[^ 1] See 42 CFR 34.2.

[^ 2] Class A conditions are medical conditions mentioned in INA 212(a)(1)(A). See 42 CFR 34.2(d).

[^ 3] This Class A medical condition only applies to aliens who seek admission as immigrants, or who seek adjustment of status to one lawfully admitted for permanent residence. Additionally, a child who is adopted and under the age of 10 years or younger is not deemed to have a Class A condition if the following conditions apply: Prior to the admission of the child, an adoptive parent or prospective adoptive parent of the child, who has sponsored the child for admission as an immediate relative, has executed an affidavit stating that the parent is aware of the vaccination requirement , and will ensure that, within 30 days of the child's admission, or at the earliest time that is medically appropriate, the child will receive the vaccinations required for immigration purposes. See 42 CFR 34.2(d)(2).

[^ 4] See 42 CFR 34.2(e) .

[^ 5] See INA 232 and 8 CFR 232.

Chapter 3 - Applicability of Medical Examination and Vaccination Requirement

A. Requirements by Benefit Type

Medical examination and vaccination requirements vary depending on the immigration benefit the person is seeking.

Most applicants subject to medical grounds of inadmissibility must undergo a medical examination to determine their admissibility. Some applicants, however, do not need to undergo a medical examination unless there is a specific concern. Nonimmigrants, for example, are in this category.

Even if the applicant is not subject to health-related grounds of inadmissibility, the officer may still order a medical examination as a matter of discretion if the evidence indicates that there may be a public health concern.[1] This could apply, for example, when an officer adjudicates a request for parole.[2]

In general, an immigration officer may order a medical examination of an applicant at any time, if the officer is concerned that the applicant may be medically inadmissible.[3] This rule applies regardless of the type of immigration benefit sought, or whether the applicant is applying for a visa, seeking entry at a U.S. port-of-entry, or already in the United States.

A civil surgeon in the United States can only perform a medical examination for purposes of a benefits application processed within the United States. Similarly, a panel physician abroad can generally only perform a medical examination for purposes of a visa application processed outside the United States. There are limited exceptions where an applicant seeking a benefit application inside the United States does not have to repeat a medical examination performed by a panel physician. The following chart highlights the benefits that require a medical examination and vaccinations, and whether a civil surgeon or panel physician should conduct the medical examination.[4]

Medical Examination and Vaccination Requirements by Benefit Type

Benefit Type	Medical Examination (Yes or No)	Vaccination (Yes or No)	Panel Physician or Civil Surgeon
Immigrant visa applicants, applying with U.S. Department of State (DOS)	Yes	Yes	Panel physician
Adjustment applicants (other than exceptions noted elsewhere in this table)	Yes	Yes	Civil surgeon
Nonimmigrant visa applicants, applying with DOS; and nonimmigrants seeking change/extension of status while in the United States[5]	No (with some exceptions)[6]	No	N/A
Temporary Protected Status (TPS) applicants[7]	No (with some exceptions)[8]	No	N/A
K or V visa applicants, applying with DOS[9]	Yes	No	Panel physician
Nonimmigrant seeking change of status to V status[10]	Yes	No	Civil surgeon

Benefit Type	Medical Examination (Yes or No)	Vaccination (Yes or No)	Panel Physician or Civil Surgeon
K or V nonimmigrants applying for adjustment of status in the United States[11]	May be required[12]	Yes	Panel physician and/or civil surgeon
Refugee applicants, including principal and derivative applicants overseas[13]	Yes	No	Panel physician
Applicants seeking derivative refugee or derivative asylee status while in the United States[14]	No	No	N/A
Principal asylum applicants in the United States[15]	No	No	N/A
Applicants seeking derivative asylee status with DOS[16]	Yes	No	Panel physician
Refugee-based adjustment applicants[17]	May be required[18]	Yes	Civil surgeon[19]
Asylees applying for adjustment of status[20]	May be required[21]	Yes	Civil surgeon
Kurdish asylees paroled under Operation Pacific Haven applying for adjustment of status	Yes	Yes	Panel physician or civil surgeon
Registry applicants	No	No	N/A
North American Indians entering the United States[22]	No	No	N/A
Children of returning residents entering the United States[23]or children of U.S. nationals	No	No	N/A
Internationally adopted orphans[24]	Yes	Yes (exception available)	Panel physician
Afghan nationals who arrived in the United States under Operation Allies Welcome (OAW) applying for adjustment of status	Yes	Yes	Panel physician or civil surgeon

B. Special Considerations

1. Nonimmigrants and TPS Applicants

In general, nonimmigrant visa applicants, nonimmigrants seeking change or extension of status, and Temporary Protected Status (TPS) applicants are only medically examined if the consular officer or immigration officer has concerns as to the applicant's inadmissibility on health-related grounds. Customs and Border Protection (CBP) officers at ports-of-entry may also require a nonimmigrant arriving with or without a visa to submit to a medical examination to determine whether a medical ground of inadmissibility applies.

2. K or V Visa Applicants Applying with DOS[25]

While the consular officer may encourage compliance, the consular officer cannot deny a K or V visa for lack of compliance with the vaccination requirements.

Some panel physicians may perform the vaccination assessment in anticipation of the applicant's later adjustment of status application.

3. Nonimmigrants Applying for Change of Status to V Status

For nonimmigrants applying for change of status to V status, the civil surgeon may perform the vaccination assessment in anticipation of the applicant's later adjustment of status application.

4. K or V Nonimmigrants Applying for Adjustment[26]

K and V nonimmigrants applying for adjustment of status are not required to repeat the medical examination if the application was filed within one year of the date of the original medical examination, and:

- The medical examination did not reveal a Class A medical condition; or
- The applicant received a conditional waiver in conjunction with the K or V nonimmigrant visa or the change of status to V and the applicant submits evidence of compliance with the waiver terms and conditions.[27]

If a new medical examination is required and reveals a Class A medical condition, a new waiver application will also be required. In such cases, the officer should determine whether the applicant complied with the terms and conditions of the first waiver, if applicable. Such determination should be given considerable weight in the adjudication of a subsequent waiver application.[28]

Even if a new medical examination is not required, applicants must still comply with the vaccination requirements if the vaccination record was not included as part of the original medical examination report. If the vaccination report was properly completed at the time of the overseas examination, the officer may accept the vaccination assessment completed by the panel physician.

An applicant's overseas medical examination report completed by a panel physician should already be in the applicant's A-file. If it is not in the A-file, the officer should request the medical examination report through a Request for Evidence (RFE).

If the applicant was granted a change of status to V in the United States,[29] the medical examination report completed by the civil surgeon should be in the A-file created at the time that the change of status was initially granted.

5. Refugees Applying for Adjustment[30]

By regulation, refugees applying for adjustment of status generally do not need to repeat the entire medical examination if the applicant was already examined by a panel physician for purposes of admission to the United States.[31] Refugees must undergo an additional medical examination only if the original examination by the panel physician revealed a Class A medical condition.

Family members granted refugee status in the United States must submit to a medical examination at the time they seek to adjust their status.

All refugees must comply with the vaccination requirements at the time of adjustment of status by submitting the relevant parts of the Report of Immigration Medical Examination and Vaccination Record (Form I-693) completed by a designated civil surgeon. A prior vaccination assessment performed by the panel physician cannot be used for purposes of the adjustment of status application.[32]

USCIS granted a blanket civil surgeon designation to state and local health department physicians for the limited purpose of completing the vaccination record for refugees applying for adjustment of status.

6. Asylees Applying for Adjustment

All asylees are required to undergo an immigration medical exam, including vaccination assessment, at time of adjustment.[33]

However, according to USCIS policy developed in consultation with the Centers for Disease Control and Prevention, an asylee dependent who had a medical examination conducted overseas is not required to undergo a new medical exam when applying for adjustment of status if:

- The results of the overseas medical examination are contained in the A-file and no Class A condition was reported;
- The asylee has applied for adjustment of status within one year of eligibility to file; and
- No evidence in the A-file or testimony given at the interview suggests that the asylee has acquired a Class A condition after his or her entry into the United States.

Even if an asylee dependent may use the result of the previous examination, he or she must still establish compliance with the vaccination requirements and submit the vaccination assessment with his or her adjustment of status application. This requirement applies even if the applicant had a vaccination assessment completed overseas by a panel physician. To comply with the requirement, the applicant must have the relevant parts of Form I-693 completed by the civil surgeon.

7. Certain Afghan Nationals Applying for Adjustment of Status After Arriving in the United States During Operation Allies Welcome

Certain Afghan nationals who arrived in the United States during OAW and completed a qualifying immigration medical examination are not required to repeat the immigration medical examination when applying for adjustment of status, provided they meet the following conditions:

- The Afghan national completed a full immigration medical examination abroad, or at a government-run facility in the United States;
- A panel physician conducted the immigration medical examination abroad and annotated the results on DS-7794 or DS-2054, and related worksheets, or a blanket-designated civil surgeon conducted the immigration medical examination in the United States at a government-run facility in the United States and annotated the results on Form I-693;
- The results of the immigration medical examination are contained in the A-file or USCIS systems and no Class A medical condition was reported; and
- No evidence in the A-file, USCIS systems, or testimony given at the interview suggests that the applicant has acquired a Class A medical condition after completing their immigration medical examination.

Additionally, in consultation with CDC, USCIS has determined that Afghan nationals who meet the above conditions may use their immigration medical examination to show they are not inadmissible under the health-related grounds for the purpose of any benefit request at any time in the future.

8. Children of Returning Residents Entering the United States[34]

For children of returning residents entering the United States, as long as the parent's visa is valid or the parent is a U.S. resident or U.S. national, there are no medical examination or vaccination requirements.

Children of returning residents entering the United States are:

- Children born abroad after the parent has been issued an immigrant visa and while the parent is applying for admission to the United States.
- Children born abroad during the temporary visit abroad of a mother who is a national or permanent resident of the United States.

9. Internationally Adopted Orphans[35]

Children 10 years of age or younger who are classified as orphans and who are applying for IR-3 and IR-4 (orphans) and IH-3 and IH-4 (Hague Convention adoptees) visas are not required to comply with the vaccination requirements before admission to the United States.[36]

Footnotes

[^ 1] Based on the conditions listed in INA 212(a)(1).

[^ 2] See INA 212(d)(5)(A).

[^ 3] See *Matter of Arthur (PDF)*, 16 I&N Dec. 558 (BIA 1978) (The applicant has the burden of proof to establish his or her admissibility to the United States according to INA 291; the burden never shifts to the government).

[^ 4] Special considerations that apply to certain benefit types are noted in Section B, Special Considerations [8 USCIS-PM B.3(B)].

[^ 5] See INA 248. See 8 CFR 214.1 and 8 CFR 248.

[^ 6] See Section B, Special Considerations [8 USCIS-PM B.3(B)].

[^ 7] See INA 244.

[^ 8] See Section B, Special Considerations [8 USCIS-PM B.3(B)].

[^ 9] See INA 214. See 8 CFR 214.2(k) and 8 CFR 214.15.

[^ 10] See INA 214(q) and 8 CFR 214.15.

[^ 11] See INA 245 and 8 CFR 245.

[^ 12] See Section B, Special Considerations [8 USCIS-PM B.3(B)].

[^ 13] See INA 207 and 8 CFR 207.7. See INA 208 and 8 CFR 208.21.

[^ 14] See INA 207 and 8 CFR 207.

[^ 15] See INA 208 and 8 CFR 208.

[^ 16] See INA 208 and 8 CFR 208.21.

[^ 17] See INA 209 and 8 CFR 209.1.

[^ 18] See Section B, Special Considerations [8 USCIS-PM B.3(B)].

[^ 19] Including state or local health department physicians, who are blanket designated by USCIS as civil surgeons for purposes of completing the vaccination record for refugees adjusting status only.

[^ 20] See INA 209 and 8 CFR 209.2.

[^ 21] See Section B, Special Considerations [8 USCIS-PM B.3(B)].

[^ 22] See 8 CFR 289.1 and 8 CFR 289.2. American Indians born in Canada who meet the regulatory requirements may be regarded as having been admitted for lawful permanent residence. Because neither an immigrant visa nor an adjustment of status application is required, the applicant is not required to comply with the medical examination and vaccination requirements.

[^ 23] See INA 101(a)(27)(A) and 22 CFR 42.22.

[^ 24] See INA 101(b)(1)(F), including Hague Convention adoptees.

[^ 25] See INA 214. See 8 CFR 214.2(k) and 8 CFR 214.15. For more information, see 9 FAM 302.2.

[^ 26] See INA 245 and 8 CFR 245.

[^ 27] See 8 CFR 245.5.

[^ 28] See Volume 9, Waivers and Other Forms of Relief, Part D, Health-Related Grounds of Inadmissibility [9 USCIS-PM D] for more information on medical waivers.

[^ 29] Under INA 214(q).

[^ 30] See INA 209 and 8 CFR 209.1.

[^ 31] See 8 CFR 209.1(c).

[^ 32] See 8 CFR 209.1(c).

[^ 33] See 8 CFR 209.2(d).

[^ 34] See INA 101(a)(27)(A) and 22 CFR 42.22.

[^ 35] See INA 101(b)(1)(F). See Chapter 9, Vaccination Requirement, Section G, Exception for Certain Adopted Children [8 USCIS-PM B.9(G)] for more on this exception.

[^ 36] See INA 212(a)(1)(C), as amended by Section 2 of the International Adoption Simplification Act, Pub. L. 111-287 (PDF), 124 Stat. 3058, 3058 (November 30, 2010).

Chapter 4 - Review of Medical Examination Documentation

A. Results of the Medical Examination

The physician must annotate the results of the examination on the following forms:

Panel Physicians

Panel physicians must annotate the results of the immigration medical examination on the Electronic Medical Examination for Visa or Refugee Applicant (Form DS-7794) or the Medical Examination for Visa or Refugee Applicant (Form DS-2054), and related worksheets.

Civil Surgeons

Civil surgeons must annotate the immigration medical examination results on the Report of Immigration Medical Examination and Vaccination Record (Form I-693).

B. Documentation Completed by Panel Physician

Since a State Department consular officer reviews the medical documentation completed by a panel physician as part of the overseas visa process, a USCIS officer may assume that the medical documentation is properly completed.[1]

Applicants who have already been examined abroad and are not required to repeat the immigration medical examination in the United States may still have to show proof of compliance with the vaccination requirement.[2]

C. Documentation Completed by Civil Surgeon

1. Civil Surgeon Designation

Except for physicians who are Public Health Service officers, only physicians designated by USCIS to act as civil surgeons may conduct an immigration medical examination in the United States and complete Form I-693.[3] Only doctors of medicine (M.D.) and doctors of osteopathy (D.O.) who are currently licensed to practice as physicians may be designated.[4] The physician must be designated as a civil surgeon at the time of the completion of the immigration medical examination.

To determine whether the physician is designated as a civil surgeon, the officer should consult the designated civil surgeon list by using the Find a Civil Surgeon webpage.

2. Complete Form

The following requirements must always be met regarding any Form I-693 submitted to USCIS:

- The form must be completed legibly;
- All required parts of the form must be completed;[5]
- The form must be signed and dated by the civil surgeon who conducted the immigration medical examination;[6]
- The form must be signed and dated by the applicant who was examined;[7]
- If applicable, the form must be signed and dated by the physician(s) completing referral evaluations;[8]
- The form must still be valid;[9] and
- The form must be in a sealed envelope as detailed in the form's instructions.[10]

Officers should review Form I-693 for compliance with the procedures and requirements outlined in Centers for Disease Control's (CDC) Technical Instructions for Civil Surgeons that were in effect as of the date of the civil surgeon's signature. An applicant is not subject to any additional requirements that do not apply to them on the day the civil surgeon signed Form I-693 unless otherwise specified by the CDC. Therefore, officers should not issue a Request for Evidence (RFE) for the applicant to submit a new or updated Form I-693 to meet requirements that did not apply to the applicant on the date the civil surgeon signed the Form I-693. For example, applicants of certain ages must be tested for gonorrhea and syphilis. If the applicant has not reached the age range for which testing is required as of the date the civil surgeon signed the Form I-693, the officer must not require the applicant to obtain the tests before final adjudication, even if the applicant reached the appropriate age for which testing is required at the time of final adjudication.

This policy also applies if there have been updates to CDC's Technical Instructions for Civil Surgeons (unless otherwise specified by CDC),[11] USCIS policy, or if there is a new edition of Form I-693. As long as the civil surgeon complied with all procedures and requirements in CDC's Technical Instructions for Civil Surgeons and used the edition of the form that was current on the date that they signed Form I-693, the applicant's Form I-693 can be accepted as valid for adjudicative purposes.

Request for Evidence

If the above requirements are not met, or if there is evidence that the form or the envelope the form was placed in has been tampered with, the officer should issue an RFE to correct any Form I-693 deficiencies. If possible, the officer should return the original Form I-693 to the applicant when issuing an RFE for corrective action. Whenever an original is returned to the applicant, the officer should retain a copy.

A response to an RFE is acceptable if it is completed by a civil surgeon in one of the following ways:

- The civil surgeon annotates the original medical examination in the deficient part(s), and both the applicant and the civil surgeon re-sign and re-date their respective certifications. The civil surgeon must place the corrected Form I-693 in a sealed envelope and the applicant delivers the new envelope to USCIS.
- The civil surgeon completes an entirely new Form I-693, and corrects for the original deficiency. The civil surgeon must place the new Form I-693 in a sealed envelope and the applicant delivers the new envelope to USCIS.
- The civil surgeon completes the following sections of a new Form I-693: the part containing the applicant's information,[12] the part or parts that were deficient in the original immigration medical examination, and the part containing the civil surgeon's information and certification. The civil surgeon must include the original Form I-693 and documentation along with the newly completed Form I-693 parts and documentation. The applicant then delivers the new envelope to USCIS.

3. Signatures

The applicant, the civil surgeon, and any other health care provider who evaluated the applicant as part of the immigration medical examination must sign the form, according to the form instructions, to verify that the content of their representations is truthful.

Signature of the Civil Surgeon

The civil surgeon's signature must be an original signature. Stamps of the physician's signature or other substitutes, or copies of the civil surgeon's original signature, are not acceptable (except for blanket-designated health departments or military physicians as described below).

As outlined in the CDC's Technical Instructions for Civil Surgeons, the civil surgeon is only permitted to sign the Form I-693 after the civil surgeon has completed the entire immigration medical examination. An examination is not completed until any necessary prescribed treatment for a Class A condition has been administered.

There may be circumstances when an applicant refuses to undergo one part of the immigration medical examination, but the civil surgeon certifies the form with a notation that part of the examination is not complete. In these cases, the officer should issue an RFE to the applicant for corrective action.

The civil surgeon might also diagnose a Class A condition for which the applicant refuses treatment. The civil surgeon might then annotate the Class A condition but still certify and sign the form. In this case, the officer should not return the form for corrective action. The officer should determine that the applicant is inadmissible and ask the applicant to request a waiver, if available.[13]

Signature of the Health Department

In agreement with CDC, USCIS granted blanket civil surgeon designation to local and state health departments in the United States. This blanket designation allows health departments to complete the vaccination portion of Form I-693 for refugees seeking adjustment if they have a physician who meets the professional qualifications for a civil surgeon. If a refugee only

requires the vaccination assessment, the only parts of the form that need to be completed are the applicant's information, the vaccination assessment, and the certifications. The other parts are irrelevant and do not have to be submitted.

If the health department physician is completing only a vaccination assessment for refugees seeking adjustment, the physician's signature may be either an original (handwritten) or a stamped signature, as long as it is the signature of the health department physician. The attending nurse may, but does not have to, co-sign with the physician. The signature of the physician must be accompanied by the health department's stamp or raised seal, whichever is customarily used.

If the health department does not properly sign, the officer should return the medical documentation to the applicant for corrective action.[14]

Signature of a Military Physician Designated as a Civil Surgeon for Members and Veterans of the Armed Forces

To ease the difficulties encountered by physicians and applicants in the military, USCIS issued a blanket civil surgeon designation to qualifying military physicians to permit them to perform the immigration medical examination and complete the Form I-693 for eligible members and veterans of the U.S. armed forces and their dependents.[15]

As agreed upon by USCIS and the CDC, military physicians who qualify under this blanket civil surgeon designation may perform the entire immigration medical examination as long as the examination is conducted in the United States on the premises of a Military Treatment Facility (MTF) and conducted for a U.S. armed forces member, veteran, or dependent who is eligible to receive medical care at the MTF.

If operating under the blanket civil surgeon designation for military physicians, a physician's signature may be either an original (handwritten) or stamped signature, as long as it is the signature of a qualifying military physician. Nurses and other health care professionals may, but are not required to, co-sign the form. The signature of the physician must be accompanied by the official stamp or raised seal of the MTF, whichever is customarily used.

If the military physician does not properly sign, the officer should return the medical documentation to the applicant for corrective action.

Signature of the Applicant

The applicant or the civil surgeon may complete the section about the applicant's information. The civil surgeon must always verify the applicant's identity by requiring a government-issued identification (ID), as stated in CDC's Technical Instructions for Civil Surgeons.

The applicant must sign the certification only when instructed by the civil surgeon, at the beginning of the immigration medical examination. By signing the form, the applicant attests that they consent to the immigration medical examination and that any information provided in relation to the examination is truthful.

Whenever the civil surgeon orders a test that they do not perform personally, the civil surgeon must ensure that the physician or staff to whom the applicant is referred checks the identity of the applicant by requesting a government-issued ID.[16]

An officer should follow the chart below to determine whether the applicant or a legal guardian must sign the form.[17]

Signature of the Applicant

Age of Applicant	Signature Requirement
Age 14 and Older	The applicant must sign Form I-693. However, a legal guardian may sign for a mentally incompetent person.
Under Age 14	Either the applicant, a parent, or legal guardian may sign the Form I-693. The officer should not reject the form as improperly completed if only the applicant, parent, or guardian signs.

Signature of Physicians Receiving Referrals for Evaluation

If the civil surgeon is unable to perform a particular medical assessment, the civil surgeon is required to refer the applicant to another physician. The physician receiving the referral is required to complete the appropriate section on Form I-693 after the civil surgeon has completed the evaluation of the applicant's condition. The civil surgeon may not sign the civil surgeon's certification on the form until the civil surgeon has received and reviewed the report of the physician who received the referral. If the referring physician ordered treatment, the civil surgeon may not sign the certification until the treatment has been completed.

Contracted services used by the civil surgeon to complete a step in the medical examination are not considered referrals. Therefore, the referral section can be blank in such cases.[18] For example, if the civil surgeon uses a contractor to draw blood, the referral section does not have to be completed. However, if the CDC's Technical Instructions for Civil Surgeons require a referral to the health department because of the applicant's Tuberculosis (TB) classification, the officer must make sure that the referral section is completed.

The officer must closely examine the TB results and should not issue an RFE for a TB health department referral if the applicant was found to have latent TB infection. In this circumstance, the civil surgeon is required only to report to the health department, not refer. The reporting process is not captured on Form I-693.[19]

4. Evidence, Validity, USCIS Discretion, and Burden of Proof

Form I-693 and the Health-Related Grounds of Inadmissibility

In general, aliens applying for immigration benefits who are required to demonstrate that they are admissible, such as adjustment of status applicants, must submit a Form I-693 to show they are free from any conditions that would render them inadmissible under the health-related grounds.[20] In most cases, the only acceptable edition of Form I-693 is the edition in use at the time the civil surgeon signs the Form I-693. Prior editions of Form I-693 are generally not acceptable because they may lack required information.[21]

Validity of Form I-693 Signed by a Civil Surgeon On or After November 1, 2023

Technological advances since November 1, 2023 have enabled civil surgeons to share certain medical data from the Form I-693 directly with CDC electronically[22] and have improved both collaboration between CDC and USCIS and reporting of public health information collected on Form I-693 by civil surgeons to local U.S. health departments. USCIS has determined that, in general, a properly completed Form I-693 that is signed by a civil surgeon[23] on or after November 1, 2023 can only be used as evidence to show that the applicant is not inadmissible under the health-related grounds for the entire period the immigration benefit application with which the Form I-693 is submitted is pending. Limiting the validity of the Form I-693 to the instant immigrant benefit application or request ensures that the immigration medical examination and vaccination results are current and do not reflect outdated findings.

If the immigration benefit application with which the Form I-693 is submitted is withdrawn or denied, then an applicant needs to submit a newly completed and signed Form I-693 with any future immigration benefit application that requires an alien to demonstrate that he or she is not inadmissible on health-related grounds.

Validity of Form I-693 Signed by a Civil Surgeon Before November 1, 2023

Before November 1, 2023, civil surgeons were not required to share or report certain information to CDC electronically. Therefore, USCIS, in consultation with CDC, determined that a properly completed Form I-693 signed by a civil surgeon before November 1, 2023, retains evidentiary value for 2 years from the date of the civil surgeon's signature.[24]

USCIS Discretion on Form I-693 Validity

Even in cases in which an applicant's Form I-693 is valid as outlined above, if a USCIS officer has reason to believe that the applicant's medical condition has changed since the civil surgeon signed the Form I-693 or that the Form I-693 does not accurately reflect the applicant's medical condition such that the applicant could be inadmissible under health-related grounds, then the officer has the discretion to request further evidence or a new or updated Form I-693.[25]

Burden of Proof

An officer generally determines that the applicant has met their burden of proof with respect to the health-related grounds of inadmissibility if all of the following criteria are met:

- A USCIS-designated civil surgeon (including a blanket designated civil surgeon) performed the immigration medical examination in accordance with U.S. Department of Health and Human Services regulations, the Technical Instructions for Civil Surgeons, and the instructions for Form I-693;
- The civil surgeon and the applicant both signed and properly completed the current edition of Form I-693 as of the date of the civil surgeon's signature;[26]
- The applicant submitted the Form I-693 to USCIS in accordance with the form instructions;[27]
- The Form I-693 establishes that the applicant does not have a Class A medical condition and has complied with the vaccination requirements, or is granted a waiver;[28] and
- USCIS confirms Form I-693 is valid when USCIS issues a decision on the underlying immigration benefit application.[29]

In general, if any one of the above criteria is not met, then the applicant has not met their burden of proof required to establish that they are free of a medical condition that would render them inadmissible to the United States based on the health-related grounds. In such cases, the officer should follow standard operating procedures regarding issuance of a denial or an RFE or Notice of Intent to Deny (NOID) to address the deficiency.

Special rules may apply to certain applicants who completed immigration medical examinations overseas, including certain nonimmigrant fiancé(e)s or spouses of U.S. citizens (K nonimmigrants), spouses of lawful permanent residents (V nonimmigrants), refugees, and asylee dependents. Such applicants generally do not need to repeat the full immigration medical examination in the United States for purposes of adjustment of status.[30]

Footnotes

[^ 1] The Technical Instructions for Panel Physicians may differ slightly from Centers for Disease Control's (CDC) Technical Instructions for Civil Surgeons. As long as the DS form is properly completed, the officer should accept the finding of the consular officer as correct.

[^ 2] See Chapter 3, Applicability of Medical Examination and Vaccination Requirement [8 USCIS-PM B.3] for specific information on who is required to be examined and to what extent.

[^ 3] Form I-693 can only be used for immigration benefits that are granted in the United States.

[^ 4] See INA 232. See 8 CFR 232.

[^ 5] Some parts of the form may not be required. For example, if an applicant is not required to undergo a chest X-ray in the TB section of the medical examination report, the chest X-ray section would not have to be completed.

[^ 6] See Subsection 3, Signatures [8 USCIS-PM B.4(C)(3)].

[^ 7] See Subsection 3, Signatures [8 USCIS-PM B.4(C)(3)].

[^ 8] See Subsection 3, Signatures [8 USCIS-PM B.4(C)(3)].

[^ 9] See Subsection 4, Evidence, Validity, USCIS Discretion, and Burden of Proof [8 USCIS-PM B.4(C)(4)].

[^ 10] USCIS may reject an application package for various reasons, including lack of payment of application fee or the applicant failing to sign the application. If USCIS rejects an application package and returns the application package with the Form I-693 envelope opened and the applicant wishes to file a new application package with the original opened Form I-693, then the applicant may file the original opened Form I-693 and any supporting documentation that was previously included by the civil surgeon in its original envelope with a copy of the rejection notice.

[^ 11] See CDC's Technical Instructions for Civil Surgeons.

[^ 12] As part of completing the new Form I-693, the civil surgeon must ensure that the applicant has signed the applicant's certification.

[^ 13] See Volume 9, Waivers and Other Forms of Relief, Part D, Health-Related Grounds of Inadmissibility [9 USCIS-PM D] for more on waivers.

[^ 14] See Part C, Civil Surgeon Designation and Revocation [8 USCIS-PM C] for more information on the blanket civil surgeon designation for health departments.

[^ 15] See Part C, Civil Surgeon Designation and Revocation [8 USCIS-PM C] for more information on the blanket civil surgeon designation for military physicians.

[^ 16] By signing the form, the civil surgeon certifies that they have examined the applicant according to the procedures and requirements outlined in the CDC's Technical Instructions for Civil Surgeons, Form I-693, and form instructions. Officers do not need to verify whether the civil surgeon instructed the referring physician to check the applicant's identity.

[^ 17] See 8 CFR 103.2(a)(2).

[^ 18] Civil surgeons are, however, still responsible for ensuring that the contractor properly checks the applicant's ID.

[^ 19] See CDC's Tuberculosis Technical Instructions for Civil Surgeons for more information.

[^ 20] See INA 212(a)(1) and INA 245(a). See 8 CFR 245.5.

[^ 21] See the Form I-693 webpage for the current and accepted edition or editions of the form.

[^ 22] Effective November 1, 2023, CDC changed the Tuberculosis Technical Instructions for Civil Surgeons to require civil surgeons enter certain information from Form I-693 into eMedical, an electronic health processing system through which appropriate notifications to the health departments are made, if the applicant is diagnosed with Class A or Class B TB classifications.

[^ 23] USCIS considers the date the civil surgeon signed the Form I-693 as the date the civil surgeon completed the examination.

[^ 24] Following consultation with CDC, USCIS considers the documentation of immigration medical examinations completed either in the United States (as documented on Form I-693) or abroad (as documented on DS-7794 or DS-2054) for certain Afghan nationals who arrived in the United States during Operation Allies Welcome (OAW) as valid indefinitely as long as certain conditions are met. For more information, see Chapter 3, Applicability of Medical Examination and Vaccination Requirement, Section B, Special Considerations, Subsection 7, Certain Afghan Nationals Applying for Adjustment of Status After Arriving in the United States During Operation Allies Welcome [8 USCIS-PM B.3(B)(7)].

[^ 25] See *Matter of Arthur* (PDF), 16 I&N Dec. 558 (BIA 1978) (The applicant has the burden of proof to establish their admissibility to the United States according to INA 291; the burden never shifts to the government). See Chapter 3, Applicability of Medical Examination and Vaccination Requirement [8 USCIS-PM B.3]. See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis [1 USCIS-PM E.8] for more information on adjudicative discretion.

[^ 26] See Section C, Documentation Completed by Civil Surgeon [8 USCIS-PM B.4(C)].

[^ 27] See Form I-693 and Application to Register Permanent Residence or Adjust Status (Form I-485).

[^ 28] For more information on determining inadmissibility based on the health-related grounds, see Chapter 5, Review of Overall Findings [8 USCIS-PM B.5] through Chapter 11, Inadmissibility Determination [8 USCIS-PM B.11].

[^ 29] From November 1, 2018 until December 9, 2021, USCIS considered Form I-693 valid for 2 years from the date of the civil surgeon's signature, as long as the underlying application was submitted no more than 60 days after the date of that signature. USCIS temporarily waived the 60-day signature requirement beginning December 9, 2021, until USCIS permanently removed it on March 31, 2023. From December 9, 2021 until October 31, 2023, USCIS considered Form I-693 valid for 2 years from the date of the civil surgeon's signature. From April 4, 2024 until June 11, 2025, Forms I-693 signed by the civil surgeon on or after November 1, 2023 were valid indefinitely to show that the applicant was not inadmissible under the health-related grounds.

[^ 30] See Chapter 3, Applicability of Medical Examination and Vaccination Requirement [8 USCIS-PM B.3] for more information on these special considerations.

Chapter 5 - Review of Overall Findings

A. Overall Finding of Admissibility

The civil surgeon should properly complete the part addressing when the medical examinations and any follow-up examinations took place. The civil surgeon should also mark the appropriate boxes in the "Summary of Overall Findings" section.

If the summary indicates a Class A condition, the officer should ensure that the findings in the other form sections correspond. If they do correspond, the applicant is inadmissible. If there is conflicting information, the officer should return the form to the applicant for corrective action.

If the civil surgeon omits the summary finding entirely, the officer should check the findings in the other form sections to determine whether the applicant has a Class A condition. If all sections are properly completed, and no Class A condition has been indicated by the civil surgeon, the officer should not issue a Request for Evidence (RFE) and instead proceed with the adjudication.

If the officer is unable to determine whether the applicant has a Class A condition based on the other form sections, the officer should return the form to the applicant for corrective action. The RFE should be sent to the applicant directing him or her to return to the civil surgeon to correct the form.

B. Changes to the Summary Findings

The Technical Instructions direct civil surgeons to treat Class A communicable diseases of public health significance or refer the applicant for treatment. Generally, the civil surgeon can only sign off upon completion of the treatment. This is why the officer may encounter a summary finding that has been reclassified from a "Class A condition" to a "Class B" or "No Class A or Class B" condition.

The officer should not reject the form because of the reclassification as long as the information is consistent with the information otherwise provided in the medical examination documentation. In such cases, the applicant is not inadmissible on health-related grounds.

For example, a civil surgeon may initially annotate the summary section with a Class A condition but, following treatment, change the annotation to a Class B condition. In this instance, the summary section may indicate an earlier Class A condition, followed by a later Class B determination. Since the civil surgeon indicated on the Report of Immigration Medical Examination and Vaccination Record (Form I-693) that a former Class A condition is now a Class B condition, the applicant is not inadmissible on health-related grounds.

Chapter 6 - Communicable Diseases of Public Health Significance

A. Communicable Diseases

Applicants who have communicable diseases of public health significance are inadmissible.[1] The Department of Health and Human Services (HHS) has designated the following conditions as communicable diseases of public health significance that apply to immigration medical examinations conducted in the United States:[2]

- Gonorrhea;
- Hansen's Disease (Leprosy), infectious;
- Syphilis, infectious stage; and

- Tuberculosis (TB), Active—Only a Class A TB diagnosis renders an applicant inadmissible to the United States. Under current Centers for Disease Control and Prevention (CDC)guidelines, Class A TB means TB that is clinically active and communicable.

What qualifies as a communicable disease of public health significance is determined by HHS, not by USCIS. Any regulatory updates HHS makes to its list of communicable diseases of public health significance are controlling over the list provided in this Part B.

1. Additional Communicable Diseases for Applicants Abroad

HHS regulations also list two additional general categories of communicable diseases of public health significance.[3] Currently, these provisions only apply to applicants outside the United States who have to be examined by panel physicians:[4]

- Communicable diseases that may make a person subject to quarantine, as listed in a Presidential Executive Order, as provided under Section 361(b) of the Public Health Service Act.[5]
- Communicable diseases that may pose a public health emergency of international concern if they meet one or more of the factors listed in 42 CFR 34.3(d) and for which the Director of the CDC has determined that (A) a threat exists for importation into the United States, and (B) such disease may potentially affect the health of the American public. The determination will be made consistent with criteria established in Annex 2 of the revised International Health Regulations. HHS/CDC's determinations will be announced by notice in the Federal Register.

2. Human Immunodeficiency Virus (HIV)

As of January 4, 2010, human immunodeficiency virus (HIV) infection is no longer defined as a communicable disease of public health significance according to HHS regulations.[6] Therefore, HIV infection does not make the applicant inadmissible on health-related grounds for any immigration benefit adjudicated on or after January 4, 2010, even if the applicant filed the immigration benefit application before January 4, 2010.

The officer should disregard a diagnosis of HIV infection when determining whether an applicant is inadmissible on health-related grounds. The officer should administratively close any HIV waiver application filed before January 4, 2010.

B. Parts of Form I-693 Addressing Communicable Diseases

The civil surgeon must complete “Findings” boxes for all categories of communicable diseases of public health significance. The civil surgeon may add explanatory remarks; however, the officer should not issue a Request for Evidence (RFE) simply because there are no remarks.

1. Tuberculosis

An initial tuberculosis (TB) screening test for showing an immune response to Mycobacterium tuberculosis[7] antigens is required for all applicants 2 years of age or older.[8] According to the Tuberculosis Technical Instructions for Civil Surgeons, applicants under 2 years of age are required to undergo an initial screening test only if the child has signs or symptoms suggestive of TB or has known human immunodeficiency virus (HIV) infection.

The “testing age” is the applicant’s age on the date the civil surgeon completed the medical examination by signing the form, not the age at the time of the adjudication. An officer should not send a RFE for testing if the applicant was properly exempt from the testing requirement due to age at the time of the medical examination. The officer, however, may always require testing if evidence indicates the applicant may have been exposed to TB since the examination.

Initial Screening Test Results

The initial screening test results must be recorded. If the initial screening test was not administered, the exceptions should be clearly annotated in the remarks portion after the “not administered” box in the testing section. The officer should be aware that anyone who previously received the Bacille Calmette-Guérin vaccine[9] must still undergo an initial TB screening test. These applicants are not exempt from the initial screening test.

The civil surgeon must also annotate the “Initial Screening Test Result and Chest X-Ray Determination” section. If the section indicates that the applicant is medically cleared relating to TB, then no further TB tests are required. In this case, the X-ray section should be left blank.

Positive Screening Results

If the initial screening test is positive, or if the applicant has signs or symptoms of TB or has known HIV infection, a chest X-ray must be performed. Applicants who have chest x-ray findings suggestive of TB, signs or symptoms of TB, or known HIV infection must be referred to the health department of jurisdiction for sputum testing. This referral, testing, and treatment can be a lengthy process, but the civil surgeon cannot sign off on the Report of Immigration Medical Examination and Vaccination Record (Form I-693) until any required steps relating to TB have been completed.

Under the Technical Instructions, a pregnant applicant can defer the chest X-ray until after pregnancy but the civil surgeon may not submit the form until the chest X-ray has been performed, interpreted, and the appropriate follow-up, if required under the Technical Instructions, is completed. If the officer receives an incomplete medical examination for a pregnant applicant, the officer should return the original form to the applicant for corrective action according to established local procedures.

Referral and Reporting to Health Departments

If a referral is required, the civil surgeon must not sign Form I-693 until the referral evaluation section has been completed and received back from the appropriate health department. If the referral evaluation section is not documented, the officer should issue an RFE for corrective action. Determining whether a referral is required is detailed in the TB Technical Instructions for Civil Surgeons.

2. Syphilis

An applicant may be required to undergo serological testing for syphilis depending on the applicant’s age and other factors set by CDC. Civil surgeons must consult CDC’s Technical Instructions for Civil Surgeons for current requirements, and to ensure they are using approved screening, testing, and treatment procedures. The testing age is determined by the applicant’s age on the date the civil surgeon completed the immigration medical examination and signed Form I-693, not the age at the time USCIS adjudicates the application.

3. Gonorrhea

An applicant may be required to undergo testing for gonorrhea depending on the applicant's age and other factors set by CDC. Civil surgeons must consult CDC's Technical Instructions for Civil Surgeons for current requirements, and to ensure they are using approved screening, testing, and treatment procedures. The testing age is determined by the applicant's age on the date the civil surgeon completed the immigration medical examination and signed Form I-693, not the age at the time USCIS adjudicates the application.

4. Other Class A and Class B Conditions for Communicable Diseases of Public Health Significance

According to the Technical Instructions for Hansen's Disease (Leprosy) for Civil Surgeons, screening for Hansen's disease includes obtaining medical history with inquiries as to past and present diagnoses of Hansen's disease, history of skin lesions unresponsive to treatment, and family history of skin lesions or known Hansen's disease. The physical exam must include a search for signs and lesions consistent with Hansen's disease, and the civil surgeon must complete the "Findings" portion in Form I-693.

Footnotes

[^ 1] See INA 212(a)(1)(A)(i).

[^ 2] See 42 CFR 34.2(b).

[^ 3] See 42 CFR 34.2(b)(2) and 42 CFR 34.2(b)(3).

[^ 4] An officer will not encounter such annotations on Report of Immigration Medical Examination and Vaccination Record (Form I-693), but may on the DS-2053/DS-2054.

[^ 5] See Pub. L. 78-410, 58 Stat. 682, 703 (July 1, 1944), as amended, codified at 42 U.S.C. Chapter 6A. The current revised list of quarantinable communicable diseases is available at cdc.gov and archives.gov/federal-register.

[^ 6] See the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Pub. L. 110-293 (PDF) (July 30, 2008). See 42 CFR 34.2(b) as amended by 74 FR 56547 (PDF) (Nov. 2, 2009).

[^ 7] Bacteria that cause latent TB infection and TB disease.

[^ 8] For acceptable tests and more information regarding procedures relating to the referral process, see the Tuberculosis Technical Instructions for Civil Surgeons.

[^ 9] Often referred to as the "BCG" vaccine. BCG vaccine is a tuberculosis vaccination that is administered in many countries outside of the United States, especially those with a high TB rate. For more information, see CDC's website at cdc.gov.

Chapter 7 - Physical or Mental Disorder with Associated Harmful Behavior

A. Physical or Mental Disorders with Associated Harmful Behavior[1]

Applicants who have physical or mental disorders and harmful behavior associated with those disorders are inadmissible.[2] The inadmissibility ground is divided into two subcategories:

- Current physical or mental disorders, with associated harmful behavior.
- Past physical or mental disorders, with associated harmful behavior that is likely to recur or lead to other harmful behavior.

There must be both a physical or mental disorder and harmful behavior to make an applicant inadmissible based on this ground. Neither harmful behavior nor a physical or mental disorder alone renders an applicant inadmissible on this ground. Harmful behavior is defined as behavior that may pose, or has posed, a threat to the property, safety, or welfare of the applicant or others.

A physical disorder is a currently accepted medical diagnosis as defined by the current edition of the Manual of International Classification of Diseases, Injuries, and Causes of Death published by the World Health Organization or by another authoritative source as determined by the Director.[3] Officers should consult the Technical Instructions for additional information, if needed.

A mental disorder is a currently accepted psychiatric diagnosis, as defined by the current edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association or by another authoritative source as determined by the Director.[4] Officers should consult the Technical Instructions for additional information, if needed.

Under the Technical Instructions, a diagnosis of substance abuse/addiction for a substance that is not listed in Section 202 of the Controlled Substances Act (with current associated harmful behavior or a history of associated harmful behavior judged likely to recur) is classified as a mental disorder.[5]

Under prior Technical Instructions and the July 20, 2010 or older versions of the form, these conditions were summarized under the drug abuse/addiction part of the form. An officer, however, should not find an applicant inadmissible for "drug abuse/addiction" if a non-controlled substance is involved.

B. Relevance of Alcohol-Related Driving Arrests or Convictions

1. Alcohol Use and Driving

Alcohol is not listed in Section 202 of the Controlled Substances Act.[6] Therefore, alcohol use disorders are treated as a physical or mental disorder for purposes of determining inadmissibility. As a result, an applicant with an alcohol use disorder will not be deemed inadmissible unless there is current associated harmful behavior or past associated harmful behavior likely to recur. The harmful behavior must be such that it poses, has posed, or is likely to pose a threat to the property, safety, or welfare of the applicant or others.

In the course of adjudicating benefit applications, officers frequently encounter criminal histories that include arrests and/or convictions for alcohol-related driving incidents, such as DUI (driving under the influence) and DWI (driving while intoxicated). These histories may or may not rise to the level of a criminal ground of inadmissibility.[7] A record of criminal arrests and/or convictions for alcohol-related driving incidents may constitute evidence of a health-related inadmissibility as a physical or mental disorder with associated harmful behavior.

Operating a motor vehicle under the influence of alcohol is clearly an associated harmful behavior that poses a threat to the property, safety, or welfare of the applicant or others. Where a civil surgeon's mental status evaluation diagnoses the presence of an alcohol use disorder (abuse or dependence), and where there is evidence of harmful behavior associated with the disorder, a Class A medical condition should be certified on Report of Immigration Medical Examination and Vaccination Record (Form I-693).

2. Re-Examinations

Requesting Re-Examinations

Some applicants may fail to report, or may underreport, alcohol-related driving incidents in response to the civil surgeon's queries. Where these incidents resulted in an arrest, they may be subsequently revealed in the criminal history record resulting from a routine fingerprint check. Consequently, a criminal record printout revealing a significant history of alcohol-related driving arrests may conflict with the medical examination report that indicates no alcohol-related driving incidents were reported to or evaluated by the civil surgeon.

In such an instance, an officer may require the applicant to be re-examined. The re-examination would be limited to a mental status evaluation specifically considering the record of alcohol-related driving incidents. On the Request for Evidence (RFE), officers should use the following language: "Please return to the civil surgeon for purposes of conducting a mental status evaluation specifically considering the record of alcohol-related driving incidents."

Upon re-examination, the civil surgeon may refer the applicant for further evaluation to a psychiatrist or to a specialist in substance-abuse disorders as provided for under the Technical Instructions. After such referral, the civil surgeon will determine whether a Class A medical condition exists and amend the Form I-693 accordingly. The determination of a Class A condition is wholly dependent on the medical diagnosis of a designated civil surgeon.

Re-Examination for Significant Criminal Record of Alcohol-Related Driving Incidents

Only applicants with a significant criminal record of alcohol-related driving incidents that were not considered by the civil surgeon during the original medical examination should be referred for re-examination.

The actual criminal charges for alcohol-related driving incidents vary among the different states. A significant criminal record of alcohol-related driving incidents includes:

- One or more arrests/convictions for alcohol-related driving incidents (DUI/DWI) while the driver's license was suspended, revoked, or restricted at the time of the arrest due to a previous alcohol-related driving incident(s);
- One or more arrests/convictions for alcohol-related driving incidents where personal injury or death resulted from the incident(s);
- One or more convictions for alcohol-related driving incidents where the conviction was a felony in the jurisdiction in which it occurred or where a sentence of incarceration was actually imposed;
- One arrest/conviction for alcohol-related driving incidents within the preceding 5 years;[8] or
- Two or more arrests/convictions for alcohol-related driving incidents within the preceding 10 years.[9]

If the officer finds that the criminal record appears to contradict the civil surgeon's finding in the medical examination report, then the officer should request a re-examination.

Example: An applicant's criminal record shows that she was convicted for DWI-related vehicular manslaughter. However, the medical examination report reflects that no Class A or B physical or mental disorder was found. In this case, the officer should request a re-examination because the medical examination report finding should have reflected that the applicant has a history relating to an alcohol-related driving incident that could indicate a physical or mental disorder with associated harmful behavior.

3. Determination Based on Re-Examination

Upon completion of the re-examination, the officer should determine whether the applicant is inadmissible. If the civil surgeon annotated a Class A condition, the applicant is inadmissible. If no Class A condition is certified by the civil surgeon, the officer may not determine that the applicant is inadmissible. In exceptional cases, the officer may seek review of the civil surgeon's determination from CDC.

If the applicant is inadmissible, he or she may file an application for waiver of inadmissibility.[10]

C. Relevance of Other Evidence

The guidance relating to alcohol-related driving arrests or convictions described above applies to any similar scenario where the record of proceeding contains evidence that may indicate inadmissibility due to a mental or physical disorder with associated harmful behavior that was not considered by the civil surgeon in the original medical examination. Such evidence includes, but is not limited to:

- A prior finding of inadmissibility due to a mental disorder;
- A history of institutionalization for a mental disorder;
- A criminal history other than drunk driving arrests/convictions, such as assaults and domestic violence, in which alcohol or a psychoactive substance was a contributing factor;
- Any other evidence that suggests an alcohol problem; or
- Other criminal arrests where there is a reasonable possibility of a mental disorder as a contributing factor.

Accordingly, where the record of proceeding available to the officer contains evidence suggestive of a mental disorder, and the Form I-693 medical report does not reflect that the evidence was considered by the civil surgeon, the applicant must be required to undergo a mental status re-examination by a civil surgeon specifically addressing the adverse evidence that may not have initially been revealed to the civil surgeon.

D. Parts of Form I-693 Addressing Physical or Mental Disorders

The civil surgeon must check the appropriate findings box on the medical examination report. The civil surgeon should also either annotate the findings in the remarks section or attach a report, if the space provided is not sufficient. However, the officer should not RFE simply because the civil surgeon has omitted the remarks or failed to attach a report.

Footnotes

[^ 1] See 42 CFR 34.2(n) (mental disorder). See 42 CFR 34.2(p) (physical disorder).

[^ 2] See INA 212(a)(2)(A)(iii).

[^ 3] HHS regulations define Director as the director of CDC or a designee as approved by the Director or Secretary of HHS. See 42 CFR 34.2(g).

[^ 4] HHS regulations define Director as the director of CDC or a designee as approved by the Director or Secretary of HHS. See 42 CFR 34.2(g).

[^ 5] See Title II of Pub. L. 91-513 (PDF), 84 Stat. 1242, 1247 (October 27, 1970), as amended, codified at 21 U.S.C. 801 et. seq.

[^ 6] See Title II of Pub. L. 91-513 (PDF), 84 Stat. 1242, 1247 (October 27, 1970), as amended, codified at 21 U.S.C. 801 et. seq.

[^ 7] See INA 212(a)(2).

[^ 8] See CDC's Technical Instructions for Physical or Mental Disorders with Associated Harmful Behaviors and Substance-Related Disorders, available at cdc.gov/immigrant-refugee-health/hcp/civil-surgeons/mental-health.html.

[^ 9] See CDC's Technical Instructions for Physical or Mental Disorders with Associated Harmful Behaviors and Substance-Related Disorders, available at cdc.gov/immigrant-refugee-health/hcp/civil-surgeons/mental-health.html.

[^ 10] See Volume 9, Waivers and Other Forms of Relief, Part D, Health-Related Grounds of Inadmissibility [9 USCIS-PM D] for more on waivers.

Chapter 8 - Drug Abuse or Drug Addiction

A. Drug Abuse or Drug Addiction

Applicants who are found to be drug abusers or addicts are inadmissible.[1] Drug abuse and drug addiction are current substance-use disorders or substance-induced disorders of a controlled substance listed in Section 202 of the Controlled Substances Act, as defined in the Diagnostic and Statistical Manual of Mental Disorders (DSM) published by the American Psychiatric Association or by another authoritative source as determined by the Director.[2]

In 2010, the Centers for Disease Control and Prevention (CDC) changed the Technical Instructions on how a civil surgeon determines whether an applicant is a drug abuser or drug addict.[3] The civil surgeon must now make this determination according to the DSM as specified in the Technical Instructions.[4]

If the applicant is classified as a drug abuser or addict, the applicant can apply again for an immigration benefit if his or her drug abuse or addiction is in remission. Remission is now defined by DSM criteria, and no longer by a set timeframe as it was under previous Technical Instructions.[5] In order for an applicant's drug abuse or addiction to be classified as in remission, the applicant must return to a civil surgeon for a new assessment.

If the officer has reason to question the completeness or accuracy of the medical examination report, the officer should ask CDC to review the medical report before sending a Request for Evidence (RFE).

Most applicants who are found to be drug abusers or addicts are ineligible for a waiver; the availability depends, however, on the immigration benefit the applicant seeks.[6]

B. Part of Form I-693 Addressing Drug Abuse or Drug Addiction

The civil surgeon must check the appropriate findings box on the medical examination report. The civil surgeon should also either annotate the findings in the remarks section or attach a report, if the space provided is not sufficient. However, the officer should not RFE simply because the civil surgeon has omitted the remarks or failed to attach a report.

C. Request for CDC Advisory Opinion

If an officer has a case where there is a question concerning the diagnosis or classification made by the civil surgeon or panel physician, the officer may forward the pertinent documents to CDC and request an advisory opinion.

The request should include the following documents:

- A cover letter indicating the request, reason(s) for the request, and the USCIS office making the request;
- A copy of the medical examination documentation (Form I-693 or Form DS-2053/DS-2054, and its related worksheets);
- A copy of the provided medical report(s) detailing the medical condition for which the advisory opinion is being requested; and
- Copies of all other relevant medical reports, laboratory results, and evaluations connected to the medical condition.

Once the documents are received by CDC, CDC reviews the documents and forwards a response letter with results of the review to the USCIS office that submitted the request.

CDC's usual processing time for review and response back to the requesting USCIS office is approximately 4 weeks.

Upon receipt, the officer should review CDC's response letter to determine next steps.

Footnotes

[^ 1] See INA 212(a)(1)(A)(iv).

[^ 2] See Title II of Pub. L. 91-513 (PDF), 84 Stat. 1242, 1247 (October 27, 1970), as amended, codified at 21 U.S.C. 801 et. seq. See 42 CFR 34.2(h) (drug abuse). See 42 CFR 34.2(i) (drug addiction). HHS regulations define Director as the Director of CDC or a designee as approved by the Director or Secretary of HHS. See 42 CFR 34.2(g).

[^ 3] See CDC's Technical Instructions for Physical or Mental Disorders with Associated Harmful Behaviors and Substance-Related Disorders, available at cdc.gov/immigrant-refugee-health/hcp/civil-surgeons/mental-health.html.

[^ 4] The DSM is a publication of the American Psychiatric Association. Considerations that were relevant under previous Technical Instructions, such as a pattern of abuse or a history of experimental use of drugs, no longer play a direct role in the admissibility determination; they are now only considered as one of the elements under the DSM assessment. The assessment under the DSM is complicated. For more information, please see the Technical Instructions.

[^ 5] Under the pre-2010 Technical Instructions, an applicant's substance abuse or addiction was in remission if the applicant had not engaged in non-medical use of a controlled substance within the past 3 years, or non-medical use of a non-controlled substance within the past 2 years.

[^ 6] See Volume 9, Waivers and Other Forms of Relief, Part D, Health-Related Grounds of Inadmissibility [9 USCIS-PM D] for more on waivers.

Chapter 9 - Vaccination Requirement

A. Vaccination Requirements for Immigrants

Some vaccines are expressly required by statute. Others are required because the Centers for Disease Control and Prevention (CDC) have determined they are in the interest of public health.[1]

The Immigration and Nationality Act (INA)[2] requires applicants to submit documentation of having received the following vaccinations:

- Mumps, measles, rubella;
- Polio;
- Tetanus and diphtheria toxoids;[3]
- Pertussis;
- Haemophilius influenza type B; and
- Hepatitis B.

CDC requires immigrants to receive the following additional vaccines:

- Varicella;
- Influenza;
- Pneumococcal pneumonia;
- Rotavirus;
- Hepatitis A; and
- Meningococcal.

If the applicant has not received any of the listed vaccinations and the vaccinations are age appropriate and medically appropriate, the applicant has a Class A medical condition and is inadmissible. Generally, all age appropriate vaccine rows of the vaccination assessment must have at least one entry before the assessment can be considered to have been properly completed.

B. Blanket Waiver if Vaccine is "Not Medically Appropriate"

1. Definition of "Not Medically Appropriate"

The term "not medically appropriate" applies to:

- Vaccinations that are not required based on the applicant's age at the time of the medical exam ("not age appropriate");[4]
- Vaccinations that cannot be administered on account of a medical contraindication("contraindication");
  - A contraindication is a condition in a recipient which is likely to result in a life-threatening problem if the vaccine is given.
  - Examples of contraindications include a severe allergic reaction to a vaccination that was previously given, or pregnancy.
- Vaccinations that are administered as a series in intervals, but there is insufficient time to complete the entire vaccination series at the time of the medical examination ("insufficient time interval");[5] or
- The influenza vaccine if it is not the flu season, or if the vaccine for the specific flu strain missing is no longer available ("not flu season").

If receiving the vaccine is not medically appropriate, the civil surgeon should indicate this medical finding on the Report of Immigration Medical Examination and Vaccination Record (Form I-693) in the appropriate boxes. USCIS will then waive that vaccine(s).[6] A separate waiver application is not required for an officer to grant a waiver of the vaccination requirement as "not medically appropriate."

The officer should generally accept a finding by the civil surgeon that a vaccine is not medically appropriate unless that finding is clearly wrong. For example, if a vaccine was age appropriate at the time of the medical exam based on the vaccination chart,[7] but the civil surgeon marked that the vaccine is not medically appropriate because it is not age appropriate, then it is clear that the civil surgeon's mark is incorrect. The same is true for a finding that a vaccine is not medically appropriate because it is not flu season; the officer should be able to clearly see whether the finding is correct based on the date of the medical examination.

An officer, however, should usually defer to a civil surgeon's finding that a vaccine is not medically appropriate because of a contraindication. This is because such a finding involves medical judgment.

As indicated in the previous section, generally all age appropriate vaccine rows of the vaccination assessment must have at least one entry before the assessment can be considered to have been properly completed. However, if the officer can see from the record that the age appropriate vaccine was not required because, for instance, "it is not the flu season" but the civil surgeon failed to mark this on the vaccination assessment, then the officer may grant a blanket waiver despite the omission. In such cases, the officer should annotate in the "For USCIS Use Only" Remarks box in the vaccination record that a blanket waiver was granted.

2. Pregnancy or an Immuno-Compromised Condition[8]

Some vaccines are, in general, not medically appropriate during pregnancy. These vaccines will likely be marked as contraindicated on Form I-693 if the applicant was pregnant at the time of the medical examination.[9]

The civil surgeon may annotate in the remarks section that the applicant did not receive one or more vaccines because of a contraindication that is based on pregnancy or a condition other than pregnancy. The reason for the contraindication may be annotated by the civil surgeon on the Form I-693; however, if it is omitted, the officer does not need to issue a Request for Evidence (RFE) solely for that omission as long as the contraindication is marked in the vaccine chart.

An officer should also never issue an RFE for additional vaccines if the applicant is no longer pregnant at the time of the adjudication of the adjustment of status. As long as the vaccination assessment was properly completed by the civil surgeon at the time of the examination, the vaccination assessment can be accepted. In other words, if a woman did not receive certain required vaccines because she was pregnant at the time of the medical examination, and the contraindication box is marked by the civil surgeon, the applicant is not required to get those vaccines later at the time of the adjudication.

Likewise, some vaccines are not medically appropriate for applicants who have an immuno-compromised condition (such as HIV/AIDS or a weakened immune system because of taking certain medications) and may be marked by the civil surgeon as contraindicated.[10]

In the case of an immuno-compromised person, the officer should never issue an RFE for additional vaccines even if, at the time of the adjudication of adjustment of status, the applicant is no longer immuno-compromised. As long as the vaccination assessment was properly completed at the time of the examination by the civil surgeon, the vaccination assessment can be accepted. The applicant should not be required to get the missing vaccines later at the time of the adjudication.

3. Blanket Waiver due to Nationwide Vaccination Shortage

USCIS will grant a blanket waiver only in the case of a vaccination shortage if CDC recommends that USCIS should do so based on CDC's assessment that there is a nationwide shortage.

An officer may only grant a blanket waiver for a vaccine based on a vaccination shortage if the following circumstances are met:

- CDC declares that there is a nationwide vaccination shortage, and issues the appropriate statement on its website for civil surgeons;
- USCIS issues the appropriate statement on uscis.gov; and
- The civil surgeon annotates the medical examination form in compliance with any additional requirements specified by CDC or USCIS.

The grant of this blanket waiver does not differ from the grant of other blanket waivers.

4. Vaccines Not Routinely Available Abroad

Generally, "national vaccination shortage" principles do not apply abroad. In the context of vaccinations administered outside of the United States, the term panel physicians use to indicate the unavailability of a vaccine is "not routinely available." Therefore, if the adjustment applicant is permitted to use the vaccination assessment completed abroad,[11] then officers should not find the applicant inadmissible solely based on the panel physician indicating a vaccine is "not routinely available." Officers should also not issue an RFE for corrective action. USCIS may grant a blanket waiver in these cases.

C. Adjudication Steps

Vaccination Requirement: Adjudication Steps	
Step 1	Determine which vaccination(s) were age appropriate for the applicant to receive based on the applicant's age on the date the medical exam was completed.[12]
Step 2	Verify that any vaccine that was required (age appropriate)[13] as of the date of the medical exam is marked as: • Received by the applicant; or • "Not medically appropriate" because of contraindication, inappropriate time interval, or not flu season.
Step 3	If the required (age appropriate) vaccinations were not received or not marked as "not medically appropriate" as of the date the medical exam was completed, determine whether the missing vaccinations would still be required as of the date of adjudication. Vaccinations missing at the time of the medical exam may no longer be required as of the date of adjudication if, for example, the applicant has aged out, or it is not the flu season, or a vaccine is no longer required by law.
Step 4	If the missing vaccinations are no longer required as of the date of the adjudication, the vaccination requirements have been met.
Step 5	If the missing vaccinations would still be required, the officer should send an RFE for an updated Form I-693 showing the applicant has received those vaccinations.

D. Vaccination Chart

USCIS officers should consult the chart in the Vaccination Technical Instructions to determine inadmissibility based on failure to meet the vaccination requirements.

E. Special Vaccination Considerations

Additionally, officers should pay special attention to the following developments.

1. COVID-19 Vaccination

On January 22, 2025, USCIS announced that as of January 20, 2025, officers would no longer issue any RFEs or Notices of Intent to Deny (NOIDs), or deny adjustment of status applications, based on an applicant's failure to submit documentation of having received the COVID-19 vaccination. On March 11, 2025, CDC updated their Technical Instructions for Civil Surgeons to remove the COVID-19 vaccination from the list of required vaccinations for immigration purposes.[14] Therefore, applicants who are subject to the immigrant vaccination requirements are not required to submit documentation of having completed the COVID-19 vaccination series for any application pending on or after January 20, 2025.

Before January 22, 2025, the COVID-19 vaccination requirement varied based on CDC's changes to the age category of applicants required to obtain the vaccination for immigration purposes.

COVID-19 Vaccination Requirements Before January 20, 2025[15]

Date Civil Surgeon Signed Form I-693	Age Required to Receive COVID-19 Vaccination
On or after October 1, 2021	12 years of age and older
On or after November 3, 2021	5 years of age and older

Date Civil Surgeon Signed Form I-693	Age Required to Receive COVID-19 Vaccination
On or after July 25, 2022	6 months of age and older

2. Human Papillomavirus (HPV) Vaccination

From August 1, 2008 through December 13, 2009, human papillomavirus (HPV) vaccination was required for female applicants ages 11 years through 26 years. The requirement was eliminated on December 14, 2009, and affects any admissibility determination under INA 212(a)(1)(A)(ii) on that date or thereafter. Therefore, for adjudications taking place on or after December 14, 2009, officers should disregard any annotation of the HPV vaccine, or the lack thereof, on Form I-693 or U.S. Department of State's Vaccination Documentation Worksheet (Form DS-3025), when determining whether the vaccination requirements are met.

3. Zoster Vaccination

From August 1, 2008 through December 13, 2009, the zoster vaccination was required for applicants ages 60 years or older unless the applicant had received the varicella vaccine.

The zoster vaccine, however, was not available in the United States due to a nationwide shortage from the time it became mandatory. Therefore, even though the vaccine was missing, the Form I-693 could be accepted if the physician was unable to obtain the vaccine.

On December 14, 2009, the zoster vaccine was removed from the list of required vaccines for immigration purposes, and the change affects any admissibility determination made on or after that date. Therefore, officers should disregard any annotation of the zoster vaccine, or the lack thereof, on any Form I-693 or U.S Department of State's Vaccination Documentation Worksheet (Form DS-3025), when determining whether the vaccination requirements are met.

4. Influenza Vaccination

The flu vaccination is only available during the flu season. For purposes of Form I-693, the flu season commences annually on October 1 and runs through March 31.

Over time, CDC has changed the age category of applicants required to obtain the flu vaccine for immigration purposes. As of November 16, 2010, CDC's Technical Instructions require that all applicants 6 months of age or older receive the flu vaccine during the flu season.

If an applicant was required to obtain the flu vaccine at the time of the medical examination (the date of the civil surgeon's certification governs) but a flu vaccine annotation is missing, the officer should only issue an RFE if it is still the same flu season and if it is reasonable to expect that the applicant will be able to obtain the flu vaccine within the time frame of the RFE.

This accounts for the fact that the flu vaccine is strain-specific and only available for a limited time each year. The officer should not issue an RFE if the applicant will not be able to obtain the strain-specific flu vaccine that had been required at the time of the medical examination because:

- It is no longer the same flu season; or
- It is not the flu season at all.

5. Vaccination Requirements Prior to August 1, 2008

The following vaccines were NOT required prior to August 1, 2008: Hepatitis A, meningococcal, rotavirus, human papillomavirus (HPV), and zoster.[16]

F. Completion of the Results Section by the Civil Surgeon

According to the Vaccination Component of the Technical Instructions, the civil surgeon should mark the appropriate results box at the bottom of the vaccination assessment chart. The Technical Instructions direct the civil surgeon to only check one appropriate box.

The officer should be aware that civil surgeons may improperly mark the boxes because they may misunderstand the meaning of these boxes. Therefore, the officer should determine, from the vaccination assessment completed by the civil surgeon, whether the applicant received all vaccines, which blanket waivers should be granted, and whether the applicant requires any other waivers. The officer should exercise discretion in reviewing the vaccination chart and when evaluating the results boxes at the bottom of the vaccination assessment chart.

If the civil surgeon did not check any result boxes, the officer should only return the form for corrective action if he or she is unable to ascertain whether the applicant is admissible. The officer should never alter or complete sections on the medical examination report that are the responsibility of the civil surgeon, such as the results boxes.

The results boxes and their meanings are described below (according to the Vaccination Component of the Technical Instructions).

Vaccination Record: Explanation of Results	
Applicant may be eligible for blanket waiver(s) as indicated above	This box will usually be checked because some vaccines may not be age appropriate for the applicant, a vaccination series could not be completed, there was a contraindication, or because of any other condition noted in the "Not Medically Appropriate" heading.
Applicant will request an individual waiver based on religious or moral convictions	If an applicant objects to vaccines based on religious or moral convictions, the "Applicant will request an individual waiver based on religious or moral convictions" box must be checked.[17] This is not a blanket waiver, and the applicant will have to submit a waiver request on Form I-601. Even if the applicant otherwise requires a blanket waiver(s), the civil surgeon must check this box, and not the box titled "Applicants may be eligible for blanket waivers." It may be, however, that the civil surgeon checks both boxes, in which case, the officer should just request the waiver documentation that establishes the religious or moral conviction.
Vaccine history complete for each vaccine, all requirements met	If the applicant has met the vaccination requirements, i.e., completed the series for all required vaccines, the "Vaccine history complete for each vaccine, all requirements met" box must be checked.
Applicant does not meet immunization requirements	If an applicant's vaccine history is incomplete and the applicant refuses administration of a single dose of any required vaccine that is medically appropriate for the applicant, the "Applicant does not meet immunization requirements" box must be checked.

Vaccination Record: Explanation of Results	
	If this box is checked, the applicant may be inadmissible. Depending on the case, the officer should ask for the reason through an RFE, Notice of Intent to Deny (NOID), or an interview. If the applicant refused to be vaccinated on account of a religious or moral conviction, the officer should direct the applicant to file a waiver. If the applicant had no religious or moral reason for refusal, the applicant is inadmissible. The officer should not return the assessment to the civil surgeon if he or she has enough information to determine health-related inadmissibility.

G. Exception for Certain Adopted Children

Some children are not subject to the vaccination requirement[18] if all of the following conditions are met:

- The child is 10 years of age or younger;
- The child is classified as an orphan (IR3 or IR4) or a Hague Convention adoptee (IH3 or IH4);[19] and
- The child is seeking an immigrant visa as an immediate relative.[20]

For the child to benefit from this exception, the adopting parent(s) must sign an affidavit prior to the immigrant visa issuance, affirming that the child will receive the required vaccination within 30 days of admission to the United States or at the earliest time that is medically appropriate. However, noncompliance with the vaccination requirements following the child's admission to the United States is not a ground for removal.

The Department of State has developed a standard affidavit form, Affidavit Concerning Exemption from Immigrant Vaccination Requirements for a Foreign Adopted Child (Form DS-1981), to ensure that adopting parents are aware of the possibility of an exception from the vaccination requirements and of their obligation to ensure that the child is vaccinated following admission.[21] The completed form must be submitted to the consulate as part of the immigrant visa application.

Only orphans or Convention adoptees whose adoptive or prospective adoptive parents have signed an affidavit will be exempt from the vaccination requirement. If the adopting parent(s) prefers that the child meet the vaccination requirement as part of the visa application process, the child may benefit from the waiver(s) for those vaccinations which the panel physician determines are medically inappropriate.[22]

When the adoptive or prospective adoptive parent cannot sign the affidavit in good faith because of religious or moral objections to vaccinations, the child will require a waiver.[23]

Footnotes

[^ 1] Effective December 14, 2009, CDC changed its methods on how to assess which vaccines should be required for immigration purposes. This led to changes in the list of required vaccines; some that were required prior to 2009 are no longer required since December 14, 2009.

[^ 2] See INA 212(a)(1)(A)(ii).

[^ 3] Applicants who have completed the initial DTP/DTaP/DT or Td/Tdap series should receive a Td/Tdap booster shot every 10 years. If the last dose was received more than 10 years ago, the applicant is required to have the booster shot, otherwise the applicant is inadmissible under INA 212(a)(1)(A)(ii).

[^ 4] See Section D, Vaccination Chart [8 USCIS-PM B.9(D)] for more information.

[^ 5] In these cases, the civil surgeon will administer the dose due at the time of the medical examination and mark on the form that there is not sufficient time to complete the entire vaccination series (insufficient time interval).

[^ 6] See INA 212(g)(2)(B).

[^ 7] See Section D, Vaccination Chart. [8 USCIS-PM B.9(D)].

[^ 8] Immuno-compromised condition refers to a medical state that does not allow the body to fight off infection.

[^ 9] See CDC's Vaccination Technical Instructions for a list of the specific vaccines not medically appropriate during pregnancy, available at cdc.gov/immigrant-refugee-health/hcp/civil-surgeons/vaccination.html.

[^ 10] See CDC's Vaccination Technical Instructions for a list of the specific vaccines not medically appropriate for immuno-compromised persons, available at cdc.gov/immigrant-refugee-health/hcp/civil-surgeons/vaccination.html.

[^ 11] See Chapter 3, Applicability of Medical Examination and Vaccination Requirement [8 USCIS-PM B.3] for more information on applicants who may use the vaccination assessment completed abroad for adjustment purposes.

[^ 12] See Section D, Vaccination Chart [8 USCIS-PM B.9(D)] for a chart of vaccine requirements by age.

[^ 13] Since the applicant was not required to receive non-age appropriate vaccines at the time of the medical exam, the officer does not need to review these vaccine rows at the time of adjudication.

[^ 14] See CDC's Technical Instructions for Civil Surgeons.

[^ 15] Starting on October 1, 2021, applicants were required to complete the COVID-19 vaccination series (one or two doses depending on the formulation) in order to meet the immigrant vaccination requirements. Beginning on December 8, 2023, applicants were required to receive one dose of the COVID-19 vaccine if a dose was due at the time of the immigration medical examination.

[^ 16] Please see information immediately above for the zoster and the HPV vaccine, since these vaccines have not been required since December 2009.

[^ 17] The applicant needs to demonstrate opposition to vaccinations in all forms, not just certain vaccinations. See Volume 9, Waivers and Other Forms of Relief, Part D, Health-Related Grounds of Inadmissibility, Chapter 3, Waiver of Immigrant Vaccination Requirement, Section E, Waiver due to Religious Belief or Moral Conviction [9 USCIS-PM D.3(E)].

[^ 18] Under INA 212(a)(1)(C), as amended by Section 2 of the International Adoption Simplification Act, Pub. L. 111-287 (PDF), 124 Stat. 3058, 3058 (November 30, 2010).

[^ 19] See INA 101(b)(1)(F) and INA 101(b)(1)(G), respectively.

[^ 20] Under INA 201(b): a child can either obtain an IR-3 or IR-4 immigrant visa as an immediate relative if the child is an “orphan” or an IH-3 or IH-4 immigrant visa if the child is a Hague Convention adoptee.

[^ 21] The affidavit is made under oath or affirmation in the presence of either the consular officer or a notary public.

[^ 22] See INA 212(g)(2)(B). This waiver authority has been delegated to the Department of State and a consular officer can grant the waiver. Neither a form nor a fee is required.

[^ 23] When the waiver application is for a child, the child’s parent must satisfy the waiver requirements under INA 212(g)(2)(C). The waiver is filed by submitting an Application for Waiver of Grounds of Inadmissibility (Form I-601) along with the required fee. See Volume 9, Waivers and Other Forms of Relief, Part D, Health-Related Grounds of Inadmissibility, Chapter 3, Waiver of Immigrant Vaccination Requirement [9 USCIS-PM D.3] for more information on the requirements for vaccination waivers based on religious beliefs or moral objections.

Chapter 10 - Other Medical Conditions

The civil surgeon should annotate any other medical condition the applicant may have, as directed by the Technical Instructions. A condition annotated in this section does not render the applicant inadmissible on health-related grounds of inadmissibility. However, it may impact other inadmissibility determinations.

Chapter 11 - Inadmissibility Determination

A. Civil Surgeon or Panel Physician Documentation

If a “Class A condition” is noted on the medical form, it is conclusive evidence that the applicant is inadmissible. The Class A annotation may also indicate that an applicant could be inadmissible on other grounds of inadmissibility. For example, “harmful behavior” associated with a physical or mental disorder, or illegal drug use, may have resulted in criminal convictions that make an applicant inadmissible under INA 212(a)(2). However, a criminal conviction should be supported by conviction records or similar evidence, and not just the medical examination report.[1]

If a civil surgeon or panel physician only annotates a “Class B condition” (per U.S. Department of Health and Human Services regulations), the applicant is never inadmissible on health-related grounds. The officer should remember that if the civil surgeon or panel physician indicates on the Report of Immigration Medical Examination and Vaccination Record (Form I-693) that a former Class A condition is now a Class B condition, the applicant is no longer inadmissible. However, a Class B condition may indicate that the applicant could be inadmissible on other grounds because of the condition, such as public charge.[2]

The officer may encounter medical documentation that is not fully completed. In this case, the officer should issue a Request for Evidence (RFE). If the physician fails to properly complete the form in response to the RFE, the applicant has not established that he or she is clearly admissible to the United States.[3]

B. Applicant’s Declaration

If the applicant indicates that he or she may be inadmissible based on a medical reason, the officer must order a medical examination of the applicant. Based on the results of that medical exam, the officer should ascertain whether the applicant actually has a Class A, Class B, or no condition at all that is relevant to the applicant’s admissibility. The applicant should not be found inadmissible unless the medical examination confirms the presence of a Class A medical condition.

C. Other Information

Even if the civil surgeon or panel physician did not annotate a Class A or B condition in the medical documentation, or if the applicant was not required to undergo a medical examination, the officer may order or reorder an immigration medical examination at any time if he or she has concerns as to an applicant’s inadmissibility on health-related grounds.

The concern should be based on information in the A-file, information that is revealed by the applicant or another applicant during an interview, or information revealed during a background investigation.

D. Other Grounds of Inadmissibility

1. General Considerations

Where relevant, the information contained in the medical examination can be used to determine whether other grounds of inadmissibility may apply. For instance, health is one factor to consider when determining if someone is inadmissible on public charge grounds. This factor must, however, be considered in light of all other factors specified by law.[4]

2. Criminal Grounds

An applicant may be inadmissible on criminal grounds if he or she has admitted to committing certain controlled substance violations.[5] An applicant may acknowledge to a civil surgeon or a panel physician that he or she has used a controlled substance, which the physician then may annotate on the medical documentation.

USCIS does not consider this acknowledgement, in and of itself, a valid admission that would make an applicant inadmissible on criminal grounds.[6] However such an acknowledgment of drug use may open a line of questioning to determine criminal inadmissibility. USCIS officers should find that an applicant has made a valid “admission” of a crime only when the admission is made in accordance with the requirements outlined by the Board of Immigration Appeals.[7]

E. Privacy Concerns

An officer should take great care to regard the privacy of the applicant. The officer should generally not discuss the applicant’s medical issues with applicants other than the applicant, his or her counsel, immigration officers, or other government officials[8] who clearly have a need to know the information.

The officer should not directly contact a civil surgeon to discuss an applicant's inadmissibility or medical issues. If the officer has any concerns that cannot be resolved by reviewing the evidence in the record, the officer should issue an RFE.

Footnotes

[^ 1] See Section D, Other Grounds of Inadmissibility [8 USCIS-PM B.11(D)] for more information.

[^ 2] See Section D, Other Grounds of Inadmissibility [8 USCIS-PM B.11(D)] for more information.

[^ 3] See INA 291.

[^ 4] See INA 212(a)(4)(B).

[^ 5] See INA 212(a)(2)(A).

[^ 6] A valid admission (absent a conviction) for purposes of criminal inadmissibility grounds "requires that the [alien] be given an adequate definition of the crime, including all essential elements, and that it be explained in understandable terms." See *Matter of K-*, 7 I&N Dec. 594, 597 (BIA 1957).

[^ 7] See *Matter of K-*, 7 I&N Dec. 594 (BIA 1957). Even in the Ninth Circuit, USCIS officers should continue to follow *Matter of K-*, rather than *Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002). Following *Matter of K-* will ensure that any admission the person may make is a fully informed one.

[^ 8] Such as the Centers for Disease Control and Prevention.

Chapter 12 - Waiver Authority

USCIS may provide waivers for some medical grounds of inadmissibility under INA 212(g) and other provisions governing the specific immigration benefit the applicant is seeking. In certain cases, applicants must file a waiver application[1]either along with their Application to Register Permanent Residence or Adjust Status (Form I-485) and Report of Immigration Medical Examination and Vaccination Record (Form I-693) or in response to a Request for Evidence.[2]

Footnotes

[^ 1] See Application for Waiver of Grounds of Inadmissibility (Form I-601), Application By Refugee for Waiver of Grounds of Excludability (Form I-602), or Application for Waiver of Grounds of Inadmissibility Under Section 245A or 210 of the Immigration and Nationality Act (Form I-690).

[^ 2] See Volume 9, Waivers and Other Forms of Relief, Part D, Health-Related Grounds of Inadmissibility [9 USCIS-PM D] for more information on waivers of medical grounds of inadmissibility.

Part C - Civil Surgeon Designation and Revocation

Chapter 1 - Purpose and Background

A. Purpose

USCIS designates eligible physicians as civil surgeons to perform medical examinations for immigration benefit applicants in the United States.[1] Civil surgeons assess whether applicants have any health conditions that could result in exclusion from the United States.

Based on the results of the civil surgeon's assessment, USCIS determines whether the applicant is admissible to the United States or whether the applicant is inadmissible based on health-related grounds of inadmissibility. The health-related grounds of inadmissibility[2] and the medical examination of applicants are designed to protect the health of the United States population.

B. Background

The Immigration Act of 1882[3] first granted the Secretary of the Treasury the authority to examine aliens arriving in the United States to prohibit the entry of any "person unable to take care of himself or herself without becoming a public charge." The Act provided that the examination be delegated to state commissions, boards, or officers.

The term "civil surgeon" was first introduced in the Immigration Act of 1891 as an alternative to surgeons of the Marine Hospital Service if such surgeons were not available to perform the medical examination on arriving aliens.[4]

The Immigration and Nationality Act (INA) of 1952, as amended by the Homeland Security Act of 2002,[5] authorizes the Secretary of Homeland Security to designate civil surgeons if medical officers of the U.S. Public Health Service (USPHS) are not available. USCIS exercises the authority to designate civil surgeons on the Secretary's behalf, and may designate as many or as few civil surgeons as needed.[6] Since USPHS medical officers are rarely available today, civil surgeons generally provide all immigration medical examinations required in the United States.

The civil surgeon's primary role is to perform immigration medical examinations to assess whether aliens have any of the following medical conditions that could result in their inadmissibility:

- Communicable disease of public health significance;
- Failure to show proof of required vaccinations (for immigrant visa applicants and adjustment of status applicants only);
- Physical or mental disorder with associated harmful behavior; and
- Drug abuse or addiction.[7]

Civil surgeons must perform such examinations according to the Technical Instructions for the Medical Examination of Aliens in the United States, issued by the Centers for Disease Control and Prevention (CDC), an agency of the Department of Health and Human Services (HHS).

The civil surgeon must also record the results of the immigration medical examination on the Report of Immigration Medical Examination and Vaccination Record (Form I-693) according to the form instructions. Applicants submit the form to USCIS as part of their immigration benefits application, if required. USCIS reviews the form to determine whether the applicant is inadmissible based on health-related grounds.

C. Professional Qualifications

Only licensed physicians with at least four years of professional experience may be designated as civil surgeons.[8] USCIS interprets “not less than four years’ professional experience” to require four years of professional practice after completion of training. Based on consultations with CDC, USCIS has determined that internships and residences do not count toward the four-year professional experience because they are both part of a physician’s training.[9] Even if one is already licensed as a physician, the four-year period of professional practice only begins when the post-graduate training ends.

Therefore, to be eligible for civil surgeon designation, the physician must meet all of the following requirements:

- Be either a Doctor of Medicine (M.D.) or a Doctor of Osteopathy (D.O.);
- Be licensed to practice medicine without restrictions in the state in which he or she seeks to perform immigration medical examinations; and
- Have the requisite four years of professional experience.

Registered nurses, nurse practitioners, medical technicians, physical therapists, physician assistants, chiropractors, podiatrists, and other healthcare workers who are not licensed as physicians (M.D. or D.O.) may not be designated or function as civil surgeons.

D. Responsibilities of Designated Civil Surgeons

Civil surgeon designation comes with a number of responsibilities. Physicians who fail to meet their responsibilities as a civil surgeon may have their designation revoked by USCIS.[10]

Civil surgeons’ responsibilities include:[11]

- Completing medical examinations according to HHS regulations and CDC requirements, such as the Technical Instructions for the Medical Examination of Aliens in the United States (Technical Instructions) and any updates posted on CDC’s website;[12]
- Making referrals for treatment and filing case reports, as required by the Technical Instructions;
- Reporting the results of the immigration medical examination on Form I-693 accurately;
- Informing USCIS of any changes in contact information within 15 days of the change;[13] and
- Refraining from any activity related to the civil surgeon designation and medical examination of immigrants if USCIS revokes the physician’s civil surgeon designation. This includes the physician informing his or her patients seeking immigration medical examinations that the physician may no longer complete medical examinations.

E. Legal Authorities

- INA 212(a)(1) – Health-related grounds
- INA 232; 8 CFR 232 – Detention of aliens for physical and mental examination
- 42 U.S.C. 252 – Medical examination of aliens
- 42 CFR 34 – Medical examination of aliens
- Technical Instructions for Civil Surgeons (Technical Instructions), and updates[14]

Footnotes

[^ 1] If a physician wishes to be designated, he or she submits an application to USCIS for designation. Civil Surgeons should be distinguished from panel physicians. Panel physicians are designated by the Department of State and provide immigration medical examinations required as part of an applicant’s visa processing at a U.S. Embassy or consulate abroad. See 42 CFR 34.2(o) and 22 CFR 42.66. See 9 FAM 302.2-3(E), Panel Physicians.

[^ 2] See INA 212(a)(1).

[^ 3] See 22 Stat. 214 (August 3, 1882).

[^ 4] See Section 8 of the Immigration Act of 1891, 26 Stat. 1084, 1085 (March 3, 1891).

[^ 5] See Pub. L. 107-296 (PDF), 116 Stat. 2135 (November 25, 2002).

[^ 6] See 8 CFR 232.2(b).

[^ 7] See INA 212(a)(1).

[^ 8] See INA 232(b) and 8 CFR 232.2(b).

[^ 9] A fellowship, however, would generally count toward professional experience since fellowships are not typically required as part of a physician’s training.

[^ 10] See Chapter 4, Termination and Revocation [8 USCIS-PM C.4] for more information on revocation.

[^ 11] See the Instructions to the Report of Immigration Medical Examination and Vaccination Record (Form I-693) and Application for Civil Surgeon Designation (Form I-910) for more information on these responsibilities.

[^ 12] Available online at cdc.gov/immigrant-refugee-health/hcp/civil-surgeons/index.html.

[^ 13] See uscis.gov/i-910 for more information on how to update contact information.

[^ 14] Available online at cdc.gov/immigrant-refugee-health/hcp/civil-surgeons/index.html.

Chapter 2 - Application for Civil Surgeon Designation

A. Background

Historically, civil surgeon designation was an informal process handled by USCIS District Directors. By regulation, USCIS District Directors are authorized to designate civil surgeons in their respective jurisdictions.[1] Physicians submitted informal written requests for civil surgeon designation to the district or field office with jurisdiction, along with documentary evidence showing they meet the professional qualifications to be a civil surgeon.

As of March 11, 2014, USCIS replaced the informal, decentralized civil surgeon application process with a formal, centralized process by (a) requiring centralized filing of the Application for Civil Surgeon Designation (Form I-910), at a Lockbox facility, and (b) delegating the District Directors' authority to grant, deny, and revoke civil surgeon designation to the Director of the National Benefits Center (NBC).[2] These changes were made to improve the application intake process, enhance case management, promote consistency and uniformity in decision-making, and improve the overall efficiency and integrity of the program.

B. Application

A physician generally must apply for civil surgeon designation with USCIS. However, physicians who qualify under a blanket designation are exempt from the filing and fee requirements.[3]

USCIS will only accept[4] and consider complete applications for civil surgeon designation; applications must be submitted in accordance with the form instructions.[5]

A complete application consists of the following:

1. Application for Civil Surgeon Designation (Form I-910)

A physician seeking designation as a civil surgeon must complete all required parts of the Application for Civil Surgeon Designation.[6]

2. Filing Fee

The physician must include the required filing fee[7] with the completed Application for Civil Surgeon Designation. Applications for civil surgeon designation that do not include the correct filing fee will be rejected.

3. Evidence

The physician must include evidence that shows that he or she meets the eligibility requirements to be designated a civil surgeon. At a minimum, the civil surgeon applicant must submit all of the following evidence with the completed Application for Civil Surgeon Designation (Form I-910):[8]

- Proof of U.S. citizenship, legal status, or authorization to work in the United States;
- A copy of the physician's current medical license in the state in which he or she seeks to perform immigration medical examinations;
- A copy of the physician's medical degree verifying he or she is an M.D. or D.O.; and
- Evidence to verify the requisite professional experience, such as letters of employment verification.

4. Signature

The physician must sign the application.[9] The signature must be submitted to USCIS on Application for Civil Surgeon Designation (Form I-910). Applications for civil surgeon designation that do not include a signature may be rejected or returned to the physician.

C. Adjudication of Civil Surgeon Applications

1. Adjudication

To determine whether to approve or deny the application for civil surgeon designation, the officer should follow these steps:

Adjudication of Civil Surgeon Applications
Step 1: Determine whether the physician meets all of the eligibility requirements to be designated a civil surgeon:
• Is the physician authorized to work in the United States?[10] • Is the physician an M.D. or a D.O? • Is the physician licensed without restriction in the state in which he or she seeks to perform immigration medical examinations? • Does the physician have at least four years of professional experience, not including residency or internships or other experience related to training? If there is insufficient information in the application and evidence submitted with the application to make this determination, the officer may issue a Request for Evidence (RFE) for additional information such as documentary evidence establishing any of the eligibility requirements. If the physician does not meet all of the eligibility requirements, the officer should **deny** the application. Otherwise, go to Step 2.
Step 2: Determine whether the application warrants a favorable exercise of discretion.[11] In general, a favorable exercise of discretion is warranted unless there are adverse factors that prevent it.
An unfavorable exercise of discretion may, for instance, be applied to any applications submitted by physicians who had a prior civil surgeon designation revoked by USCIS, and where the concerns underlying that revocation have not been resolved. If there is insufficient evidence in the application to make this determination, the officer may request additional information through the issuance of a Request for Evidence (RFE). ***Examples***

Adjudication of Civil Surgeon Applications
Example: The physician had a prior civil surgeon designation revoked due to the physician's confirmed participation in an immigration fraud scheme. The officer should deny the civil surgeon application as a matter of discretion. The fee will not be refunded since USCIS performed an adjudication of the application. *Example:* The physician had a prior civil surgeon designation revoked due to suspension of her medical license. However, the officer determines that the underlying reason for the suspension has been resolved, is unlikely to recur, and the physician now has a current, unrestricted medical license. In this case, the officer may approve the civil surgeon application if the physician otherwise meets the eligibility requirements.

2. Approval

If the application for civil surgeon designation is approved, the officer should do the following:

Notification

Notify the physician in writing of the approval.

Files

Either create a new file for the physician who was granted civil surgeon designation; or, if a file for the physician already exists, update the file to reflect the grant of designation.

The files should be maintained in such a way as to facilitate retrieval or review of information relating to the specific civil surgeon. The file should be retained according to the established records retention schedule.

Updating Civil Surgeon List

The NBC should coordinate with External Affairs Directorate (EXA) to ensure the civil surgeon list is updated in a timely manner to reflect all newly designated civil surgeons. At a minimum, the newly designated civil surgeon's full name, name of medical practice, address, and telephone number should be added to the list. Particular care should be taken when entering the civil surgeon's zip code and telephone number since these are the primary ways that applicants search for civil surgeons.

3. Denial

If the application for civil surgeon designation is denied, the officer should do the following:

Notification

Notify the physician in writing of the denial. There is no appeal from a decision denying designation as a civil surgeon. However, the physician may file a motion to reopen or reconsider.[12] In the decision denying designation as a civil surgeon, the officer must notify the physician of the possibility to file a timely motion to reopen or reconsider.

A physician who is denied designation is not precluded from reapplying for civil surgeon designation. In the decision denying designation as a civil surgeon, the officer should also notify the physician that he or she may reapply if the physician believes that he or she has overcome the reason(s) for denial.[13]

Files

Create a new file for each physician who was denied designation; or, if a file for the physician already exists, the officer should update the file to reflect the denial of the designation.

4. File Maintenance

The files should be maintained in such a way as to facilitate retrieval or review of information relating to the specific civil surgeon. The file should be retained according to the established records retention schedule.

Footnotes

[^ 1] See 8 CFR 232.2. In some circumstances, District Directors had delegated the designation authority to Field Office Directors in their districts.

[^ 2] USCIS field offices continued to accept applications for civil surgeon designation until March 11, 2014. Federal regulations provide the authority for this transfer of authority: *Director or district director* prior to March 1, 2003, means the district director or regional service center director, unless otherwise specified. On or after March 1, 2003, pursuant to delegation from the Secretary of Homeland Security or any successive re-delegation, the terms mean, to the extent that authority has been delegated to such official: asylum office director; director, field operations; district director for interior enforcement; district director for services; field office director; service center director; or special agent in charge. The terms also mean such other official, including an official in an acting capacity, within U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, or other component of the Department of Homeland Security who is delegated the function or authority above for a particular geographic district, region, or area. See 8 CFR 1.2.

[^ 3] See Chapter 3, Blanket Civil Surgeon Designation [8 USCIS-PM C.3] for more information.

[^ 4] USCIS also has the authority to select as many (or as few) civil surgeons necessary to serve the needs of the jurisdiction. See 8 CFR 232.2(b). Therefore, USCIS may also reject complete applications if it determines the jurisdiction's needs are met. In this case, USCIS would return the entire application package to the physician, including the fee associated with the application.

[^ 5] Filing instructions can be found at uscis.gov/I-910.

[^ 6] The current version of the form and instructions can be accessed online at uscis.gov/i-910.

[^ 7] See 8 CFR 106.1(a). The current filing fee can also be found at uscis.gov/i-910.

[^ 8] If not all of the required initial evidence has been submitted or the officer determines that the totality of the evidence submitted does not meet the applicable standard of proof, the officer may request additional evidence.

[^ 9] See 8 CFR 103.2(a)(2).

[^ 10] If an officer grants civil surgeon designation to a physician who is only authorized to work in the United States for a limited period of time, the designation should be limited to the duration of the physician's work authorization.

[^ 11] USCIS has the discretion to designate as many (or as few) civil surgeons as needed. See 8 CFR 232.2(b).

[^ 12] See 8 CFR 103.5. To file a motion to reopen or reconsider, a physician should file a Notice of Appeal or Motion (Form I-290B), with fee. Forms and fee information can be found at uscis.gov.

[^ 13] If the physician would like to reapply for civil surgeon designation because he or she has overcome the reason(s) for denial, the physician must file a new Application for Civil Surgeon Designation (Form I-910) with the required evidence and filing fee.

Chapter 3 - Blanket Civil Surgeon Designation

A. Blanket Designation of State and Local Health Departments[1]

1. Overview

USCIS has the authority to designate either individual physicians or members of a specified class of physicians as civil surgeons, provided they meet the legal requirements.[2] Through policy and in agreement with the Centers for Disease Control and Prevention (CDC), USCIS designated all state and local health departments as civil surgeons. Health departments may only use this blanket civil surgeon designation to complete the vaccination assessments for refugees seeking adjustment of status.[3]

This blanket designation eases the difficulties encountered by refugee adjustment applicants in complying with the vaccination requirement. It also relieves USCIS of the need to maintain lists of health departments and the names of individual physicians at these health departments.

2. Eligible Physicians

Participation in this blanket civil surgeon designation is entirely voluntary and at the discretion of each health department. Health departments may only participate under this blanket designation if they have physicians authorized to provide medical services who meet the professional qualifications of a civil surgeon[4] since only these qualifying physicians may certify the vaccination assessment for refugees seeking adjustment of status. This includes volunteer physicians at state and local health departments.

Eligible physicians at health departments may, but are not required to, personally perform the vaccination assessment. Nurses or other medical professionals may perform the vaccination assessment and complete the vaccination record in the Report of Immigration Medical Examination and Vaccination Record (Form I-693) as long as the health department physician reviews and certifies the Form I-693.

Neither health departments nor eligible physicians at health departments need to obtain approval from USCIS prior to performing the vaccination component of immigration medical examinations as specified in the next section. Blanket designated civil surgeons are exempt from both application and fee requirements for civil surgeon designation.

However, health departments and eligible physicians must review and be familiar with the Technical Instructions for the vaccination requirements before they can begin performing vaccination assessments.[5]

3. Scope

Pursuant to the understanding reached between USCIS and CDC, health departments may only use this blanket civil surgeon designation to complete the vaccination assessments for refugees seeking adjustment of status.[6] Therefore, health departments operating under this blanket designation should examine government-issued documents presented by the applicant to verify that he or she is a refugee.[7] This blanket designation does not cover asylees seeking adjustment of status.[8]

Accordingly, health departments operating under this blanket designation are authorized *only* to perform the vaccination component of the immigration medical examination for refugees seeking adjustment of status. If a health department physician would like to perform parts of the immigration medical examination other than the vaccination assessment, the physician must obtain designation as a civil surgeon through the standard application process.[9]

Refugees who require the entire medical exam,[10] likewise need to visit a physician designated as a civil surgeon through the standard application process.[11]

4. Recording and Certification Requirements

Health departments operating under the blanket civil surgeon designation must record the vaccination assessment on the Report of Immigration Medical Examination and Vaccination Record (Form I-693) as follows:

- Ensure the applicant's information and certification are completed;
- Complete the vaccination record; and
- Complete the civil surgeon's information and certification.

In accordance with the agreements reached with CDC, health departments operating under the blanket civil surgeon designation are required to certify Form I-693 by providing the attending physician's signature and a seal or stamp of the health department:

Physician Signature

The attending physician must sign Form I-693. A signature stamp may be used. Health department nurses or other health care professionals may, but are not required to, co-sign the form. However, a form that has been signed only by a registered nurse, physician's assistant, or other medical professional who is not a licensed physician is not sufficient.

If a form for a refugee adjusting status has been signed only by a medical professional employed by the health department (without an accompanying signature by a medical doctor), a Request for Evidence (RFE) should be sent to the applicant for corrective action.

Health Department Stamp or Seal

The health department is also required to affix either the official stamp or raised seal (whichever is customarily used) of that health department on the space designated on the form.

As with all immigration medical examinations, the signed Form I-693 must be placed in a sealed envelope, according to the form's instructions.

B. Blanket Designation of Military Physicians as Civil Surgeons

1. Overview

USCIS, in consultation with CDC, has authorized a blanket civil surgeon designation to military physicians for the completion of all parts of a required immigration medical examination for members and veterans of the U.S. armed forces, and certain dependents who are eligible to receive medical care from military physicians at military treatment facilities (MTFs).

Effective July 26, 2021, USCIS is extending this blanket civil surgeon designation to allow military physicians to also complete the immigration medical examination for certain Afghan nationals seeking a special immigrant visa, including both principal applicants and eligible family members, in coordination with Operation Allies Refuge.[12]

This blanket civil surgeon designation recognizes the service and sacrifices made by U.S. armed forces members and veterans, as well as translators, interpreters, and other professionals employed by or on behalf of the U.S. government in Afghanistan and their eligible dependents. It also eases the difficulties these persons may encounter in obtaining the required immigration medical examination in the United States. The blanket civil surgeon designation also facilitates the civil surgeon designation process for military physicians and relieves USCIS of the need to maintain lists of individual military physicians designated as civil surgeons.

2. Eligible Physicians

Participation in this blanket civil surgeon designation is entirely voluntary and at the discretion of each medical facility. This blanket designation only applies to military physicians who:

- Meet the professional qualifications of a civil surgeon[13] except that the physician may be licensed in any state in the United States, and is not required to be licensed in the state in which the physician is performing the immigration medical examination;
- Are employed by the Department of War or provides medical services to U.S. armed forces members, veterans, and their dependents as military contract providers or civilian physicians; and
- Are authorized to provide medical services at a military treatment facility (MTF) within the United States.

Neither the medical facility nor the physician who qualifies and wishes to participate in the blanket designation needs to obtain approval from USCIS prior to performing immigration medical examinations as specified in the next section. Blanket designated civil surgeons are exempt from both USCIS application and fee requirements for civil surgeon designation.

However, military physicians must review and be familiar with CDC's Technical Instructions for the Medical Examination of Aliens in the United States before they can begin performing immigration medical examinations.[14]

3. Scope

Pursuant to the understanding reached between USCIS and CDC, military physicians only qualify under this blanket civil surgeon designation when two conditions are met. First, the examination must be conducted in the United States at an MTF or other location where the military physician may be authorized to examine Afghan nationals in coordination with Operation Allies Refuge. Second, the immigration medical examination is being conducted for:

- A U.S. armed forces member or veteran;
- A dependent of a U.S. armed forces member or veteran who is eligible to receive medical care at an MTF; or
- Certain Afghan nationals seeking a special immigrant visa, including both principal applicants and eligible family members, in coordination with Operation Allies Refuge.

If these two conditions are not met, military physicians are not covered under this blanket designation and must apply for civil surgeon designation under the standard designation process[15] in order to perform immigration medical examinations.

U.S. armed forces members, veterans, or dependents must visit a physician designated as a civil surgeon through the standard application process if they:

- Prefer to have the immigration medical examination performed by a physician who does not qualify under this blanket designation for military physicians;
- Prefer to have the immigration medical examination performed in a U.S. location other than at the MTF at which they are authorized to receive medical services (or other authorized location under this blanket designation for military physicians); or
- Do not have access to a military physician who is performing immigration medical examinations under this blanket designation.

4. Recording and Certification Requirements

Military physicians operating under the blanket civil surgeon designation must record the results of the immigration medical examination on the Report of Immigration Medical Examination and Vaccination Record (Form I-693), according to the standard procedures all civil surgeons are required to follow.

In accordance with the agreements reached with CDC, a military physician operating under the blanket civil surgeon designation is required to certify Form I-693 by providing both of the following on the form:

Physician Signature

The blanket designated civil surgeon must sign Form I-693. A signature stamp may be used. Nurses or other health care professionals may, but are not required to, co-sign the form. However, a form that has been signed only by a registered nurse, physician's assistant, or other medical professional who is not a licensed physician is not sufficient. If a form for a U.S. armed forces member, veteran, or eligible dependent has been signed only by a medical professional employed by the military facility (without an accompanying signature by a medical doctor), an RFE should be sent to the applicant for corrective action.

MTF Stamp or Seal

The MTF is also required to affix either the official stamp or raised seal of that facility on the space designated on the form.

The signed Form I-693 must be placed in a sealed envelope, according to the form's instructions.

Footnotes

[^ 1] See INA 209.

[^ 2] As specified under INA 232(b), 8 CFR 232.2(b), and 42 CFR 34.2(c).

[^ 3] See INA 209.

[^ 4] As described in Chapter 1, Purpose and Background, Section C, Professional Qualifications [8 USCIS-PM C.1(C)].

[^ 5] The Technical Instructions are available online at: cdc.gov/immigrant-refugee-health/hcp/civil-surgeons/vaccination.html.

[^ 6] See INA 209.

[^ 7] Refugees may present their Arrival-Departure Record (Form I-94), Refugee Travel Document (Form I-571), or Employment Authorization Document (Form I-766) as evidence of refugee status. However, health departments completing the vaccination assessment will not know whether a refugee seeks adjustment under INA 209 or under another provision. Therefore, when reviewing a vaccination assessment completed by a blanket designated civil surgeon for a refugee seeking adjustment, the officer should confirm that the refugee is adjusting under INA 209 before accepting the vaccination assessment performed by a blanket designated health department.

[^ 8] See INA 209.

[^ 9] As outlined in Chapter 2, Application for Civil Surgeon Designation [8 USCIS-PM C.2].

[^ 10] See 8 CFR 209.1(b).

[^ 11] However, blanket-designated health departments may still perform the *vaccination component* of the medical exam for refugees who require the entire medical exam.

[^ 12] See U.S. Embassy in Afghanistan's Operation Allies Refuge webpage. See Section 602(b) of the Afghan Allies Protection Act of 2009, Title VI of Pub. L. 111-8 (PDF), 123 Stat. 524, 807 (March 11, 2009). See Section 1059 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-163 (PDF), 119 Stat. 3136, 3443 (January 6, 2006). For more information, see Volume 6, Immigrants, Part H, Designated and Special Immigrants, Chapter 9, Certain Afghan Nationals [6 USCIS-PM H.9] and Chapter 10, Certain Iraqi and Afghan Translators and Interpreters [6 USCIS-PM H.10]; and Volume 7, Adjustment of Status, Part F, Special Immigrant-Based Adjustment, Chapter 9, Certain Broadcasters [7 USCIS-PM F.9] and Chapter 10, Certain Afghan and Iraqi Nationals [7 USCIS-PM F.10].

[^ 13] As described in Chapter 1, Purpose and Background, Section C, Professional Qualifications [8 USCIS-PM C.1(C)].

[^ 14] The Technical Instructions are available online at: cdc.gov/immigrant-refugee-health/hcp/civil-surgeons/index.html.

[^ 15] As outlined in Chapter 2, Application for Civil Surgeon Designation [8 USCIS-PM C.2].

Chapter 4 - Termination and Revocation

A. Voluntary Termination

A civil surgeon who no longer wishes to be designated as a civil surgeon should request, in writing, that USCIS terminate the designation.[1]

A physician who voluntarily terminates his or her civil surgeon designation must re-apply with USCIS if he or she wishes to be designated as a civil surgeon again.

B. Revocation

Current regulations do not contain specific revocation provisions; however, the law does not preclude revocation, especially when the physician no longer qualifies for civil surgeon designation.

1. Grounds for Revocation

USCIS may revoke a physician's civil surgeon designation if he or she:

- Fails to comply with the Technical Instructions, Form I-693 Instructions, or fails to fulfill other responsibilities of a civil surgeon consistently or intentionally;
- Falsifies or conceals any material fact in the application for civil surgeon designation, or provides any false documents or information to obtain the designation;
- Knowingly falsifies or conceals any material fact on Form I-693, or includes any false documents or information to support any findings in the record;
- Fails to maintain a currently valid and unrestricted license to practice as a physician in any state in which the physician conducts immigration medical examinations, unless otherwise excepted or exempted from this requirement;
- Is subject to any court or disciplinary action that revokes, suspends, or otherwise restricts the physician's authority to practice as a physician in any state in which the physician conducts immigration medical examinations; or
- Has failed to meet any of the professional qualifications for a civil surgeon at any time during the period of a physician's designation as a civil surgeon, unless USCIS finds both that the physician has corrected any gap in eligibility and that the physician refrained from conducting immigration medical examinations during any period in which the physician was not eligible for designation as a civil surgeon.

2. Initiating Revocation

The file should be well-documented before USCIS takes any steps to revoke a physician's civil surgeon designation. When the proposed revocation is based on allegations of misconduct reported by an adjustment of status applicant, the officer should take a sworn statement to support the allegations. The officer should also retain any other available evidence of the alleged misconduct.

The National Benefits Center (NBC) may request the assistance of other USCIS offices to collect evidence if such evidence is not otherwise available to the NBC and if resources allow. For instance, if the NBC is unable to reach or communicate with a particular civil surgeon, the NBC may request assistance from the local office to contact the civil surgeon.

In instances where the civil surgeon may be involved in fraud, USCIS Fraud Detection and National Security Directorate (FDNS) should be notified per the standard fraud referral operating procedures and the civil surgeon's record should be annotated to reflect that suspected fraud played a factor in initiating revocation. Depending on the nature and severity of the allegations, it may also be necessary to consult with the Centers for Disease Control and Prevention (CDC) to obtain expert medical advice.

An officer may refer a proposed revocation of civil surgeon designation to USCIS counsel for review. When referring a case to USCIS counsel, the officer should include the reasons for the intended revocation and a copy of the supporting evidence.

Once the decision has been made to initiate the revocation, the officer must serve the physician with a notice of intent to revoke by Certified Mail/Return Receipt Requested or other method that provides proof of delivery. The notice must clearly state the exact grounds for the intended revocation and include copies of any relevant evidence.[2] The officer must give the physician 30 days from the date of the notice to respond with countervailing evidence. The physician may be represented by private counsel at his or her own expense.[3]

3. Allegations of Malpractice, Breaches of Medical Ethics, and Other Improper Conduct

The authority to designate civil surgeons does not give USCIS authority to regulate the practice of medicine. For this reason, the process for revoking designation as a civil surgeon is not the proper forum for adjudicating complaints against a physician concerning malpractice, breach of medical ethics, or other improper conduct. If USCIS receives a complaint of this kind, USCIS should advise the complainant to make the complaint with the proper medical licensing authority for the State or territory in which the physician practices.

4. Decision

Once the period for the physician's response to the notice of intent to revoke has expired, USCIS reviews the record and decide whether to revoke the physician's designation as a civil surgeon. Any response from the physician is included in the record of proceeding. USCIS must notify the physician in writing of the decision.

There is no administrative appeal from a decision to revoke a physician's designation as a civil surgeon. The physician may, however, file a motion to reopen or reconsider.[4] A decision revoking a physician's designation as a civil surgeon must notify the physician of the right to file a timely motion to reopen or reconsider.

Similarly, USCIS may reopen and reconsider a decision on its own motion. A physician whose civil surgeon designation is revoked is not precluded from reapplying for civil surgeon designation, but the ground(s) upon which revocation is based should be considered as part of the adjudication of a subsequent application for civil surgeon designation. A physician, however, whose prior civil surgeon designation was revoked based on confirmed involvement in an immigration benefits fraud scheme will be denied civil surgeon designation upon reapplication.

If USCIS revokes a physician's designation as a civil surgeon, the public civil surgeon list should be updated immediately to remove the civil surgeon's information.[5]

If an officer reviewing Form I-693 has a concern about the sufficiency of an immigration medical examination performed by a physician who was designated at the time of the medical exam but subsequently had his or her designation revoked, the officer may reorder the medical exam to be performed by a civil surgeon to address the concern.[6]

Footnotes

[^ 1] For more information on where to send a request to terminate one's designation, visit the USCIS website.

[^ 2] USCIS may redact certain sensitive or identifying information.

[^ 3] Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28) must also be filed in this case.

[^ 4] As permitted in 8 CFR 103.5. To file a motion to reopen or reconsider, a physician should file a Notice of Appeal or Motion (Form I-290B), with fee. Forms and fee information can be found at uscis.gov.

[^ 5] As specified in Chapter 5, Civil Surgeon List [8 USCIS-PM C.5].

[^ 6] In general, an officer may order or reorder an immigration medical examination, in part or in whole, at any time if he or she has concerns regarding an applicant's inadmissibility on health-related grounds. See Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility [8 USCIS-PM B].

Chapter 5 - Civil Surgeon List

A. Overview

USCIS maintains a nationwide list of civil surgeons available to the public. Applicants may search the list for civil surgeons designated in their area at USCIS.gov (via the Civil Surgeon Locator) or through the USCIS Contact Center's toll-free number at 1-800-375-5283.

Physicians on the civil surgeon list are generally current in their designation as civil surgeons. Since the list is updated weekly, it is advisable for the applicants to check that a physician is still on the civil surgeon list as close as possible to the date of the immigration medical exam appointment. If uncertain, applicants should also confirm with their doctors regarding their civil surgeon status prior to the immigration medical examination.

B. Requests to Update the Civil Surgeon Information

A civil surgeon should inform USCIS of any change that is relevant to the civil surgeon designation within 15 days of the change.[1]

If an officer at a USCIS field or district office receives a request to update the civil surgeon list, he or she should forward the request to the National Benefits Center (NBC) for review.

C. Maintaining the Civil Surgeon List

USCIS reviews all requests from civil surgeons to update contact information or to terminate the civil surgeon designation. USCIS also updates the civil surgeon list accordingly, as well as removes civil surgeons whose designations have been suspended or revoked.

1. Request to Update Contact Information

If a civil surgeon's request to update contact information involves a move to a new state, then evidence of medical licensure in the new state[2] must accompany the request before the officer may approve it. If this evidence is missing, the officer may request this information through the issuance of a Request for Evidence (RFE).

2. Termination, Suspension, or Revocation

If a civil surgeon requests to be removed from the civil surgeon list or if USCIS determines designation should be suspended or revoked, the officer should annotate the date and reason for removal. Records of former civil surgeons should be retained internally; the information may be relevant, for instance, to the adjudication of a medical examination the civil surgeon completed before he or she was removed from the civil surgeon list or if the physician re-applies for civil surgeon designation in the future.

3. Updates and Review of Civil Surgeon List

USCIS ensures the civil surgeon list is updated in a timely manner to reflect any changes in a civil surgeon's contact information or designation status. In addition, USCIS performs a review of the civil surgeon list on a bi-annual basis, at a minimum, to ensure that all publicly available civil surgeon information is current and accurate.

If during this review USCIS learns that a civil surgeon is no longer performing immigration medical examinations in the location specified as part of the designation, or is no longer practicing medicine at all, USCIS may terminate the civil surgeon designation and remove the physician from the list. USCIS should follow regular revocation procedures.

Footnotes

[^ 1] See uscis.gov/i-910 for more information on how to update contact information.

[^ 2] The physician must show that he or she continues to meet the professional qualifications to be a civil surgeon in the new state.

Part D - Criminal and Related Grounds of Inadmissibility

Part E - Terrorism

Part F - National Security and Related Grounds of Inadmissibility

Chapter 1 - Purpose and Background [Reserved]

Chapter 2 - [Reserved]

Chapter 3 - Immigrant Membership in Totalitarian Party

A. Purpose and Background

1. Purpose

The inadmissibility ground for immigrant membership in or affiliation with the Communist or any other totalitarian party is part of a broader set of laws passed by Congress to address threats to the safety and security of the United States. Its original purpose was to protect the United States against un-American and subversive activities that were considered threats to national security.

In general, any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate), domestic or foreign, is inadmissible.[1] There are two exceptions to this ground of inadmissibility and a limited waiver available to certain aliens depending on the immigration benefit they are seeking.[2]

2. Background

During and after World War I, the U.S. government was concerned with the external threats of anarchism and communism. In response, Congress passed the Immigration Act of 1918 that authorized the detention and deportation of alien anarchists under an extremely broad definition of anarchism irrespective of his or her date of entry into the United States.[3] Furthermore, Congress also criminalized the reentry of any alien who was previously deported under provisions of this Act.[4]

In 1938, Congress sought to protect the internal security, national defense, and foreign relations of the United States by requiring that foreigners disseminating propaganda and foreign ideologies be registered and identified.[5]

Near the onset of World War II, concern about the possibility of hostile foreign enemies living in the United States was on the rise. In response, Congress passed the Alien Registration Act of 1940.[6] With this Act, Congress made it a crime for any person to advocate for the overthrow or destruction of the U.S. government by force or violence, print or distribute materials advocating such activities, or organize any groups that advocate such activities. Congress also made it a crime for any person to attempt or conspire to commit such acts. The Act also established a removal ground for aliens convicted of these new offenses within 5 years of entry or convicted more than once at any time after entry.[7]

In the aftermath of World War II and in response to the rise of communism in the global arena, Congress passed a succession of laws, including the Internal Security Act of 1950.[8] Through the Internal Security Act of 1950, Congress aimed to combat the world communism movement and prosecute those who knowingly and willfully participated.[9]

The Internal Security Act of 1950 created criminal penalties for conspiring to create a totalitarian dictatorship in the United States and to unlawfully communicate or receive classified information. It did not create criminal penalties for membership or the holding of office in a communist organization, but required communist organizations to register, submit annual reports, and prohibited the members of communist organizations from applying for, renewing, or using a U.S. passport.[10]

The Internal Security Act of 1950 also amended the Immigration Act of 1918 by adding new grounds of exclusion specific to members of communist or totalitarian parties, affiliates of such groups, or to aliens who advocate the doctrines of world communism or any other form of totalitarianism.[11] It likewise expanded the deportation provisions to cover such aliens.

The Act also created new restrictions on naturalization by making aliens who were members or affiliates of a communist organization or who advocated certain communist or totalitarian positions (or were members or affiliates of organizations that advocated such positions) ineligible for naturalization.[12] Naturalized citizens who engaged in such activities within 5 years following their naturalization would be subject to revocation of their naturalization orders.

A year later, Congress amended the Internal Security Act of 1950 to include some of the exceptions to the grounds of exclusion specific to the members and affiliates of communist organizations to better align the actual language of the statute with the intent of Congress. The amendment stated that only membership or affiliation which was voluntary would be considered for exclusion and would not include membership or affiliation which is or was solely when the alien was under 16 years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and where necessary for such purposes.[13]

Subsequently, Congress passed the Immigration and Nationality Act (INA) of 1952 which, for the first time, authorized the exclusion of all aliens, immigrants or nonimmigrants, on the basis of membership in or affiliation with the Communist or any other totalitarian party.[14] As with previous acts, the INA of 1952 also declared that aliens were excludable based on a wide variety of other activities linked to the Communist Party or other totalitarian parties even if the aliens were not members or affiliates.

The INA of 1952 included exceptions and waivers similar to those available today. There were two classes of exceptions available to immigrants and nonimmigrants alike. The first, which was based solely on the alien's personal history (and tracked the Internal Security Act amendments of 1951), excepted aliens if their membership or affiliation "is or was involuntary, or is or was solely when under sixteen years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and where necessary for such purposes."[15]

The second exception was available to aliens whose admission "would be in the public interest" if their membership or affiliation had terminated at least 5 years before the date of the application and the alien had been "actively opposed to the doctrine, program, principles, and ideology" of the Communist or totalitarian organization during those 5 years.[16]

The INA of 1952 also contained an exception for nonimmigrant diplomats (A) and nonimmigrant representatives of international organizations (G) as well as a general waiver for temporary admission as a nonimmigrant.[17] The general waiver for aliens seeking nonimmigrant visas was only to be granted in the discretion of the Attorney General based on the recommendation of the Secretary of State or a consular officer.

Subsequent amendments provided for additional exceptions. In 1977, Congress passed the Foreign Relations Authorization Act of Fiscal Year 1978, which contained a provision popularly referred to as the "McGovern Amendment."[18] This provision slightly modified the operation of the nonimmigrant waiver established in INA 212(d)(3). While the INA stated that an excludable alien applying for a nonimmigrant visa would only receive the visa and be admitted in the discretion of the Attorney General based on a recommendation by the Secretary of State or a consular officer, the McGovern Amendment required the Secretary of State to make a favorable recommendation to the Attorney General within 30 days of receiving the nonimmigrant visa application unless "the admission of such alien would be contrary to the security interests of the United States."[19]

Congress limited the scope of the McGovern Amendment in 1979 with a provision in the Department of State Authorization Act, Fiscal Years 1980 and 1981, by eliminating eligibility for the McGovern Amendment for three groups: representatives of "purported labor organizations" that were actually instruments of totalitarian states; members, officers, officials, representatives, and spokesmen of the Palestine Liberation Organization; and aliens from countries that signed the Helsinki Final Act but which were not in substantial compliance with its provisions.[20]

The Immigration Act of 1990 (IMMACT 90) completely reorganized the exclusion grounds, amending some and deleting others.[21] While Congress retained the exclusion ground in the INA relating to membership or affiliation, with IMMACT 90, Congress eliminated the various other related exclusion grounds such as those that penalized the advocacy or publication of communist or other subversive views or materials.

The IMMACT 90 exclusion provision related to membership in the Communist or other totalitarian party is nearly identical to the current inadmissibility ground at INA 212(a)(3)(D), with two minor differences.[22] Through IMMACT 90, Congress limited the exclusion ground to "immigrants" rather than applying this provision on its own terms to "aliens" more generally.[23] While nonimmigrant members of communist or totalitarian parties cannot be found inadmissible based on INA 212(a)(3)(D), they may be found inadmissible based on other grounds, if applicable.

The naturalization provisions contain a separate but related ineligibility ground for an alien who has been a member of (or affiliated with) the Communist or any other totalitarian party within 10 years of filing and until the applicant takes the Oath of Allegiance.[24] As in the inadmissibility context, there are statutory exceptions to the naturalization bar based on past membership and past involuntary membership.[25] The regulations related to naturalization contain definitions and concepts concerning the Communist Party or other totalitarian parties that USCIS also applies to its interpretation of the inadmissibility ground found at INA 212(a)(3)(D).[26]

3. Legal Authorities

- INA 212(a)(3)(D) - Immigrant membership in totalitarian party

B. Overview of Inadmissibility Ground

In general, any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible.[27]

1. Applicability

This ground of inadmissibility applies to an alien seeking immigrant status, such as an applicant inside the United States applying for adjustment of status to that of a lawful permanent resident (LPR), an applicant for an immigrant visa with the U.S. Department of State (DOS) at a U.S. embassy or consulate outside of the United States, or an applicant for admission as an immigrant at a U.S. port of entry.[28]

The inadmissibility ground applies to membership (past or present) and those with an affiliation with such parties. There are certain exceptions to this ground of inadmissibility as well as a waiver.[29]

2. Overview of Inadmissibility Determination

The following table provides officers with an overview of how to determine whether an applicant is inadmissible under INA 212(a)(3)(D).

Overview of Inadmissibility Determination

Step	If yes, then…	If no, then…
Step 1: Determine whether the organization is the Communist or any other totalitarian party	Go to Step 2	Applicant is not inadmissible under INA 212(a)(3)(D)

Step	If yes, then…	If no, then…
Step 2: Determine whether applicant's connection to the organization rises to the level of membership in or affiliation with such organization	Go to Step 3	Applicant is not inadmissible under INA 212(a)(3)(D)
Step 3: Determine whether membership or affiliation was "meaningful"	Go to Step 4	Applicant is not inadmissible under INA 212(a)(3)(D)
Step 4: Determine whether one of the exceptions applies	Applicant is not inadmissible under INA 212(a)(3)(D)	Applicant is inadmissible under INA 212(a)(3)(D)

3. Communist or Any Other Totalitarian Party

An immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party is inadmissible under INA 212(a)(3)(D), unless an exception applies.

Under INA 212(a)(3)(D), an officer must first determine whether the organization in question meets the definition of Communist or any other totalitarian party.

The regulations define the Communist Party as:

- The Communist Party of the United States;
- The Communist Political Association;
- The Communist Party of any state of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state;
- Any section, subsidiary, branch, affiliate, or subdivision of any such association or party;
- The direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt; and
- Any communist-action or communist-front organization that was required to register under former Section 786 of Title 50 of the U.S. Code, provided that the applicant knew or had reason to believe, while he or she was a member, that such organization was a communist-front organization.[30]

"Any other totalitarian party" is defined as "an organization which advocates the establishment in the United States of a totalitarian dictatorship or totalitarianism."[31]

"Totalitarian dictatorship" or "totalitarianism" refer to systems of government not representative in fact, characterized by:

- The existence of a single political party, organized on a dictatorial basis, with so close an identity between such party and its policies and the governmental policies of the country in which it exists, that the party and the government constitute an indistinguishable unit; and
- The forcible suppression of opposition to such party.[32]

After determining that the group in question meets the definition of the Communist or any other totalitarian party, the officer must determine if the person is or has been a member of or affiliated with that group. If the group does not meet the definition, then the person is not inadmissible under this ground.

4. Extent of Immigrant's Involvement

Membership

Membership may be established by the applicant's testimony alone, where that testimony shows a sufficiently viable and purposeful relationship.[33] Membership is not defined in the INA or in the regulations, and is dependent on a person satisfying the requirements for membership as specified by the membership organization in question.

Membership may be established by evidence that the applicant was issued a membership card, paid dues to the organization,[34] or even based on witness testimony regarding the applicant's membership in the organization (including seeing the applicant's name on membership records, dues records, and testimony regarding meeting attendance).[35]

Affiliation

Even if an immigrant is not a member of the Communist or any other totalitarian party, he or she may still be inadmissible if found to be an affiliate of such an organization. The INA states that while "the giving, loaning, or promising of support or of money or any other thing of value for any other purpose to any organization shall be presumed to constitute affiliation . . . nothing in this paragraph shall be construed as an exclusive definition of affiliation."[36]

Affiliation implies less than membership but more than sympathy.[37] Affiliation includes more than mere interest or sympathy for an organization but may also be accompanied by some positive and voluntary action that provides support, money, or another thing of value.[38] The regulations state that "[a]ffiliation with an organization includes, but is not limited to, the giving, lending, or promising of support or of money or anything of value, to that organization to be used for any purpose."[39]

"Affiliate" is also used in the context of this inadmissibility ground to describe links between organizations, in addition to ties between a person and an organization. An affiliate organization of a totalitarian party is one that is related to, or identified with, a proscribed association or party[40] in such close association as to evidence an adherence to or a furtherance of the purposes and objectives of such association or party, or as to indicate a working alliance to bring to fruition the purposes and objectives of the proscribed association or party.[41]

Special Considerations for Military and Government Service

Service in the armed forces of a communist or totalitarian-controlled country, whether voluntary or not, does not in itself constitute or establish applicant's membership in or affiliation with a communist or totalitarian party.[42] Notwithstanding, if the applicant's service in the armed forces is inherently political, the applicant is inadmissible as a member or affiliate of a communist or totalitarian party. In such cases, the officer should determine if the evidence supports a finding that the applicant was aware of the political nature of his or her military service. For example, an applicant may occupy a sufficiently high rank in the armed forces of his or her country that is inherently political or perform a specific mission that is inherently political.

If the applicant was or is a government worker in a communist or communist-controlled country, then the officer should give special attention and scrutinize such employment since voluntary service in a political capacity constitutes affiliation with a political party or the organization in power at the time of service.[43]

5. Whether Involvement was Meaningful

Even if the officer has determined that the applicant is or has been a member of or affiliate of a proscribed group, the evidence must show that the applicant's membership or affiliation was meaningful when finding the applicant inadmissible.

"Meaningful" membership or affiliation versus "non-meaningful" membership or affiliation has never been codified in the INA but is rather a judicially created concept. In general, membership in a communist or totalitarian party must be intentional in order to be meaningful. Most notably, the Supreme Court of the United States has held that "[t]here must be a substantial basis for finding that an alien committed himself to the Communist Party in consciousness that he was 'joining an organization known as the Communist Party which operates as a distinct and active political organization[.]'"[44]

An alien's membership or affiliation is meaningful if the evidence shows that the alien is aware of the political aspects of the proscribed organization during the time of their membership or if the evidence shows that the alien engaged in party activities to a degree that substantially supports an inference of his or her awareness of the party's political aspect.[45] Accordingly, an alien's knowledge or awareness of a communist or totalitarian party's political nature is sufficient to establish that an alien's membership is meaningful.[46]

C. Adjudication

1. Evidence

A finding of inadmissibility under INA 212(a)(3)(D) must be based on evidence, such as oral testimony, written testimony, or any other documentation containing information about the applicant's current or prior membership in or affiliation with the Communist or any other totalitarian party. Some USCIS forms, including the Application to Register Permanent Residence or Adjust Status (Form I-485), require applicants to list their memberships in organizations and parties.

Membership or affiliation is a question of fact for the officer to determine. If the facts and evidence available would allow a reasonable person to conclude that the applicant is a member or an affiliate of the Communist or any other totalitarian party, then the applicant must establish that he or she qualifies for one of the exceptions or the waiver.

If an applicant misrepresents information regarding membership or affiliation in answering questions on Form I-485, the applicant could also be found inadmissible under INA 212(a)(6)(C)(i).[47]

2. Burden of Proof

The burden of proof to establish admissibility when seeking an immigration benefit is always on the applicant.[48] The burden never shifts to the Government at any time during adjudication.[49]

To determine whether an applicant is inadmissible based on his or her membership in or affiliation with the Communist or any other totalitarian party, there must be sufficient evidence that would lead a reasonable person to find that he or she is or was a member of or affiliated with a proscribed group.[50] If there is evidence that would permit a reasonable person to conclude that the applicant is inadmissible under this ground, then the officer should find that the applicant has not successfully met the burden of proof. If there is any adverse, third-party information in the record, then the officer conducting an interview is generally expected to confront the applicant with the information and resolve the issue at the time of the interview.

If an officer is basing a decision in whole or in part on information of which the applicant is unaware or could not reasonably be expected to be aware, and the applicant was not confronted with that information and given an opportunity to respond during an interview, the officer must issue a Notice of Intent to Deny (NOID).[51] The NOID provides the applicant an opportunity to review and respond to the information, unless the information is classified.[52] An applicant who fails to meet the burden of proof is inadmissible for being a member or affiliate of the Communist or any other totalitarian party, unless the applicant is able to successfully rebut the officer's inadmissibility finding.[53]

If the applicant is successful in rebutting the inadmissibility finding, the officer should find that the applicant is not inadmissible for being a member or affiliate of the Communist or any other totalitarian party.

D. Exceptions and Waivers

1. Exceptions

Congress provided two statutory exceptions for immigrants who might otherwise be found inadmissible for their membership in or affiliation with the Communist or any other totalitarian party. There are two categories of exceptions: involuntary membership and past membership.

Involuntary Membership

The first category of exceptions applies to immigrants whose membership or affiliation is or was:

- Involuntary;
- Solely when under 16 years of age;
- By operation of law; or
- For purposes of obtaining employment, food rations, or other essentials of living and where necessary for such purposes.[54]

Membership or affiliation is considered involuntary when it is the result of factors such as coercion, fraud, duress, incapacity, or some other error which may impair or negate the capacity for affirmative and intentional actions.[55] The burden remains on the applicant to establish that the association is involuntary.[56]

An exception also applies when such membership or affiliation occurred solely when the applicant was under the age of 16.[57] However, political activities and continuing commitments after the age of 16 are not protected under this exception.[58]

The statute also excepts membership or affiliation occurring solely by operation of law. This includes any case where "the alien automatically, and without personal acquiescence, became a member of or affiliated with a proscribed party or organization by official act, proclamation, order, edict, or decree."[59]

Joining a proscribed organization in order to obtain the essentials of living is also excepted, absent an ideological commitment to the cause.[60] Examples of the essentials of living refer to "food, shelter, clothing, employment and an education which were routinely available to the rest of the population."[61]

Under the INA, an immigrant is not inadmissible when his membership in or affiliation with a communist or totalitarian party is necessary in order to obtain food or employment. Inadmissibility "shall not apply to an alien because of membership or affiliation if the alien establishes . . . that the membership or affiliation is or was . . . for purposes of obtaining employment, food rations, or other essentials of living and whether necessary for such purposes."[62] If the immigrant's membership or affiliation with a communist or totalitarian party was not actually necessary for purposes of such essentials of living, then the immigrant is inadmissible unless another exception applies.

Past Membership

If an officer has determined that the applicant has been a member of or affiliated with a proscribed organization and one of the involuntary membership exceptions does not apply, the officer should evaluate whether the past membership exception applies to the applicant.

An immigrant may be excepted from inadmissibility under INA 212(a)(3)(D) if the immigrant can establish that:

- His or her membership in or affiliation with a proscribed organization terminated at least 2[63] or 5 years before the date of receipt of the application (if the immigrant's membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of such date, the immigrant must establish that his or her membership or affiliation terminated at least 5 years before the date of receipt); and
- He or she is not a threat to the security of the United States.[64]

In cases that involve past membership, mere termination for the requisite time period is sufficient; active opposition is not required.[65] It is also the applicant's burden to prove that he or she is not a threat to the security of United States.

Furthermore, where the evidence shows that the immigrant is a threat to the security of the United States, the immigrant may also be inadmissible under security and related grounds[66] or terrorist activities.[67] An immigrant may be found to be a threat to the security of the United States and ineligible for the exception even if not inadmissible under a separate security or terrorist inadmissibility ground.[68]

If the officer finds that a meaningful membership or affiliation in a proscribed organization exists, and the immigrant does not qualify for either of the two exceptions, then the officer should find the immigrant inadmissible under INA 212(a)(3)(D) for being or having been a member of the Communist or any other totalitarian party.

2. Waiver

A discretionary waiver is available for certain family members of U.S. citizens or LPRs.

The INA provides that the Secretary of Homeland Security may waive this ground of inadmissibility for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest if:

- The alien is a parent, spouse, son, daughter, brother, or sister of a U.S. citizen, or is a spouse, son, or daughter of an LPR;
- The alien is not a threat to the security of the United States; and
- The alien warrants a favorable exercise of discretion.[69]

When considering whether or not an alien is a threat to the security of the United States, USCIS considers the following non-exhaustive list of factors:

- Espionage;
- Terrorism;
- Subversion;
- Public safety, including criminal history and gang activity;
- Risks to intellectual property;
- Risks to information security, including disinformation campaigns;
- Risks to election security; and
- Risks to public health.

To apply for the waiver, the person must file an Application for Waiver of Grounds of Inadmissibility (Form I-601).[70]

Footnotes

[^ 1] See INA 212(a)(3)(D)(i).

[^ 2] See INA 212(a)(3)(D)(ii)-(iv). For more information, see Section D, Exceptions and Waivers [8 USCIS-PM F.3(D)].

[^ 3] See Sections 1 and 2 of the Immigration Act of 1918, Pub. L. 65-221 (PDF), 40 Stat. 1012, 1012 (October 16, 1918). This Act expanded upon the brief definition of anarchy found in prior law to cover all forms of activities related to its advocacy, including membership in and affiliation with any organization or group that advocated opposition to all forms of organized government.

[^ 4] See Section 3 of the Immigration Act of 1918, Pub. L. 65-221 (PDF), 40 Stat. 1012, 1012-13 (October 16, 1918).

[^ 5] See Section 2 of the Foreign Agents Registration Act of 1938, Pub. L. 75-583, 52 Stat. 631, 632 (June 8, 1938) (codified at 22 U.S.C. 611-621).

[^ 6] Also known as the Smith Act, see Pub. L. 76-670 (June 28, 1940).

[^ 7] In the Alien Registration Act of 1940, Congress also expanded the exclusion grounds from the Immigration Act of 1918 relating to "aliens who are members of the anarchistic and similar classes." Previously, only aliens who were members of such classes at the time of entry were excludable. In 1940, Congress expanded the ground to include aliens who "at any time" were members of these classes.

[^ 8] See Pub. L. 81-831 (September 23, 1950).

[^ 9] See Sections 2 and 4 of the Internal Security Act of 1950, Pub. L. 81-831, 64 Stat. 987, 987-89, 991-92 (September 23, 1950).

[^ 10] See Sections 6 and 7 of the Internal Security Act of 1950, Pub. L. 81-831, 64 Stat. 987, 993, 993-95 (September 23, 1950).

[^ 11] This exclusion ground did not apply to certain nonimmigrants. See Section 22 of the Internal Security Act of 1950, Pub. L. 81-831, 64 Stat. 987, 1006-10 (September 23, 1950).

[^ 12] See Section 25 of the Internal Security Act of 1950, Pub. L. 81-831, 64 Stat. 987, 1013-15 (September 23, 1950).

[^ 13] See Pub. L. 82-14 (March 28, 1951).

[^ 14] See former Section 212(a)(28) of the INA of 1952, also referred to as the McCarran-Walter Act, Pub. L. 82-414 (PDF), 66 Stat. 163, 184 (June 27, 1952).

[^ 15] See former INA 212(a)(28)(I)(i).

[^ 16] See former INA 212(a)(28)(I)(ii).

[^ 17] See Section 212(d)(2) and (3) of the INA of 1952, Pub. L. 82-414 (PDF), 66 Stat. 163, 187 (June 27, 1952).

[^ 18] See Section 112 of the Foreign Relations Authorization Act of Fiscal Year 1978, Pub. L. 95-105 (PDF), 91 Stat. 844, 848 (August 17, 1977).

[^ 19] See Section 112 of the Foreign Relations Authorization Act of Fiscal Year 1978, Pub. L. 95-105 (PDF), 91 Stat. 844, 848 (August 17, 1977).

[^ 20] See Section 109 of the Department of State Authorization Act, Fiscal Years 1980 and 1981, Pub. L. 96-60 (PDF), 93 Stat. 395, 397 (August 15, 1979).

[^ 21] See Pub. L. 101-649 (PDF) (November 29, 1990).

[^ 22] In 1991, Congress amended the term “alien” to “immigrant” in INA 212(a)(3)(D)(iv). See Section 307(a)(4) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. 102-232 (PDF), 105 Stat. 1733, 1753 (December 12, 1991). A few years later, Congress made further amendments to the INA by replacing the term “excludable” with “inadmissible.” See Section 301 of the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L 104-208 (PDF), 110 Stat. 3009, 3009-575-79 (September 30, 1996).

[^ 23] See Section 601 of IMMACT 90, Pub. L. 101-649 (PDF), 104 Stat. 4978, 5067-77 (November 29, 1990).

[^ 24] See INA 313 and 8 CFR 313.

[^ 25] See INA 313 and 8 CFR 313.

[^ 26] See 8 CFR 313.1. For more information on the corresponding naturalization provision, see Volume 12, Citizenship and Naturalization, Part D, General Naturalization Requirements, Chapter 7, Attachment to the Constitution [12 USCIS-PM D.7].

[^ 27] See INA 212(a)(3)(D)(i).

[^ 28] For more information on adjustment of status, see Volume 7, Adjustment of Status [7 USCIS-PM].

[^ 29] For more information, see Section D, Exceptions and Waivers [8 USCIS-PM F.3(D)].

[^ 30] See 8 CFR 313.1 (definitions).

[^ 31] See INA 101(a)(37). See 22 CFR 40.34(f).

[^ 32] See INA 101(a)(37). See 22 CFR 40.34(f), which indicates that any former or present voluntary member of, or an alien who was, or is, voluntarily affiliated with a noncommunist party, organization, or group, or any section, subsidiary, branch, affiliate or subdivision thereof, which during the time of its existence in which the totalitarian party did not or does not advocate for the establishment of a totalitarian dictatorship in the United States, is not considered ineligible under INA 212(a)(3)(D) to receive a visa.

[^ 33] See *Langhammer v. Hamilton*, 295 F.2d 642, 645 (1st Cir. 1961) (holding that the respondent was deportable for being a member of the Communist Party, an excludable class of aliens, based exclusively on the alien's own testimony).

[^ 34] See *Langhammer v. Hamilton*, 295 F.2d 642, 647 (1st Cir. 1961) (where the alien was found to be a member of three Communist-controlled organizations in addition to the Party itself. In that case, the evidence showed that he not only carried a membership card and paid dues, but also served as an officer of two different Party units, organized meetings, arranged for speakers, collected dues from others, and maintained Party records).

[^ 35] See *Matter of A---*, 6 I&N Dec. 524 (BIA 1955) (where the respondent was found to be a member of the Communist Party based on a witness testifying that he had seen the respondent's name on official Communist Party records, received a Communist Party membership book issued to the respondent, and another witness testifying to seeing the respondent at a Communist Party meeting). See *Wellman v. Butterfield*, 235 F.2d 932 (7th Cir. 1958) (finding that a witness testifying to attending over a hundred closed Communist Party meetings with the respondent and that the witness had issued the respondent a membership card and collect dues from the respondent was sufficient to prove membership in the Communist Party).

[^ 36] See INA 101(e)(2). See 8 CFR 313.1.

[^ 37] See *Bridges v. Wixon*, 326 U.S. 135 (1945).

[^ 38] See *Matter of G---*, 5 I&N Dec. 112 (BIA 1953) (holding that an alien, who was not a member of the Communist Party, but was a sympathizer with its principles, who subscribed to and sold a Communist newspaper, distributed Communist literature, and made speeches on behalf of the Party was deemed to have been affiliated with the Communist Party). See *Bridges v. Wixon*, 326 U.S. 135 (1945) (where the Supreme Court states that affiliation implies something less than membership but more than sympathy).

[^ 39] See 8 CFR 313.1.

[^ 40] Including any section, subsidiary, branch, or subdivision of the association or party.

[^ 41] See 22 CFR 40.34(a).

[^ 42] See 22 CFR 40.34(b).

[^ 43] See 22 CFR 40.34(c).

[^ 44] See *Rowoldt v. Perfetto*, 355 U.S. 115, 120 (1957) (quoting *Galvan v. Press*, 347 U.S. 522, 528 (1954)).

[^ 45] See *Gastelum-Quinones v. Kennedy*, 374 U.S. 469, 476-77 (1963) (holding that the evidence was insubstantial to demonstrate that the person was "sensible to the Party's nature as a political organization" or that he engaged in "Party activities to a degree substantially supporting an inference of his awareness of the Party's political aspect").

[^ 46] See *Wellman v. Butterfield*, 253 F.2d 932, 933 (6th Cir. 1958) ("[T]he foregoing evidence was sufficient to . . . establish that the appellant joined the party, aware that she was 'joining an organization known as the Communist Party which operates as a distinct and active political organization[.]'" (quoting *Galvan*)). See *Matter of Rusin (PDF)*, 20 I&N Dec. 128 (BIA 1989) (holding that the applicant did not have a meaningful association with the Communist Party since she did not commit herself to a Communist organization).

[^ 47] For more information, see Part J, Fraud and Willful Misrepresentation [8 USCIS-PM J].

[^ 48] See INA 291. See *Matter of Bett (PDF)*, 26 I&N Dec. 437 (BIA 2014). For more information, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 4, Burden and Standards of Proof [1 USCIS-PM E.4].

[^ 49] See INA 291.

[^ 50] The reasonable person standard derives from *INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (agency factfinding must be accepted unless a reasonable fact finder would necessarily conclude otherwise).

[^ 51] For example, investigative reports, reports from informants, school record, or employment records not provided by the applicant.

[^ 52] See 8 CFR 103.2(b)(16)(iv).

[^ 53] If USCIS has made a decision on the application, the applicant may provide new facts for consideration by seeking a motion to reopen. To do so, the applicant must file a Notice of Appeal or Motion (Form I-290B).

[^ 54] See INA 212(a)(3)(D)(ii).

[^ 55] See *Matter of B---*, 5 I&N Dec. 72 (BIA 1953).

[^ 56] See *Matter of B---*, 5 I&N Dec. 72 (BIA 1953). For more information on burden of proof, see Section C, Adjudication, Subsection 2, Burden of Proof [8 USCIS-PM F.3(C)(2)].

[^ 57] See INA 212(a)(3)(D)(ii).

[^ 58] See *Matter of Pust (PDF)*, 11 I&N Dec. 228 (BIA 1965) (where the BIA acknowledged that the respondent's participation of youth organizations commenced when he was under 16 years of age and continued throughout high school but his membership was found to be of a passive nature for the purposes of obtaining a grade school and high school education).

[^ 59] See 22 CFR 40.34(e). See *Grzymala-Siedlecki v. U.S.*, 285 F.2d 836 (5th Cir. 1961) (where the person automatically became a member of the Communist Party even though "[h]e signed no application for membership, received no membership card and was never sworn in.").

[^ 60] See INA 212(a)(3)(D)(ii).

[^ 61] See, for example, 8 CFR 313.3(d)(1)(i).

[^ 62] See INA 212(a)(3)(D)(ii).

[^ 63] Immigrants who were members of or affiliated with a communist or other totalitarian party that was not controlling the government of a foreign state that was a totalitarian dictatorship only need to show that their membership or affiliation terminated 2 years before the date of receipt of the application.

[^ 64] See INA 212(a)(3)(D)(iii).

[^ 65] See Section 601 of IMMACT 90, Pub. L. 101-649 (PDF), 104 Stat. 4978, 5067-5077 (November 29, 1990) which eliminated the requirement of active opposition to the doctrine, program, principles, and ideology of the Communist or totalitarian organization.

[^ 66] See INA 212(a)(3)(A).

[^ 67] See INA 212(a)(3)(B).

[^ 68] See Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section E, Security Checks and National Security Concerns [7 USCIS-PM A.6(E)] for more information regarding national security concerns.

[^ 69] See INA 212(a)(3)(D)(iv). For more information on discretion, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis [1 USCIS-PM E.8] and Volume 9, Waivers, Part A, Waiver Policies and Procedures, Chapter 5, Discretion [9 USCIS-PM A.5].

[^ 70] For more general information on waivers, see Volume 9, Waivers, Part A, Waiver Policies and Procedures [9 USCIS-PM A].

Part G - Public Charge Ground of Inadmissibility

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures.

See more

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures. We are working quickly to update and incorporate all of the AFM content into the USCIS Policy Manual, the agency's centralized online repository for immigration policies. Until then, we have moved any remaining AFM content to its corresponding

Policy Manual Part. To the extent that a provision in the Policy Manual conflicts with remaining AFM content or Policy Memoranda, the updated information in the Policy Manual prevails. If you have questions or concerns about any discrepancies among these resources, contact PolicyFeedback@uscis.dhs.gov.

AFM Chapter 20 - Immigrants in General (External)

Chapter 1 - Purpose and Background

A. Purpose

Under the Immigration and Nationality Act (INA) 212(a)(4), an applicant who is applying for a visa, admission, or adjustment of status and who is likely at any time to become a public charge, is inadmissible,[1] unless exempt from this ground of inadmissibility.[2] DHS has the authority to waive this ground of inadmissibility for certain applicants for admission[3] and, in limited circumstances, also has the authority to waive this ground of inadmissibility for certain applicants for adjustment of status.[4]

B. Background

1. Public Charge Ground of Inadmissibility General Overview

The INA provides that an applicant for a visa, admission, or adjustment of status is inadmissible if in the opinion of the consular officer, immigration officer, or immigration judge at the time of application for a visa, admission, or adjustment of status, the applicant is likely at any time to become a public charge.[5]

The public charge ground of inadmissibility, therefore, applies to any alien applying for a visa to come to the United States temporarily or permanently, for admission, or for adjustment of status to that of a lawful permanent resident (LPR).[6] Congress has exempted by statute certain applicants for a visa, admission, or adjustment of status from the public charge ground of inadmissibility.[7]

The INA does not define public charge. It does, however, specify that consular officers, immigration officers, and immigration judges must, at a minimum, consider certain factors when determining whether an alien is likely at any time to become a public charge.

2. Public Benefits Under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996

In 1996, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), which is commonly known as the 1996 welfare reform law, was passed by Congress. PRWORA stated that aliens generally should not depend on public resources and that the availability of public benefits should not constitute an incentive for immigration to the United States.[8] Moreover, PRWORA significantly restricted an alien's eligibility for federal, state, local, and tribal public benefits.[9]

3. History of Public Charge Statutory and Regulatory Changes

Illegal Immigration Reform and Immigrant Responsibility Act of 1996

In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[10] was passed by Congress. IIRIRA amended Section 212(a)(4) of the INA, introducing the mandatory statutory factors, and created the enforceable Affidavit of Support Under Section 213A of the INA (Form I-864).[11]

More specifically, IIRIRA codified the following minimum factors that must be considered when making public charge inadmissibility determinations: age; health; family status; assets, resources, and financial status; and education and skills.[12]

Additionally, with IIRIRA, Congress made the legally enforceable Affidavit of Support Under Section 213A of the INA (Form I-864) a requirement for most family-sponsored and certain employment-based immigrants,[13] and indicated that it may be considered as a factor in a public charge inadmissibility determination.[14]

1999 Interim Field Guidance

On May 26, 1999, the legacy Immigration and Naturalization Service (INS) issued interim guidance, titled “Field Guidance on Deportability and Inadmissibility on Public Charge Grounds” (1999 Interim Field Guidance (PDF)).[15] This guidance identified how the agency would determine if an alien is likely at any time to become a public charge[16] for admission and adjustment of status purposes, and when an alien would be deportable[17] as a public charge.[18]

INS incorporated the policies contained in the 1999 Interim Field Guidance in a proposed rule published on May 26, 1999.[19] However, INS never finalized the proposed rule. INS, and later DHS, continued to apply the public charge ground consistent with the 1999 Interim Field Guidance for 2 decades.

Under the 1999 Interim Field Guidance and the 1999 proposed rule, “public charge” for purposes of a public charge inadmissibility determination was defined as an alien who is likely to become primarily dependent on the government for subsistence, as demonstrated by either:

- Receipt of public cash assistance for income maintenance; or
- Institutionalization for long-term care at government expense.[20]

Regulatory Changes in 2019

On August 14, 2019, DHS issued a final rule regarding the public charge ground of inadmissibility, titled “Inadmissibility on Public Charge Grounds” (2019 Final Rule).[21] The 2019 Final Rule provided new and expanded definitions for certain terms and provided a multi-factor framework along with associated evidentiary requirements.

The 2019 Final Rule also added provisions that rendered certain nonimmigrants ineligible for extension of stay or change of status if they received specific public benefits for a certain period. Additionally, it revised DHS regulations governing the Secretary’s discretion to accept a public charge bond for those seeking adjustment of status.

The 2019 Final Rule was set to take effect on October 15, 2019. Before it did, numerous plaintiffs filed suits challenging the 2019 Final Rule in five district courts, across four circuits.[22] The 2019 Final Rule was ultimately implemented on February 24, 2020. However, following a series of preliminary injunctions and stays or reversals of those injunctions, a partial final judgment vacating the 2019 Final Rule went into effect nationwide on March 9, 2022.[23] DHS subsequently formally removed the 2019 Final Rule from the Code of Federal Regulations (CFR).[24]

After the 2019 Final Rule was vacated and removed from the CFR, DHS returned to making public charge inadmissibility determinations in accordance with the statute and the 1999 Interim Field Guidance.[25]

Regulatory Changes in 2022

On August 23, 2021, DHS published an Advance Notice of Proposed Rulemaking (ANPRM) to seek broad public feedback on the public charge ground of inadmissibility to inform its development of a future regulatory proposal.[26] DHS reviewed all of the comments and considered them in developing a Notice of Proposed Rulemaking (NPRM).[27]

On February 24, 2022, DHS published an NPRM.[28] Following careful consideration of public comments received in response to the NPRM, DHS published a final rule, titled "Public Charge Ground of Inadmissibility," on September 9, 2022 (2022 Final Rule).[29]

The 2022 Final Rule implemented a different policy than the 2019 Final Rule. Under the 2022 Final Rule, similar to the 1999 Interim Field Guidance that was in place for 2 decades before the 2019 Final Rule, aliens are considered likely at any time to become a public charge if they are likely at any time to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense.

The 2022 Final Rule only addresses the public charge ground of inadmissibility and does not address the public charge ground of deportability, which was addressed in the 1999 Interim Field Guidance and 1999 NPRM.

C. Scope

The guidance outlined in this Part G only applies to Applications to Register Permanent Residence or Adjust Status (Forms I-485) postmarked (or, if applicable, submitted electronically) on or after December 23, 2022.[30]

Officers must adjudicate applications postmarked (or, if applicable, submitted electronically) before December 23, 2022, consistent with the 1999 Interim Field Guidance.[31] Public charge bond availability depends on the immigration benefit the applicant is seeking.[32] The discussion of immigration bonds in this Part G is limited to public charge bonds administered by USCIS for applicants seeking adjustment of status with USCIS.[33]

D. Legal Authorities

- INA 212(a)(4); 8 CFR 212 – Public charge inadmissibility
- INA 213A; 8 CFR 213a – Requirements for sponsor's affidavit of support
- INA 213; 8 CFR 213.1 – Admission of aliens on giving bond or undertaking; return upon permanent departure; admission under bond or cash deposit
- 8 CFR 103.6 – Immigration bonds
- INA 245; 8 CFR 245 – Adjustment of status of nonimmigrant to that of person admitted for permanent residence
- 31 U.S.C. 9304-9308 – Surety corporations

Footnotes

[^ 1] See INA 212(a)(4)(A).

[^ 2] See 8 CFR 212.23(a).

[^ 3] See INA 212(d)(3)(A). See 8 CFR 212.23(c)(1).

[^ 4] See INA 245(j). See 8 CFR 245.11 and 8 CFR 212.23(c)(2).

[^ 5] See INA 212(a)(4).

[^ 6] See INA 212(a)(4).

[^ 7] See Chapter 3, Applicability, Section C, Exemptions [8 USCIS-PM G.3(C)].

[^ 8] See Section 400 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193 (PDF), (August 22, 1996) (codified at 8 U.S.C. 1601 (PDF)).

[^ 9] See 8 U.S.C. 1601-1646, as amended.

[^ 10] See Division C of Pub. L. 104-208 (PDF), 110 Stat. 3009 (September 30, 1996).

[^ 11] See Division C of Pub. L. 104-208 (PDF), 110 Stat. 3009 (September 30, 1996). Congress added requirements for certain immigrant categories by creating INA 213A, making a sponsor's affidavit of support submitted on behalf of an alien legally enforceable under IIRIRA. See Division C, Title V of Pub. L. 104-208 (PDF), 110 Stat. 3009, 3009-670 (September 30, 1996).

[^ 12] See INA 212(a)(4)(B). See Section 531 of Division C of Pub. L. 104-208 (PDF), 110 Stat. 3009-546, 3009-674 (September 30, 1996) (amending INA 212(a)(4)).

[^ 13] See INA 212(a)(4)(C), INA 212(a)(4)(D), and INA 213A.

[^ 14] See INA 212(a)(4)(B)(ii). See Chapter 6, Affidavit of Support Under Section 213A of the INA [8 USCIS-PM G.6].

[^ 15] See 64 FR 28689 (PDF) (May 26, 1999). Due to a printing error, the Federal Register version of the field guidance appears to be dated "March 26, 1999" even though the guidance was actually signed May 20, 1999, became effective May 21, 1999, and was published in the Federal Register on May 26, 1999.

[^ 16] See INA 212(a)(4).

[^ 17] See INA 237(a)(5).

[^ 18] See 64 FR 28689 (PDF) (May 26, 1999).

[^ 19] See 64 FR 28676 (PDF) (May 26, 1999).

[^ 20] See 64 FR 28689 (PDF) (May 26, 1999). See 64 FR 28676 (PDF) (May 26, 1999).

[^ 21] See 84 FR 41292 (PDF) (Aug. 14, 2019), as amended by 84 FR 52357 (PDF) (Oct. 2, 2019).

[^ 22] See *CASA de Maryland, Inc., et al. v. Trump*, 19-cv-2715 (D. Md.). See *City and County of San Francisco, et al. v. DHS, et al.*, 19-cv-04717 (N.D.Ca.). See *City of Gaithersburg, et al. v. Trump, et al.*, 19-cv-02851 (D. Md.). See *Cook County et al. v. McAleenan et al.*, 19-cv-06334 (N.D. Ill.). See *La Clinica De La Raza, et al. v. Trump, et al.*, 19-cv-4980 (N.D. Ca.). See *Make the Road New York, et al. v. Cuccinelli, et al.*, 19-cv-07993 (S.D.N.Y.). See *New York, et al. v. DHS, et al.*, 19-cv-07777 (S.D.N.Y.). See *State of California, et al. v. DHS, et al.*, 19-cv-04975 (N.D. Cal.). See *State of Washington, et al. v. DHS, et al.*, 19-cv-05210 (E.D. Wa.).

[^ 23] See *Cook County v. Wolf*, 498 F.Supp.3d 999 (N.D. Ill. 2020).

[^ 24] See 86 FR 14221 (PDF) (Mar. 15, 2021).

[^ 25] See 64 FR 28689 (PDF) (May 26, 1999).

[^ 26] See 86 FR 47025 (PDF) (Aug. 23, 2021) (advance notice of proposed rulemaking).

[^ 27] See 87 FR 10570, 10597 (PDF) (Feb. 24, 2022) (proposed rule).

[^ 28] See 87 FR 10570 (PDF) (Feb. 24, 2022) (proposed rule).

[^ 29] See 87 FR 55472 (PDF) (Sept. 9, 2022) (final rule).

[^ 30] The effective date of the DHS final rule. See 87 FR 55472 (PDF) (Sept. 9, 2022) (final rule).

[^ 31] See 64 FR 28689 (PDF) (May 26, 1999).

[^ 32] See INA 213.

[^ 33] See 8 CFR 213.1. USCIS also accepts bonds before the issuance of an immigrant visa upon a request from a U.S. consular officer or upon the presentation by an interested person of a notification from the consular officer requiring such a bond. For more information, contact the U.S. Department of State. Moreover, U.S. Immigration and Customs Enforcement (ICE) administers other types of immigration bonds, such as voluntary departure bonds, delivery bonds, and order of supervision bonds. For more information on these types of bonds, contact ICE.

Chapter 2 - Definitions

Under the Immigration and Nationality Act (INA) 212(a)(4), an applicant for adjustment of status is inadmissible if, in the opinion of the immigration officer at the time of application for adjustment of status, they are “likely at any time to become a public charge.”[1]

A. Likely at Any Time to Become a Public Charge

The INA does not define the phrase “likely at any time to become a public charge.”[2]

The regulations at 8 CFR 212.21(a) define “likely at any time to become a public charge” to mean “likely at any time to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense.”[3]

B. Public Cash Assistance for Income Maintenance

For purposes of a public charge inadmissibility determination, “public cash assistance for income maintenance” means:

- Supplemental Security Income (SSI);
- Cash assistance for income maintenance under the Temporary Assistance for Needy Families (TANF) program; or
- State, tribal, territorial, or local cash benefit programs for income maintenance, commonly called “General Assistance.”[4]

C. Long-term Institutionalization at Government Expense

For the purpose of a public charge inadmissibility determination, “long-term institutionalization at government expense” means government assistance for long-term institutionalization (in the case of Medicaid, limited to institutional services under Section 1905(a) of the Social Security Act) received by a beneficiary, including in a nursing facility or mental health institution.

Long-term institutionalization at government expense is the only category of Medicaid-funded services (limited to institutional services under Section 1905(a) of the Social Security Act) considered in a public charge inadmissibility determination.[5]

As part of the consideration of long-term institutionalization, USCIS considers both permanent institutionalization as well as institutionalization for a long period of time short of indefinite duration, in the totality of the circumstances.[6] However, long-term institutionalization does not include imprisonment for conviction of a crime or institutionalization for short periods for rehabilitation purposes.[7]

Long-term institutionalization does not include sporadic or intermittent periods of institutionalization, even on a recurring basis.[8] No other services paid for by Medicaid, including home and community-based services (HCBS), and no services provided under the Children’s Health Insurance Program (CHIP), are considered as long-term institutionalization at government expense.[9]

D. Receipt (of Public Benefits)

USCIS determines an individual’s likelihood of becoming primarily dependent on the government for subsistence, as demonstrated by the alien’s receipt of public cash assistance for income maintenance or long-term institutionalization at government expense.[10] “Receipt (of public benefits)” only occurs when the applicant is listed as a beneficiary of the benefit.

USCIS does not consider public benefits received by the applicant's relatives, including children, or received by the applicant solely on behalf of third parties. It is not considered receipt to apply for a public benefit on one's own behalf or on behalf of another. Similarly, approval for future receipt of a public benefit on the alien's own behalf or on behalf of another is also not considered receipt.[11]

E. Government

DHS defines "government" for the purpose of implementing the public charge ground of inadmissibility as "any Federal, State, Tribal, territorial, or local government entity or entities of the United States."[12]

F. Household

For the purpose of a public charge inadmissibility determination, DHS states that an alien's household includes:[13]

- The alien;
- The alien's spouse, if physically residing with the alien;
- The alien's parents, if physically residing with the alien;
- The alien's unmarried siblings under 21 years of age, if physically residing with the alien;
- The alien's children,[14] if physically residing with the alien;
- Any other individuals who are listed as dependents on the alien's federal income tax return;[15] and
- Any other individuals who list the alien as a dependent on their federal income tax return.

Footnotes

[^ 1] See INA 212(a)(4).

[^ 2] See INA 212(a)(4)(A).

[^ 3] See 8 CFR 212.21(a).

[^ 4] See 8 CFR 212.21(b). USCIS does not consider benefits that are not referenced above when making a public charge inadmissibility determination. See 8 CFR 212.22(a)(3). For details and examples, see Chapter 7, Consideration of Current and/or Past Receipt of Public Cash Assistance for Income Maintenance or Long-term Institutionalization at Government Expense [8 USCIS-PM G.7].

[^ 5] See 8 CFR 212.21(c).

[^ 6] See Chapter 7, Consideration of Current and/or Past Receipt of Public Cash Assistance for Income Maintenance or Long-term Institutionalization at Government Expense, Section C, Long-term Institutionalization at Government Expense [8-USCIS-PM G.7(C)].

[^ 7] See 8 CFR 212.21(c).

[^ 8] See 87 FR 55472, 55563 (PDF) (Sept. 9, 2022).

[^ 9] For more information about long term-institutionalization, see Chapter 7, Consideration of Current and/or Past Receipt of Public Cash Assistance for Income Maintenance or Long-term Institutionalization at Government Expense, Section C, Long-term Institutionalization at Government Expense [8 USCIS-PM G.7(C)].

[^ 10] See 8 CFR 212.21(a). For more information regarding the public benefits considered in a public charge inadmissibility determination, see Section B, Public Cash Assistance for Income Maintenance [8 USCIS-PM G.2(B)], and Section C, Long-term Institutionalization at Government Expense [8 USCIS-PM G.2(C)].

[^ 11] See 8 CFR 212.21(d).

[^ 12] See 8 CFR 212.21(e).

[^ 13] See 8 CFR 212.21(f).

[^ 14] As defined in INA 101(b)(1).

[^ 15] Including a spouse or child as defined in INA 101(b)(1) not physically residing with the alien.

Chapter 3 - Applicability

In general, the public charge ground of inadmissibility at Immigration and Nationality Act (INA) 212(a)(4) applies to an applicant who is applying for a visa, admission, or adjustment of status.[1] An alien applying for a visa, admission, or adjustment of status must establish that they are not inadmissible under any ground of inadmissibility including the public charge ground.[2] If an alien is exempt from the public charge ground of inadmissibility, this ground of inadmissibility does not apply to them.[3]

A. Applicants for Admission

The public charge ground of inadmissibility[4] generally applies to applicants for admission[5] as an immigrant[6] or a nonimmigrant unless they are specifically exempted by statute or regulations.[7] U.S. Customs and Border Protection (CBP) inspects applicants for admission to the United States. When an applicant for admission demonstrates that they are admissible, the applicant may be permitted to enter the United States as an immigrant or nonimmigrant.[8]

1. Nonimmigrants

Under INA 212(a)(4), any alien who is applying for a visa or for admission to the United States as a nonimmigrant is inadmissible if they are likely at any time to become a public charge. An alien applies directly to a U.S. consulate or embassy abroad for a nonimmigrant visa to travel to the United States temporarily for a limited purpose, such as to visit for business or

tourism.[9] Department of State (DOS) consular officers assess whether the alien is inadmissible and therefore ineligible for a visa, including under the public charge ground of inadmissibility, as applicable.[10] Eligible aliens may also apply for admission as a nonimmigrant without a visa under, for example, the Visa Waiver Program (VWP).[11]

Once DOS issues the nonimmigrant visa, or the prospective traveler has obtained any required pre-travel authorization from CBP, the alien generally may travel to the United States using that visa or travel authorization, if applicable, and apply for admission at a port of entry. CBP then determines whether the applicant for admission is inadmissible under any ground, including public charge.

2. Immigrants

An alien who is abroad and is the beneficiary of an approved immigrant visa petition may apply to DOS for an immigrant visa to allow them to travel to the United States and seek admission to the United States as an immigrant.[12] As part of the immigrant visa process, DOS determines whether the applicant is eligible for the visa, which includes a determination of whether the alien has demonstrated that they are not inadmissible under any of the applicable grounds in INA 212.

Once DOS issues the immigrant visa, the alien may travel to the United States and seek admission as an immigrant at a port of entry. CBP determines whether the applicant for admission as an immigrant is inadmissible under any ground, including public charge.[13]

3. Certain Lawful Permanent Residents Returning to the United States

Lawful permanent residents (LPRs) generally are not considered to be applicants for admission, and therefore are not subject to inadmissibility determinations upon their return from a trip abroad. However, in certain limited circumstances, an LPR is considered an applicant for admission and, therefore, subject to an inadmissibility determination upon the LPR's return to the United States.[14] This inadmissibility determination includes whether the alien is inadmissible under the public charge ground of inadmissibility.

B. Applicants for Adjustment of Status

The public charge ground of inadmissibility will generally apply to all applicants for adjustment of status unless they are specifically exempt from the public charge ground of inadmissibility.

The tables below indicate which applicants for adjustment of status are subject to the public charge ground of inadmissibility:[15]

Family-Based Adjustment of Status Applicants Subject to the Public Charge Ground of Inadmissibility
Spouses, children, and parents of U.S. citizens[16]
Unmarried sons and daughters of U.S. citizens and their children[17]
Spouses, children, and unmarried sons and daughters of LPRs[18]
Married sons and daughters of U.S. citizens and their spouses and children[19]
Brothers and sisters of U.S. citizens[20]
Fiancé(e)s of U.S. citizens[21]
Amerasians based on preference category, born on or after December 31, 1950, and before October 22, 1982[22]
Spouses, widows, or widowers of U.S. citizens[23]

Employment-Based Adjustment of Status Applicants Subject to the Public Charge Ground of Inadmissibility
Priority workers[24]
Professionals with advanced degrees or aliens of exceptional ability[25]
Skilled workers, professionals, and other workers[26]
Investors[27]

Special Immigrant Adjustment of Status Applicants Subject to the Public Charge Ground of Inadmissibility
Religious workers[28]
Certain employees or former employees of the U.S. government abroad[29]
Panama Canal Zone employees[30]
Foreign medical school graduates[31]
Retired employees of international organizations[32]
U.S. armed forces personnel[33]
International broadcasters[34]

Other Adjustment of Status Applicants Subject to the Public Charge Ground of Inadmissibility
Diplomats or high-ranking officials unable to return home (Section 13 of the Act of September 11, 1957)
Persons born in the United States under diplomatic status[35]

Other Adjustment of Status Applicants Subject to the Public Charge Ground of Inadmissibility
Diversity visa immigrants[36]
Certain entrants before Jan. 1, 1982[37]
S (Alien witness or informant)[38]

C. Exemptions

The public charge ground of inadmissibility does not apply, based on statutory or regulatory authority, to the following applicants for visas, admission, and adjustment of status:[39]

- Asylees[40] and refugees;[41]
- Amerasian immigrants at admission;[42]
- Afghan and Iraqi interpreters or Afghan and Iraqi nationals employed by or on behalf of the U.S. government;[43]
- Cuban and Haitian entrants at adjustment of status;[44]
- Applicants seeking adjustment under the Cuban Adjustment Act;[45]
- Nicaraguans and other Central Americans who are adjusting status to LPR;[46]
- Haitians who are adjusting status to LPR;[47]
- Lautenberg parolees;[48]
- Special immigrant juveniles;[49]
- Applicants for registry;[50]
- Applicants seeking temporary protected status (TPS);[51]
- Certain nonimmigrant ambassadors, ministers, diplomats, and other foreign government officials, and their families;[52]
- Victims of human trafficking (T nonimmigrants);[53]
- Victims of qualifying criminal activity (U nonimmigrants);[54]
- Self-petitioners under the Violence against Women Act (VAWA);[55]
- Certain battered aliens who are “qualified aliens” under PRWORA;[56]
- Applicants adjusting status who qualify for a benefit as surviving spouses, children, or parents of military members;[57]
- American Indians born in Canada who are not U.S. citizens;[58]
- Certain members of the Texas Band of Kickapoo Indians of the Kickapoo Tribe of Oklahoma;[59]
- Nationals of Vietnam, Cambodia, and Laos applying under the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 2001;[60]
- Polish and Hungarian Parolees;[61]
- Certain Syrian nationals;[62]
- Applicants adjusting under the Liberian Refugee Immigration Fairness (LRIF) law;[63] and
- Any other categories of aliens exempt from the public charge ground of inadmissibility under any other law.[64]

D. Categories of Aliens Exempt from the Public Charge Ground of Inadmissibility Who Must Still Submit Form I-864

Under INA 212(a)(4)(D), certain aliens applying to adjust status in an employment-based category are required to submit an Affidavit of Support Under Section 213A of the INA (Form I-864). This includes aliens whose employment-based petition was filed by a relative of the alien[65] or by an entity in which the alien’s relative has a significant ownership interest.[66]

Congress did not include an exemption from this requirement for aliens applying to adjust status in the employment-based category, even for certain categories of aliens who are otherwise exempt from the public charge ground of inadmissibility.[67]

Therefore, if an alien in the following categories applies for adjustment of status based on an employment-based petition that requires a Form I-864, these applicants must submit a Form I-864 executed by their petitioning relative (or the relative with significant ownership interest in the petitioning entity):[68]

- Aliens who have a pending application that sets a prima facie case for eligibility for T nonimmigrant status;
- Aliens who have been granted T nonimmigrant status and are in valid T nonimmigrant status at the time the adjustment of status application is properly filed with USCIS and at the time the adjustment of status is adjudicated;
- Petitioners for U nonimmigrant status;
- Aliens who have been granted U nonimmigrant status and are in valid U nonimmigrant status at the time the adjustment of status application is properly filed with USCIS and at the time the adjustment of status is adjudicated;
- Self-petitioners under the Violence Against Women Act (VAWA); and
- Certain aliens who have been battered or subjected to extreme cruelty by a family member in the United States.[69]

Footnotes

[^ 1] See INA 212(a)(4)(A).

[^ 2] See INA 291 and INA 212(a)(4).

[^ 3] See 8 CFR 212.23. See Section C, Exemptions [8 USCIS-PM G.3(C)].

[^ 4] See INA 212(a)(4).

[^ 5] See INA 101(a)(4) and INA 101(a)(13)(A).

[^ 6] An alien, who is a lawful permanent resident (LPR), who travels abroad and seeks to enter the United States again is generally not seeking admission under the Immigration and Nationality Act (INA). See INA 101(a)(13)(C).

[^ 7] See 8 CFR 212.23. For more information, see Section C, Exemptions [8 USCIS-PM G.3(C)].

[^ 8] See INA 235. See 8 CFR 235. CBP follows CBP guidance on the determination, in accordance with DHS regulations at 8 CFR 212.20 and 8 CFR 212.23.

[^ 9] Certain nonimmigrant classifications are subject to petition requirements, and in such cases USCIS generally must approve a petition before the nonimmigrant applies for a visa. See INA 214. In addition, certain aliens are not subject to a visa requirement in order to seek admission as a nonimmigrant. See INA 217. See 8 CFR 212.1.

[^ 10] See INA 221 and INA 222. See 8 CFR 204.

[^ 11] Examples of other ways in which eligible aliens may apply for admission as a nonimmigrant without a visa include but are not limited to the Guam-CNMI VWP (see 8 CFR 212.1(q)) as well as certain nationals of Canada, Bermuda, the Bahamas, the British Virgin Islands, and Mexico in certain situations (see 8 CFR 212.1(a)-(c)).

[^ 12] See INA 221 and INA 222. See 8 CFR 204.

[^ 13] The public charge ground of inadmissibility does not apply to nonimmigrants seeking extension of stay or change of status in the United States.

[^ 14] See INA 101(a)(13)(C). See Volume 7, Adjustment of Status, Part B, 245(a) Adjustment, Chapter 2, Eligibility Requirements, Section A, “Inspected and Admitted” or “Inspected and Paroled,” Subsection 2, Admission [7 USCIS-PM B.2(A)(2)]. An LPR who travels abroad does not undergo another public charge inadmissibility determination upon return to the United States unless CBP determines that the returning LPR is an applicant for admission based on one of the criteria set forth in INA 101(a)(13)(C) (for example, CBP determines that the alien has been absent from the United States for more than 180 days).

[^ 15] The tables provided include footnotes indicating the immigrant classes of admission as well as the associated codes that appear on applicants’ USCIS-issued documents and in USCIS systems. For additional information about the applicability of the public charge ground of inadmissibility, and in particular whether you may be required to submit the Affidavit of Support under Section 213A of the INA based on the immigration classification under which you are applying for adjustment of status, see the Appendices [8 USCIS-PM G, Appendices Tab] and Chapter 6, Affidavit of Support Under Section 213A of the INA [8 USCIS G.6].

[^ 16] Immediate relatives, including the following categories: IR-6 Spouses; IR-7 Children; CR-7 Children, conditional; IH-8 Children adopted abroad under the Hague Adoption Convention; IH-9 Children coming to the United States to be adopted under the Hague Adoption Convention; IR-8 Orphans adopted abroad; IR-9 Orphans coming to the United States to be adopted; IR-0 Parents of adult U.S. citizens. Children adopted abroad generally do not apply for adjustment of status.

[^ 17] Family-sponsored 1st preference applicants, including the following categories: A-16 Unmarried Amerasian sons/daughters of U.S. citizens; F-16 Unmarried sons/daughters of U.S. citizens; A-17 Children of A-11 or A-16; F-17 Children of F-11 or F-16; B-17 Children of B-11 or B-16.

[^ 18] Family-sponsored 2nd preference applicants, including the following categories: F-26 Spouses of alien residents, subject to country limits; C-26 Spouses of alien residents, subject to country limits, conditional; FX-6 Spouses of alien residents, exempt from country limits; CX-6 Spouses of alien residents, exempt from country limits, conditional; F-27 Children of alien residents, subject to country limits; C-28 Children of C-26 or C-27, subject to country limits, conditional; B-28 Children of B-26 or B-27, subject to country limits; F-28 Children of F-26 or F-27, subject to country limits; C-20 Children of C-29, subject to country limits, conditional; B-20 Children of B-29, subject to country limits; F-20 Children of F-29, subject to country limits; C-27 Children of alien residents, subject to country limits, conditional; FX-7 Children of alien residents, exempt from country limits; CX-8 Children of CX7, exempt from country limits, conditional; FX-8 Children of FX-7 or FX-8, exempt from country limits; CX-7 Children of alien residents, exempt from country limits, conditional; F-29 Unmarried sons/daughters of alien residents, subject to country limits; C-29 Unmarried children of alien residents, subject to country limits, conditional.

[^ 19] Family-sponsored 3rd preference applicants, including the following categories: A-36 Married Amerasian sons/daughters of U.S. citizens; F-36 Married sons/daughters of U.S. citizens; C-36 Married sons/daughters of U.S. citizens, conditional; A-37 Spouses of A-31 or A-36; F-37 Spouses of married sons/daughters of U.S. citizens; C-37 Spouses of married sons/daughters of U.S. citizens, conditional; B-37 Spouses of B-31 or B-36; A-38 Children of A-31 or A-36, subject to country limits; F-38 Children of married sons/daughters of U.S. citizens; C-38 Children of C-31 or C-36, subject to country limits, conditional; B-38 Children of B-31 or B-36, subject to country limits.

[^ 20] Family-sponsored 4th preference applicants, including the following categories: F-46 Brothers/sisters of U.S. citizens, adjustments; F-47 Spouses of brothers/sisters of U.S. citizens, adjustments; F-48 Children of brothers/sisters of U.S. citizens, adjustments.

[^ 21] Applicants admitted as a K-1 or K-2 nonimmigrant, including the following categories: CF-1 Spouses, entered as fiancé(e), adjustments conditional; IF-1 Spouses, entered as fiancé(e), adjustments.

[^ 22] Includes the following categories: Immediate Relative AR-6 Children, Amerasian, First Preference: A-16 Unmarried Amerasian sons/daughters of U.S. citizens; Third Preference A-36 Married Amerasian sons/daughters of U.S. citizens. See INA 204(f). Note that this program does not have a specific sunset date and it is likely that all potential applicants have already applied.

[^ 23] Includes the following categories: IW-6 Widows or widowers of U.S. citizens; IW-7 Children of IW-6.

[^ 24] Employment-sponsored 1st preference applicants, including the following categories: E-16 Immigrants with extraordinary ability; E-17 Outstanding professors or researchers; E-18 Certain Multinational executives or managers; E-19 Spouses of E-11, E-12, E-13, E-16, E-17, or E18; E-10 Children of E-11, E-12, E-13, E-16, E-17, or E-18.

[^ 25] Employment-sponsored 2nd preference applicants, including the following categories: E-26 Professionals holding advanced degrees; ES-6 Soviet scientists; E-27 Spouses of E-21 or E-26; E-28 Children of E-21 or E-26.

[^ 26] Employment-sponsored 3rd preference applicants, including the following categories: EX-6 Schedule - A worker; EX-7 Spouses of EX-6; EX-8 Children of EX-6; E-36 Skilled workers; E-37 Professionals with baccalaureate degrees; E-39 Spouses of E-36 or E-37; E-30 Children of E36 or E-37; EW-8 Other workers; EW-0 Children of EW-8; EW-9 Spouses of EW-8; EC-6 Chinese Student Protection Act (CSPA) principals; EC-7 Spouses of EC-6; EC-8 Children of EC-6.

[^ 27] Employment-sponsored 5th preference applicants, including the following categories: C-56 Employment creation, not in targeted area, adjustments, conditional; E-56 Employment creation; I-56 Employment creation, targeted area, pilot program, adjustments, conditional; T-56 Employment creation, targeted area, conditional; R-56 Investor pilot program, not targeted, conditional; C-57 Spouses of C-51 or C-56, conditional; E-57 Spouses of E-51 or E-56; I-57 Spouses of I-51 or I-56, conditional; T-57 Spouses of T-51 or T-56, conditional; R-57 Spouses of R-51 or R-56, conditional; C-58 Children of C-51 or C-56, conditional; E-58 Children of E-51 or E-56; I-58 Children of I-51 or I-56, conditional; T-58 Children of T-51 or T-56, conditional; R-58 Children of R-51 or R-56, conditional.

[^ 28] Includes the following categories: SD-6 Ministers; SD-7 Spouses of SD-6; SD-8 Children of SD-6; SR-6 Religious workers; SR-7 Spouses of SR-6; SR-8 Children of SR-6.

[^ 29] Includes the following categories: SE-6 Employees of U.S. government abroad, adjustments; SE-7 Spouses of SE-6; SE-8 Children of SE-6. Note that this program does not have a specific sunset date and it is likely that all potential applicants have already applied.

[^ 30] Includes the following categories: SF-6 Former employees of the Panama Canal Company or Canal Zone Government; SF-7 Spouses or children of SF-6; SG-6 Former U.S. government employees in the Panama Canal Zone; SG-7 Spouses or children of SG-6; SH-6 Former employees of the Panama Canal Company or Canal Zone government, employed on April 1, 1979; SH-7 Spouses or children of SH-6. Note that this program does not have a specific sunset date it is likely that all potential applicants have already applied.

[^ 31] Includes the following categories: SJ-6 Foreign medical school graduate who was licensed to practice in the United States on Jan. 9, 1978; SJ-7 Spouses or children of SJ-6. Note that this program does not have a specific sunset date and it is likely that all potential applicants have already applied.

[^ 32] Includes the following categories: SK-6 Retired employees of international organizations; SK-7 Spouses of SK-1 or SK-6; SK-8 Certain unmarried children of SK-6; SK-9 Certain surviving spouses of deceased international organization employees.

[^ 33] Also known as the Six and Six Program, includes the following categories: SM-6 U.S. armed forces personnel, service (12 years) after 10/1/91; SM-9 U.S. armed forces personnel, service (12 years) by 10/91; SM-7 Spouses of SM-1 or SM-6; SM-0 Spouses or children of SM-4 or SM-9; SM-8 Children of SM-1 or SM-6.

[^ 34] Includes the following categories: BC-6 Broadcast (IBCG of BBG) employees; BC-7 Spouses of BC-1 or BC-6; BC-8 Children of BC-6.

[^ 35] As described in 8 CFR 101.3, includes the category NA-3.

[^ 36] Includes the following categories: DV-1 Diversity immigrant; DV-2 Spouses of DV-1; DV-3 Children of DV-1.

[^ 37] Includes the following categories: W-16 Previously granted temporary resident status (legalization) who entered United States without inspection before Jan. 1, 1982; W-26 Previously granted temporary resident status (legalization) who entered United States as a nonimmigrant and overstayed visa before Jan. 1, 1982.

[^ 38] S-nonimmigrants applying for adjustment of status may apply for a waiver of the public charge ground of inadmissibility using Inter-Agency Alien Witness and Informant Record (Form I-854). See Chapter 8, Waivers of Inadmissibility Based on Public Charge Ground [8 USCIS-PM G.8].

[^ 39] See 8 CFR 212.23(a) where DHS has codified this list of exemptions.

[^ 40] See INA 208. See 8 CFR 208.

[^ 41] See INA 207 and INA 209. See 8 CFR 209.2.

[^ 42] See Sections 101(e) and 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, Pub. L. 100-202 (PDF), 101 Stat. 1329-183 (December 22, 1987), as amended.

[^ 43] See Section 1059(a)(2) of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109–163 (PDF), 119 Stat. 3136, 3444 (January 6, 2006), as amended, and Section 602(b), Title VI of the Omnibus Appropriations Act, 2009, Pub. L. 111-8 (PDF), (March 11, 2009), as amended, and Section 1244(g) of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181 (PDF), 122 Stat. 3, 396 (January 28, 2008), as amended.

[^ 44] See Section 202 of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. 99-603 (PDF), 100 Stat. 3359, 3404 (November 6, 1986), as amended.

[^ 45] See Cuban Adjustment Act, Pub. L. 89-732 (PDF) (November 2, 1966), as amended.

[^ 46] See Sections 202(a) and 203 of the Nicaraguan Adjustment and Central American Relief Act, Pub. L. 105-100 (PDF), 111 Stat. 2160, 2193 (November 19, 1997), as amended.

[^ 47] See Section 902 of the Haitian Refugee Immigration Fairness Act of 1998, Pub. L. 105-277 (PDF), 112 Stat. 2681, 2681-538 (October 21, 1998), as amended.

[^ 48] See Section 599E of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Pub. L. 101-167 (PDF), 103 Stat. 1195, 1263 (November 21, 1989), as amended.

[^ 49] See INA 245(h).

[^ 50] Registry is a section of immigration law that enables certain aliens who have been present in the United States since January 1, 1972, the ability to apply for lawful permanent residence even if currently in the United States unlawfully. See INA 249. See 8 CFR 249.

[^ 51] See 8 CFR 244.3. INA 244(c)(2)(ii) authorizes DHS to waive any INA 212(a) ground, except for those that Congress specifically noted could not be waived.

[^ 52] See INA 101(a)(15)(A)(i), INA 101(a)(15)(A)(ii), and INA 102. See 22 CFR 41.21(d). See INA 101(a)(15)(G)(i), INA 101(a)(15)(G)(ii), INA 101(a)(15)(G)(iii), and INA 101(a)(15)(G)(iv).

[^ 53] See INA 245(l). If the applicant is adjusting based on an employment-based petition where the petition is filed by either a qualifying relative or an entity in which such relative has a significant ownership interest (5 percent or more), and the applicant, at both the time of filing and adjudication of the Application to Register Permanent Residence or Adjust Status (Form I-485), is still in valid T nonimmigrant status, the applicant is not subject to INA 212(a)(4) but is still required to file an Affidavit of Support Under Section 213A of the INA (Form I–864). See 8 CFR 213a.2(b)(2).

[^ 54] See INA 101(a)(15)(U) and INA 212(a)(4)(E)(ii). See Section 804 of the Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4 (PDF), 127 Stat. 54, 111 (March 7, 2013). If the applicant is adjusting based on an employment-based petition where the petition is filed by either a qualifying relative or an entity in which such relative has a significant ownership interest (5 percent or more), and the applicant, at both the time of filing and adjudication of the Form I-485, is still in valid U nonimmigrant status, the applicant is not subject to INA 212(a)(4) but is still required to file Form I–864. See 8 CFR 213a.2(b)(2).

[^ 55] See INA 212(a)(4)(E)(i).

[^ 56] See INA 212(a)(4)(E)(iii). See Section 804 of the Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4 (PDF), 127 Stat. 54, 111 (March 7, 2013). See Section 431(c) of Pub. L. 104-193 (PDF), 110 Stat. 2105, 2274 (August 22, 1996). See 8 U.S.C. 1641(c).

[^ 57] See Section 1703 of the National Defense Authorization Act, Pub. L. 108-136 (PDF), 117 Stat. 1392 (November 24, 2003) (posthumous benefits to surviving spouses, children, and parents).

[^ 58] See INA 289.

[^ 59] See Pub. L. 97-429 (PDF) (January 8, 1983).

[^ 60] See Section 586 of Pub. L. 106-429 (PDF), 114 Stat. 1900, 1900A-57 (November 6, 2000) under 8 CFR 245.21.

[^ 61] Includes certain Polish and Hungarian parolees who were paroled into the United States from November 1, 1989 to December 31, 1991. See Section 646(b) of IIRIRA, Division C of Pub. L. 104-208 (PDF), 110 Stat. 3009-546, 3009-709 (September 30, 1996).

[^ 62] See Pub. L. 106-378 (PDF) (October 27, 2000).

[^ 63] See Section 7611 of the National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116-92 (PDF), 113 Stat. 1198, 2309 (December 20, 2019) (Liberian Refugee Immigration Fairness), later extended by Section 901 of Division O, Title IX of the Consolidated Appropriations Act of 2021, Pub. L. 116-260 (PDF), 134 Stat. 1182, 2155 (December 27, 2020) (Adjustment of Status for Liberian Nationals Extension).

[^ 64] For the most comprehensive list and description of the exemptions, see 8 CFR 212.23(a).

[^ 65] Relatives include spouse, parents, children, adult sons or daughters, brothers, and sisters. See 8 CFR 213a.1. An affidavit of support under this section is not required, however, if the relative is a brother or sister of the intending immigrant, unless the brother or sister is a citizen. See 8 CFR 213a.2(a)(2)(i)(C).

[^ 66] Significant ownership interest means an ownership interest of 5 percent or more in a for-profit entity that filed an immigrant visa petition to accord a prospective employee an immigrant status under INA 203(b). See 8 CFR 213a.1.

[^ 67] See INA 212(a)(4)(E).

[^ 68] See 8 CFR 212.23(b).

[^ 69] See INA 212(a)(4)(E)(iii). The list of “qualified aliens” included in this exemption is described in 8 U.S.C. 1641(c). See 8 CFR 212.23(b).

Chapter 4 - Prospective Determination Based on the Totality of the Circumstances

The public charge inadmissibility determination is a prospective determination based on the totality of an applicant’s circumstances.[1] In making such a determination, USCIS reviews all information in the record.

The public charge inadmissibility determination is inherently subjective in nature given the express wording of INA 212(a)(4)(A), which states that the public charge inadmissibility determination is “in the opinion of” DHS.[2]

The burden of proof to establish admissibility when seeking adjustment of status is always on the applicant.[3] The burden never shifts to the government during the adjudication process.[4]

A. Prospective Determination

A public charge inadmissibility determination is based on an applicant’s likelihood at any time in the future to become a public charge,[5] that is, the likelihood of becoming primarily dependent on the government for subsistence as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense.

B. Factors USCIS Considers

Evaluating whether an applicant is likely at any time to become a public charge based on the totality of the applicant’s circumstances[6] means evaluating all the information provided on the Application to Register Permanent Residence or Adjust Status (Form I-485), Report of Immigration Medical Examination and Vaccination Record (Form I-693), any other forms and evidence contained in the record, and statements by an applicant during an interview, if applicable. USCIS considers all information or evidence in the record that is relevant in the totality of the circumstances.[7]

For all applicants subject to the public charge ground of inadmissibility,[8] the officer will consider the statutory minimum factors: age;[9] health;[10] family status;[11] assets, resources, and financial status;[12] and education and skills.[13] The officer will favorably consider a sufficient Affidavit of Support Under Section 213A of the INA (Form I-864) (when required).[14] The officer will also consider any current or past receipt (or both) of public cash assistance for income maintenance or long-term institutionalization at government expense by the applicant.[15] However, relatively few applicants will be both subject to the public charge ground of inadmissibility and eligible for public benefits prior to adjustment of status.[16]

There is no “bright-line” test in making a public charge inadmissibility determination. No one factor, other than the lack of a sufficient Affidavit of Support Under Section 213A of the INA, if required, can be the sole criterion for determining if an alien is likely at any time to become a public charge.[17] Instead, the officer must determine whether the applicant's circumstances, assessed in their totality, suggest that the applicant is more likely than not to become a public charge.[18]

C. Empirical Analysis of the Best-Available Data

Under 8 CFR 212.22(b), USCIS may periodically issue guidance to officers about how the factors under 8 CFR 212.22(a) may inform the likelihood that an applicant will become a public charge at any time, based on an empirical analysis of the best-available data as appropriate.[19]

USCIS has reviewed the available data and currently anticipates that the best-available data may be found in the Survey of Income and Program Participation (SIPP) from the U.S. Census Bureau, which is a nationally representative longitudinal survey of households that provides comprehensive information on the dynamics of income, employment, household composition, and government program participation. USCIS continues to analyze the SIPP data and other sources of data to consider how the best-available data can help inform this policy guidance as appropriate.

The regulation's reference to empirical analysis does not contemplate individual officers conducting their own such analysis. The analysis of the best-available data mentioned in the regulation is performed at the agency level and is used to inform the Policy Manual content as appropriate.

USCIS will continue to analyze the data and may update the Policy Manual in the future as appropriate.

Footnotes

[^ 1] See INA 212(a)(4). See 8 CFR 212.22(b).

[^ 2] See *Matter of Harutunian (PDF)*, 14 I&N Dec. 583, 588 (Reg. Comm. 1974) ("[T]he determination of whether an alien falls into that category [as likely to become a public charge] rests within the discretion of the consular officers or the Commissioner . . . Congress inserted the words 'in the opinion of' (the consul or the Attorney General) with the manifest intention of putting borderline adverse determinations beyond the reach of judicial review." (citation omitted)). See *Matter of Martinez-Lopez (PDF)*, 10 I&N Dec. 409, 421 (A.G. 1964) ("[U]nder the statutory language the question for visa purposes seems to depend entirely on the consular officer's subjective opinion.").

[^ 3] See INA 291. See *Matter of Bett* (PDF), 26 I&N Dec. 437 (BIA 2014).

[^ 4] See *Matter of Arthur* (PDF), 16 I&N Dec. 558 (BIA 1978).

[^ 5] See 8 CFR 212.22(a). See *Matter of Harutunian (PDF)*, 14 I&N Dec. 583 (Reg. Comm. 1974). See *Matter of Perez (PDF)*, 15 I&N Dec. 136 (BIA 1974). In comparison, the public charge ground of removal under INA 237(a)(5) is predicated on whether the alien has become a public charge. See *Matter of Viado (PDF)*, 19 I&N Dec. 252, 253 (Comm. 1985) ("The distinction is based on the fact that the determination of excludability involves a prediction of the likelihood of an alien becoming a public charge in the future, rather than an assessment of whether the alien has already become a public charge.")

[^ 6] See 8 CFR 212.22(b). See *Matter of Perez (PDF)*, 15 I&N Dec. 136, 137 (BIA 1974) ("The determination of whether an alien is likely to become a public charge under section 212(a)(15) is a prediction based upon the totality of the alien's circumstances at the time he or she applies for an immigrant visa or admission to the United States.").

[^ 7] See 87 FR 55472, 55497 (PDF) (Sept. 9, 2022) (final rule).

[^ 8] See INA 212(a)(4). See 8 CFR 212.23(a).

[^ 9] See 8 CFR 212.22(a)(1)(i). See Chapter 5, Statutory Minimum Factors, Section A, Age [8 USCIS-PM G.5(A)].

[^ 10] See 8 CFR 212.22(a)(1)(ii). See Chapter 5, Statutory Minimum Factors, Section B, Health [8 USCIS-PM G.5(B)].

[^ 11] See 8 CFR 212.22(a)(1)(iii). See Chapter 5, Statutory Minimum Factors, Section C, Family Status [8 USCIS-PM G.5(C)].

[^ 12] See 8 CFR 212.22(a)(1)(iv). See Chapter 5, Statutory Minimum Factors, Section D, Assets, Resources, and Financial Status [8 USCIS-PM G.5(D)].

[^ 13] See 8 CFR 212.22(a)(1)(v). See Chapter 5, Statutory Minimum Factors, Section E, Education and Skills [8 USCIS-PM G.5(E)].

[^ 14] See 8 CFR 212.22(a)(2). See Chapter 6, Affidavit of Support Under Section 213A of the INA [8 USCIS-PM G.6].

[^ 15] See 8 CFR 212.22(a)(3). See Chapter 7, Consideration of Current and/or Past Receipt of Public Cash Assistance for Income Maintenance or Long-term Institutionalization at Government Expense [8 USCIS-PM G.7].

[^ 16] See 87 FR 55472, 55519 (PDF) (Sept. 9, 2022) (final rule).

[^ 17] See 8 CFR 212.22(b).

[^ 18] See 87 FR 55472, 55517 (PDF) (Sept. 9, 2022) (final rule) (DHS defined the term ''likely'' as ''more likely than not'' in the 2019 Final Rule. DHS continues to believe that this interpretation is appropriate).

[^ 19] See 8 CFR 212.22(b). USCIS may periodically issue new guidance to officers to inform the totality of the circumstances assessment.

Chapter 5 - Statutory Minimum Factors

Under INA 212(a)(4), officers are required to consider specific minimum factors in determining whether an applicant seeking admission to the United States or seeking to adjust status to that of lawful permanent resident is likely at any time to become a public charge. These statutory minimum factors include the alien's:

- Age;
- Health;
- Family status;
- Assets, resources, and financial status; and
- Education and skills.[1]

This chapter discusses the statutory minimum factors. Subsequent chapters discuss the Affidavit of Support Under Section 213A of the INA and consideration of current or past receipt of public cash assistance for income maintenance or long-term institutionalization at government expense.[2]

A. Age

USCIS must consider an alien's age in a public charge inadmissibility determination.[3] The applicant indicates their age on the Application to Register Permanent Residence or Adjust Status (Form I-485).

In some circumstances, such as in the case of children, an applicant's age may on its face suggest that they are at present unable to earn a living through employment. USCIS considers the applicant's household's income, assets, and liabilities, however, not just those of the applicant.

USCIS considers an applicant's age in the totality of the alien's circumstances, as part of a prospective determination.[4] Furthermore, USCIS considers age in combination with the other factors, and examines the applicant's age in relation to its possible impact on the other factors (for example, health or assets, resources, and financial status).

B. Health

USCIS must consider an alien's health in a public charge inadmissibility determination.[5]

1. Report of Immigration Medical Examination and Vaccination Record

In considering an alien's health in a public charge inadmissibility determination, USCIS generally defers to the medical information provided by a civil surgeon on the Report of Immigration Medical Examination and Vaccination Record (Form I-693) or by a panel physician on the following Department of State forms: Medical Examination for Immigrant or Refugee Applicant (1991 TB Technical Instructions) (Form DS-2053), the Medical Examination for Immigrant or Refugee Applicant (2007 TB Technical Instructions) (Form DS-2054), or the Electronic Medical Examination for Visa Applicant (DS-7794), and related worksheets.[6] Officers should not make health diagnoses.

Such information includes diagnoses of any Class A[7] or Class B medical conditions diagnosed by the civil surgeon or panel physician. Class A conditions are medical conditions listed in INA 212(a)(1)(A) that render a person inadmissible and ineligible for a visa or adjustment of status.

Class B medical conditions include any "physical or mental abnormality, disease, or disability serious in degree or permanent in nature amounting to a substantial departure from normal well-being," in which case the civil surgeon or panel physician must also document "the nature and extent of the abnormality; the degree to which the alien is incapable of normal physical activity; and the extent to which the condition is remediable . . . [as well as] the likelihood, that because of the condition, the applicant will require extensive medical care or institutionalization."[8]

USCIS may request additional information regarding an applicant's health if the information provided in the report of medical examination is incomplete.[9]

2. Relationship Between Health and Disability

INA 212(a)(4)(B)(i) requires USCIS to consider an alien's health when making a public charge inadmissibility determination, which may include consideration of any disabilities, as defined by Section 504 of the Rehabilitation Act, identified in the report of medical examination.[10] However, USCIS will not find an applicant inadmissible on the public charge ground solely based on an applicant's disability.

As noted previously, no one factor (other than the lack of a sufficient Affidavit of Support Under Section 213A of the INA when required) will lead to a public charge inadmissibility finding. Disability alone is not a sufficient basis to determine whether an alien is likely at any time to become primarily dependent on the government for subsistence and therefore inadmissible under INA 212(a)(4).[11]

Additionally, many disabilities do not impact a person's health, prevent a person from working, or require extensive medical care or institutionalization. In fact, the vast majority of people with disabilities do not use institutional care.[12]

Therefore, USCIS does not presume that an alien having a disability in and of itself means that the alien is in poor health or is likely at any time to become primarily dependent on the government for subsistence. Likewise, USCIS does not presume that the alien's disability in and of itself negatively impacts any of the other statutory minimum factors.

C. Family Status

USCIS must consider an alien's family status, as evidenced by the applicant's household size, as household is defined in 8 CFR 212.21(f), in a public charge inadmissibility determination.[13]

The applicant indicates their household size on Form I-485. A household includes:[14]

- The alien;
- The alien's spouse, if physically residing with the alien;
- The alien's parents, if physically residing with the alien;
- The alien's unmarried siblings under 21 years of age, if physically residing with the alien;
- The alien's children,[15] if physically residing with the alien;
- Any other individuals who are listed as dependents on the alien's federal income tax return;[16] and
- Any other individuals who list the alien as a dependent on their federal income tax return.

As seen in this list, an applicant's household includes certain individuals living with the alien (who may or may not contribute financially to the household) as well as certain relatives and close relations who may contribute financially to the alien's household while not residing with the alien. Financial contributions from these non-cohabitating household members are included in the consideration of the applicant's assets, resources, and financial status factor, as described below.

D. Assets, Resources, and Financial Status

USCIS must consider an alien's assets, resources, and financial status in a public charge inadmissibility determination.[17] In considering an alien's assets, resources, and financial status, USCIS examines the alien's household's[18] income, assets, and liabilities.[19]

The applicant indicates their household's income, assets, and liabilities on Form I-485. Applicants are not required to submit any specific supporting evidence related to their household's income, assets, and liabilities. USCIS may request additional evidence on a case-by-case basis if more information is needed to make a public charge inadmissibility determination.

Income

Applicants indicate their household's annual income, which may include income provided to the household from sources who are not members of the household, such as alimony or child support.[20] A household's annual income excludes any income from Supplemental Security Income (SSI); Temporary Assistance for Needy Families (TANF); or state, tribal, territorial, or local cash benefit programs for income maintenance (often called "General Assistance" in the state context, but which also exist under other names).[21] Similarly, the household's income excludes any income from illegal activities or sources such as proceeds from illegal gambling or drug sales.[22]

USCIS does not limit the consideration of income only to income that appears on federal income tax forms, and considers all evidence of income from lawful sources. Examples of income that may not appear on income tax forms include child support and alimony. Some households may also have regular income, such as Social Security income, that does not reach the minimum required threshold for filing federal income taxes.[23] USCIS also considers any evidence an alien submits pertaining to expected future income.

In some instances, the household's income may include income that has resulted from unauthorized employment. Whether an alien or a member of the alien's household engaged in unlawful employment, and any immigration consequences flowing from such unauthorized employment, is a separate determination from the public charge inadmissibility determination.[24]

Therefore, this income is not excluded from the household's income calculation, and USCIS considers any income derived from employment, regardless of whether the household members had employment authorization, as long as the income is not derived from illegal activities or sources, such as illegal gambling.

Assets and Liabilities

When considering the applicant's financial status, USCIS also considers the alien's household's assets and resources, for example, investments or home equity, excluding any assets from illegal activities or sources, such as proceeds from illegal gambling or drug sales. USCIS also considers the alien's household's liabilities, both secured and unsecured, such as loans, alimony, and child support payments. By taking into account an alien's household's liabilities, USCIS is able to examine the alien's overall financial status in the totality of the circumstances.

USCIS considers financial obligations and debts alongside assets and resources to avoid artificially inflating the calculation of an alien's financial status, as these obligations and debts would decrease the resources that are actually accessible to the alien. However, if an alien has financial obligations and debts, this does not necessarily indicate that the alien is inadmissible under the public charge ground, and USCIS considers this factor in the totality of the circumstances.

E. Education and Skills

USCIS must consider an alien's education and skills in a public charge inadmissibility determination.[25] In considering an alien's education and skills in this determination, USCIS considers any degrees, certifications, licenses, educational certificates, and skills obtained through work experience or educational programs.[26] The applicant indicates their education and skills on Form I-485.

Skills obtained through work experience (including volunteer and unpaid opportunities) include but are not limited to the alien's workforce skills, training, licenses for specific occupations or professions, language skills, and certificates documenting mastery or apprenticeships in skilled trades or professions. Educational certificates are issued by an educational institution (or a training provider) and certify that an occupation specific program of study was completed.

While some aliens may establish their education and skills through evidence of completed degrees, the statutory education and skills factor does not specify that only formal education is acceptable.

USCIS may consider other evidence of attained knowledge and skills, including those skills earned through certifications and licensure, as well as skills obtained through on-the-job training or overall work experience. This consideration allows USCIS to acknowledge those aliens who hold occupations that do not require official licenses or certifications but whose occupations impart skills that otherwise affect the alien's overall employability.

Footnotes

[^ 1] See INA 212(a)(4)(B)(i).

[^ 2] See Chapter 6, Affidavit of Support Under Section 213A of the INA [8 USCIS-PM G.6]. See Chapter 7, Consideration of Current and/or Past Receipt of Public Cash Assistance for Income Maintenance or Long-term Institutionalization at Government Expense [8 USCIS-PM G.7].

[^ 3] See 8 CFR 212.22(a)(1)(i).

[^ 4] For more information about the totality of the circumstances determination, see Chapter 4, Prospective Determination Based on the Totality of the Circumstances [8 USCIS-PM G.4]. For more information about the totality of circumstances specifically relating to children, see Chapter 9, Adjudicating Public Charge Inadmissibility for Adjustment of Status Applications, Section A, Evidence in the Record, Subsection 3, Other Notable Circumstances Relevant in the Totality of the Circumstances [8 USCIS-PM G.9(A)(3)].

[^ 5] See INA 212(a)(4)(B)(i).

[^ 6] See 8 CFR 212.22(a)(1)(ii). As of October 1, 2013, panel physicians only use DS-2054 or DS-7794. The DS-2053 is no longer used after that date. Applicants for adjustment of status generally submit Form I-693; however, immigrants applying for adjustment of status as a refugee, a derivative of an asylee, or a K or V nonimmigrant visa holder, as well as some Afghan nationals as part of Operation Allies Welcome who have already had a medical examination overseas, may submit a medical examination performed by a panel physician.

[^ 7] See 42 CFR 34.2(d).

[^ 8] See 42 CFR 34.4(b)(2) and 42 CFR 34.4(c)(2). For more information about Class A and Class B conditions, see Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility [8 USCIS-PM B].

[^ 9] See 8 CFR 212.22(a)(1)(ii).

[^ 10] See 8 CFR 212.22(a)(1)(ii).

[^ 11] See 8 CFR 212.22(a)(4).

[^ 12] See 87 FR 55472, 55544 (PDF) (Sept. 9, 2022).

[^ 13] See INA 212(a)(4)(B)(i). See 8 CFR 212.22(a)(1)(iii).

[^ 14] See 8 CFR 212.21(f).

[^ 15] As defined in INA 101(b)(1).

[^ 16] Including a spouse or child as defined in INA 101(b)(1) not physically residing with the alien.

[^ 17] See INA 212(a)(4)(B)(i).

[^ 18] As defined in 8 CFR 212.21(f).

[^ 19] USCIS does not include income derived from the public benefits listed in 8 CFR 212.21(b): Supplemental Security Income (SSI); cash assistance for income maintenance under the Temporary Assistance for Needy Families (TANF); and state, tribal, territorial, or local cash benefit programs for income maintenance, commonly called "General Assistance," in the income calculation. See 8 CFR 212.22(a)(1)(iv). USCIS also does not include any income or assets derived from illegal activities or sources, such as proceeds from illegal gambling or drug sales. See 8 CFR 212.22(a)(1)(iv).

[^ 20] See 87 FR 55472, 55475 (PDF) (Sept. 9, 2022).

[^ 21] See 8 CFR 212.22(a)(1)(iv).

[^ 22] See 8 CFR 212.22(a)(1)(iv) and 8 CFR 212.21(b).

[^ 23] See the Internal Revenue Service's (IRS) Who Should File a Tax Return webpage for more information on the minimum taxable income threshold.

[^ 24] See INA 245(c)(2) and INA 245(c)(8). For more information about the unauthorized employment determination, see Volume 7, Adjustment of Status, Part B, 245(a) Adjustment, Chapter 6, Unauthorized Employment (INA 245(c)(2) and INA 245(c)(8)) [7 USCIS-PM B.6].

[^ 25] See INA 212(a)(4)(B)(i).

[^ 26] See 8 CFR 212.22(a)(1)(v).

Chapter 6 - Affidavit of Support Under Section 213A of the INA

A. Background

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) created the requirement for a legally enforceable affidavit of support to reduce the potential for an intending immigrant to become a public charge.[1] When required, the applicant must submit an Affidavit of Support Under Section 213A of the INA (Form I-864 or Form I-864EZ)[2] completed by a sponsor.

Form I-864[3] is a legally enforceable contract that a U.S. citizen, U.S. national, or lawful permanent resident (LPR) signs to accept financial responsibility for an alien, usually a relative, who is coming to the United States to live permanently. Form I-864[4] is legally binding and requires a sponsor to maintain the applicant at an annual income of no less than 125 percent of the Federal Poverty Guidelines (FPG).[5] The U.S. citizen, U.S. national, or LPR who signs the Form I-864 becomes the immigrant's sponsor once the applicant becomes an LPR.

For Form I-864 to be sufficient, a sponsor generally must demonstrate that the sponsor is able to maintain the sponsored alien at an annual income of not less than 125 percent of the FPG.[6] The presence of a sufficient Form I-864 does not eliminate the need to consider all of the factors of a public charge inadmissibility determination, and USCIS only considers it as one factor in the totality of the circumstances.[7] However, the statute requires a finding of inadmissibility on the public charge ground if the alien is required to submit an affidavit of support and fails to do so.[8]

B. Applicants Required to File Form I-864

The Immigration and Nationality Act (INA) outlines which aliens are required to submit a legally enforceable Form I-864.[9] Most aliens intending to immigrate or to adjust status as immediate relatives or the family-sponsored preference categories, and in certain employment-based categories after December 19, 1997, are required to submit Form I-864 signed by a sponsor.[10]

Aliens required to submit an Affidavit of Support Under Section 213A of the INA, and who are not otherwise exempt, are inadmissible on the public charge ground if they do not submit a sufficient Form I-864.[11]

1. Immediate Relatives and Family-Sponsored Preference Immigrants

In general, most aliens applying for an immigrant visa or adjustment of status based on a family relationship are required to submit Form I-864. The following table outlines categories of applicants by immigrant category who must submit Form I-864 unless otherwise exempt:

Immediate Relatives and Family-Sponsored Preference Immigrants	
Immediate Relatives of U.S. Citizens	U.S. citizens' parents, spouses, and unmarried children under the age of 21, including most orphans and Hague Convention adoptees[12]
First Preference	Unmarried sons and daughters of U.S. citizens who are 21 years of age or older, including their unmarried children[13]
Second Preference	Spouses, children, and unmarried sons and daughters of LPRs, including their unmarried children[14]
Third Preference	Married sons and married daughters of U.S. citizens, including their spouses and unmarried children[15]
Fourth Preference	Brothers and sisters of adult U.S. citizens, including their spouses and unmarried minor children[16]

All of these applicants are required to submit Form I-864, unless exempt from the requirement.

2. Certain Employment-Based Immigrants

In general, most aliens applying for an employment-based immigrant visa or adjustment of status are not required to file Form I-864.[17] Applicants seeking LPR status based on an employment-based petition are required to file Form I-864 if:

- The petitioner is a relative of the applicant;[18] or

- The petitioner is an entity[19] in which the applicant's relative has a significant ownership interest.[20]

These applicants are required to file Form I-864 unless an exception applies.

3. K Nonimmigrants

Principal K nonimmigrants[21] seeking adjustment of status must submit Form I-864.[22] This requirement also applies to an alien who seeks adjustment after having been admitted as the child of a principal K nonimmigrant.

Any applicant for adjustment of status based on a K nonimmigrant visa must submit a Form I-864 at the time of adjustment of status. Termination of the marriage between the K-1 beneficiary and the petitioner does not end the K-1 nonimmigrant's eligibility for adjustment.[23]

A former spouse can still be the sponsor who submits the Form I-864 for a K-1 and a K-2 nonimmigrant to adjust status. However, if the former spouse does not submit the Form I-864, or timely withdraws one already submitted, the K-1 and K-2 nonimmigrants are inadmissible based on the public charge ground unless an exception applies.[24]

4. Accompanying Spouse or Child

A spouse or child is considered to be accompanying a principal immigrant if:

- The spouse or child applies for an immigrant visa or adjustment of status at the same time as the principal immigrant; or
- The spouse or child applies for an immigrant visa or adjustment of status within 6 months after the date the principal immigrant acquires LPR status.

If the principal applicant is required to have a Form I-864, then any accompanying spouse or child must also be included on that affidavit of support. To meet the requirement, the accompanying spouse or child must submit a photocopy of the principal applicant's Form I-864. A photocopy of the principal's supporting documentation,[25] however, is not required.

5. Following-to-Join Spouse or Child

When a spouse or a child of a principal applicant applies for an immigrant visa or adjustment of status 6 months or more after the principal immigrant, the spouse or child is considered to be following-to-join the principal.

If the principal applicant is required to have a Form I-864, then the following-to-join spouse or child must also have a Form I-864. Each following-to-join spouse or child requires a Form I-864, independent of the principal applicant's Form I-864, at the time of adjustment of status or consular processing.[26]

6. T and U Nonimmigrants, VAWA Self-Petitioners, and Certain "Qualified Aliens" Subject to Affidavit of Support Under Section 213A of the INA Requirements

In general, INA 212(a)(4)(E) provides that the following provisions do not apply to "qualified alien" victims:

- Public charge inadmissibility, in general;[27]
- Minimum factors to be considered in the public charge inadmissibility determination;[28] and
- Inadmissibility for lack of sufficient affidavit of support for family-based immigrants.[29]

A "qualified alien" victim[30] includes:

- A Violence Against Women Act (VAWA) self-petitioner;
- An alien who is an applicant for, or is granted, U nonimmigrant status;[31] or
- A "qualified alien" as described in the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),[32] such as an alien who has a pending application establishing prima facie eligibility for T nonimmigrant status or has been granted T nonimmigrant status.

When Congress created the current version of INA 212(a)(4)(E), it did not exempt qualified "alien victims" from the requirements under INA 212(a)(4)(D). INA 212(a)(4)(D) makes an alien inadmissible on public charge in employment-based cases,[33] unless the alien has a properly executed Form I-864 from the alien's relative if:[34]

- The alien's relative filed the employment-based petition; or
- The alien's relative has a significant ownership interest (of 5 percent or more) in the business or entity that filed the employment-based petition.

If the qualified "alien victim" files for adjustment of status under an employment-based category and their petitioning employer meets the above circumstances but does not submit a sufficient Form I-864,[35] then the alien is inadmissible on the public charge ground.

C. Applicants Not Required to File Form I-864

Certain applicants are not statutorily required to submit a Form I-864. Other applicants, although generally required to file a Form I-864, may be exempt from this requirement. Being exempt from the Form I-864 requirement is different from being exempt from the public charge inadmissibility ground.[36]

An officer still makes an inadmissibility determination for an applicant who is exempt from the Form I-864 filing requirement unless the alien is also exempt from the public charge ground of inadmissibility.[37]

1. Applicants Exempt from Filing Form I-864

Some categories of adjustment of status applicants are exempt from the Form I-864 requirement but must request an exemption from the Form I-864 requirement when filing their Form I-485 to establish that a Form I-864 is not required.[38]

These categories include children of U.S. citizens who will automatically become U.S. citizens under the Child Citizenship Act of 2000 (PDF) (CCA)[39] upon their admission to the United States, self-petitioning widows and widowers of U.S. citizens, and self-petitioning battered spouses and children. Applicants who have earned (or can be credited with) 40 quarters (credits) of coverage under the Social Security Act (PDF) may also request an exemption from the Form I-864 requirement to establish that a Form I-864 is not required.[40]

Certain Children of U.S. Citizens

Under the CCA, children born abroad to U.S. citizens may automatically acquire U.S. citizenship if, before their 18th birthday, are residing in the United States in the legal and physical custody of the U.S. citizen parent pursuant to an admission as an immigrant or adjustment of status to that of an LPR.[41] If qualified for automatic acquisition of citizenship, the child is exempt from the Form I-864 requirement.[42]

The CCA has specific provisions for alien children adopted by U.S. citizens. An alien child adopted by U.S. citizens, such as orphans or Hague Adoptees (IR-3 or IH-3 classifications) automatically acquires U.S. citizenship if the child enters the United States before the child's 18th birthday and resides with the U.S. citizen parent.[43] Therefore, these children are exempt from the affidavit of support requirement.

However, this exception does not apply if:

- The child is "coming to be adopted" as an orphan or Hague Adoptee (IR-4 or IH-4 classification);[44] or
- The child is admitted as an immediate relative immigrant as the stepchild of a U.S. citizen.[45]

Certain Self-Petitioning Immigrants

The following self-petitioning immigrants are exempt from the Form I-864 requirement:

- An alien who has an approved Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) as a self-petitioning widow or widower;[46]
- An alien who has an approved Form I-360 as a battered spouse or child;[47] and
- An alien who has an approved Form I-360 as a VAWA self-petitioner.[48]

Applicants Who Have Earned or Can be Credited with 40 Qualifying Quarters of Work

An alien who has earned or can be credited with 40 qualifying quarters (credits) of work in the United States under the Social Security Act (PDF) (SSA) is exempt from the requirement to file a Form I-864.[49] A quarter, as defined by the Social Security Administration, is a period of 3 calendar months ending on March 31, June 30, September 30, or December 31.[50]

An alien can acquire 40 qualifying quarters through any of the following circumstances:

- Any quarter during which the alien works in the United States, as long as the alien received the minimum income established by the Social Security Administration during the entire quarter;[51]
- Being credited with quarters the alien's spouse worked during the marriage;[52]
- Being credited with any quarters during which the alien was under 18 years of age and the alien's parent worked;[53] or
- A combination of the above.[54]

Since 1978, quarters are based on total wages and self-employment income earned during the year, regardless of the months during the year the actual work was performed. An applicant can earn all four credits for the year in less time if the applicant earns the required income.

For example, in 2014, a person must have earned $1,200 in covered earnings to earn one Social Security or Medicare work credit and $4,800 to earn the maximum four credits for the year. A person who earned $4,800 in 2014 earned all four credits for the year regardless of how long that year it took to earn the income.

An officer does not need to calculate an applicant's quarters. Applicants who claim they can be credited with sufficient quarters of coverage must submit official Social Security records to support the claim.[55]

2. Adjustment Applications Filed Before December 19, 1997

Any applicant for adjustment of status who filed an Application to Register Permanent Residence or Adjust Status (Form I-485) before December 19, 1997 is exempt from the requirement to file an Affidavit of Support Under Section 213A of the INA.[56] The exemption is dependent on the filing date and applies even if USCIS conducts the interview or adjudicates the case after that date.

3. Other Categories of Applicants Not Required to File Form I-864

The following are categories of immigrants who are not required to file an Affidavit of Support Under Section 213A of the INA with Form I-485, but who are subject to the public charge ground of inadmissibility:[57]

- Diversity immigrants;[58]
- Employment-based immigrants, unless the visa petition was filed by a relative or an entity in which the applicant's relative has a significant ownership interest, as described above;[59]
- Immigrant investors;[60]
- Diplomats or high-ranking officials unable to return home (Section 13 of the Act of September 11, 1957);[61]
- Persons born in the United States under diplomatic status;[62]
- Certain entrants before January 1, 1982;[63]
- S nonimmigrants;[64]
- Religious workers;[65]
- Certain employees or former employees of the U.S. government abroad;[66]
- Panama Canal Zone employees;[67]
- Certain physicians;[68]
- G-4 or NATO-6 employees and their family members;[69]
- Certain U.S. armed forces members (also known as the Six and Six program);[70]
- Certain broadcasters;[71] and
- Immigrants applying under the Amerasian Act of 1982.

The following are categories of immigrants not required to file an Affidavit of Support Under Section 213A of the INA with Form I-485, and who are not subject to the public charge ground of inadmissibility:

- Refugees and asylees at time of adjustment of status to lawful permanent resident status;[72]
- Immigrants applying under the Amerasian Homecoming Act;[73]
- Afghan and Iraqi Interpreters, or Afghan and Iraqi nationals employed by or on behalf of the U.S. Government;[74]
- Cuban and Haitian entrants;[75]
- Immigrants applying under the Cuban Adjustment Act;[76]
- Nicaraguans and other Central Americans applying under the Nicaraguan Adjustment and Central American Relief Act;[77]
- Haitians applying under the Haitian Refugee Immigration Fairness Act of 1998;[78]
- Lautenberg parolees;[79]
- Special immigrant juveniles;[80]
- Applicants for Registry;[81]
- Victims of human trafficking (T nonimmigrants);[82]
- Victims of qualifying criminal activity (U nonimmigrants);[83]
- Haitians adjusting status under the Help Haiti Act of 2010;[84]
- Self-petitioners under the VAWA;[85]
- Certain “qualified aliens” under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA);[86]
- Applicants adjusting status who qualify for a benefit as surviving spouses, children, or parents of military members;[87]
- American Indians born in Canada;[88]
- Nationals of Vietnam, Cambodia, and Laos applying under the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 2001;[89]
- Polish or Hungarian Parolees;[90]
- Applicants adjusting under Liberian Refugee Immigration Fairness (LRIF);[91]
- Certain Syrian nationals;[92] and
- Any other categories of aliens exempt under any other law from the public charge ground of inadmissibility provisions under INA 212(a)(4).

D. Consideration of Form I-864 as a Factor in the Totality of the Circumstances Analysis

Under the statute, the minimum income the sponsor must demonstrate for a Form I-864 to be deemed sufficient is generally 125 percent of the FPG[93] based on the sponsor’s household size.[94]

Sponsored immigrants[95] are considered less likely to turn to the government first for financial support because they can and have been known to successfully enforce the statutory requirement that sponsors provide financial support to the sponsored immigrant at the level required by statute for the period the obligation is in effect.[96] Therefore, USCIS will favorably consider a sufficient Affidavit of Support Under Section 213A of the INA, when required, in making a public charge inadmissibility determination.[97]

Additionally, federal and state deeming provisions reduce the likelihood that a sponsored alien would be eligible for a means-tested benefit, and therefore, less likely to become primarily dependent on the government for subsistence at any time in the future.[98] Therefore, a sufficient Form I-864 is a positive consideration in the totality of the circumstances. However, a sufficient Form I-864 does not, alone, result in a finding that an alien is not inadmissible under the public charge ground due to the statute’s requirement to consider the statutory minimum factors.[99]

Footnotes

[^ 1] See Title V, Subtitle C of Pub. L. 104-208 (PDF), 110 Stat. 3009, 3009-675 (September 30, 1996).

[^ 2] A sponsor may use Form I-864EZ if the sponsor is the Petition for Alien Relative (Form I-130) petitioner, there is only one beneficiary on the Form I-130 petition, and the income the sponsor is using to qualify is based entirely on the sponsor’s salary or pension and is shown on one or more Forms W-2 provided by the sponsor’s employer(s) or former employer(s). Hereinafter, any references to the Form I-864 also include the Form I-864EZ.

[^ 3] Filed on Form I-864 or Form I-864EZ.

[^ 4] As required under INA 212(a)(4) and INA 213A.

[^ 5] See INA 213A. See 8 CFR 213a.

[^ 6] See INA 213A. A sponsor who is on active duty (other than active duty for training) in the U.S. armed forces and who is petitioning for a spouse or child only has to demonstrate the means to maintain an annual income equal to at least 100 percent of the FPG. See 8 CFR 213a.2(c)(2).

[^ 7] See 8 CFR 212.22(a) and 8 CFR 212.22(b).

[^ 8] See INA 212(a)(4)(D).

[^ 9] See INA 212(a)(4) and INA 213A. A sponsor may use Form I-864EZ if the sponsor is the Form I-130 petitioner, there is only one beneficiary on the Form I-130 petition, and the income the sponsor is using to qualify is based entirely on the sponsor’s salary or pension and is shown on one or more Forms W-2 provided by the sponsor’s employer(s) or former employer(s). Hereinafter, any references to the Form I-864 also include the Form I-864EZ.

[^ 10] See INA 212(a)(4) and INA 213A.

[^ 11] See INA 212(a)(4).

[^ 12] See INA 201(b)(2). Certain orphans that become U.S. citizens at time of adjustment of status under INA 320 are exempt from filing Form I-864.

[^ 13] See INA 203(a)(1).

[^ 14] See INA 203(a)(2).

[^ 15] See INA 203(a)(3).

[^ 16] See INA 203(a)(4).

[^ 17] Even though an affidavit of support is not required, an officer still makes a public charge inadmissibility determination when assessing the applicant's admissibility, unless the applicant is exempt from the public charge ground of inadmissibility.

[^ 18] For employment-based cases, an affidavit of support is required only if the intending immigrant will work for a relative who is eligible to file a Form I-130 petition, on behalf of the intending immigrant. For purposes of the affidavit of support, a relative is defined as a U.S. citizen or LPR who is the intending immigrant's spouse, parent, child, adult son or daughter; or a U.S. citizen who is the intending immigrant's brother or sister. See 8 CFR 213a.1.

[^ 19] An entity includes any petitioning for-profit entity such as a business or corporation.

[^ 20] Owning 5 percent or more of an entity constitutes a significant ownership interest. See 8 CFR 213a.1.

[^ 21] This includes a relative who is either a K-1 fiancé(e), a K-3 spouse, or a K-2 or K-4 child of fiancé(e) or spouse. See 8 CFR 213a.2(a)(2)(i)(A).

[^ 22] See 8 CFR 213a.2(a)(2)(i)(A). K nonimmigrants include the fiancé(e)s of U.S. citizens and their accompanying children, spouse of a U.S. citizen and their accompanying minor children, and step-children of U.S. citizens. A child has to be under 21 years of age. See INA 101(b).

[^ 23] See *Matter of Sesay (PDF)*, 25 I&N Dec. 431 (BIA 2011).

[^ 24] See *Matter of Song*, 27 I&N Dec. 488, 492 (BIA 2018) (noting that the two exceptions to the requirement that the petitioner execute Form I-864 are when the applicant is or was married to an abusive spouse as set forth in INA 204(a)(1)(A)(iii) and INA 204(a)(1)(A)(iv), or when the petitioner died before the adjustment application was adjudicated and the applicant has a qualifying relative execute a Form I-864 as set forth in INA 213A).

[^ 25] Supporting documentation such as federal income tax returns or transcripts, W-2, and employment verification.

[^ 26] See 8 CFR 213a.2(g).

[^ 27] See INA 212(a)(4)(A).

[^ 28] See INA 212(a)(4)(B).

[^ 29] See INA 212(a)(4)(C).

[^ 30] As outlined in INA 212(a)(4)(E).

[^ 31] See INA 101(a)(15)(U).

[^ 32] See Section 431(b) of PRWORA, Pub. L. 104-193 (PDF), 110 Stat. 2105, 2274 (August 22, 1996).

[^ 33] See INA 203(b).

[^ 34] Under INA 213A. See 8 CFR 213a.

[^ 35] As required under INA 212(a)(4)(D) and INA 212(a)(4)(E) and as described in INA 213(a) and 8 CFR 213a.

[^ 36] See Chapter 3, Applicability [8 USCIS-PM G.3].

[^ 37] See 8 CFR 212.23 for exemptions from public charge inadmissibility.

[^ 38] See 8 CFR 213a.2(a)(1)(i)(B). As of December 10, 2024, applicants make a request for an exemption from the Form I-864 requirement using the Application to Register Permanent Residence or Adjust Status (Form I-485).

[^ 39] See the Child Citizenship Act of 2000, Pub. L. 106-395 (PDF) (October 30, 2000). See INA 320.

[^ 40] See 8 CFR 213a.2(a)(1)(i)(B).

[^ 41] See INA 320. See Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens, Chapter 4, Automatic Acquisition of Citizenship after Birth (INA 320) [12 USCIS-PM H.4].

[^ 42] See INA 320. For more information on children acquiring citizenship under the Child Citizenship Act of 2000, see Volume 12, Citizenship and Naturalization, Part H, Children of U.S. Citizens, Chapter 4, Automatic Acquisition of Citizenship after Birth (INA 320) [12 USCIS-PM H.4].

[^ 43] See the Child Citizenship Act of 2000, Pub. L. 106-395 (PDF) (October 30, 2000).

[^ 44] An IR-4 or IH-4 immigrant becomes a citizen under INA 320 only when the adoption is finalized after admission and all eligibility requirements are met. See the Before Your Child Immigrates to the United States webpage.

[^ 45] The stepchild of a U.S. citizen does not acquire citizenship under INA 320. See *Acevedo v. Lynch*, 798 F.3d 1167, 1171 (9th Cir. 2015). See *Matter of Guzman–Gomez (PDF)*, 24 I&N Dec. 824 (BIA 2009).

[^ 46] See INA 212(a)(4)(C).

[^ 47] See INA 212(a)(4)(C). See INA 212(a)(4)(E)(i). See Section 804 of the Violence Against Women Reauthorization Act of 2013 (VAWA 2013), Pub. L. 113-4 (PDF), 127 Stat. 54, 111 (March 7, 2013).

[^ 48] See INA 212(a)(4)(C). See INA 212(a)(4)(E)(i). See Section 804 of the Violence Against Women Reauthorization Act of 2013 (VAWA 2013), Pub. L. 113-4 (PDF), 127 Stat. 54, 111 (March 7, 2013).

[^ 49] Qualifying quarter, as defined under Title II of the Social Security Act, is specifically tied to earnings. For more information, see the Social Security Administration's website.

[^ 50] See 42 U.S.C. 413.

[^ 51] Credits are based on total wages and self-employment income during the year. For more information, see the Social Security Administration's website.

[^ 52] See INA 213A(a)(3)(B). An alien cannot claim credit for any quarter worked by a spouse in which the spouse was receiving federal means-tested public benefits.

[^ 53] See INA 213A(a)(3)(B). An alien cannot claim credit for any quarter worked by a parent in which the parent was receiving federal means-tested public benefits.

[^ 54] However, quarters cannot be counted more than once even if there are multiple circumstances that apply to make a quarter qualifying.

[^ 55] See 8 CFR 213a.2(a)(2)(ii)(C).

[^ 56] See 8 CFR 213a.2(a)(2)(i) and 8 CFR 213a.2(a)(2)(ii)(B). See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208 (PDF) (September 30, 1996).

[^ 57] For some of these categories, although the applicants are subject to public charge under INA 212(a)(4), the employers generally would not be a relative of the alien or a for-profit entity and therefore the requirement for an affidavit of support under INA 212(a)(4)(D) is inapplicable.

[^ 58] A winner of the diversity visa lottery has no petitioner. Diversity visas are issued under INA 203(c) which do not fall under INA 212(a)(4)(C) or INA 212(a)(4)(D).

[^ 59] See INA 212(a)(4). This exemption also includes Afghan and Iraqi Interpreters who received a special immigrant visa by filing a petition under INA 203(b)(4).

[^ 60] See INA 203(b)(5).

[^ 61] See Section 13 of Pub. L. 85-316 (September 11, 1957), as amended by Pub. L. 97-116 (PDF) (December 29, 1981). See 8 CFR 245.3.

[^ 62] As described in 8 CFR 101.3.

[^ 63] See INA 245A(b)(1)(C)(i) and INA 245A(a)(4)(A). See INA 245A(d)(2)(B)(iii) for the special rule for determination of public charge for these applicants. Certain aged, blind, or disabled persons as defined in Section 1614(a)(1) of the Social Security Act, codified at 42 U.S.C. 1382c(a)(1), may apply for a waiver of inadmissibility due to public charge. See INA 245A(d)(2)(B)(ii).

[^ 64] S nonimmigrants may file a waiver of the public charge ground of inadmissibility on Inter-Agency Alien Witness and Informant Record (Form I-854). See INA 245(j) and INA 101(a)(15)(S). See 8 CFR 214.2(t)(2) and 8 CFR 1245.11.

[^ 65] Includes the following categories: SD-6 (ministers), SD-7 (spouses of SD-6), SD-8 (children of SD-6), SR-6 (religious workers), SR-7 (spouses of SR-6), and SR-8 (children of SR-6).

[^ 66] See INA 101(a)(27)(D). See 22 CFR 42.32(d)(2). Includes the following categories: SE-6 (employees of U.S. government abroad, adjustments), SE-7 (spouses of SE-6), and SE-8 (children of SE-6). Note that this program does not have a specific sunset date and technically applicants could apply but should have already applied.

[^ 67] See INA 101(a)(27)(E), INA 101(a)(27)(F), and INA 101(a)(27)(G). See 22 CFR 42.32(d)(3). Includes the following categories: SF-6 (former employees of the Panama Canal Company or Canal Zone Government), SF-7 (spouses or children of SF-6), SG-6 (former U.S. government employees in the Panama Canal Zone), SG-7 (spouses or children of SG-6), SH-6 (former employees of the Panama Canal Company or Canal Zone Government, employed on April 1, 1979), and SH-7 (spouses or children of SH-6). Note that this program does not have a specific sunset date and technically applicants could apply but should have already applied.

[^ 68] See INA 101(a)(27)(H) and INA 203(b)(4). Includes the following categories: SJ-6 (foreign medical school graduate who was licensed to practice in the United States on Jan. 9, 1978) and SJ-7 (spouses or children of SJ-6). Note that this program does not have a specific sunset date and technically applicants could apply but should have already applied.

[^ 69] See INA 101(a)(27)(I) and INA 101(a)(27)(L). See 8 CFR 101.5. See 22 CFR 42.32(d)(5). See 22 CFR 41.24 and 22 CFR 41.25. Includes SN-6 (retired NATO-6 civilian employees), SN-7 (spouses of SN-6), SN-9 (certain surviving spouses of deceased NATO-6 civilian employees), and SN-8 (certain unmarried sons and daughters of SN-6).

[^ 70] See INA 101(a)(27)(K). Includes the following categories: SM-6 (U.S. armed forces personnel, service (12 years) after October 1, 1991), SM-9 (U.S. armed forces personnel, service (12 years) by October 1991), SM-7 (spouses of SM-1 or SM-6), SM-0 (spouses or children of SM-4 or SM-9), and SM-8 (children of SM-1 or SM-6).

[^ 71] See INA 101(a)(27)(M). See 8 CFR 204.13. Includes the following categories: BC-6 (broadcast (IBCG of BBG) employees), BC-7 (spouses of BC-1 or BC-6), and BC-8 (children of BC-6).

[^ 72] See INA 209(c).

[^ 73] See Section 584 of Pub. L. 100-202 (PDF), 101 Stat. 1329, 1329-183 (December 22, 1987).

[^ 74] See Section 1059(a)(2) of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-163 (PDF), 119 Stat. 3136, 3444 (January 6, 2006), as amended, and Section 602(b) of the Afghan Allies Protection Act of 2009, Title VI of Pub. L. 111-8 (PDF), 123 Stat. 524, 807 (March 11, 2009), as amended, and Section 1244(g) of the National Defense Authorization Act for Fiscal Year 2008, as amended, Pub. L. 110-181 (PDF), 122 Stat. 3, 396 (January 28, 2008).

[^ 75] See Section 202 of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. 99-603 (PDF), 100 Stat. 3359, 3404 (November 6, 1986), as amended.

[^ 76] See Cuban Adjustment Act, Pub. L. 89-732 (PDF) (November 2, 1966), as amended.

[^ 77] See Sections 202(a) and 203 of Pub. L. 105-100 (PDF), 111 Stat. 2160, 2193 (November 19, 1997), as amended.

[^ 78] See Section 902 of Pub. L. 105-277 (PDF), 112 Stat. 2681, 2681-538 (October 21, 1998), as amended.

[^ 79] See Section 599E of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Pub. L. 101-167 (PDF), 103 Stat. 1195, 1263 (November 21, 1989), as amended.

[^ 80] See INA 245(h).

[^ 81] Registry is a section of immigration law that enables certain aliens who have been present in the United States since January 1, 1972 the ability to apply for lawful permanent residence even if currently in the United States unlawfully. See INA 249. See 8 CFR 249.

[^ 82] See INA 245(l). If the applicant is adjusting based on an employment-based petition where the petition is filed by either a qualifying relative, or an entity in which such relative has a significant ownership interest (5 percent or more), and the applicant, at both the time of filing and adjudication of the Form I–485, is still in valid T nonimmigrant status, the applicant is not subject to INA 212(a)(4) but is still required to file Form I–864. See 8 CFR 213a.2(b)(2).

[^ 83] See INA 101(a)(15)(U) and INA 212(a)(4)(E)(ii). See Section 804 of the Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4 (PDF) (March 7, 2013). If the applicant is adjusting based on an employment-based petition where the petition is filed by either a qualifying relative, or an entity in which such relative has a significant ownership interest (5 percent or more), and the applicant, at both the time of filing and adjudication of the Form I-485, is still in valid U nonimmigrant status, the applicant is not subject to INA 212(a)(4) but is still required to file Form I–864. See 8 CFR 213a.2(b)(2).

[^ 84] See Help Haitian Adoptees Immediately to Integrate Act of 2010 (Help HAITI Act), Pub. L. 111-293 (PDF) (December 9, 2010).

[^ 85] See INA 212(a)(4)(E)(i).

[^ 86] See INA 212(a)(4)(E)(iii). See Section 804 of the Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4 (PDF) (March 7, 2013). See Section 431(c) of Pub. L. 104-193 (PDF), 110 Stat. 2105, 2274 (August 22, 1996). See 8 U.S.C. 1641(c).

[^ 87] See Section 1703 of the National Defense Authorization Act, Pub. L. 108-136 (PDF), 117 Stat. 1392, 1693 (November 24, 2003) (posthumous benefits to surviving spouses, children, and parents).

[^ 88] See INA 289.

[^ 89] See Section 586 of Pub. L. 106-429 (PDF), 114 Stat. 1900, 1900A-57 (November 6, 2000) under 8 CFR 245.21.

[^ 90] Includes certain Polish and Hungarian parolees who were paroled into the United States from November 1, 1989 to December 31, 1991. See Section 646(b) of IIRIRA, Division C of Pub. L. 104-208 (PDF), 110 Stat. 3009-546, 3009-709 (September 30, 1996).

[^ 91] See Section 7611 of the National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116-92 (PDF), 113 Stat. 1198, 2309 (December 20, 2019) (Liberian Refugee Immigration Fairness), later extended by Section 901 of Division O, Title IX of the Consolidated Appropriations Act of 2021, Pub. L. 116-260 (PDF), 134 Stat. 1182, 2155 (December 27, 2020) (Adjustment of Status for Liberian Nationals Extension).

[^ 92] See Pub. L. 106-378 (PDF) (October 27, 2000).

[^ 93] See INA 213A. See 8 CFR 213a.

[^ 94] See INA 213A(a)(1)(A). A sponsor who is on active duty (other than active duty for training) in the U.S. armed forces and who is petitioning for a spouse or child only has to demonstrate the means to maintain an annual income equal to at least 100 percent of the FPG. See 8 CFR 213a.2(c)(2).

[^ 95] A “sponsored immigrant” means any alien “who was an intending immigrant, once that person has been lawfully admitted for permanent residence, so that the affidavit of support filed for that person under this part has entered into force.” See 8 CFR 213a.1.

[^ 96] See *Erler v. Erler*, 824 F.3d 1173 (9th Cir. 2016). See *Belevich v. Thomas*, 17 F.4th 1048 (11th Cir. 2021). See *Wenfang Liu v. Mund*, 686 F.3d 418 (7th Cir. 2012).

[^ 97] See 8 CFR 212.22(a).

[^ 98] See Section 564(f) of IIRIRA, Division C of Pub. L. 104-208 (PDF), 110 Stat. 3009-546, 3009-684 (September 30, 1996). Under INA 291, the sponsor’s income and resources, as well as the income and resources of the sponsor’s spouse, is counted as the sponsored immigrant’s income for the purposes of determining eligibility for any federal means-tested public benefits.

[^ 99] See INA 212(a)(4)(B).

Chapter 7 - Consideration of Current and/or Past Receipt of Public Cash Assistance for Income Maintenance or Long-term Institutionalization at Government Expense

The public charge inadmissibility determination is prospective, based on an applicant’s likelihood at any time in the future to become a public charge – that is, USCIS must evaluate the alien’s likelihood of becoming primarily dependent on the government for subsistence through future receipt of public cash assistance for income maintenance or long-term institutionalization at government expense.

As described above, under the regulations, every public charge inadmissibility determination must include consideration of the alien’s age; health; family status; assets, resources, and financial status; and education and skills; an Affidavit of Support Under Section 213A of the INA (if required); and the applicant’s current and/or past receipt of public cash assistance for income maintenance or long-term institutionalization at government expense.

USCIS considers current and/or past receipt of public cash assistance for income maintenance and long-term institutionalization at government expense in the totality of the circumstances, taking into account the amount, duration, and recency of the receipt.[1] Current and/or past receipt of benefits alone, however, is not a sufficient basis to determine whether an applicant is likely at any time to become a public charge.[2]

A. Most Aliens Are Not Eligible for Public Benefits

Relatively few aliens in the United States are both subject to the public charge ground of inadmissibility and eligible for the public benefits considered as part of the inadmissibility determination before adjusting their status to that of a lawful permanent resident (LPR).

Aliens who are eligible for public cash assistance for income maintenance or long-term institutionalization at government expense are often already LPRs or are in a group exempt from the public charge ground of inadmissibility.[3]

B. Public Cash Assistance for Income Maintenance

Public cash assistance for income maintenance means:[4]

- Supplemental Security Income (SSI);[5]
- Cash assistance for income maintenance under the Temporary Assistance for Needy Families (TANF) program;[6] and
- State, tribal, territorial, or local cash benefit programs for income maintenance.[7]

Public cash assistance for income maintenance, even for a short period of time, is considered as part of the totality of the circumstances analysis. But the length of time that has elapsed since the alien has received cash benefits is also relevant: the longer the time since an alien received such cash benefits, the less the past receipt would be a predictor of future receipt.[8]

In addition, the longer the period that an alien received cash assistance for income maintenance in the past and the greater the amount of benefits, the stronger the implication that the alien is likely to become a public charge. For example, if an alien receives a small amount of cash assistance for a limited period of time, such receipt would be unlikely to result in an adverse public charge inadmissibility determination (though receipt is but one consideration and is not outcome determinative on its own).[9]

Evidence demonstrating the alien's ability to be self-supporting in the future may overcome the negative implication of any past receipt of such benefits.

C. Long-term Institutionalization at Government Expense

As part of a public charge inadmissibility determination, USCIS considers whether an alien has received, is currently receiving, or is likely to receive long-term institutionalization at government expense, including in a nursing facility or mental health institution. As part of the consideration of long-term institutionalization, USCIS considers both permanent institutionalization as well as institutionalization for a long period of time short of indefinite duration, in the totality of the circumstances.

Long-term institutionalization at government expense is the only category of Medicaid-funded services (limited to institutional services provided under section 1905(a) of the Social Security Act) considered in a public charge inadmissibility determination.[10] No other services paid for by Medicaid, including home and community-based services (HCBS), and no services provided under the Children's Health Insurance Program (CHIP), are considered as long-term institutionalization at government expense.

In all circumstances, current and/or past long-term institutionalization at government expense is not alone a sufficient basis to determine that an applicant is likely at any time to become a public charge. Rather, it is one consideration in the totality of the circumstances.[11]

Long-term institutionalization does not include imprisonment for conviction of a crime or institutionalization for short periods or for rehabilitation purposes.[12] Long-term institutionalization also does not include sporadic or intermittent periods of institutionalization, even on a recurring basis, such as for caregiver respite care or behavioral health or substance abuse disorder treatment. HCBS are also not considered as long-term institutionalization at government expense.[13]

In general, USCIS would consider an alien to have been long-term institutionalized if they have been continuously institutionalized, were assessed for HCBS, offered HCBS, and made an informed choice to remain in an institution, or have been continuously institutionalized regardless of whether they were assessed for or offered HCBS but have not presented evidence demonstrating that such institutionalization violated their rights.

USCIS also considers any evidence provided by an alien that they are or were institutionalized at government expense in violation of their rights, and, where such evidence is credible, it will have the tendency of offsetting evidence of current or past institutionalization.[14]

1. Home and Community-Based Services

When examining an alien's long-term institutionalization, USCIS does not consider an alien's past, current, or future receipt of, or eligibility for, HCBS, even if they are offered at government expense, including through Medicaid.

HCBS help older adults and individuals with disabilities, such as intellectual or developmental disabilities, physical disabilities, and mental illnesses, fully participate in their communities and receive services in their own home or community. HCBS can promote employment and decrease reliance on costly government-funded institutional care.

In contrast to institutional care paid for by Medicaid, Medicaid-funded HCBS do not include payments for room and board, and therefore do not provide an individual's total care for basic needs that is generally provided by an institution.

2. Institutionalization in Violation of Federal Law

There are some circumstances in which an individual may be institutionalized long-term at government expense in violation of federal anti-discrimination laws, including the Americans with Disabilities Act (PDF) (ADA) and Section 504 of the Rehabilitation Act (PDF).

The ADA requires public entities, and Section 504 requires recipients of federal funds, to provide services to individuals in the most integrated setting appropriate to their needs. Unjustified institutionalization of individuals with disabilities by a public entity is a form of discrimination under the ADA and Section 504.[15]

As noted above, the likelihood that an alien will become a public charge at any time is determined by assessing the alien's likelihood of becoming primarily dependent on the government for subsistence as evidenced by long-term institutionalization at government expense (as well as any receipt of public cash assistance for income maintenance). However, in making this determination, USCIS considers evidence submitted by the applicant that their current, past, or potential future institutionalization violates federal law.[16]

If an applicant believes that their institutionalization was in violation of federal law, they must submit evidence in support of this claim with their Application to Register Permanent Residence or Adjust Status (Form I-485).[17] USCIS may also request such evidence after the filing of Form I-485. If USCIS issues a Request for Evidence, that request would only be sent to the applicant for adjustment of status (and their attorney or accredited representative).

Services available to some individuals may not be in full compliance with disability rights laws, such that, as noted, individuals who might otherwise receive HCBS are instead institutionalized at government expense. Individuals may submit evidence that their institutionalization violates federal law, and USCIS considers such evidence in the totality of the circumstances. Specifically, where such evidence is credible, it will have the tendency of offsetting evidence of current or past institutionalization.

Evidence suggesting that an individual may have experienced long-term institutionalization in violation of federal law may include, but is not limited to, documentation showing:

- The state's HCBS waiting lists prevent an individual from receiving community-based services for which they are eligible;[18]
- Enforcement-related action (complaint filed in court) by a federal civil rights agency (for example, U.S. Department of Justice or U.S. Department of Health and Human Services Office for Civil Rights (HHS OCR)) alleging non-compliance by a state, or other public entity, or a facility with federal civil rights laws that contributed to the individual's institutionalization;
- An administrative decision, such as a letter of findings issued by the U.S. Department of Justice or HHS OCR under Title II of the Americans with Disabilities Act, 28 CFR 35.172(c) or HHS OCR under Section 1557 of the Affordable Care Act, 45 CFR 92.5, or Section 504 of the Rehabilitation, 45 CFR Parts 84 and 85;
- Settlement agreement, or a court-ordered consent decree that impacts the individual's institutionalization;
- A plan of care (for example, person centered plan or individualized service plan) that fails to state whether the individual wants to leave the institution and could be served in the community;[19] or
- A discharge plan of care for the individual that does not document that the individual has been asked about their interest in receiving information regarding returning to the community, or indicate whether the individual could be served in the community.[20]

D. Receipt, Approval or Certification

USCIS determines an individual's likelihood of becoming primarily dependent on the government for subsistence, as demonstrated by the alien's receipt of public cash assistance for income maintenance or long-term institutionalization at government expense.[21]

Such receipt occurs when a public benefit-granting agency provides these benefits to an individual listed as a beneficiary of such benefits. USCIS does not consider public benefits received by the applicant's relatives, including children, or received by the applicant solely on behalf of third parties (including a member of the alien's household as defined in the regulation).[22]

The applicant indicates their past or current receipt of public cash assistance for income maintenance or long-term institutionalization at government expense on Form I-485.

It is not considered "receipt" to apply for a public benefit on one's own behalf or on behalf of another. Similarly, approval for future receipt of a public benefit on the alien's own behalf or on behalf of another is also not considered "receipt."[23]

However, to the extent that the alien applies on their own behalf, USCIS may consider the application or approval for future receipt as part of all information or evidence in the record that is relevant in the totality of the circumstances. For instance, approval for future receipt of a public benefit on the alien's own behalf may indicate a probability of actual future receipt of public benefits by the alien.[24]

An applicant may supplement their application with an explanation of any temporary circumstances that gave rise to receipt of, or approval for, public cash assistance for income maintenance or long-term institutionalization at government expense.

E. Public Benefits Not Considered

As stated in 8 CFR 212.22(a)(3), in making a public charge inadmissibility determination, USCIS will not consider receipt of, or certification or approval for future receipt of, public benefits not referenced in sections 212.21(b)[25] and (c),[26] such as:

- Supplemental Nutrition Assistance Program (SNAP) or other nutrition programs;
- Children's Health Insurance Program (CHIP);
- Medicaid (other than for long-term use of institutional services under section 1905(a) of the Social Security Act);
- Housing benefits;
- Any benefits related to immunizations or testing for communicable diseases; or
- Other supplemental or special-purpose benefits.[27]

USCIS also emphasizes the additional following programs and public assistance that are not considered in a public charge inadmissibility determination; however, the below list is not exhaustive:[28]

- Treatments or preventative services related to COVID-19, including vaccinations;
- The use of home and community-based services (HCBS);
- Any services provided under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act)[29] or comparable disaster assistance provided by state, tribal, territorial, or local governments;
- Benefits under the Emergency Food Assistance Act (TEFAP);[30]
- Child and Adult Care Food Program (CACFP);
- School lunch programs;
- Cash payments that are provided for childcare assistance or other supplemental, special purpose cash assistance;
- Cash payments that are provided as part of pandemic or disaster relief funds, such as the American Rescue Plan Act;
- Food Distribution Program on Indian Reservations (FDPIR);
- Services provided by the Indian Health Service (IHS), tribes and tribal organizations under the Indian Self-Determination and Education Assistance Act (ISDEA),[31] and Urban Indian Organizations (UIO), as defined at 25 U.S.C. 1603(29), that have a grant or contract with IHS under title V of the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. 1603;
- Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) provided by local communities or through public or private nonprofit organizations;
- Attending public school;
- Child care related services including the Child Care and Development Block Grant (CCDBG) or Child Care and Development Fund (CCDF);[32]

- Special Supplemental Nutrition Program for Women, Infants, and Children (WIC);[33]
- Health insurance coverage through the Health Insurance Marketplace, state-based marketplaces, or the Small Business Health Options Program (SHOP) under the Affordable Care Act, and financial assistance for such coverage;
- Transportation vouchers or other non-cash transportation services;
- Housing assistance under the McKinney-Vento Homeless Assistance Act;[34]
- Energy benefits such as the Low Income Home Energy Assistance Program (LIHEAP);[35]
- Educational benefits, including, but not limited to, benefits under the Head Start Act;[36]
- Student loans and home mortgage loan programs;
- Publicly funded scholarships and educational grants;
- Guaranteed income programs that are not equivalent to public cash assistance for income maintenance, in that they typically do not provide the primary source of income for recipients, are made available without income-based eligibility rules, or both;[37]
- Foster care and adoption benefits;
- Earned benefits such as Social Security retirement benefits, government pensions, veterans' benefits, and unemployment insurance; and
- Child Tax Credit (CTC), or other tax-related cash benefits including Earned Income Tax Credit (EITC); Additional Child Tax Credit (ACTC); Premium Tax Credit (PTC); Advance Payment of Premium Tax Credit (APTC); and state, local, or tribal tax credit.

USCIS also does not consider public benefits received by an applicant's family members (including U.S. citizen children or other relatives).[38]

F. Exclusion From Consideration of Receipt of Public Benefits In Certain Circumstances

1. Receipt of Public Benefits While an Alien Is Present in a Category Exempt From or Received a Waiver of the Public Charge Ground of Inadmissibility

USCIS does not consider any public benefits received by an alien during periods in which the alien was present in the United States in an immigration category:

- That is exempt from the public charge ground of inadmissibility; or
- For which the alien received a waiver of public charge inadmissibility.[39]

However, public cash assistance for income maintenance or long-term institutionalization at government expense received before an alien was in exempt status (or was in a category for which they had received a waiver of the public charge ground of inadmissibility) or after the alien was no longer in an exempt status (or was in a category for which they had received a waiver of the public charge ground of inadmissibility) would be considered in a public charge inadmissibility determination in the totality of the circumstances, including consideration of any mitigating information that the applicant may wish to bring to USCIS' attention.

2. Receipt of Public Benefits by Aliens Granted Benefits Available to Refugees

USCIS does not consider any public benefits that were received by aliens who, while not refugees, are eligible for resettlement assistance, entitlement programs, and other benefits available to refugees,[40] including services provided to an "unaccompanied alien child."[41] This provision only applies to the categories of aliens who are eligible for all three types of support listed (resettlement assistance, entitlement programs, and other benefits) typically reserved for refugees.

For example, the U.S. government has resettled and continues to resettle our Afghan allies. This is a population invited by the government to come to the United States at the government's expense in recognition of their assistance over the past 2 decades or their unique vulnerability were they to remain in Afghanistan.[42]

In recognition of the unique needs of this population and the manner of their arrival in the United States, Congress explicitly extended benefits normally reserved for refugees to our Afghan allies.[43] As part of an effort by the U.S. government to assist aliens impacted by the Russian invasion of Ukraine, Congress has also extended benefits normally reserved for refugees to certain Ukrainians.[44]

Footnotes

[^ 1] See 8 CFR 212.22(a)(3) and 8 CFR 212.21(d). If an applicant has been approved for future receipt of a considered public benefit, that information may be considered in the totality of the circumstances. For more information on the totality of the circumstances assessment, see Chapter 4, Prospective Determination Based on the Totality of the Circumstances [8 USCIS-PM G.4].

[^ 2] See 8 CFR 212.22(a)(3).

[^ 3] See the Public Charge Resources webpage for a table that identifies the major categories of aliens who are generally subject to the public charge ground of inadmissibility and may be eligible for the federal cash assistance for income maintenance or long-term institutionalization at government expense prior to filing for adjustment of status. This table is provided for background purposes only and should not be used to determine eligibility for public benefits. Note that this table does not include state, tribal, territorial, and local cash assistance programs for income maintenance (often called "General Assistance" programs), or non-Medicaid programs that support long-term institutionalization at government expense.

[^ 4] See 8 CFR 212.21(b). For the definition of receipt, see 8 CFR 212.21(d).

[^ 5] See 42 U.S.C. 1381 et seq.

[^ 6] See 42 U.S.C. 601 et seq.

[^ 7] These programs are often called "General Assistance" in the state context, but also exist under other names. See 8 CFR 212.21(b).

[^ 8] See 87 FR 55472, 55518 (PDF) (Sept. 9, 2022).

[^ 9] See 87 FR 55472, 55525 (PDF) (Sept. 9, 2022).

[^ 10] See 8 CFR 212.21(c).

[^ 11] See 8 CFR 212.22(b).

[^ 12] See 8 CFR 212.21(c).

[^ 13] For more information about long term-institutionalization, see Chapter 2, Definitions, Section C, Long-term Institutionalization at Government Expense [8 USCIS-PM G.2(C)].

[^ 14] See 87 FR 55472, 55533 (PDF) (Sept. 9, 2022). For more information, see Subsection 2, Institutionalization in Violation of Federal Law [8 USCIS-PM G.7(C)(2)].

[^ 15] See *Olmstead v. L.C.*, 527 U.S. 581 (1999). See U.S. Department of Justice, Civil Rights Division, Disability Rights Section, *Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.*

[^ 16] See 8 CFR 212.22(a)(3).

[^ 17] See 8 CFR 212.22(a)(3). See the instructions for Form I-485.

[^ 18] See 87 FR 55472, 55534 (PDF) (Sept. 9, 2022).

[^ 19] See 42 CFR 483.100-138. See 42 CFR 483.20. See 42 CFR 483.21. Such a plan of care is to be included in a comprehensive assessment of the resident not less often than once every 12 months.

[^ 20] See 42 CFR 483.20. See 42 CFR 483.21. Such a discharge plan of care is to be included in a comprehensive assessment of the resident not less often than once every 12 months.

[^ 21] See 8 CFR 212.21(a). For more information regarding the public benefits considered in a public charge inadmissibility determination, see Section B, Public Cash Assistance for Income Maintenance [8 USCIS-PM G.7(B)], and Section C, Long-term Institutionalization at Government Expense [8 USCIS-PM G.7(C)].

[^ 22] See 8 CFR 212.21(f) (defining household).

[^ 23] See 8 CFR 212.21(d).

[^ 24] See 8 CFR 212.22(b). For more information about the totality of the circumstances determination, see Chapter 4, Prospective Determination Based on the Totality of the Circumstances [8 USCIS-PM G.4].

[^ 25] See 8 CFR 212.21(b).

[^ 26] See 8 CFR 212.21(c).

[^ 27] See 8 CFR 212.22(a)(3).

[^ 28] As there are multiple federal and state public benefits programs, USCIS is unable to list all programs not included within the public charge inadmissibility determination.

[^ 29] See Pub. L. 100-707 (PDF) (November 23, 1988).

[^ 30] See 7 U.S.C. 7501 to 7 U.S.C. 7517.

[^ 31] See Pub. L. 93-638 (PDF) (January 4, 1975).

[^ 32] See 42 U.S.C. 9858 to 42 U.S.C. 9858q.

[^ 33] See 42 U.S.C. 1786.

[^ 34] See 42 U.S.C. 11401.

[^ 35] See 42 U.S.C. 8621 to 42 U.S.C. 8630.

[^ 36] See Pub. L. 110-134 (PDF), 121 Stat. 1363 (December 12, 2007).

[^ 37] However, if a guaranteed income program functions like cash assistance for income maintenance in that it is income-based, and provides the primary source of support for the recipients, then it would be considered in a public charge inadmissibility determination.

[^ 38] See Chapter 2, Definitions, Section D, Receipt (of Public Benefits) [8 USCIS-G.2(D)].

[^ 39] See 8 CFR 212.22(d), 8 CFR 212.23(a), and 8 CFR 212.23(c).

[^ 40] Refugees as admitted under INA 207. Refugee services as described under INA 412(d)(2).

[^ 41] As defined under Section 462(g)(2) of the Homeland Security Act, Pub. L. 107–296 (PDF), 116 Stat. 2135, 2202 (November 25, 2002). See 8 CFR 212.22(e).

[^ 42] See DHS publication, Operation Allies Welcome (PDF).

[^ 43] See Extending Government Funding and Delivering Emergency Assistance Act, Pub. L. 117-43 (PDF) (September 30, 2021).

[^ 44] See Additional Ukraine Supplemental Appropriations Act of 2022, Pub. L. 117-128 (PDF) (May 21, 2022).

Chapter 8 - Waivers of Inadmissibility Based on Public Charge Ground

The availability of a waiver of a ground of inadmissibility depends on the immigration benefit the applicant is seeking.

A. Immigrant Waivers

In general, the public charge ground of inadmissibility cannot be waived for aliens seeking lawful permanent resident (LPR) status. However, the following aliens seeking LPR status may overcome the public charge ground of inadmissibility if they apply for and USCIS grants a waiver of the public charge ground of inadmissibility:

- Applicants seeking adjustment of status on account of their witness or informant status.[1]
- Certain aged, blind, or disabled applicants for adjustment of status under the legalization program.[2]

B. Nonimmigrant Waivers

The following nonimmigrants seeking admission may overcome the public charge ground of inadmissibility if the alien applies for and is granted a waiver of the public charge ground of inadmissibility:

- Nonimmigrants seeking admission to the United States – An alien applying for a nonimmigrant visa or seeking temporary admission as a nonimmigrant may seek a temporary waiver of inadmissibility.[3] This application for a temporary waiver of inadmissibility is adjudicated by U.S. Customs and Border Protection (CBP) as part of either an alien's application for admission at a port of entry or an alien's application for a nonimmigrant visa at a U.S. consulate or embassy.[4] If granted, the waiver generally only applies to the nonimmigrant classification for which it was granted.
- Applicants for admission as nonimmigrant witnesses or informants (S nonimmigrants)[5] – The application to seek nonimmigrant status as a witness or informant, including the request for a waiver of a ground of inadmissibility, is made on the Inter-Agency Alien Witness and Informant Record (Form I-854A). The waiver is discretionary, and USCIS may grant the waiver if it considers it to be in the national interest to do so.

Footnotes

[^ 1] See INA 245(j). See 8 CFR 212.23(c)(2) and 8 CFR 245.11. According to 8 CFR 245.11(c), grounds of inadmissibility that were waived at the time of obtaining S nonimmigrant status are considered waived for purposes of the adjustment.

[^ 2] See INA 245A and INA 245A(d)(2)(B). See 8 CFR 212.23(c)(3). Aged, blind, or disabled applicants, as defined in Section 1614(a)(1) of the Social Security Act, as codified in 42 U.S.C. 1382c(a)(1), for adjustment of status under INA 245A may apply for a waiver of the public charge ground of inadmissibility. The waiver is filed on the Application for Waiver of Grounds of Inadmissibility Under Sections 245A or 210 of the Immigration and Nationality Act (Form I-690) according to the form's instructions.

[^ 3] See INA 212(d)(3)(A).

[^ 4] For more information on applying for a waiver as a nonimmigrant under INA 212(d)(3), visit CBP.gov.

[^ 5] See INA 101(a)(15)(S). See 8 CFR 212.23(c)(1). See INA 212(d)(1). See 8 CFR 214.2(t)(5)(i). See 8 CFR 212.4(j)(1). The waiver is granted by USCIS.

Chapter 9 - Adjudicating Public Charge Inadmissibility for Adjustment of Status Applications

Officers determine whether in the totality of the circumstances, after reviewing all the factors and evidence, the applicant is likely at any time to become a public charge.[1]

A. Evidence in the Record

In making a public charge inadmissibility determination, a USCIS officer considers evidence relevant to the statutory minimum factors;[2] a sufficient Affidavit of Support Under Section 213A of the INA (Form I-864), where required; current and/or past receipt of public cash assistance for income maintenance or long-term institutionalization at government expense, if any; and the record as a whole, as part of a totality of the circumstances framework.

Evidence that could appear in the record as a whole, which USCIS may consider relevant in the totality of the circumstances, could include the applicant's employment history (as stated on the Application to Register Permanent Residence or Adjust Status (Form I-485));[3] approval for the applicant to receive public cash assistance for income maintenance or long-term institutionalization at government expense in the future;[4] or other relevant information.

While many aliens may demonstrate their income through their employment history and associated salaries, some aliens may have periods of unemployment. USCIS may consider the alien's employment history, in the totality of the circumstances, in the context of assessing the alien's education and skills, as well as assets, resources and financial status. However, like other factors and considerations, the fact that an alien has experienced or is experiencing a period of unemployment is not alone sufficient to conclude that an alien will become a public charge in the future. Also, a history of prior employment may be helpful to determine that the alien has the education or skills that make it likely that they will again be employed and again earn income.

If deemed necessary in the totality of the circumstances assessment, a USCIS officer may request evidence of expected employment, including job offers with estimated salary.[5]

1. Potential Future Receipt of Public Cash Assistance for Income Maintenance or Long-term Institutionalization at Government Expense

Although USCIS expects this to be rare, it is possible that an applicant could, on their own behalf, be certified for, or approved to receive in the future, public cash assistance for income maintenance or long-term institutionalization at government expense.

While such certification or approval would not constitute receipt of such benefits under the regulations,[6] evidence of such certification or approval could indicate the probability of future receipt, and be considered by USCIS as probative of whether the applicant is likely to become a public charge at any time in the future.[7] As such, USCIS considers this certification or approval for future receipt, if any, in the totality of the circumstances.

2. Other Relevant Information

The totality of the circumstances analysis includes all information or evidence in the record before the officer that is relevant to a public charge inadmissibility determination, including forms and evidence previously submitted to USCIS.

For example, it is possible that some applicants for adjustment of status may have previously requested and received a fee waiver for a prior immigration benefit. In such a case, the officer considers this evidence in the totality of circumstances, such as by taking into account the recency and amount of the fee waiver, as well as the grounds for eligibility.[8]

As a general matter, the most common eligibility criteria for a fee waiver are receipt of a means-tested benefit or household income below 150 percent of the Federal Poverty Guidelines (FPG), both of which would already be evident in the applicant's responses to questions on Form I-485. If the fee waiver were requested on the basis of financial hardship, then the officer

could request additional evidence on the nature and recency of such hardship in the totality of the circumstances. Note that USCIS is not collecting information about previously received fee waivers on Form I-485. However, if such information is in the record, officers may consider it in the totality of the circumstances.[9]

3. Other Notable Circumstances Relevant in the Totality of the Circumstances

Children

The statute does not exempt children from the public charge ground of inadmissibility.[10] As with all applicants, when making a public charge inadmissibility determination for applicants who are children, USCIS must consider all of the required factors, including current and/or past receipt of public benefits.[11] As with any applicant, USCIS considers the recency, amount, and duration of receipt of such benefits when determining whether an alien child is likely at any time to become primarily dependent on the government for subsistence.[12]

In the rare case that an alien child has received or is receiving public cash assistance for income maintenance or has been institutionalized long-term at government expense, USCIS will, consistent with the totality of the circumstances analysis, consider financial contributions of a child's household and the circumstances that resulted in the child's receipt of public benefits and the likelihood that those circumstances would continue in the future.

The officer should also take into account whether the benefits received were due to temporary parental unemployment or other temporary circumstances. For applicants who were long-term institutionalized at government expense while children, USCIS considers any evidence supplied by the applicant that the applicant's condition was or is not permanent or was or can be managed through home and community-based services, as well as any evidence that the applicant was or is institutionalized in violation of their rights in the totality of the circumstances.[13]

Benefits Received by Aliens During or After Pregnancy

Aliens who are pregnant or were recently pregnant are not exempt from the public charge ground of inadmissibility based on that pregnancy. If an applicant received or is receiving public cash assistance for income maintenance or long-term institutionalization at government expense while pregnant or recently pregnant, USCIS must consider that receipt.

However, USCIS takes the applicant's surrounding circumstances into account when assessing whether they are likely at any time to become a public charge, including the temporary nature of pregnancy and potentially temporary nature of postpartum conditions, and how these circumstances may have impacted the applicant's receipt of public benefits, in the totality of the circumstances.[14]

Active-duty Service Members

Active-duty U.S. service members are not exempt from the public charge ground of inadmissibility based on that service.[15] However, in general, very few active-duty service members use the public benefits considered in public charge inadmissibility determinations,[16] and active-duty service members therefore generally will not be impacted by the consideration of receipt of public benefits in a public charge inadmissibility determination.

In the rare case of an active-duty service member who received or is receiving public cash assistance for income maintenance or long-term institutionalization at government expense, the officer should consider any evidence the applicant provides regarding circumstances surrounding the duration, amount, and recency of receipt, and how that may have been impacted by their service. The officer should also consider any evidence the applicant submits relating to skills they obtained through their military service.

Crime, Domestic Violence, or Other Adverse Circumstances

Aliens who have experienced crime, domestic violence, or other adverse circumstances may have used public cash assistance for income maintenance or long-term institutionalization at government expense but may not fall into one of the specific categories that Congress has exempted from the public charge ground of inadmissibility.[17] Such aliens may choose to provide information or evidence relating to their temporary circumstances that may be relevant to a public charge inadmissibility determination.[18] USCIS takes the surrounding circumstances into account in the totality of the circumstances.

B. Totality of the Circumstances Scenarios

Below are hypothetical examples that are intended to help illustrate a USCIS officer's review of an applicant's factors, circumstances, and evidence, in the totality of the circumstances. These hypotheticals are not meant to be exhaustive or all-inclusive with respect to the scenarios that may give rise to a public charge inadmissibility finding; rather they are illustrative of the process and are not meant to dictate the outcome of any particular case.

Although a USCIS officer may encounter similar fact patterns as those presented in the scenarios below, an officer may reasonably reach a different conclusion than what is described below in consideration of the totality of the individual's circumstances. Public charge inadmissibility determinations are made in the totality of circumstances for each individual case, on a case-by-case basis.

Additionally, for purposes of the following hypothetical scenarios, it is assumed that:

- The applicant is applying for adjustment of status before USCIS and is otherwise eligible for the benefit;
- The applicant submitted the required forms and all other required supporting evidence; and
- The facts asserted are supported by evidence in the record.

Scenario 1

The applicant is a single, 25-year-old, recent college graduate living with their parent, and is currently unemployed. Their parent is currently supporting the applicant financially, and these are the only two individuals in the applicant's household. The household's income and net worth (assets minus liabilities) are relatively low. A sufficient Affidavit of Support Under Section 213A of the INA was submitted on behalf of the applicant. There is no information in the record to show that the applicant is receiving or has received public benefits, or has any Class A or Class B medical conditions.

The officer evaluates each of the factors USCIS considers in a public charge inadmissibility determination, and concludes that the factors do not indicate that the applicant is likely at any time to become primarily dependent on the government for subsistence. For example, the applicant's record of current unemployment, in the totality of the circumstances, does not outweigh the other factors and considerations. As a result, the officer finds in the totality of the circumstances that the applicant has met their burden of demonstrating they are not inadmissible under INA 212(a)(4).

Scenario 2

The applicant is a single 35-year-old with no evidence of any Class A or Class B medical conditions. The applicant has one child who lives with the applicant. The applicant is a currently employed high school graduate, with moderate household income and relatively low household net worth. A sufficient Affidavit of Support Under Section 213A of the INA was submitted on behalf of the applicant. There is evidence in the record that the applicant received public cash assistance for income maintenance for a period of 1 year, over 10 years ago.

The officer evaluates each of the factors USCIS considers as part of the public charge inadmissibility determination, including the recency, amount, and duration of the past receipt of public cash assistance for income maintenance. The officer determines that the alien's combination of factors does not show that the applicant is likely at any time to become primarily dependent on the government for subsistence, in part because the applicant is currently employed, and their receipt of public cash assistance was neither recent nor long in duration. As a result, the officer finds in the totality of the circumstances that the applicant has met their burden of demonstrating that they are not inadmissible under INA 212(a)(4).

Scenario 3

The applicant is a single 55-year-old, living alone, with no evidence of a Class A or Class B medical condition. The applicant is an unemployed college graduate who has not been employed for over a decade with low income arising solely from receipt of public cash assistance for income maintenance, and low household net worth. A sufficient Affidavit of Support Under Section 213A of the INA was submitted on behalf of the applicant. The applicant indicated that they are currently receiving public cash assistance for income maintenance and have been receiving such assistance for over 5 years.

The officer evaluated each of the factors USCIS considers in a public charge inadmissibility determination and the officer determined that the combination of factors shows that the applicant is likely at any time to become primarily dependent on the government for subsistence, given that the applicant is currently receiving public cash assistance for income maintenance, has received this benefit for an extended period of time, and has demonstrated no prospect of obtaining another source of income.

As a result, even though the applicant has a sufficient Affidavit of Support under Section 213A of the INA and is in good health, the officer finds in the totality of the circumstances that the applicant has not met their burden of demonstrating they are not inadmissible under INA 212(a)(4). The officer finds that the applicant is inadmissible under INA 212(a)(4).

C. Summary: Step by Step Determination of Public Charge Inadmissibility

The officer should examine all facts and circumstances of the applicant's case when evaluating inadmissibility for public charge.[19] The officer should follow the steps in the table below to determine inadmissibility.

Step-By-Step Determination of Public Charge Inadmissibility

Step	If Yes, then …	If No, then …	For More Information
Step 1: Is the applicant subject the public charge ground of inadmissibility?	Go to Step 2.	Not inadmissible based on the public charge ground.[20]	See Chapter 3, Applicability [8 USCIS-PM G.3].
Step 2: Is the applicant required to submit an Affidavit of Support Under Section 213A (Form I-864 or Form I-864EZ)?	Go to Step 3.	Go to Step 4.	Chapter 6, Affidavit of Support Under Section 213A of the INA [8 USCIS-PM G.6].
Step 3: Was the Form I-864 (or Form I-864EZ) submitted and determined sufficient by the officer?	Go to Step 4.	Inadmissible based on the public charge ground.	
Step 4: Was the application postmarked (or, if applicable, submitted electronically) on or after December 23, 2022?	Go to Step 5.	Follow the 1999 Interim Field Guidance for adjudication.	Chapter 1, Purpose and Background, Section C, Scope [8 USCIS-PM G.1(C)].
Step 5: After reviewing the applicable forms[21] and evidence, is the applicant likely at any time to become a public charge based on the totality of the circumstances?	Go to Step 6.	Not inadmissible based on the public charge ground.	Chapter 5, Statutory Minimum Factors [8 USCIS-PM G.5] through Chapter 7, Consideration of Current and/or Past Receipt of Public Cash Assistance for Income Maintenance or Long-term Institutionalization at Government Expense [8 USCIS-PM G.7].
Step 6: Is a waiver of inadmissibility available?	The officer may issue a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) to the applicant to provide them an opportunity to request a waiver, unless already requested. If the waiver is approved, the applicant may be admitted despite the public charge ground of inadmissibility. The officer should continue with the adjudication of the application.	Inadmissible based on the public charge ground. Go to Step 7.	Chapter 9, Adjudicating Public Charge Inadmissibility for Adjustment of Status Applications [8 USCIS-PM G.9] Chapter 8, Waivers of Inadmissibility Based on Public Charge Ground [8 USCIS-PM G.8].
Step 7: Does USCIS offer the applicant for adjustment of status who is inadmissible only on account of public charge the opportunity to post a public charge bond?	The officer issues a NOID, notifying the applicant that the applicant may submit a public charge bond. Proceed to Step 8.	The applicant is inadmissible on the public charge ground. The officer may issue a NOID or deny the application in accordance with USCIS policy.	Chapter 10, Public Charge Bonds [8 USCIS-PM G.10]
Step 8: Was a proper and suitable bond posted on behalf of the applicant?	The applicant may be admitted despite inadmissibility based on the public charge	The applicant is inadmissible on the public charge ground. The	Chapter 11, Public Charge Bonds: Posting and Accepting Bonds [8 USCIS-PM G.11]

Step	If Yes, then …	If No, then …	For More Information
	ground. The officer should continue with the adjudication of the application.	officer should deny the application.	

D. Decision

1. Request for Evidence or Notice of Intent to Deny

If the initial evidence submitted by the applicant does not establish eligibility or ineligibility, USCIS may issue an RFE or NOID to request more information or evidence from the applicant in accordance with USCIS policy.[22]

If a NOID is issued, the officer must provide an explanation of the consideration of all the factors and why the officer believes that the applicant is likely at any time to become primarily dependent on the government for subsistence, based on the consideration of the totality of the applicant's circumstances. If an officer is basing a decision in whole or in part on information of which the applicant is unaware or could not reasonably be expected to be aware, the officer must issue a NOID.[23]

2. Not Inadmissible Based on Public Charge Ground

If, after reviewing the application for adjustment of status and supporting evidence, the officer finds that the applicant is not likely to at any time become primarily dependent on the government for subsistence based on the consideration of the totality of applicant's circumstances, then the officer should determine that the applicant is not inadmissible based on the public charge ground. The officer should continue with the adjudication.

3. Inadmissible Based on Public Charge Ground

If, after reviewing the application for adjustment of status and supporting evidence, the officer finds that the applicant is likely at any time to become primarily dependent on the government for subsistence, then the officer should determine that the applicant is inadmissible under the public charge ground.

In this case, the officer should determine whether the applicant may be eligible to apply for a waiver or whether to offer the applicant the opportunity to post a public charge bond.[24] If the applicant is ineligible to apply for a waiver and USCIS has decided not to offer the applicant an opportunity to post a public charge bond, then the applicant is inadmissible under the public charge ground and therefore, ineligible for adjustment of status and the officer either issues a NOID or denies the benefit request in accordance with USCIS policy.[25]

Waiver

If the applicant is eligible to apply for a waiver, the officer should inform the applicant through the issuance of an RFE or NOID in accordance with USCIS policy.[26] If the applicant submits a waiver and the waiver is approved, the applicant is no longer inadmissible under the public charge ground, and the officer should continue with the adjudication of the adjustment of status application, in accordance with the guidance.

Bond

If an applicant for adjustment of status is inadmissible based on the public charge ground, and USCIS offers, as a matter of discretion, the applicant an opportunity to post a public charge bond,[27] the officer must issue a NOID in accordance with USCIS policy.[28]

If the applicant posts the public charge bond as instructed in the NOID and USCIS accepts the bond, the officer should continue with the adjudication of the immigration benefit request, in accordance with the guidance.

Denial

USCIS officers must articulate the reasons for a finding of inadmissibility under the public charge ground based on the totality of the circumstances in the denial decision issued to the applicant.[29] Every written denial decision issued by USCIS based on the totality of the circumstances analysis must reflect consideration of each of the factors[30] in the public charge inadmissibility determination (other than an Affidavit of Support Under 213A of the INA when not required) and specifically articulate the reasons for the officer's determination.[31]

Footnotes

[^ 1] See INA 212(a)(4). See 8 CFR 212.22(b).

[^ 2] See INA 212(a)(4)(B). See Chapter 5, Statutory Minimum Factors [8 USCIS-PM G.5].

[^ 3] See 87 FR 55472, 55497 (PDF) (Sept. 9, 2022) (final rule).

[^ 4] Applying for a public benefit on one's own behalf or on behalf of another does not constitute receipt of public benefits by such alien, and approval for future receipt of a public benefit on one's own behalf or on behalf of another does not constitute receipt of public benefits. See 8 CFR 212.21(d).

[^ 5] For more information about the consideration of an alien's totality of the circumstances, see Chapter 4, Prospective Determination Based on the Totality of the Circumstances [8 USCIS-PM G.4].

[^ 6] See 8 CFR 212.21(d).

[^ 7] See 8 CFR 212.21(d). See 87 FR 55472, 55497 (PDF) (Sept. 9, 2022) (final rule).

[^ 8] See 87 FR 55472, 55566 (PDF) (Sept. 9, 2022) (final rule).

[^ 9] See 87 FR 55472, 55566 (PDF) (Sept. 9, 2022) (final rule).

[^ 10] See INA 212(a)(4)(A).

[^ 11] See 8 CFR 212.21(b).

[^ 12] See 87 FR 55472, 55524-25 (PDF) (Sept. 9, 2022).

[^ 13] See 87 FR 55472, 55538 (PDF) (Sept. 9, 2022) (final rule). This consideration is consistent with how USCIS considers long-term institutionalization for all applicants. For more information, see Chapter 7, Consideration of Current and/or Past Receipt of Public Cash Assistance for Income Maintenance or Long-term Institutionalization at Government Expense, Section C, Long-term Institutionalization at Government Expense, Subsection 1, Home and Community-Based Services [8 USCIS PM-G.7(C)(1)] and Subsection 2, Institutionalization in Violation of Federal Law [8 USCIS-PM G.7(C)(2)].

[^ 14] See 87 FR 55472, 55524-25 (PDF) (Sept. 9, 2022).

[^ 15] See INA 212(a)(4)(A).

[^ 16] The total number of active-duty service members is publicly available in the form of a “strength summary” on the U.S. Department of War (DOW)’s Defense Manpower Data Center’s DOW Personnel, Workforce Reports & Publications webpage. USCIS does not consider the receipt of SNAP benefits, which are sometimes utilized by service members and their families, in the public charge inadmissibility determination. Additionally, aliens must generally be lawful permanent residents (LPRs) in order to join the U.S. military and LPRs are only subject to the public charge ground of inadmissibility in limited circumstances. See the USA.gov Join the Military webpage. However, under the Military Accessions Vital to National Interest (MAVNI) program, certain aliens who were asylees, refugees, temporary protected status beneficiaries, deferred action beneficiaries, or nonimmigrants in certain categories could enlist. The then-U.S. Department of Defense ceased recruiting service members through the MAVNI program in 2016. See Chapter 3, Applicability, Section A, Applicants for Admission, Subsection 3, Certain Lawful Permanent Residents Returning to the United States [8 USCIS-PM G.3(A)(3)].

[^ 17] For a list of those exempted from the public charge ground of inadmissibility, see 8 CFR 212.23 and Chapter 3, Applicability [8 USCIS-PM G.3].

[^ 18] See 87 FR 55472, 55563 (PDF) (Sept. 9, 2022).

[^ 19] See INA 212(a)(4).

[^ 20] Self-petitioners under the Violence Against Women Act (VAWA) must request an exemption from the Form I-864 requirement when filing their Application to Register Permanent Residence or Adjust Status (Form I-485) but are not subject to the public charge inadmissibility ground. See INA 212(a)(4)(E)(i). Self-petitioning VAWA applicants (and their derivatives) are therefore not inadmissible under the public charge ground and officers do not make a public charge inadmissibility determination once they determine the applicant qualifies for the exemption.

[^ 21] Including Form I-485, Form I-864 or Form I-864EZ, and Report of Immigration Medical Examination and Vaccination Record (Form I-693). Officers may issue a Request for Evidence (RFE) to the applicant to provide them an opportunity to submit additional evidence.

[^ 22] See 8 CFR 103.2(b)(8)(i). Generally, USCIS issues written notices in the form of an RFE or NOID to request missing initial or additional evidence. However, USCIS has the discretion to deny a benefit request without issuing an RFE or NOID. See 8 CFR 103.2(b)(8)(iii). For more information, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)], and Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 9, Rendering a Decision, Section B, Denials, Subsection 1, Denials Based on Lack of Legal Basis [1 USCIS-PM E.9(B)(1)].

[^ 23] See 8 CFR 103.2(b)(16)(i). See 8 CFR 103.2(b)(8)(iv).

[^ 24] For more information, see Chapter 8, Waivers of Inadmissibility Based on Public Charge Ground [8 USCIS-PM G.8] and Chapter 10, Public Charge Bonds [8 USCIS-PM G.10].

[^ 25] See 8 CFR 103.2(b)(8)(iii). See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 26] See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 27] In accordance with 8 CFR 213.1.

[^ 28] See 8 CFR 103.2(b)(8)(iii). See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 29] See 8 CFR 212.22(c). See 8 CFR 103.3(a)(1)(i). For more information about the consideration of the totality of the circumstances, see Chapter 4, Prospective Determination Based on the Totality of the Circumstances [8 USCIS-PM G.4].

[^ 30] See 8 CFR 212.22(a).

[^ 31] See 8 CFR 212.22(c) and 8 CFR 212.22(a). For more information about the factors considered in a public charge inadmissibility determination, see Chapter 5, Statutory Minimum Factors [8 USCIS-PM G.5], Chapter 6, Affidavit of Support Under Section 213A of the INA [8 USCIS-PM G.6], and Chapter 7, Consideration of Current and/or Past Receipt of Public Cash Assistance for Income Maintenance or Long-term Institutionalization at Government Expense [8 USCIS-PM G.7].

Chapter 10 - Public Charge Bonds

If an applicant is determined to be inadmissible based on the public charge ground,[1] but is otherwise admissible, they may be admitted in the discretion of the Secretary of Homeland Security, after posting a suitable and proper bond.[2] Public charge bonds are intended to ensure “that the alien will not in the future become a public charge.”[3] Before an applicant may post a public charge bond, USCIS must invite them to do so.[4]

If USCIS decides in its discretion that the applicant may post a bond, USCIS will issue a Notice of Intent to Deny (NOID) in which it will invite the applicant to submit a bond. No public charge bonds will be accepted from adjustment of status applicants without an invitation from USCIS. In the case of visa applicants, a bond will be accepted by USCIS only if USCIS receives notification that a consular officer requires the bond.

USCIS may accept a public charge bond before the issuance of an immigrant visa upon the receipt of a request directly from a United States consular officer or upon the presentation by an interested person of a notification from the consular officer requiring the bond.[5]

A public charge bond is a type of immigration bond.[6] A bond, including a public charge bond, is a contract between the United States (the obligee) and a natural person or a company (the obligor) who pledges a sum of money to guarantee a set of conditions imposed by the U.S. government concerning the alien (also called the principal).[7]

In the case of the public charge bond, the obligor pledges a sum of money to guarantee that the applicant will not become a public charge, as defined in the statute.[8] The purpose of a public charge bond is to act as "security for performance and fulfillment of the financial obligations of a bonded alien to the U.S. government."[9]

Public charge bonds are intended to hold the United States and all states, territories, counties, towns, municipalities, and districts harmless against aliens becoming public charges.[10] A public charge bond is issued on the condition that the alien does not become a public charge after the bond is issued.

If the U.S. government invites the alien to post a public charge bond, and the alien posts the bond in the amount specified by USCIS and complies with all other requirements as provided in the form and form instructions, USCIS accepts the public charge bond and adjusts the applicant's status to that of a lawful permanent resident (LPR) despite the alien's inadmissibility.

A. Background

Historically, bond provisions started with states requiring certain amounts of money to be posted as assurance that an alien would not become a public charge.[11] Beginning in 1893, immigration inspectors served on boards of special inquiry that reviewed exclusion cases of aliens who were likely to become public charges because they lacked funds or relatives or friends who could provide support.[12] In these cases, the board of special inquiry usually admitted the alien if someone could post bond or one of the immigrant aid societies would accept responsibility for the alien.

Bond provisions were codified in federal immigration laws in 1903.[13] The present language of INA 213 has been in the law without significant variation since 1907.[14] Under Section 21 of the Immigration Act of 1917, an immigration officer could admit an alien if a suitable bond was posted.[15] Regulations implementing the public charge bond were promulgated in 1964 and 1966,[16] and are currently found at 8 CFR 103.6 and 8 CFR 213.1. In 1970, Congress amended INA 213 to permit the posting of cash received by the U.S. Department of the Treasury (Treasury) and to eliminate specific references to communicable diseases of public health significance.[17]

With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996, Congress amended the section by adding a parenthetical that clarified that a bond may be requested in addition to, and not in lieu of, the Affidavit of Support Under Section 213A of the INA (Form I-864) and the deeming requirement under INA 213A.[18]

The 1999 Interim Field Guidance explained the IIRIRA changes to the public charge bond statute and noted that officers can offer public charge bonds as they had done in the past, but did not detail procedures for public charge bonds.[19]

The 2022 Final Rule added streamlined provisions to clarify acceptance, forms, and amount of USCIS public charge bonds, as well as cancellation of bonds.[20]

B. Type of Bonds

Public charge bonds may generally be posted as:[21]

- A cash bond – This type of bond is posted as cash equivalent as specified by USCIS;[22] or
- A surety bond – This type of bond is posted through a surety company certified by the Treasury.[23]

Regardless of the type of public charge bond, the bond must be posted with USCIS by submitting a Public Charge Bond (Form I-945) in accordance with its instructions.[24]

Cash Bonds

A cash bond is secured by a deposit of the full face value of the bond. It can be posted by a company or a natural person. If an applicant is given the opportunity to post a public charge bond, the bond should be paid in accordance with the Form I-945 instructions.

Once USCIS receives the funds, the money is held in a U.S. Treasury account until it is either forfeited due to breach or the bond is canceled. Funds used to secure a bond accrue interest at the rate set by the Treasury on the date the funds are received.[25]

Surety Bonds

A surety bond is a bond that is submitted on the alien's behalf by a company, which guarantees the payment of a certain amount of money if the alien fails to comply with the conditions set by the government as part of the bond. In the case of a surety bond, no cash is exchanged as part of the bond contract; only if and when the alien breaches the conditions of the bond will the surety company pay the promised amount of money to the government.

Before a surety company can do business with any government entity, it must be certified by the Treasury.[26] All certified companies are listed in a document entitled Circular 570.[27] USCIS only accepts surety bonds from companies certified by the Treasury to post bonds.[28]

A surety company can execute a bond on its own or it can do so through authorized agents.[29] To establish that an agent is an authorized agent who may act on behalf of the surety company, the agent must provide evidence of the authorization through a power of attorney that must comply with the state laws governing the jurisdiction in which it is executed.

This power of attorney is not the same as the Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28). Therefore, when submitting a public charge bond on behalf of a certified surety company, the agent must attach either an original power of attorney, or a true copy (as defined under applicable state law), to Form I-945.

If the agent[30] also seeks to act in the capacity of an attorney or accredited representative of the surety company, the agent must also submit Form G-28.[31]

If the surety company posts bonds through an agent, the agent becomes a co-obligor. This means that the agent is jointly and severally liable for the bond amount. If the alien breaches the condition of the bond by receiving public benefits above the threshold, either the surety company or the agent or both can be held liable for and up to the amount of the bond.

Example

Immigration Bonds, Inc. provides public charge bond services on behalf of Bank B, a Treasury-certified surety company. When submitting a public charge bond, Immigration Bonds, Inc. must submit Form I-945 and an original or a true copy (as defined under applicable state law) of the power of attorney that complies with the state laws governing the jurisdiction in which the power of attorney was executed. The power of attorney demonstrates that Immigration Bonds, Inc. is authorized to submit the bond on behalf of Bank B.

By completing the Form I-945, the agent must sign as a co-obligor on the bond. If Immigration Bonds, Inc. also acts as Bank B's attorney or accredited representative, Immigration Bonds, Inc., would also have to submit a properly completed Form G-28. If the public charge bond is accepted, then Immigration Bonds, Inc. and Bank B become co-obligors on the

public charge bond.

If the public charge bond is breached because the alien does not comply with the bond conditions, the U.S. government may collect from either Immigration Bonds, Inc. or Bank B or both to obtain the full face value of the public charge bond.

The following table illustrates the differences between the public charge cash and surety bonds.

Differences Between Cash and Surety Bonds

	Cash Bond	Surety Bond
Who can post it?	• Natural person, including the alien; or • Company or other entity	• Certified surety company; or • The certified surety company's authorized agent
The bond is posted by submitting what documents?	• Form I-945, completed in accordance with the form instructions; • Payment submitted according to the form's instructions; and • Form G-28, if necessary	• Form I-945, completed in accordance with the form instructions; • If submitted by an authorized agent of an acceptable surety company: power of attorney complying with state laws of governing jurisdiction in which the power of attorney was executed; and • Form G-28, if the agent is also acting in the capacity of an attorney or accredited representative
Is a payment submitted with the bond?	• Yes, payment is submitted in accordance with Form I-945's instructions	• No, no payment accompanies the bond submission
Can the bond have a co-obligor?	• No	• Yes, if the bond is submitted by an authorized agent of an acceptable surety company, the authorized agent becomes a co-obligor

C. Bond Amount

A public charge bond must be at least $1,000.[32] However, USCIS determines the appropriate bond amount for each applicant on a case-by-case basis.

D. Bond Duration

USCIS only accepts public charge bonds of unlimited duration. This means that the bond will not expire, but instead remains in effect until one of the following events occurs:

- USCIS approves a substitute bond that replaces the bond originally posted;[33]
- USCIS cancels the bond;[34] or
- USCIS determines that the bond is breached.[35]

E. Bond Stages

The decision to allow an applicant who is inadmissible only on the public charge ground to submit a public charge bond is within DHS's discretion. The posting of a public charge bond by an applicant who is found to be inadmissible only on account of the public charge ground authorizes USCIS, upon accepting the bond, to adjust the status of the applicant to that of an LPR. Before posting a public charge bond, USCIS must invite the alien to do so.[36] No public charge bonds will be accepted without an invitation from USCIS.

The public charge bond is posted on the condition that the applicant does not become a public charge after adjusting status.[37] If the applicant does not maintain all conditions of the public charge bond, the bond is breached, and the U.S. government will demand payment on the bond.

If the applicant does not become a public charge while the bond is in effect, then USCIS will cancel the bond upon the request from either the obligor or agent or co-obligor (the one who posted the bond), or the applicant.[38]

The following table summarizes the various stages of a public charge bond.

Public Charge Bond Stages

Stage	For More Information
Posting and acceptance of a public charge bond	Chapter 11, Public Charge Bonds: Posting and Accepting Bonds [8 USCIS-PM G.11]
Maintenance of a public charge bond, including substitution	Chapter 12, Public Charge Bonds: Maintaining, Substituting, and Canceling Bonds, Section A, Maintaining Bonds [8 USCIS-PM G.12(A)] Chapter 12, Public Charge Bonds: Maintaining, Substituting, and Canceling Bonds, Section B, Substituting a Bond [8 USCIS-PM G.12(B)]
Breach of the public charge bond	Chapter 12, Public Charge Bonds: Maintaining, Substituting, and Canceling Bonds, Section C, Breach of Bond [8 USCIS-PM G.12(C)]
Cancellation of the public charge bond	Chapter 12, Public Charge Bonds: Maintaining, Substituting, and Canceling Bonds, Section D, Canceling a Bond [8 USCIS-PM G.12(D)]

Footnotes

[^ 1] See INA 212(a)(4).

[^ 2] See INA 213. See 8 CFR 103.6 and 8 CFR 213.1.

[^ 3] See *Matter of Viado (PDF)*, 19 I&N Dec. 252, 253 (BIA 1985).

[^ 4] See 8 CFR 213.1(a).

[^ 5] See 8 CFR 213.1(b).

[^ 6] There are many types of immigration bonds prescribed in the Immigration and Nationality Act (INA). Most immigration bonds are currently administered by U.S. Immigration and Customs Enforcement (ICE), and not USCIS. For example, ICE administers the voluntary departure bonds, delivery bonds, and order of supervision bonds. For more information on other immigration bonds, contact ICE.

[^ 7] See *Matter of Allied Fid. Ins. Co. (PDF)*, 19 I&N Dec. 124, 125-26 (BIA 1984) (discussing the contractual nature of delivery bonds submitted under 8 CFR 103.6).

[^ 8] See INA 212(a)(4).

[^ 9] See Public Charge Bond (Form I-945) instructions.

[^ 10] See INA 213. See *Matter of Viado* (PDF), 19 I&N Dec. 252 (BIA 1985).

[^ 11] See *Mayor, Aldermen and Commonality of City of N.Y. v. Miln*, 36 U.S. 102 (1837) (upholding a New York statute that required vessel captains to provide certain biographical information about every passenger on the ship and further permitting the mayor to require the captain to provide a surety of not more than $300 for each alien passenger to indemnify and hold harmless the government from all expenses incurred to financially support the alien and the alien's children).

[^ 12] See Immigration Act of 1892, Pub. L. 51-551 (PDF), 26 Stat. 1084 (March 3, 1891), which created the Office of the Superintendent of Immigration within the U.S. Department of the Treasury. The Superintendent oversaw a new corps of U.S. immigration inspectors stationed at the country's principal ports of entry. See the USCIS Origins of Federal Immigration Service webpage.

[^ 13] See Immigration Act of 1903, Pub. L. 57-162 (PDF), 32 Stat. 1213 (March 3, 1903).

[^ 14] See Section 26 of the Act of February 20, 1907, Pub. L. 59-96 (PDF), 34 Stat. 898, 907.

[^ 15] See Pub. L. 64-301 (PDF), 39 Stat. 874, 876 (February 5, 1917).

[^ 16] See 29 FR 10579 (PDF) (July 30, 1964) and 31 FR 11713 (PDF) (Sept. 7, 1966).

[^ 17] See Immigration and Nationality Act Amendments of 1970, Pub. L. 91-313 (PDF), 84 Stat. 413 (July 10, 1970). See 116 Cong. Rec. S 9957 (daily ed. June 26, 1970).

[^ 18] See Section 564(f) of Division C of Pub. L. 104-208 (PDF), 110 Stat. 3009, 3009-684 (September 30, 1996). The Examinations Handbook included guidance on public charge bond processes and policies in Part VI, at VI-88 through VI-98 (October 1, 1988). After legacy Immigration and Naturalization Service (INS) retired the Examinations Handbook, INS's Operating Instructions provided guidance on the topic at Section 103.6 and 213.1 (November 1997). In 1998, INS removed the Operating Instructions and transferred the parts relating to immigration bonds to the Inspector's Field Manual, Chapter 45. Neither INS nor USCIS appear to have issued new guidance on the topic since that time. With the creation of the Adjudicator's Field Manual (AFM), USCIS incorporated existing public charge bond guidance into Chapter 61.1, but given the affidavit of support, the authority has rarely been exercised since the passage of IIRIRA.

[^ 19] See 64 FR 28689 (PDF) (May 26, 1999).

[^ 20] See 87 FR 55472 (PDF)(Sept. 9, 2022) (final rule). See 8 CFR 103.6 and 8 CFR 213.1.

[^ 21] See 8 CFR 103.6.

[^ 22] See 8 CFR 213.1.

[^ 23] See 8 CFR 103.6.

[^ 24] See 8 CFR 103.2(a)(1).

[^ 25] See 8 CFR 293.1.

[^ 26] See 31 U.S.C. 9304-9308. As part of the certification process, the Treasury ascertains the company's credit worthiness.

[^ 27] Circular 570 is available at the Treasury's Listing of Certified Companies webpage.

[^ 28] The Treasury certifies companies only after having evaluated a surety company's qualifications to underwrite federal bonds, including whether those sureties meet the specified corporate and financial standards. Under 31 U.S.C. 9305(b)(3), a surety (or the obligor) must be able to carry out its contracts and must comply with statutory requirements, including prompt payment of demands arising from an administratively final determination that the bond has been breached.

[^ 29] However, a surety bond cannot be posted by a person who is not an authorized agent for a certified company. For example, if an alien is offered the opportunity to post a public charge bond, the alien cannot submit a surety bond on their own behalf.

[^ 30] An agent or co-obligor may also act through their authorized representative, as defined in 8 CFR 1.2 and 8 CFR 292. Such a representative must submit Form G-28 on behalf of the agent or co-obligor.

[^ 31] If the Form G-28 is missing, but should have been submitted, USCIS should request the Form G-28 before proceeding.

[^ 32] See 8 CFR 213.1(c).

[^ 33] For more information on bond substitution, see Chapter 12, Public Charge Bonds: Maintaining, Substituting, and Canceling Bonds, Section B, Substituting a Bond [8 USCIS-PM G.12(B)].

[^ 34] For more information on bond cancellation, see Chapter 12, Public Charge Bonds: Maintaining, Substituting, and Canceling Bonds, Section D, Canceling a Bond [8 USCIS-PM G.12(D)].

[^ 35] For more information on bond breach, see Chapter 12, Public Charge Bonds: Maintaining, Substituting, and Canceling Bonds, Section C, Breach of Bond [8 USCIS-PM G.12(C)].

[^ 36] See 8 CFR 213.1(a).

[^ 37] See INA 213.

[^ 38] See INA 213.

Chapter 11 - Public Charge Bonds: Posting and Accepting Bonds

A. Permission to Post Bond

A public charge bond may only be submitted by the applicant or on the applicant's behalf after USCIS notifies the applicant and the applicant's representative (if any) that a public charge bond may be submitted. USCIS does not accept requests to submit a public charge bond or unsolicited public charge bonds that are submitted with an Application to Register Permanent Residence or Adjust Status (Form I-485) or while the application is pending.

Because public charge bonds are only made available in USCIS' discretion[1] to applicants inadmissible under the public charge ground,[2] the officer should adjudicate all aspects of the adjustment of status application before USCIS will consider whether the applicant should be offered the possibility to post a public charge bond.

B. USCIS Discretion to Offer a Bond

Providing the applicant with the opportunity to post a public charge bond is wholly within the discretion of the Secretary of Homeland Security. USCIS, therefore, determines whether to provide an adjustment of status applicant with the opportunity to post a public charge bond on a case-by-case basis and based on the facts of each individual case.[3]

USCIS views bonds as an effective way to provide a safeguard to hold public benefit agencies harmless in the event that the applicant receives public cash assistance for income maintenance or long-term institutionalization at government expense. USCIS does not offer the opportunity to post a public charge bond if the adjustment application would be denied on any other basis, including discretionary grounds.

Determining Public Charge Bond Amount

The purpose of the public charge bond is to hold the U.S. government harmless if an alien becomes a public charge after adjusting to lawful permanent resident (LPR) status while the bond is in effect.

A public charge bond must be at least $1,000 and in such an amount that it will hold harmless[4] public benefit agencies who are likely to provide the applicant with public cash assistance for income maintenance or long-term institutionalization during the period in which the bond is in effect.[5]

However, USCIS determines the appropriate bond amount for each applicant on a case-by-case basis. USCIS considers the same factors listed in 8 CFR 212.22(a) when making a determination of the bond amount. The stronger the likelihood that the applicant will become a public charge (in the opinion of USCIS when considering these factors), the higher the bond amount.

The same factors considered as part of the public charge inadmissibility determination that rendered the applicant more likely than not to become a public charge at any time in the future should guide the determination of the public charge bond amount.

C. Requesting a Bond

If USCIS determines that giving the adjustment of status applicant the opportunity to submit a public charge bond is warranted, as a matter of discretion,[6] USCIS will request the submission of the Public Charge Bond (Form I-945) by issuing a Notice of Intent to Deny (NOID). The NOID should discuss, at a minimum, all of the following items:

- That the alien has been found inadmissible on the public charge ground and the reason(s) why;
- That USCIS decided to favorably exercise its discretion to allow the alien to have a public charge bond submitted, which would permit, if accepted, the alien to adjust status to that of an LPR;
- The public charge bond amount;
- That the bond must be posted by submitting Form I-945 completed in accordance with the form's instructions;
- The due date, that is, by when Form I-945 must be submitted to (postmark date) USCIS;
- The consequences for failure to respond to the notice and for the failure to submit Form I-945, in accordance with the form's instructions. In particular, the NOID should specify that the public charge bond will be rejected or deemed insufficient, and that the adjustment of status will be denied, if the bond is not properly submitted in accordance with the instructions; and
- Any additional information required to properly post the bond.

D. Assessing the Sufficiency of a Submitted Public Charge Bond

Once the public charge bond is submitted, USCIS should determine whether the bond was properly completed as outlined in the form's instructions and the NOID, and that the appropriate bond amount has been paid. The bond is not effective until USCIS accepts the bond.

A public charge bond is a contract between the U.S. government (USCIS) and the obligor. A contract is generally not effective until both parties accept the contract. USCIS accepts a bond when the designated USCIS authority signs the public charge bond on behalf of the U.S. government.[7]

In general, before a public charge bond can be endorsed with the signature of the authorized designated authority, USCIS must ensure that the public charge bond meets the regulatory requirements,[8] is submitted in accordance with instructions outlined in the form's instructions and the NOID, and that the appropriate bond amount has been paid. Otherwise, the bond

may be rejected upon submission or ultimately deemed insufficient.

Additionally, the conditions of the public charge bond are outlined in Form I-945 and in the NOID issued by USCIS. The obligor submitting the Form I-945 may not alter these terms in any way. USCIS does not accept a public charge bond as sufficient and acceptable if:

- The obligor or alien submits the Form I-945 with an attachment or rider that contains additional conditions or otherwise alters the terms of the public charge bond;[9]
- The obligor physically alters the terms contained on Form I-945;[10] or
- The obligor submits the bond on a contract other than Form I-945.[11]

1. Accepting the Bond

If USCIS determines that the public charge bond meets the regulatory requirements, the requirements outlined in the form's instructions, and in the NOID, USCIS may forward the public charge bond documentation to the designated USCIS authority for signature and acceptance of the public charge bond. Once the bond is signed and accepted, USCIS must issue a receipt.[12]

2. Issuing a Receipt for Accepted Bonds

Once the bond is signed by the designated USCIS authority and accepted, the obligor, the authorized agent (in the case of a surety bond), any representative, and the alien and the alien's representative, if any, are notified that the bond has been accepted. The officer should also provide a receipt to the obligor and a copy of the receipt to the applicant and their representative (if any).

Because USCIS accepted the public charge bond, the officer adjudicating the adjustment of status application should proceed with the final adjudication of the adjustment. If the applicant is otherwise eligible for adjustment of status at the time the public charge bond is accepted by USCIS, then the adjustment of status application may be approved.[13]

3. Bond Not Accepted

If the public charge bond does not meet the regulatory requirements, the requirements outlined in the form's instructions, or in the NOID, USCIS cannot accept the public charge bond and denies the adjustment of status application. The denial decision will include a discussion of how the bond did not meet the regulatory requirements.

Footnotes

[^ 1] See INA 213.

[^ 2] See INA 213. See 8 CFR 213.1.

[^ 3] See INA 213. See 8 CFR 213.1.

[^ 4] By "hold harmless," USCIS means that the bond amount should be set based on the value of the public benefits likely to be received by the applicant.

[^ 5] See 8 CFR 213.1(c). See INA 213.

[^ 6] To perform a discretionary analysis, USCIS weighs all positive factors present in a particular case against any negative factors in the totality of the circumstances. Some examples of discretionary considerations include: close family ties in the United States, community standing, length of lawful residence in the United States, evidence of respect for law and order, and violations of immigration law. Additionally, if an applicant is currently receiving public cash assistance for income maintenance or long-term institutionalization at government expense at the time of the public charge inadmissibility determination and indicates that they intend to continue receiving such benefits in the foreseeable future, USCIS will decline to offer the opportunity to submit a public charge bond as a matter of discretion. For more information on the use of discretion in adjudications, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis [1 USCIS-PM E.8].

[^ 7] Officers tasked with evaluating the public charge bond should consult with their supervisory chain to determine to whom to forward a public charge bond so that it can be signed by the designated USCIS authority.

[^ 8] See 8 CFR 213.1.

[^ 9] This is the case even if the obligor generally agrees with the Form I-945 terms but suggests that the contract cover additional conditions. USCIS cannot accept a bond under conditions other than those outlined in Form I-945 and the NOID.

[^ 10] For example, the obligor may not strike any of the text on Form I-945 or the obligor may not add any text in writing to the Form I-945. In particular, the obligor may not use the overflow section in Form I-945 to add terms or alter the obligation imposed with Form I-945.

[^ 11] This is the case even if the document submitted by the obligor contains the same text as Form I-945 and the terms as outlined in the NOID but are on a document other than the Form I-945.

[^ 12] See Subsection 1, Accepting the Bond [8 USCIS-PM G.11(E)(1)].

[^ 13] For more information about adjustment of status, please see Volume 7, Adjustment of Status [7 USCIS-PM].

Chapter 12 - Public Charge Bonds: Maintaining, Substituting, and Canceling Bonds

A. Maintaining Bonds

Once an alien has adjusted their status to that of a lawful permanent resident (LPR), USCIS must ensure that the bond continues to be enforceable during the bond's validity. Additionally, an obligor, agent or co-obligor, or the alien may experience a change of address, or the obligor or the alien may wish to substitute the bond.

USCIS will send a copy of any communication with the obligor, the obligor's representative, if any, the agent or co-obligor, and the agent or co-obligor's representative, if any, to the alien, and the alien's representative, if any.[1] For that reason, any communication relating to the review of the bond should ordinarily be in writing.

If the officer has to communicate with any of the parties involved in the bond orally, USCIS generally transcribes the communication, and sends a copy of the transcribed communication to all parties involved. USCIS also retains a copy of the communication in the alien's file.

B. Substituting a Bond

An alien or an obligor may have an interest in having the bond substituted at any time. For example, an alien may have found a different obligor who provides the alien better financial terms and conditions for purposes of a public charge bond submission. Another example would be if the obligor would like to be released from the public charge bond obligation and therefore, asks the alien to seek a new obligor.

Acceptance of the Substitute Bond

A public charge bond on file with USCIS may be substituted. A substitute bond may either be submitted by the original obligor or a new obligor on behalf of the alien. A substitute bond is submitted on Public Charge Bond (Form I-945) and completed in accordance with the form's instructions.[2]

When USCIS is reviewing the sufficiency of the substitute bond, USCIS ensures that the following requirements are met before presenting the public charge bond to the designated USCIS authority for signature and acceptance of the bond:

- The bond must meet all of the requirements applicable to the initial bond; and
- The bond must cover all liabilities that the initial obligor incurred, including any breach of the bond conditions, before USCIS accepts the substitute bond. The reason for this requirement is that USCIS may not learn of a breach until after the expiration or cancellation of the bond previously submitted to USCIS. Form I-945 includes this requirement as a term of the condition. When USCIS is verifying the sufficiency of the substitute public charge bond, USCIS must ensure that no text on the Form I-945 has been altered before USCIS accepts the form by having it signed by the designated USCIS authority.

In addition, USCIS follows the steps outlined in this part,[3] addressing the acceptance of a public charge bond when reviewing the substitute public charge bond for sufficiency.

If USCIS determines that the substitute bond is sufficient, the officer should forward the public charge bond for acceptance by the designated USCIS authority for signature. The substitute bond is effective on the day it is signed by the designated USCIS authority. The officer should proceed with issuing the receipt as outlined in this part.[4]

As part of the acceptance of the new public charge bond, USCIS cancels the bond being substituted, releases any prior obligors from liability, and accepts the substitute bond. A copy of the communication must be sent to all parties involved. If the bond that is returned to the obligor was a cash bond, USCIS must return the original bond amount and any interest accrued to the obligor of the bond being substituted.

If the substitute bond submitted is insufficient, USCIS generally notifies the obligor of the substitute bond so that the obligor may correct the deficiency or deficiencies within the timeframe stipulated in USCIS' notice. This notice should not only be sent to the new obligor, but all parties involved, including the obligor and agent or co-obligor, if any, on file (the bond to be substituted), the agent or co-obligor of the substitute bond, the alien, and any representative of any of the parties involved. If the deficiency is not corrected within the timeframe specified, the bond currently on file remains in effect.

C. Breach of Bond

A condition of the bond is that the alien not receive public benefits[5] in the form of either public cash assistance for income maintenance or long-term institutionalization at government expense after the alien has adjusted their status to that of a LPR and until USCIS cancels the bond.[6] A bond may be breached for non-compliance of any condition imposed on the public charge bond.[7]

1. Investigation

USCIS may learn of a potential bond breach from various sources. For example, USCIS may learn of a potential bond breach from the alien requesting that the public charge bond be canceled, when indicating as part of the cancellation request, that they have received public benefits. Regardless of the source of the information, USCIS investigates the allegation of the public charge bond breach.

Handling Information Prohibited from Disclosure to the Obligor

When investigating the information received about public benefits receipt, USCIS is required to send all communications relating to the bond to all parties involved, including the obligor, the agent or co-obligor, and all parties' representatives, if any. Before sending any communication regarding the bond breach, USCIS consults the Office of the Chief Counsel (OCC) to determine whether any information USCIS has would be protected by law from the disclosure to the obligor.

If the information may not be disclosed by law, USCIS may not address it in the communication and use it for purposes of the public charge breach determination. Information that is not prohibited from disclosure should be included in the communication to all parties.

2. Adjudication

A bond breach exists because the alien did not comply with the conditions of the bond; however, USCIS must declare the bond breached by notifying the obligor. Before the bond can be declared breached, USCIS must determine whether the information supports a finding that any conditions imposed by the bond were breached.

If USCIS finds that there is insufficient information to determine whether a breach occurred, USCIS should request additional information from the alien or the obligor. However, if the evidence USCIS possesses supports a finding of a breach, then USCIS should inform the obligor and an agent or co-obligor of USCIS' intention to declare the bond breached by issuing a Notice of Intent to Declare the Public Charge Bond Breached. The notice must, at a minimum, comply with the following guidelines:

- Be sufficiently specific to give the obligor or the agent or co-obligor the opportunity to respond and submit rebuttal evidence;
- Include all documentation received that supports the breach determination and is by law permitted to be disclosed to the obligor or agent or co-obligor. Any information that is prohibited, by law, from being disclosed should be redacted and may not be used to support the bond breach. USCIS should consult OCC before sending the notice to avoid inadvertent disclosure; and
- Include a date by when the obligor must respond and submit rebuttal evidence.

USCIS must also send a copy of any notification to the obligor or co-obligor regarding the breach to the alien and the alien's representative, if any.

3. Determination

After receiving the obligor's response to the Notice of Intent to Declare the Public Charge Bond Breached, USCIS determines whether the obligor's response and any evidence submitted to rebut the initial breach determination is sufficient to overcome USCIS' initial determination that the bond was breached.

If the obligor or agent or co-obligor has not provided sufficient evidence to rebut USCIS' determination that the public charge bond was breached or if the obligor did not respond by the date required in the Notice of Intent to Declare the Public Charge Bond Breached, USCIS declares the bond breached, and informs the obligor and agent or co-obligor, if any, of the right to appeal the bond breach determination. USCIS must provide a copy of the determination to all parties involved in the bond.

If the information reveals that the alien has not breached the public charge bond conditions, the public charge bond remains in place. USCIS must provide a copy of the determination to all parties involved of in the bond.

4. Appeal of Breach Determination

An obligor[8] may appeal a breach determination to USCIS' Administrative Appeals Office (AAO) by filing a Notice of Appeal or Motion (Form I-290B) together with the appropriate fee and required evidence.[9] If the obligor fails to appeal the bond breach determination within the requisite appeal period, or if the appeal is filed untimely, the bond breach determination becomes administratively final unless a motion is granted to reopen or reconsider the proceedings, if permitted under the regulations.

If the obligor appeals the bond breach determination in a timely fashion, USCIS reviews the decision before the appeal is forwarded to the AAO.[10] If an appeal is warranted, USCIS may treat the appeal as a motion and then take favorable action, which would resolve the appeal. USCIS may reopen a proceeding or reconsider a decision on their own motion.[11]

If the officer is not inclined to take a favorable action, the appeal should be forwarded to the AAO for a decision on the obligor's appeal.

5. Collecting Bond Amount

An administratively final determination that a bond has been breached creates a claim in favor of the United States. The claim may not be released or discharged by an immigration officer.

Cash Bonds

In a cash bond, the actual face value of the bond is deposited with USCIS to be held in case of a bond breach. Upon an administratively final decision that the bond has been breached, the money that was deposited for purposes of the bond becomes the means to satisfy the claim that the bond breach created in favor of the U.S. government. At that time, the entire bond amount is forfeited by the obligor. However, USCIS must return the interest accrued on the deposited amount. After all business is concluded, the obligor is released from the public charge bond.

Surety Bonds

In a surety bond, no cash is exchanged as part of the bond contract when the bond is posted.[12] Only if the bond is breached will the surety company be required to pay the promised amount of money to the U.S. government. A surety company (or the obligor) must carry out its contracts and comply with statutory requirements, including prompt payment of demands arising from an administratively final determination that the bond had been breached.[13]

D. Canceling a Bond

In general, a public charge bond has to remain in place until the bond can be canceled and USCIS determines that the bond has not been breached.

1. Request to Cancel

In general, until either the obligor or the alien has filed a request to cancel the bond and USCIS has favorably adjudicated it, the bond remains in effect. USCIS may, however, at its own discretion, cancel the public charge bond if USCIS determines that the alien otherwise meets the requirement for cancellation.[14]

The request to cancel the public charge bond must be submitted on a Request for Cancellation of Public Charge Bond (Form I-356). The request must be completed and submitted in accordance with the form's instructions and accompanied by the appropriate fee, if applicable.[15]

Because the form may be submitted either by the obligor or the alien, Form I-356 has several parts that must be completed either by the obligor (the person who has posted the bond) or by the obligor's authorized agent (co-obligor, for surety companies only) who posted the bond on behalf of the alien, or by the alien. If the alien is deceased, the executor of the alien's estate may complete the alien's part on behalf of the alien.

Therefore, it is possible that a cancellation request is submitted without the obligor or any agent or co-obligor, or the alien (or the alien's executor) knowing about it. In the form instructions, USCIS encourages completion of the entire form by all parties before it is submitted. However, it is possible for a request to be submitted when only partially completed, particularly when one party has requested cancellation of the bond without informing or including the other parties in the cancellation request.

Missing Information from the Alien

If the obligor (or the agent or co-obligor) submits the cancellation request but the request does not contain the information from the alien required to cancel the bond, the officer should do the following:

- Copy the request for cancellation of the public charge bond form for all parties involved;
- Send the original request received from the obligor to the alien for completion of their parts of the bond cancellation request form, including signature parts;
- Specify the date when the alien's response is due (for purposes of calculating the response due date, the officer should follow USCIS guidance on the issuance of a Request for Evidence); and
- Send a copy of the communication to the obligor and the agent or co-obligor and any representative, even though the request originated from the obligor or agent or co-obligor.

If the alien fails to respond to the communication within the timeframe stipulated, the officer should deny the request to cancel the public charge bond. This denial is without prejudice to the filing of another cancellation request.

Missing Information from Obligor

If the request to cancel the bond is submitted by the alien without involvement of the obligor, USCIS officers should evaluate the information contained in the request to cancel the bond and proceed with the cancellation adjudication. If the alien's information reveals that the bond may have been breached, the officer is required to notify the obligor through a Notice of Intent to Declare the Public Charge Bond Breached and share the information provided by the alien, to the extent permissible by law. This provides sufficient notice to the obligor of the alien's request to cancel the bond, and the opportunity to rebut any derogatory information regarding a possible bond breach.

2. Adjudicating the Request

An alien or obligor may request that USCIS cancel the public charge bond if the alien:

- Died (as evidenced by a certified copy of a death certificate, provided the immigrant did not become a public charge before death);
- Permanently departed the United States (provided the immigrant did not become a public charge before departure);
- Naturalized or otherwise obtained United States citizenship (provided the immigrant did not become a public charge before naturalization); or
- Reached their 5-year anniversary since admission or becoming an LPR. For purposes of this determination, the alien or the obligor must establish that the public charge bond has not been breached during the 5-year period preceding the alien's fifth anniversary of becoming an LPR.[16]

In addition to having to demonstrate that the above requirements are met, the obligor and the alien must demonstrate that the bond has not been breached before the cancellation of the public charge bond by USCIS.[17]

Form I-356 lists the pertinent information that the alien has to provide to establish that the bond be canceled.

If there is insufficient information to determine whether a breach occurred, or whether the cancellation requirements are met, USCIS may request additional information from the alien or the obligor.

3. Special Considerations Related to Permanent Departure

USCIS must approve the request to cancel the public charge bond if the alien has not breached the public charge bond and permanently departed the United States.[18]

An alien is considered to have permanently departed if the alien has:

- Lost or abandoned LPR status, whether involuntarily by operation of law or voluntarily; and
- Is physically outside the United States.

An alien must establish that both elements have been met before USCIS cancels the bond.

For these purposes, an alien is deemed to have involuntarily lost LPR status by operation of law only if the alien lost their status:

- In removal proceedings with the entry of a final order of removal; or
- Through rescission of adjustment of status.

If an alien loses their LPR status through operation of law, the alien would be required to provide evidence of the loss of status by submitting evidence of the official determination of loss of LPR status before USCIS can cancel the bond.

Generally, determining whether an alien has abandoned their LPR status voluntarily is fact specific and courts consider factors such as the length of an alien's absence from the United States, family and employment ties, property holdings, residence, and the alien's intent or actions.[19] Any alien may intentionally relinquish LPR status through their voluntary actions, such as by submitting a declaration of intent to abandon LPR status. Neither the Immigration and Nationality Act nor DHS regulations direct how aliens may formally inform the U.S. government of their abandoning their LPR status.

To simplify the process, USCIS created the Record of Abandonment of Lawful Permanent Resident Status (Form I-407) as a means by which an alien may formally record that they have abandoned LPR status. The purpose of the form is to create a record and to ensure that the alien acts voluntarily and willingly, and is informed of the right to a hearing before an immigration judge and has knowingly, willingly, and affirmatively waived that right.

An alien may demonstrate voluntary relinquishment of the LPR status for purposes of bond cancellation by showing proof that they submitted Form I-407 to the U.S. government from outside the United States.

4. Decision

If USCIS determines that the obligor or the alien met the burden of proof to establish that the bond has not been breached since the alien became an LPR and that the conditions for the cancellation of the bond are met, USCIS may cancel the public charge bond. The decision to cancel the bond must be sent to all parties involved. When the public charge bond is canceled, the obligor is released from liability.

USCIS must notify the obligor and all parties involved of the cancellation of the bond and retain a copy of the communication in the file. If the public charge bond has been secured by a cash deposit or a cash equivalent, USCIS must refund the cash deposit and any interest earned to the obligor along with the communication.[20]

If USCIS determines that the alien does not meet the requirements for cancellation, other than a bond breach, then USCIS issues a Notice of Intent to Deny (NOID) to the obligor and any agent or co-obligor and any representative, in order to extend the opportunity to rebut any information. The notice must include the information provided by the alien in Form I-356, unless protected by law, and any other documentation.

The officer will send a notice of the communication to the alien and the alien's representative. If the obligor's timely response to the NOID reveals that the alien does not meet the cancellation requirements then the officer should not cancel the public charge bond.

If the obligor's response cannot overcome the adverse information, then USCIS issues the decision, informing the obligor and the agent or co-obligor and any representative and the alien and the alien's executor, if any, and the alien's representative, if any, that the bond cannot be canceled and that it remains in effect. The obligor may file an appeal to challenge this determination.[21]

An obligor may only file a motion[22] after an unfavorable decision on an appeal.

If USCIS determines that the alien has breached the public charge bond, USCIS initiates bond breach proceedings.[23] As part of the notification to the obligor of USCIS' intent to declare the bond breached, the officer should explain why the bond cannot be canceled.

Footnotes

[^ 1] See Public Charge Bond (Form I-945).

[^ 2] See 8 CFR 103.2(a)(1).

[^ 3] See Chapter 11, Public Charge Bonds: Posting and Accepting Bonds [8 USCIS-PM G.11].

[^ 4] See Chapter 11, Public Charge Bonds: Posting and Accepting Bonds, Section D, Assessing the Sufficiency of a Submitted Public Charge Bond, Subsection 2, Issuing a Receipt for Accepted Bonds [8 USCIS-PM G.11(D)(2)].

[^ 5] See 8 CFR 212.21(b)-(d).

[^ 6] See 8 CFR 103.6(c)(1).

[^ 7] See INA 213.

[^ 8] The obligor includes the term agent or co-obligor.

[^ 9] See 8 CFR 103.3.

[^ 10] See 8 CFR 103.3(a)(2).

[^ 11] See 8 CFR 103.5(a)(5)(i).

[^ 12] See Chapter 10, Public Charge Bonds, Section B, Type of Bonds [8 USCIS-PM G.10(B)].

[^ 13] See 31 U.S.C. 9305(b)(3).

[^ 14] See 8 CFR 103.6(c)(1).

[^ 15] See 8 CFR 103.5.

[^ 16] See Public Charge Bond (Form I-945).

[^ 17] See Instructions for Request for Cancellation of Public Charge Bond (Form I-356).

[^ 18] See INA 213.

[^ 19] See *Matter of Huang (PDF)*, 19 I&N Dec. 749, 755-57 (BIA 1988) (considering the alien's absence from the United States because of her husband's work and study abroad, as well as her own employment abroad, to find that her absence was not temporary in nature and that she had abandoned her LPR status). See *Matter of Kane (PDF)*, 15 I&N Dec. 258, 265 (BIA 1975) (alien who spent 11 months per year living in her native country operating a lodging house abandoned her LPR status; her desire to retain her status, without more, was not sufficient). See *Matter of Quijencio (PDF)*, 15 I&N Dec. 95, 97-98 (BIA 1974) (alien's LPR status considered abandoned after 12-year absence). See *Matter of Castro (PDF)*, 14 I&N Dec. 492, 494 (BIA 1973) (alien who severed his ties to the United States for 6 years, moved abroad, acquired land, built a house and obtained steady employment, but made brief business trips to the United States was not a returning resident and had abandoned his status). See *Matter of Montero (PDF)*, 14 I&N Dec. 399, 400-01 (BIA 1973) (alien who returned to her native country to join her husband, children, home, employment, and financial resources without fixed intent to return within a fixed period had abandoned her LPR status). See *Khoshfahm v. Holder*, 655 F.3d 1147, 1154 (9th Cir. 2011) (alien child who was out of the country for 6 years and prevented from returning due to the father's heart condition and the events of September 11 did not abandon his LPR status).

[^ 20] See INA 293. See 8 CFR 293.1.

[^ 21] See generally 8 CFR 103.

[^ 22] See 8 CFR 103.5.

[^ 23] See Section C, Breach of Bond [8 USCIS-PM G.12(C)].

Part H - Labor Certification and Select Immigrant Qualifications

Part I - Illegal Entrants and Other Immigration Violators

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures.

See more

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures. We are working quickly to update and incorporate all of the AFM content into the USCIS Policy Manual, the agency's centralized online repository for immigration policies. Until then, we have moved any remaining AFM content to its corresponding Policy Manual Part. To the extent that a provision in the Policy Manual conflicts with remaining AFM content or Policy Memoranda, the updated information in the Policy Manual prevails. If you have questions or concerns about any discrepancies among these resources, contact PolicyFeedback@uscis.dhs.gov.

AFM Chapter 40 - Grounds of Inadmissibility under Section 212(a) of the Immigration and Nationality Act (External)

Part J - Fraud and Willful Misrepresentation

Chapter 1 - Purpose and Background

A. Purpose

To properly control movement across its borders, a government must be able to scrutinize and assess a person's identity as part of determining eligibility to enter. If an alien willfully provides incorrect information about his or her identity and intentions for entering the country, he or she has deprived the government of its right to examine the request for admission.[1]

In recognition of these principles, Congress provided a specific ground of inadmissibility to address the use of fraud or willful misrepresentation when obtaining a benefit under the Immigration and Nationality Act (INA).

There are exceptions and waivers to inadmissibility due to fraud or willful misrepresentation available to an alien under certain circumstances depending on the particular immigration benefit sought.[2]

B. Background

The 1924 Immigration Act[3] made obtaining a visa under a false name or submitting false evidence in support of a visa application a federal crime. The Board of Immigration Appeals (BIA) and the courts used this principle to find that a visa obtained by fraud was no visa at all, making the alien's admission with a fraudulent visa unlawful.[4]

Congress codified the BIA's and the courts' approach in the Immigration and Nationality Act of 1952. With former INA 212(a)(19), it created a new bar to admission for any applicant who used fraud or willful misrepresentation to gain entry into the United States or obtain a visa or other documentation.[5]

In 1986, Congress amended the bar so that an alien could be found inadmissible for using fraud or willful misrepresentation when seeking any benefit under the INA, not just entry, visas, or other documents.[6] Congress re-designated former INA 212(a)(19) as INA 212(a)(6)(C) in 1990 but did not alter the bar to admission itself.[7] Substantive changes to the inadmissibility ground did not come until 1996, when Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[8]

With the passage of IIRIRA, Congress created two separate inadmissibility grounds that remain unchanged to this day:[9]

- Fraud or willful misrepresentation made in connection with obtaining an immigration benefit;[10] and
- False claim to U.S. citizenship made on or after September 30, 1996.[11]

These two grounds differ significantly. This Part J only addresses the inadmissibility determination for fraud or willful misrepresentation made in connection with obtaining an immigration benefit. This includes, however, false claims to U.S. citizenship made prior to September 30, 1996.

Aliens who made a false claim to U.S. citizenship prior to September 30, 1996, cannot be found inadmissible under the false claim to U.S. citizenship ground of inadmissibility.[12] IIRIRA made this ground applicable only to false claims made on or after September 30, 1996.[13]

Therefore, for false claims to U.S. citizenship made before September 30, 1996, the officer must analyze the alien's inadmissibility according to the general fraud and willful misrepresentation ground of inadmissibility, as outlined in this Part J.[14]

C. Scope

This guidance addresses inadmissibility for fraud and willful misrepresentation[15] in relation to obtaining a benefit under the INA, including inadmissibility for falsely claiming U.S. citizenship before September 30, 1996.

D. Legal Authorities

- INA 212(a)(6)(C)(i) – Illegal entrants and immigration violators - misrepresentation

Footnotes

[^ 1] See *Matter of B- and P-,* 2 I&N Dec. 638, 645-46 (A.G. 1947).

[^ 2] For more on the waiver of fraud or willful misrepresentation under INA 212(i), see Volume 9, Waivers and Other Forms of Relief, Part F, Fraud and Willful Misrepresentation [9 USCIS-PM F].

[^ 3] See Sections 22(b) and 22(c) of the Immigration Act of 1924, Pub. L. 68-139 (May 26, 1924).

[^ 4] *See Matter of B- and P-,* 2 I&N Dec. 638, 640-41 (A.G. 1947), citing *McCandless v. Murphy,* 47 F.2d 1072 (3rd Cir. 1931). See *United States ex rel. Leibowitz v. Schlotfeldt,* 94 F.2d 263 (7th Cir. 1938). See *United States ex rel. Fink v. Reimer,* 96 F.2d 217 (2nd Cir. 1938).

[^ 5] Former INA 212(a)(19) made inadmissible any applicant who "seeks to procure, or has sought to procure or has procured a visa or other documentation, or seeks to enter the United States by fraud, or by willfully misrepresenting a material fact." See the Immigration and Nationality Act of 1952, Pub. L. 82-414 (PDF) (June 27, 1952).

[^ 6] Congress expanded former INA 212(a)(19) to make one inadmissible for using fraud or willful misrepresentation in relation to "a visa, other documentation, or entry into the United States or other benefit provided under this Act." See Section 6(a) of the Immigration Marriage Fraud Amendments of 1986, Pub. L. 99-639 (PDF), 100 Stat. 3537, 3543 (November 10, 1986).

[^ 7] See Section 601(a) of the Immigration Act of 1990, Pub. L. 101-649 (PDF), 104 Stat. 4978, 5067 (November 29, 1990).

[^ 8] See Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Division C of Pub. L. 104-208 (PDF) (September 30, 1996).

[^ 9] See Section 344(a) of IIRIRA, Division C of Pub. L. 104-208 (PDF), 110 Stat. 3009, 3009-637 (September 30,1996).

[^ 10] See INA 212(a)(6)(C)(i).

[^ 11] See INA 212(a)(6)(C)(ii).

[^ 12] See INA 212(a)(6)(C)(ii).

[^ 13] See Section 344(a) of IIRIRA, Division C of Pub. L. 104-208 (PDF) (September 30, 1996).

[^ 14] See INA 212(a)(6)(C)(i).

[^ 15] See INA 212(a)(6)(C)(i). Inadmissibility for falsely claiming U.S. citizenship on or after September 30, 1996 is a separate inadmissibility ground. See INA 212(a)(6)(C)(ii).

Chapter 2 - Overview of Fraud and Willful Misrepresentation

A. General

An applicant may be found inadmissible if he or she obtains a benefit under the Immigration and Nationality Act (INA) either through:

- Fraud; or
- Willful misrepresentation.

Although fraud and willful misrepresentation are distinct actions for inadmissibility purposes, they share common elements. All of the elements necessary for a finding of inadmissibility based on willful misrepresentation are also needed for a finding of inadmissibility based on fraud. However, a fraud finding requires two additional elements.

This is why an alien who is inadmissible for fraud is always also inadmissible for willful misrepresentation. However, the opposite is not necessarily true: an alien inadmissible for willful misrepresentation is not necessarily inadmissible for fraud.[1]

Additionally, misrepresentation of a material fact may lead to other adverse immigration consequences. For example, if the beneficiary commits marriage fraud, it may have adverse immigration consequences for both the petitioner and the beneficiary.

B. Willful Misrepresentation

Inadmissibility based on willful misrepresentation requires a finding that an alien willfully misrepresented a material fact.[2] For an alien to be inadmissible, the officer must find all of the following elements:

- The alien procured, or sought to procure, a benefit under U.S. immigration laws;
- The alien made a false representation;
- The false representation was willfully made;
- The false representation was material; and
- The false representation was made to a U.S. government official, generally an immigration or consular officer.[3]

If all of the above elements are present, then the alien is inadmissible for willful misrepresentation.

If the alien succeeded in obtaining the benefit under the INA, he or she would be inadmissible for having procured the benefit by willful misrepresentation. If the attempt was not successful,[4] the alien would still be inadmissible for having “sought to procure” the immigration benefit by willful misrepresentation. In each case, evidence of intent to deceive is not required.[5]

C. Fraud

Inadmissibility based on fraud requires a finding that an alien knowingly made a false representation of a material fact with the intent to deceive the other party.[6]

For an alien to be inadmissible for having procured entry, a visa, other documentation, or any other benefit under the INA by fraud, the officer must find all of the following elements:

- The alien procured, or sought to procure, a benefit under U.S. immigration laws;
- The alien made a false representation;
- The false representation was willfully made;
- The false representation was material;
- The false representation was made to a U.S. government official, generally an immigration or consular officer;[7]
- The false representation was made with the intent to deceive a U.S. government official authorized to act upon the request (generally an immigration or consular officer);[8] and
- The U.S. government official believed and acted upon the false representation by granting the benefit.[9]

If all of the above elements are present, then the alien is inadmissible for having procured an immigration benefit by fraud. Since the elements required for fraud also include the elements for willful misrepresentation, the alien is also inadmissible for willful misrepresentation.

If the alien was unsuccessful in obtaining the benefit,[10] he or she may still be inadmissible for having “sought to procure” the immigration benefit by fraud. In this case, the fraud element requiring the U.S. government official to believe and act upon the false representation is not applicable; however, intent to deceive is still a required element.

In cases of attempted fraud, it may be difficult to establish the alien’s intent to deceive because the fraud has not actually succeeded. However, establishing intent to deceive may be unnecessary; if evidence supports a finding of willful misrepresentation, which does not require intent to deceive,[11] then the alien is already considered inadmissible without any further determination of fraud.

D. Comparing Fraud and Willful Misrepresentation

In practice, the distinction between fraud and willful misrepresentation is not greatly significant because either fraud or a willful misrepresentation alone is sufficient to establish inadmissibility.

The following table shows a comparison of the elements required for each ground:

Comparing Fraud and Willful Misrepresentation

	Elements Required for a Finding of …	
Scenario	**Willful Misrepresentation**	**Fraud**
The alien procured, or sought to procure, a benefit under U.S. immigration laws.	x	x
The alien made a false representation.	x	x
The false representation was willfully made.	x	x
The false representation was material.	x	x
The false representation was made to a U.S. government official.	x	x
When making the false representation, the alien intended to deceive a U.S. government official authorized to act upon the request (generally an immigration or consular officer).	*Not Applicable*	x
The U.S. government official believed and acted upon the false representation.	*Not Applicable*	x *(Not applicable if fraud finding based on "seeking to procure" benefit)*

As the table illustrates, a fraud finding encompasses a willful misrepresentation finding. Therefore, if all the elements are present to make a finding of fraud, then the elements for making a finding of willful misrepresentation must also necessarily be present.

Example:

The officer finds that an alien obtained an immigration benefit by fraud. The alien is then inadmissible for both fraud[12] and willful misrepresentation.

Example:

The officer finds that there was no intent to deceive, but the other elements of fraud are present. The alien is not inadmissible based on fraud but is still inadmissible for willful misrepresentation.[13]

E. Overview of Admissibility Determination

A finding of willful misrepresentation or fraud requires certain determinations. If the evidence indicates that the alien may be inadmissible due to fraud or willful misrepresentation, the officer should follow the steps in the table below to determine inadmissibility:

Overview of Admissibility Determination

Step		For More Information
Step 1	Determine whether the alien procured, or sought to procure, a benefit under U.S. immigration laws.	Chapter 3, Adjudicating Inadmissibility, Section B, Procuring a Benefit under the INA [8 USCIS-PM J.3(B)]
Step 2	Determine whether the alien made a false representation.	Chapter 3, Adjudicating Inadmissibility, Section C, False Representation [8 USCIS-PM J.3(C)]
Step 3	Determine whether the false representation was willfully made.	Chapter 3, Adjudicating Inadmissibility, Section D, Willfulness [8 USCIS-PM J.3(D)]
Step 4	Determine whether the false representation was material.	Chapter 3, Adjudicating Inadmissibility, Section E, Materiality [8 USCIS-PM J.3(E)]
Step 5	Determine whether the false representation was made to a U.S. government official.	Chapter 3, Adjudicating Inadmissibility, Section F, Fraud or Willful Misrepresentation Must Be Made to a U.S. Government Official [8 USCIS-PM J.3(F)]
Step 6	Determine whether, when making the false representation, the alien intended to deceive a U.S. government official authorized to act upon request (generally an immigration or consular officer).	Chapter 3, Adjudicating Inadmissibility, Section G, Elements Only Applicable to Fraud [8 USCIS-PM J.3(G)]
Step 7	Determine whether the U.S. government official believed and acted upon the false representation.	Chapter 3, Adjudicating Inadmissibility, Section G, Elements Only Applicable to Fraud [8 USCIS-PM J.3(G)]
Step 8	Determine whether a waiver of inadmissibility is available.	Volume 9, Waivers and Other Forms of Relief[14]

When making the inadmissibility determination, the officer should keep in mind the severe nature of the penalty for fraud or willful misrepresentation. The alien will be barred from admission for the rest of his or her life unless the alien qualifies for and is granted a waiver. The officer should examine all facts and circumstances when evaluating inadmissibility for fraud or willful misrepresentation.

Footnotes

[^ 1] For more on the interplay between findings of fraud and willful misrepresentation, see Section D, Comparing Fraud and Willful Misrepresentation [8 USCIS-PM J.2(D)].

[^ 2] See INA 212(a)(6)(C)(i). For a definition of materiality, see Chapter 3, Adjudicating Inadmissibility, Section E, Materiality [8 USCIS-PM J.3(E)].

[^ 3] See *Matter of Y-G-,* 20 I&N Dec. 794, 796 (BIA 1994).

[^ 4] For example, the misrepresentation was detected and the benefit was denied.

[^ 5] See *Matter of Kai Hing Hui,* 15 I&N Dec. 288, 289-90 (BIA 1975).

[^ 6] See *Matter of Tijam,* 22 I&N Dec. 408, 424 (BIA 1998).

[^ 7] See *Matter of Y-G-,* 20 I&N Dec. 794, 796 (BIA 1994).

[^ 8] See *Matter of Tijam,* 22 I&N Dec. 408, 424 (BIA 1998).

[^ 9] See *Matter of G- G-*, 7 I&N Dec. 161 (BIA 1956).

[^ 10] For example, the fraud was detected and the benefit was denied.

[^ 11] See *Matter of Kai Hing Hui,* 15 I&N Dec. 288, 289-90 (BIA 1975).

[^ 12] See *Matter of B- and P-,* 2 I&N Dec. 638, 651 (A.G. 1947).

[^ 13] See *Matter of Kai Hing Hui,* 15 I&N Dec. 288, 290 ("We interpret the Attorney General's decision in *Matter of S- and B-C-* as one which modified *Matter of G-G-* so that the intent to deceive is no longer required before the willful misrepresentation charge comes into play.").

[^ 14] For guidance on the waiver of the fraud and willful misrepresentation inadmissibility ground under INA 212(i), see Volume 9, Waivers and Other Forms of Relief, Part F, Fraud and Willful Misrepresentation [9 USCIS-PM F].

Chapter 3 - Adjudicating Inadmissibility

A. Evidence and Burden of Proof

1. Evidence

To find an alien inadmissible for fraud or willful misrepresentation,[1] there must be at least some evidence that would permit a reasonable person to find that the alien used fraud or that he or she willfully misrepresented a material fact in an attempt to obtain a visa, other documentation, admission into the United States, or any other immigration benefit.[2]

In addition, the evidence must show that the alien made the misrepresentation to an authorized official of the U.S. government, whether in person, in writing, or through other means.[3] Examples of evidence an officer may consider include oral or written testimony, or any other documentation containing false information.

2. Burden of Proof

The burden of proof to establish admissibility during the immigration benefit-seeking process is always on the applicant. During the adjudication of the benefit, the burden never shifts to the government.[4]

If there is no evidence the applicant obtained or sought to obtain a benefit under the Immigration and Nationality Act (INA) by fraud or willful misrepresentation, USCIS should find that the applicant has met the burden of proving that he or she is not inadmissible under this ground.[5]

If there is evidence that would permit a reasonable person to conclude that the applicant may be inadmissible for fraud or willful misrepresentation, then the applicant has not successfully met the burden of proof. In these cases, USCIS considers the applicant inadmissible for fraud or willful misrepresentation, unless the applicant is able to successfully rebut the officer's inadmissibility finding.

Special issues may arise if evidence indicates that an applicant is violating, or has violated, his or her nonimmigrant status or is otherwise engaging, or has engaged, in conduct in the United States that is inconsistent with representations the applicant made to a consular or DHS officer when applying for admission, a visa, or another immigration benefit. Although conduct inconsistent with one's nonimmigrant status and prior representations does not automatically mean there is a misrepresentation, such evidence permits a reasonable person to conclude that the applicant may be inadmissible for fraud or willful misrepresentation, especially if the violation or conduct occurred shortly after the U.S. Department of State (DOS) visa interview or after admission. The officer should carefully assess the circumstances of the applicant's case.[6]

If the officer's finding of inadmissibility is based on evidence that the applicant obtained or sought to obtain a benefit under the INA through willful misrepresentation, then the applicant has the burden of establishing at least one of the following facts to rebut the finding:

- The misrepresentation was not made to procure a visa, admission, or some other benefit under the INA;
- There was no false representation;
- The false representation was not willful;
- The false representation was not material; or
- The false representation was not made to a U.S. government official.

If the officer's finding of inadmissibility is based on evidence that the applicant obtained a benefit under the INA by fraud, then the applicant has the burden of establishing at least one of the following facts to rebut the finding:

- The fraud was not made to procure a visa, admission, or some other benefit under the INA;
- There was no false representation;
- The false representation was not willful;
- The false representation was not material;
- The false representation was not made to a U.S. government official;

- The person did not intend to deceive; or
- The U.S. government official did not believe or did not act upon the false representation.

If the officer's finding of inadmissibility is based on evidence that the applicant sought to obtain a benefit under the INA by fraud, then the applicant has the burden of establishing at least one of the following facts to rebut the finding:

- The fraud was not made to procure a visa, admission, or some other benefit under the INA;
- There was no false representation;
- The false representation was not willful;
- The false representation was not material;
- The false representation was not made to a U.S. government official; or
- The person did not intend to deceive.

If the officer determines, after assessing all of the evidence, that the applicant has established at least one of the above facts, then the applicant has successfully rebutted the inadmissibility finding. The applicant has therefore met the burden of proving that he or she is not inadmissible on account of fraud or willful misrepresentation.

If the officer determines, after assessing all of the evidence, that the applicant has established none of these facts, then the applicant has not successfully rebutted the inadmissibility finding. The applicant is therefore inadmissible because he or she has not satisfied the burden of proof.[7]

Finally, if the officer finds that the evidence for and against a finding of fraud or willful misrepresentation is of equal weight, then the applicant is inadmissible due to failure to meet the burden of proof. As long as there is a reasonable evidentiary basis to conclude that an alien is inadmissible for fraud or willful misrepresentation, and the applicant has not overcome that reasonable basis with evidence, the officer should find the applicant inadmissible.

B. Procuring a Benefit under the INA

1. General

In order to be found inadmissible for fraud or willful misrepresentation, an alien must seek to procure, have sought to procure, or have procured one of the following:

- An immigrant or nonimmigrant visa;
- Other documentation;
- Admission into the United States; or
- Other benefit provided under the INA.

The fraud or willful misrepresentation must have been made to an official of the U.S. government, generally an immigration or consular officer.[8]

2. Other Documentation

"Other documentation" refers to documents required when an alien applies for admission to the United States. This includes, but is not limited to:

- Re-entry permits;
- Refugee travel documents;
- Border crossing cards; and
- U.S. passports.

Documents evidencing extension of stay are not considered entry documents.[9] Similarly, documents such as petitions and labor certification forms are documents that are presented in support of a visa application or applications for status changes. They are not, by themselves, entry documents and therefore, they are also not considered "other documentation."

However, if such documents are used in support of obtaining another benefit provided under the INA, they may be relevant to a finding of willful misrepresentation or fraud.

3. Other Benefits Provided under the INA

Any "other benefit" refers to an immigration benefit or entitlement provided for by the INA. This includes, but is not limited to:

- Requests for extension of nonimmigrant stay;[10]
- Change of nonimmigrant status;[11]
- Permission to re-enter the United States;
- Waiver of the 2-year foreign residency requirement;[12]
- Employment authorization;[13]
- Parole;[14]
- Voluntary departure;[15]
- Adjustment of status;[16]and
- Requests for stay of deportation.[17]

C. False Representation

1. General

False representation, or usually called "misrepresentation," is an assertion or manifestation that is not in accordance with the true facts. An alien may make a false representation in oral interviews, or written applications, or by submitting evidence containing false information.[18]

2. False Representation Must be Connected to Benefit

An alien is only inadmissible if he or she makes a misrepresentation in connection with his or her own immigration benefit. If an alien misrepresents a material fact in connection with another's immigration benefit, then the alien is not inadmissible for fraud or willful misrepresentation.[19] However, fraud or willful misrepresentation made in connection with another's immigration benefit may make the alien inadmissible for alien smuggling.[20]

There may be situations in which a representative or a parent makes a misrepresentation on behalf of the applicant. The question then becomes whether the applicant himself or herself willfully allowed such an action.

D. Willfulness

The alien is only inadmissible for fraud or willful misrepresentation if the false representation was willfully made.

1. Definition of Willfulness

The term "willfully" should be interpreted as "knowingly" as distinguished from accidentally, inadvertently, or in a good faith belief that the factual claims are true.[21] To find the element of willfulness, the officer must determine that the alien had knowledge of the falsity of the misrepresentation, and therefore knowingly, intentionally, and deliberately presented false material facts.[22]

When determining the "willfulness" of an alien's false representation, the officer should consider the circumstances that existed at the time the benefit was issued.[23]

USCIS petitions and applications are signed "under penalty of perjury." The alien may also be interviewed under oath. By signing or by making statements under oath, the alien therefore asserts his or her claims are truthful. If the evidence in the record subsequently shows that the claims are factually unsupported, that may indicate the applicant willfully misrepresented his or her claim(s).

2. Silence or Failure to Volunteer Information

An alien's silence or failure to volunteer information does not, in and of itself, constitute fraud or willful misrepresentation because silence itself does not establish a conscious concealment.[24] Silence or omission can, however, lead to a finding of fraud or willful misrepresentation if it is clear from the evidence that the alien consciously concealed information.

If the evidence shows that the alien was reasonably aware of the nature of the information sought and knowingly, intentionally, and deliberately concealed information from the officer, then the officer should find that the applicant consciously concealed and willfully misrepresented a material fact.

Example:

An applicant is legally married but has lived apart from his spouse for 20 years. During that time apart, the applicant lived with another person for 10 years as domestic partners until the other person died. A few years later, having been in touch with his legal spouse by letter, the applicant states in his application for admission to the United States that he is coming to join his wife.

Although the applicant did not reveal the complications in his marital status during the past 20 years, the applicant was not specifically asked any questions relating to these facts. As a matter of law, the applicant is still married to the spouse, and there is no evidence that he married the spouse to obtain an immigration benefit. Since the applicant gave reasonably accurate and correct answers, his failure to disclose his complicated marital situation did not constitute conscious concealment of facts.

Example:

During World War II, a person was captured by Germans while serving in the Russian Army and forced to serve as an armed guard at a Nazi concentration camp. The person later applies for a visa and is questioned about his present and past memberships and affiliations, including any military service. The person discloses that he had served in the Russian army but does not mention his time as a guard at the concentration camp. When pressed for more on his military service, the person continues to present only information on service in the Russian army.

Since the person provided an unreasonably narrow response to a general question, it is likely that the person was fully aware that his time at the concentration camp was pertinent to the response and information sought by the officer. When the person provided only a partial response, he concealed information knowingly, intentionally, and deliberately. The person's conscious concealment of facts, therefore, constitutes willful misrepresentation.[25]

3. Refusal to Respond to Questions

An alien's refusal to answer a question does not necessarily mean that he or she willfully made a false representation. However, refusal to answer a question during an admissibility determination could result in the officer finding that the applicant failed to establish admissibility.[26]

4. Misrepresentation Made by a Person's Agent

If the false representation is made by an applicant's attorney or agent, the applicant will be held responsible if it is established that the applicant was aware of the action taken by the representative in furtherance of his or her application. This includes oral misrepresentations made at the border by someone assisting an alien to enter illegally. Furthermore, a person cannot deny responsibility for any misrepresentation made on the advice of another unless it is established that the person lacked the capacity to exercise judgment.[27]

5. Misrepresentations by Minors (Under 18) or those who are Mentally Incompetent

The INA does not exempt an alien from inadmissibility for fraud or willful misrepresentation solely based on age or mental incapacity. The BIA has not yet addressed in any precedent decision whether a minor is shielded from this inadmissibility on account of being a minor.

Both fraud and willful misrepresentation must be intentional acts. There may be cases in which the officer finds that an alien, because of mental incompetence or young age, was incapable of independently forming an intent to defraud or misrepresent. In these cases, an alien's inability to commit intentional acts precludes a finding of inadmissibility for fraud or willful misrepresentation since the alien could not have acted "willfully."

The officer should consider all relevant factors when evaluating fraud or willful misrepresentation including the applicant's:

- Age;
- Level of education;

- Background;
- Mental capacity;
- Level of understanding;
- Ability to appreciate the difference between true and false; and
- Other relevant circumstances.

The fact that a misrepresentation occurred while the alien was under 18 years of age, in particular, is not determinative. There is no categorical rule that someone under 18 cannot, as a matter of law, make a willful misrepresentation. An alien may be able to claim, however, that, on the basis of the facts of his or her own case, he or she lacked the capacity necessary to form a willful intent to misrepresent a material fact.

If admissibility is an issue in a case, USCIS does not bear the burden of proving that the alien is inadmissible. As long as there is at least some evidence that would permit a reasonable person to find an applicant inadmissible, the applicant must establish that the inadmissibility ground does not apply. For this reason, someone who appears to have made a willful misrepresentation of a material fact while under the age of 18 would have to prove his or her lack of capacity.

This burden of proof would also apply to someone who claimed a lack of capacity based on a reason other than age, such as cognitive or other disabilities.

If the evidence, clearly and beyond doubt, shows that the alien did not have the capacity to form an intent to deceive, then the misrepresentation could not have been fraudulent. Similarly, if the evidence, clearly and beyond doubt, shows that the alien did not have the capacity to know that the information was false, then the misrepresentation could not have been willful.

In these cases, the officer should not find the applicant inadmissible for fraud or willful misrepresentation.

6. Timely Retraction

As a defense to inadmissibility for fraud or willful misrepresentation, an alien may show that he or she timely retracted or recanted the false statement. The effect of a timely retraction is that the misrepresentation is eliminated as if it had never happened.[28] If an alien timely retracts the statement, the alien is not inadmissible for fraud or willful misrepresentation.

For the retraction to be effective, it has to be voluntary and timely.[29] The applicant must correct his or her representation before being exposed by the officer or U.S. government official or before the conclusion of the proceeding during which he or she gave false testimony. A retraction can be voluntary and timely if made in response to an officer's question during which the officer gives the applicant a chance to explain or correct a potential misrepresentation.

Admitting to the false representation after USCIS has challenged the veracity of the claim is not a timely retraction.[30] For example, an applicant's recantation of the false testimony is neither voluntary nor timely if made a year later and only after it becomes apparent that the disclosure of the falsity of the statements is imminent.[31] A retraction or recantation is only timely if it is made in the same proceeding in which the alien gives the false testimony or misrepresentation.[32]

E. Materiality

1. Definition of Materiality

A false representation only renders an alien inadmissible if it is material. A "material" misrepresentation is a false representation concerning a fact that is relevant to the alien's eligibility for an immigration benefit.[33]

2. Test to Determine Materiality

The U.S. Supreme Court has developed a test to determine whether a misrepresentation is material: A concealment or a misrepresentation is material if it has a natural tendency to influence or was capable of influencing the decisions of the decision-making body.[34] The misrepresentation is only material if it led to the person gaining some advantage or benefit to which he or she may not have been entitled under the true facts.

A misrepresentation has a natural tendency to influence the officer's decision to grant the immigration benefit if:

- The alien would be inadmissible on the true facts;[35] or
- The misrepresentation tends to cut off a line of inquiry, which is relevant to the applicant's eligibility and which might have resulted in a proper determination that he or she is inadmissible.[36]

The table below provides step-by-step guidelines to assist officers to determine whether a misrepresentation is material.

Guidelines for Determining whether Misrepresentation is Material

Step	If Yes, then…	If No, then…
Step 1: Consider whether the evidence in the record supports a finding that the applicant is (or was) inadmissible on the true facts.	Misrepresentation is Material	*Proceed to Step 2*
Step 2: Consider whether misrepresentation tended to shut off a line of inquiry, which was relevant to the applicant's eligibility.	*Proceed to Step 3*	Misrepresentation is NOT Material
Step 3: If a relevant line of inquiry had been cut off, ask whether that inquiry might have resulted in a determination of ineligibility. (The applicant has the burden to show that it would not have resulted in ineligibility.)	Misrepresentation is Material	Misrepresentation is NOT Material

3. Harmless Misrepresentation

A misrepresentation that is not material because it is not relevant to an applicant's eligibility for the benefit is considered a harmless misrepresentation.[37] An applicant is not inadmissible for making a harmless misrepresentation even though the applicant misrepresented a fact. However, a harmless misrepresentation may still be taken into account when considering whether a benefit is warranted as a matter of discretion.

4. Misrepresenting Identity

A misrepresentation concerning an alien's identity is generally material because it almost always shuts off a line of inquiry that prevents the officer from determining the alien's eligibility for the benefit sought.[38] However, if the line of inquiry that is shut off is not relevant to the benefit sought and would not have resulted in the denial of the benefit sought, then the misrepresentation is harmless and does not result in inadmissibility.[39] The applicant bears the burden of proof to demonstrate that the line of inquiry that was shut off by the misrepresentation of identity is irrelevant to eligibility for the benefit sought and is therefore harmless.[40]

F. Fraud or Willful Misrepresentation Must Be Made to a U.S. Government Official

In addition to the other elements outlined above, the alien must have made the fraud or willful misrepresentation to a U.S. government official in order for such act to rise to the level of an inadmissible offense.[41] Fraud or willful misrepresentation made to a private person or entity would not make one inadmissible under this ground.[42]

G. Elements Only Applicable to Fraud

Fraud differs from willful misrepresentation in that there are generally two extra elements, in addition to the willful misrepresentation elements listed in Chapter 2(B),[43] necessary for a fraud finding:

- The willful misrepresentation was made with the intent to deceive a U.S. government official authorized to act upon the request (generally an immigration or consular officer); and
- The U.S. government official believed and acted upon the willful misrepresentation by granting the immigration benefit.[44]

Depending on whether the alien successfully procured the immigration benefit, one or both elements are needed to establish inadmissibility based on fraud.

If the alien successfully obtained the immigration benefit, the officer needs to establish both elements. If the alien was unsuccessful in obtaining the immigration benefit, he or she may still be inadmissible for "seeking to procure" the benefit by fraud. In this case, the officer only needs to establish that the alien intended to deceive a U.S. government official for the purpose of obtaining an immigration benefit to which the alien was not entitled.[45]

As stated previously, the distinction between fraud and willful misrepresentation is not of great practical importance since either fraud or a willful misrepresentation alone is sufficient to establish inadmissibility.

All of the elements necessary for a finding of willful misrepresentation are also needed for a finding of fraud. However, the opposite is not necessarily true: an alien inadmissible for willful misrepresentation is not necessarily also inadmissible for fraud.

Therefore, once an officer determines that all the elements of willful misrepresentation are present, the alien is inadmissible without any further determination of fraud.

Footnotes

[^ 1] See INA 212(a)(6)(C)(i).

[^ 2] The "reasonable person" standard is drawn from *INS v. Elias-Zacarias,* 502 U.S. 478 (1992) (agency fact-finding must be accepted unless a reasonable fact-finder would necessarily conclude otherwise).

[^ 3] See *Matter of Y-G-,* 20 I&N Dec. 794 (BIA 1994). See *Matter of D-L- & A-M-,* 20 I&N Dec. 409 (BIA 1991). See *Matter of L-L-,* 9 I&N Dec. 324 (BIA 1961).

[^ 4] See INA 291. See *Matter of Arthur,* 16 I&N Dec. 558 (BIA 1978).

[^ 5] See *Matter of D- L- and A- M-,* 20 I&N Dec. 409 (BIA 1991).

[^ 6] For more information on willfulness, see Section D, Willfulness [8 USCIS-PM J.3(D)].

[^ 7] See *Matter of Rivero-Diaz,* 12 I&N Dec. 475 (BIA 1967). See *Matter of M-,* 3 I&N Dec. 777 (BIA 1949).

[^ 8] See *Matter of Y-G-,* 20 I&N Dec. 794 (BIA 1994). See *Matter of D-L- & A-M-,* 20 I&N Dec. 409 (BIA 1991). See *Matter of L-L-,* 9 I&N Dec. 324 (BIA 1961).

[^ 9] See *Matter of M-y R-,* 6 I&N Dec. 315 (BIA 1954). See 9 FAM 302.9-4(B)(7), Interpretation of the Terms "Other Documentation" or "Other Benefit."

[^ 10] See 8 CFR 214.1.

[^ 11] See INA 248. See 8 CFR 248.

[^ 12] See INA 212(e).

[^ 13] See INA 274A. See 8 CFR 274a.12.

[^ 14] See INA 212(d)(5). See 8 CFR 212.5.

[^ 15] See INA 240B. See 8 CFR 240.25 and 8 CFR 1240.26.

[^ 16] See INA 245.

[^ 17] See 9 FAM 302.9-4(B)(7), Interpretation of the Terms "Other Documentation" or "Other Benefit."

[^ 18] See legacy Immigration and Naturalization Service General Counsel Opinion 91-39. See 9 FAM 302.9-4(B)(3), Interpretation of the Term Misrepresentation.

[^ 19] See *Matter of M-R-,* 6 I&N Dec. 259 (BIA 1954) (the procurement of documentation for the applicant's two children to facilitate their entry into the United States did not render the applicant himself inadmissible under former INA 212(a)(19)).

[^ 20] See INA 212(a)(6)(E).

[^ 21] See *Matter of Healy and Goodchild,* 17 I&N Dec. 22 (BIA 1979).

[^ 22] See *Matter of G-G-,* 7 I&N Dec. 161 (BIA 1956), *superseded in part by Matter of Kai Hing Hui,* 15 I&N Dec. 288 (BIA 1975). *See Matter of Tijam,* 22 I&N Dec. 408, 425 (BIA 1998) (Rosenberg, J., concurring and dissenting).

[^ 23] See *Matter of Healy and Goodchild,* 17 I&N Dec. 22, 28 (BIA 1979) (finding that the applicant had not willfully misrepresented since he could have reasonably believed his actions were correct under the law at the time).

[^ 24] See *Matter of G-,* 6 I&N Dec. 9 (BIA 1953), superseded on other grounds by *Matter of F-M-,* 7 I&N Dec. 420 (BIA 1957). See 9 FAM 302.9-4(B)(3), Interpretation of the Term Misrepresentation, Differentiation Between Misrepresentation and Failure to Volunteer Information.

[^ 25] See *Fedorenko v. United States,* 449 U.S. 490 (1981).

[^ 26] It is the applicant's burden to establish that he or she is not inadmissible. See INA 291. See *Matter of Arthur,* 16 I&N Dec. 558 (BIA 1978).

[^ 27] See 9 FAM 302.9-4(B)(4), Interpretation of Term Willfully. For more information on factors the officer should consider when determining whether a person is capable of exercising judgment and committing intentional acts, see Subsection 5, Misrepresentations by Minors (Under 18) or those who are Mentally Incompetent [8 USCIS-PM J.3(D)(5)].

[^ 28] See *Matter of R-R-,* 3 I&N Dec. 823 (BIA 1949). See *Matter of M-,* 9 I&N Dec. 118 (BIA 1960) (also cited by *Matter of R-S-J-,* 22 I&N Dec. 863 (BIA 1999)).

[^ 29] "If the witness withdraws the false testimony of his own volition and without delay, the false statement and its withdrawal may be found to constitute one inseparable incident out of which an intention to deceive cannot rightly be drawn." See *Llanos-Senarrilos v. United States,* 177 F.2d 164, 165 (9th Cir. 1949). See *Matter of R-R-,* 3 I&N Dec. 823 (BIA 1949). See *Matter of Namio,* 14 I&N Dec. 412 (BIA 1973), referring to *Matter of M-,* 9 I&N Dec. 118 (BIA 1960) and *Llanos-Senarrilos v. United States,* 177 F.2d 164 (9th Cir. 1949).

[^ 30] See *Matter of Namio,* 14 I&N Dec. 412 (BIA 1973).

[^ 31] See *Matter of Namio,* 14 I&N Dec. 412 (BIA 1973).

[^ 32] See *Llanos-Senarrilos v. United States,* 177 F.2d 164, 165 (9th Cir. 1949).

[^ 33] Officers may consult with field office leadership and Office of the Chief Counsel for further assistance as needed to determine whether an applicant's misrepresentation is material.

[^ 34] See *Kungys v. United States,* 485 U.S. 759, 770 (1988) (proceeding to revoke a person's naturalization).

[^ 35] See *Fedorenko v. United States,* 449 U.S. 490 (1981) (visa applicant who failed to disclose that he had been an armed guard at a concentration camp made a false statement that was material and is therefore inadmissible because disclosure of true facts would have made applicant ineligible for a visa).

[^ 36] See *Matter of S- and B-C-,* 9 I&N Dec. 436, 447-49 (A.G. 1961), accord. *Matter of Bosuego,* 17 I&N Dec. 125 (BIA 1980). *See Matter of Ng,* 17 I&N Dec. 536 (BIA 1980). See *Said v. Gonzales,* 488 F.3d 668 (5th Cir. 2007) (though the court never reaches the issue, it is discussed).

[^ 37] See *Matter of Martinez-Lopez,* 10 I&N Dec. 409 (BIA 1964) (submission of a forged job offer in the United States was not material when the applicant was not otherwise inadmissible as a person likely to become a public charge). See *Matter of Mazar,* 10 I&N Dec. 79 (BIA 1962) (no materiality in the nondisclosure of membership in the Communist Party since the membership was involuntary and would not have resulted in a determination of inadmissibility).

[^ 38] See *Matter of O-R-E-*, 28 I&N Dec. 330, 339-40 (BIA 2021) (holding a misrepresentation of identity is material because it impairs the "adjudicator's ability to probe past conduct that might be potentially disqualifying or bear on the exercise of discretion"). See *Matter of S- and B-C-* (PDF), 9 I&N Dec. 436, 448 (A.G. 1961) (noting that "a misrepresentation as to identity will generally have the effect of shutting off an investigation").

[^ 39] See *Matter of Ng* (PDF), 17 I&N Dec. 536, 537 (BIA 1980) (finding that misrepresentations, even concerning identity, must shut off a line of inquiry relevant to eligibility for the benefit in order to be a material misrepresentation). See *Matter of S- and B-C-* (PDF), 9 I&N Dec. 436, 448-49 (A.G. 1961) (emphasizing that "a remote, tenuous, or fanciful connection between a misrepresentation and a line of inquiry which is relevant to the alien's eligibility is insufficient to satisfy this aspect of the test of materiality"). For more information on harmless misrepresentations, see Subsection 3, Harmless Misrepresentation [8 USCIS-PM J.3(E)(3)]. Note that while an applicant is not inadmissible under INA 212(a)(6)(C)(i) for making a harmless misrepresentation, such misrepresentation still may be taken into account when considering whether a benefit is warranted as a matter of discretion.

[^ 40] See *Matter of S- and B-C-,* 9 I&N Dec. 436 (A.G. 1961).

[^ 41] See *Matter of Y-G-,* 20 I&N Dec. 794, 796 (BIA 1994).

[^ 42] See *Matter of Y-G-,* 20 I&N Dec. 794 (BIA 1994). See *Matter of L-L-,* 9 I&N Dec. 324 (BIA 1961).

[^ 43] See 8 USCIS-PM J.2(B).

[^ 44] See *Matter of G-G,* 7 I&N Dec. 161 (BIA 1956). See *Matter of Kai Hing Hui,* 15 I&N Dec. 288 (BIA 1975).

[^ 45] For a comparison of the elements required for a finding of fraud and a finding of willful misrepresentation, see Chapter 2, Overview of Fraud and Willful Misrepresentation, Section D, Comparing Fraud and Willful Misrepresentation [8 USCIS-PM J.2(D)].

Part K - False Claim to U.S. Citizenship

Chapter 1 - Purpose and Background

A. Purpose

U.S. citizenship confers important rights and responsibilities, including the right to vote and to hold public office. U.S. citizens also have an unqualified right to live in the United States. In recognition of these principles, Congress provided a specific ground of inadmissibility to address when an alien falsely claims to be a U.S. citizen for any purpose or benefit under the Immigration and Nationality Act (INA) or any other federal or state law. Indeed, the immigration consequences for falsely claiming U.S. citizenship are severe.[1] The alien is permanently barred from admission.[2]

There are exceptions and waivers to this ground of inadmissibility. The Department of Homeland Security has the authority to waive inadmissibility for purposes of a nonimmigrant admission. A waiver is not available, however, to most aliens seeking lawful permanent resident (LPR) status.

B. Background

Congress added the ground of inadmissibility for falsely claiming U.S. citizenship with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[3] Prior to the passage of IIRIRA, an alien who falsely claimed U.S. citizenship for purposes of immigration benefits was inadmissible because of fraud and willful misrepresentation.[4] Concerned about aliens' increased use of fraud to access various federal benefits,[5] Congress divided the provision into two separate inadmissibility grounds including:[6]

- Fraud or willful misrepresentation made in connection with obtaining an immigration benefit;[7] and
- False claim to U.S. citizenship made on or after September 30, 1996 in connection with obtaining any benefit or for any purpose under federal or state law, including immigration law.[8]

These two grounds differ significantly. This part only addresses the inadmissibility determination for false claims to U.S. citizenship made on or after September 30, 1996, the date that the new inadmissibility ground for falsely claiming U.S. citizenship became effective.

The officer cannot make a finding of inadmissibility under the false claim to U.S. citizenship ground of inadmissibility for aliens who made a false claim to U.S. citizenship prior to September 30, 1996.[9] In those cases, the officer must analyze the alien's inadmissibility according to the fraud and willful misrepresentation ground of inadmissibility.[10]

This distinction is important, because aliens who made a false claim to U.S. citizenship before September 30, 1996, may apply for a waiver of the ground of inadmissibility for fraud and misrepresentation.[11] Aliens who made a false claim to U.S. citizenship on or after September 30, 1996, generally are not eligible for waivers if they seek permanent resident status.[12]

The chart below outlines the distinctions between the inadmissibility grounds of fraud or willful misrepresentation[13] and falsely claiming U.S. citizenship.[14]

Comparing Fraud or Willful Misrepresentation and False Claim to U.S. Citizenship

Inadmissibility Ground	Offense	Description	Made To	Waiver
Fraud or Willful Misrepresentation INA 212(a)(6)(C)(i)	Fraud or willful misrepresentation anytime or false claim to U.S. citizenship made before September 30, 1996	Misrepresentation material for any purpose or benefit under INA (immigration benefit)	Government official exercising authority under the immigration and nationality laws[15]	Most immigrant aliens may apply for a waiver
False Claim to U.S. Citizenship INA 212(a)(6)(C)(ii)	False claim to U.S. citizenship made on or after September 30, 1996	False claim to U.S. citizenship for any purpose or benefit under INA or any other federal or state law	Any government or non-government official[16]	Waiver unavailable for most immigrant aliens[17]

C. Scope

This guidance addresses inadmissibility for falsely claiming U.S. citizenship[18] for any purpose or benefit under the INA or any other federal or state law, made on or after September 30, 1996.

D. Legal Authorities

- INA 212(a)(6)(C)(ii) – Illegal entrants and immigration violators – falsely claiming citizenship

Footnotes

[^ 1] Falsely claiming U.S. citizenship is also a criminal offense under 18 U.S.C. 911. This Part K does not address the criminal consequences of falsely claiming U.S. citizenship but addresses when a criminal conviction is evidence for purposes of the inadmissibility determination.

[^ 2] See INA 212(d)(3). If the alien needs a nonimmigrant visa, then the Department of State (DOS) must concur in the waiver.

[^ 3] See Pub. L. 104-208 (PDF) (September 30, 1996).

[^ 4] See INA 212(a)(6)(C). For more information on fraud and willful misrepresentation, see Part J, Fraud and Willful Misrepresentation [8 USCIS-PM J].

[^ 5] See H.R. Rep. 104-861, p. 50 (Sept. 28, 1996). See 142 Cong. Rec. S11503 (daily ed. September 27, 1996) (statement of Sen. Hatch). See H.R. Rep. 104-828, p. 199 (Sept. 24, 1996) (Conf. Rep.) (Joint Explanatory Statement). See *Matter of Richmond,* 26 I&N Dec. 779 (BIA 2016).

[^ 6] See Section 344(a) of IIRIRA, Division C of Pub. L. 104-208 (PDF), 110 Stat. 3009, 3009-637 (September 30, 1996).

[^ 7] See INA 212(a)(6)(C)(i).

[^ 8] See INA 212(a)(6)(C)(ii). See *Matter of Richmond,* 26 I&N Dec. 779 (BIA 2016).

[^ 9] See INA 212(a)(6)(C)(ii). See Section 344(c) of IIRIRA, Pub. L. 104-208 (PDF), 110 Stat. 3009-546, 3009-637 (September 30, 1996).

[^ 10] For more information, see Part J, Fraud and Willful Misrepresentation [8 USCIS-PM J].

[^ 11] See INA 212(a)(6)(C)(i) and INA 212(i).

[^ 12] Depending on the immigration benefit the applicant is seeking, the alien may have a waiver available; however, aliens seeking to immigrate as immediate relatives, under a preference category, or based on the diversity visa lottery do not have a waiver available.

[^ 13] See INA 212(a)(6)(C)(i).

[^ 14] See INA 212(a)(6)(C)(ii).

[^ 15] For example, a Customs and Border Protection, Immigration and Customs Enforcement, or USCIS officer, a consular officer, or an immigration judge.

[^ 16] For example, a private employer, lender, school, or other entity.

[^ 17] See Chapter 4, Exemptions, Exceptions and Waivers [8 USCIS-PM K.4].

[^ 18] See INA 212(a)(6)(C)(ii). Inadmissibility for fraud or willful misrepresentation or falsely claiming U.S. citizenship before September 30, 1996, is a separate inadmissibility ground. See INA 212(a)(6)(C)(i).

Chapter 2 - Determining False Claim to U.S. Citizenship

An alien is inadmissible based on a false claim to U.S. citizenship if:

- The alien made a representation of U.S. citizenship;
- The representation was false; and
- The alien made the false representation for any purpose or benefit under the Immigration and Nationality Act (INA) or any other federal or state law.[1]

The statute does not require an alien to make a false claim to U.S. citizenship intentionally, knowingly, or willfully to be found inadmissible under INA 212(a)(6)(C)(ii).[2] Therefore, even if an alien believed that he or she was a U.S. citizen when he or she made the false claim for any purpose or benefit under the INA or any other federal or state law, the alien is inadmissible unless the narrow statutory exception applies.[3]

Statutory Exemptions, Exceptions, and Waivers

Congress determined that special immigrant juveniles (SIJs) seeking adjustment of status[4] and applicants for registry[5] are exempt from the false claim ground of inadmissibility and therefore, the ground does not apply.

Additionally, there is a narrow statutory exception for false claims made on or after September 30, 1996 that applies to certain aliens who reasonably believed they were a U.S. citizen.[6] Congress made the exception apply retroactively.[7] However, there are no exceptions in the statute based solely on age or on mental capacity at the time of the false claim to U.S. citizenship.[8]

There is no waiver of inadmissibility for the false claim ground in INA 212. However, Congress authorized waivers of inadmissibility for this ground for applicants seeking adjustment of status under certain immigrant categories.[9]

A. Overview of Inadmissibility Determination

The officer should examine all facts and circumstances when evaluating inadmissibility based on a false claim to U.S. citizenship. The officer should follow the steps in the table below to determine inadmissibility.

Overview of Inadmissibility Determination

Step		For More Information
Step 1	Determine whether the alien made a false claim of U.S. citizenship.	Section B, False Claim to U.S. Citizenship [8 USCIS-PM K.2(B)]
Step 2	Determine whether the alien made a false claim to U.S. citizenship on or after September 30, 1996.	Section C, Claim Made On or After September 30, 1996 [8 USCIS-PM K.2 (C)]
Step 3	Determine whether the alien's false claim to U.S. citizenship was for any purpose or benefit under the INA or under any other federal or state law.	Section D, Any Purpose or Benefit Under the INA or Any Federal or State Law [8 USCIS-PM K.2(D)]
Step 4	Determine whether the alien timely retracted the false claim to U.S. citizenship.	Section E, Timely Retraction [8 USCIS-PM K.2(E)]
Step 5	Determine whether the alien is not inadmissible because a statutory exception or waiver applies.[10]	Chapter 4, Exemptions, Exceptions and Waivers, Section A, Applicability [8 USCIS-PM K.4(A)] and Section C, Exception [8 USCIS-PM K.4(C)]

B. False Claim to U.S. Citizenship

An officer should first determine whether an alien falsely claimed to be a U.S. citizen.

1. Type of Claim

An alien may have falsely claimed to be a U.S. citizen in oral interviews, written applications, or submitted evidence. The claim must be false, meaning it is not in accordance with the true facts. The false claim does not need to be made under oath.

2. Representation Before Government Official Not Necessary

Unlike inadmissibility for fraud or willful misrepresentation of a material fact,[11] an alien does not need to have made the false claim of U.S. citizenship to a U.S. government official. The alien can have made the false claim to any federal, state, or local official, or even to a private person or entity, such as an employer.[12]

3. Claiming to be a U.S. National

Status as a U.S. citizen is related to, but is not the same as, U.S. national status. A U.S. citizen is any person born in the United States or who otherwise acquires U.S. citizenship at or after birth.[13] A U.S. national is any person owing permanent allegiance to the United States and may include a U.S. citizen or a non-U.S. citizen U.S. national.[14] A non-U.S. citizen U.S. national owes permanent allegiance to the United States and is entitled to live in the United States but is not a U.S. citizen.[15]

An alien who falsely claims to be a U.S. national but not a U.S. citizen is not inadmissible based on a false claim to U.S. citizenship.[16] The alien, however, may be inadmissible for fraud or willful misrepresentation of a material fact if all other elements for that ground are met.[17]

Employment Eligibility Verification (Form I-9) Version Before April 3, 2009

The Form I-9 used prior to April 3, 2009 asked the person completing the form whether the person is a "citizen or national" of the United States and required checking a box corresponding to the answer. The fact that an alien marked "Yes" on an earlier edition of the Employment Eligibility Verification does not necessarily subject an alien to inadmissibility for falsely claiming U.S. citizenship because the earlier edition of Form I-9 did not distinguish a claim of nationality from a claim of citizenship.[18]

An affirmative answer to this question does not, by itself, provide sufficient evidence that would permit a reasonable person to find an alien falsely represented U.S. citizenship because of the question's ambiguity.[19]

In these cases, the alien must demonstrate to an officer that he or she understands the distinction between a U.S. citizen and non-U.S. citizen U.S. national.[20] The alien has the burden of showing that he or she claimed to be a non-U.S. citizen U.S. national as opposed to a U.S. citizen. The alien's inadmissibility for a false claim to U.S. citizenship depends on whether the alien meets the burden of showing that he or she intended to claim to be a non-U.S. citizen U.S. national when completing the Form I-9.

This inquiry is not necessary if the alien used the April 3, 2009 edition or any later edition of the Form I-9, as these editions clearly differentiate between a citizen of the United States and a non-U.S. citizen U.S. national of the United States.

C. Claim Made On or After September 30, 1996

An officer should determine whether the false claim to U.S. citizenship[21] occurred on or after September 30, 1996.[22] If an alien falsely claimed U.S. citizenship before September 30, 1996, an alien may be inadmissible for fraud or willful misrepresentation of a material fact[23] but not for falsely claiming U.S. citizenship.[24]

D. Any Purpose or Benefit Under the INA or Any Federal or State Law

An alien is inadmissible for falsely claiming U.S. citizenship if an alien falsely represents him or herself to be a citizen of the United States for any purpose or benefit under the INA, including INA 274A or any other federal or state law.[25]

To determine that an alien is inadmissible based on a false claim to U.S. citizenship, an officer must find direct or circumstantial evidence:

- That the alien made the false claim with the subjective intent of achieving:
  - A purpose under the INA or any other federal or state law;[26] or
  - A benefit under the INA or any other federal or state law; and[27]
- That the false claim to citizenship affects or matters to the purpose or benefit sought.

The false claim to U.S. citizenship must be material, meaning whether someone is a U.S. citizen must affect or make a difference in whether the alien can obtain the purpose or benefit sought.[28] Determining inadmissibility under this ground is fact specific.[29] Therefore, not every false claim results in inadmissibility.[30]

There may be cases where the facts show that an alien intended to achieve both a purpose and obtain a benefit. However, an alien can also be inadmissible based on a false claim made with the subjective intent to achieve a purpose, even if it did not involve an application for any specific benefit, such as misrepresentation of U.S. citizenship status to avoid negative legal consequences, including removal proceedings.[31]

1. Subjective Intent to Achieve a Purpose or Benefit

An officer can only find an alien inadmissible based on a false claim to U.S. citizenship if the alien made the false claim with the subjective intent to obtain a purpose or benefit under the INA or any other federal or state law.[32] An alien has a subjective intent to obtain a purpose or benefit under the INA or any other federal or state law if he or she believes that U.S. citizenship is relevant to the purpose or benefit sought.[33]

Whether an alien made the false claim with the subjective intent of obtaining any purpose or benefit under the INA or any other federal or state law is a question of fact and dependent on the circumstances of each case.[34] Officers must find direct or circumstantial evidence demonstrating that an alien made the false claim with the subjective intent of achieving a purpose or benefit under the INA or any other federal or state law.[35]

The INA does not exempt an alien from this ground of inadmissibility based solely on his or her age or on his or her mental incapacity,[36] and there is no defense to this ground of inadmissibility based solely on an alien's age or mental capacity. However, an officer may consider an alien's age or mental capacity when determining whether he or she made the false claim to U.S. citizenship with the subjective intent to achieve a purpose or benefit. The officer should consider all relevant factors when evaluating whether an alien had the subjective intent to achieve a purpose or benefit, including an alien's:

- Age;[37]
- Level of education;
- Background;
- Mental capacity;
- Level of understanding;
- Ability to appreciate the difference between true and false; and
- Other relevant circumstances.[38]

2. Objective Purpose or Benefit

Officers must determine the presence of a purpose or benefit objectively. This means that they must determine that U.S. citizenship affected or mattered to the purpose or benefit sought by an alien.[39]

When a Claim Affects the Purpose or Matters to the Benefit Sought

If U.S. citizenship…	Then the claim to U.S. citizenship…
Influences the official decision to grant or deny the benefit sought	Affects the purpose of the benefit sought.[40]
Is required as part of the benefit eligibility	Matters to the benefit sought.[41]

It is the alien's burden to show that U.S. citizenship did not affect or matter to the purpose or benefit sought.[42]

3. Benefit

A benefit must be identifiable and specified in the INA or any other federal or state law.[43] A benefit includes, but is not limited to:

- A U.S. passport;[44]
- A driver's license;
- Entry into the United States;[45] and
- Obtaining employment, loans, or any other benefit under federal or state law, if citizenship is a requirement for eligibility.[46]

4. Purpose

The term purpose is broad and includes avoiding negative legal consequences.[47] Negative legal consequences that an alien may seek to avoid by falsely claiming U.S. citizenship include, but are not limited to:

- Removal proceedings;[48]
- Inspection by immigration officials;[49] and
- Prohibition on unauthorized employment.[50]

Purpose, however, is not limited to avoiding negative legal consequences. A purpose also includes obtaining a more favorable outcome. For example, an alien would be falsely claiming U.S. citizenship to achieve a purpose under federal or state law if what the alien seeks has eligibility or evidentiary requirements that do not apply to U.S. citizens and the false claim allows the alien to avoid these requirements. This is true even if what is sought is available to both U.S. citizens and aliens.

5. False Claim Must Be for Their Own Purpose or Benefit

An alien is only inadmissible if he or she makes a false claim to U.S. citizenship for his or her own purpose or benefit. If an alien falsely claims U.S. citizenship on behalf of another person, the alien that made the misrepresentation is not inadmissible for falsely claiming U.S. citizenship.[51]

6. False Claim Made by a Third Party

If someone else, such as an alien's attorney, agent, or legal representative makes the false claim to U.S. citizenship on the alien's behalf, the alien is held responsible if the officer finds the alien was aware.[52] This includes oral misrepresentations made at the border by a person assisting an alien to enter illegally. Furthermore, an alien cannot deny responsibility for any false claim made by the alien based on the advice of another person.[53]

E. Timely Retraction

An alien is not inadmissible if he or she made a timely retraction of the fraud or misrepresentation.[54] If an alien timely retracts the statement, an officer can then adjudicate the case as if the fraud or misrepresentation had never happened.

Similarly, an alien may also timely retract a false claim to U.S. citizenship. If the alien does so, he or she would not be inadmissible under INA 212(a)(6)(C)(ii). The retraction must be voluntary and timely to be effective.[55] The alien must correct the false claim before an officer or U.S. government official challenges the alien's truthfulness and before the conclusion of the proceeding during which the alien made the false claim. A retraction can only be timely if the alien makes it in the same proceeding in which the alien gives the false testimony or misrepresentation.[56]

Admitting to the false claim after an official has challenged the accuracy of the claim is not a timely retraction.[57]

Footnotes

[^ 1] See INA 212(a)(6)(C)(ii).

[^ 2] See *Matter of Zhang*, 27 I&N Dec. 569 (BIA 2019). In *Matter of Zhang*, the BIA held that under the plain language of INA 237(a)(3)(D)(i), which is virtually identical to INA 212(a)(6)(C)(ii), the alien does not need "an intent to falsely represent citizenship status." See *Matter of Zhang*, 27 I&N Dec. 569, 571 (BIA 2019). The BIA reasoned that the absence of a knowing or willful requirement for false claims to citizenship in INA 212(a)(6)(C)(ii)(I) and INA 237(a)(3)(D)(i) indicates that there was no congressional intent to include one. See *Matter of Zhang*, 27 I&N Dec. 569, 571 n.3 (BIA 2019). All prior DHS guidance, memos, and opinions that provided a defense to inadmissibility based on knowledge, age, or mental capacity are superseded by *Matter of Zhang*, including the DHS Office of General Counsel Memo "False Citizenship Claims by Children: Knowledge and Legal Capacity Elements" issued on December 6, 2012. USCIS applies the precedent decision, *Matter of Zhang*, to all pending adjustment of status applications, including those in which the false claim predates the decision.

[^ 3] See INA 212(a)(6)(C)(ii).

[^ 4] See INA 245(h)(2). See 8 CFR 245.1(e)(3)(iii) and 8 CFR 245.1(e)(3)(iv). See Volume 7, Adjustment of Status, Part F, Special Immigrant-Based Adjustment, Chapter 7, Special Immigrant Juveniles [7 USCIS-PM F.7].

[^ 5] See INA 249. See Volume 7, Adjustment of Status, Part O, Registration, Chapter 4, Aliens Who Entered the United States Prior to January 1, 1972 [7 USCIS-PM O.4].

[^ 6] See INA 212(a)(6)(C)(ii)(II). See Chapter 4, Exemptions, Exceptions and Waivers, Section C, Exception [8 USCIS-PM K.4(C)].

[^ 7] See Section 201(b) of the Child Citizenship Act of 2000 (CCA), Pub. L. 106-395 (PDF), 114 Stat. 1631, 1633 (October 30, 2000).

[^ 8] See INA 212(a)(6)(C)(ii). See *Matter of Zhang*, 27 I&N Dec. 569 (BIA 2019). Although the BIA did not address legal capacity in their decision, the BIA determined that it is not necessary to show intent to establish a false claim of U.S. citizenship. Therefore, all prior DHS guidance, memos, and opinions that provided a defense to inadmissibility based on knowledge, age, or mental capacity are superseded by *Matter of Zhang*, including the December 6, 2012, DHS Office of General Counsel memo "False Citizenship Claims by Children: Knowledge and Legal Capacity Elements." USCIS applies the precedent decision, *Matter of Zhang*, to all pending adjustment of status applications, including those in which the false claim predates the decision.

[^ 9] For information about waivers for inadmissibility under INA 212(a)(6)(C)(ii), see Chapter 4, Exemptions, Exceptions, and Waivers, Section D, Waivers [8 USCIS-PM K.4(D)].

[^ 10] See INA 212(a)(6)(C)(ii)(II).

[^ 11] See INA 212(a)(6)(C)(i).

[^ 12] For example, the alien could have made a false claim to U.S. citizenship to comply with the employment verification requirements under INA 274A.

[^ 13] See U.S. Constitution, amend. XIV. See INA 301 and INA 309. See Volume 12, Citizenship and Naturalization [12 USCIS-PM].

[^ 14] See INA 101(a)(22).

[^ 15] See INA 308. As of 2014, American Samoa (including Swains Island) is the only outlying possession of the United States, as defined under INA 101(a)(29). See Volume 12, Citizenship and Naturalization [12 USCIS-PM].

[^ 16] See INA 212(a)(6)(C)(ii)(I).

[^ 17] For example, if the false claim to U.S. nationality was made to a U.S. government official in seeking an immigration benefit. See INA 212(a)(6)(C). See Part J, Fraud and Willful Misrepresentation [8 USCIS-PM J].

[^ 18] In *Ateka v. Ashcroft,* 384 F.3d 954 (8th Cir. 2004) and in *Rodriguez v. Mukasey,* 519 F.3d 773 (8th Cir. 2008), the aliens specifically testified that they claimed to be citizens when checking the particular box on the prior version of the Form I-9. Based on this testimony, the court determined that these aliens were inadmissible on account of falsely claiming U.S. citizenship.

[^ 19] See *U.S. v. Karaouni,* 379 F.3d 139 (9th Cir. 2004).

[^ 20] In *Ateka v. Ashcroft,* 384 F.3d 954 (8th Cir. 2004), for example, the evidence showed that the alien had no idea what it meant to be a noncitizen national, and that the alien intended to claim that the alien was a citizen.

[^ 21] INA 212(a)(6)(C)(ii)(I) makes an alien inadmissible and INA 237(a)(3)(D)(i) applies to an alien who has been admitted but has become removable on account of the false representation. If an alien falsely claims citizenship by voting, that person would also be inadmissible under INA 212(a)(10)(D), which declares an alien inadmissible who votes in violation of any federal, state, or local law.

[^ 22] The date this inadmissibility ground became effective. See Section 344(c) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. 104-208 (PDF) (September 30, 1996).

[^ 23] See INA 212(a)(6)(C)(i). For more information on inadmissibility based on fraud and willful misrepresentation, see Part J, Fraud and Willful Misrepresentation [8 USCIS-PM J].

[^ 24] See Chapter 1, Purpose and Background, Section B, Background [8 USCIS-PM K.1(B)].

[^ 25] See INA 212(a)(6)(C)(ii).

[^ 26] See *Matter of Richmond*, 26 I&N Dec. 779, 786 (BIA 2016). For examples of benefits, see Subsection 3, Benefit [8 USCIS-PM K.2(D)(3)].

[^ 27] See *Matter of Richmond*, 26 I&N Dec. 779, 786 (BIA 2016). For examples of benefits, see Subsection 3, Benefit [8 USCIS-PM K.2(D)(3)].

[^ 28] See *Matter of Richmond*, 26 I&N Dec. 779, 786-87 (BIA 2016). However, in *Patel v. U.S. Att'y Gen.*, 971 F.3d 1258 (11th Cir. 2020) the Eleventh Circuit held that a false claim to U.S. citizenship does not have to be material to result in inadmissibility. Officers should confer with local counsel if adjudicating a case in the Eleventh Circuit that involves inadmissibility based on false claim to U.S. citizenship. For more information on materiality, see Part J, Fraud and Willful Misrepresentation, Chapter 3, Adjudicating Inadmissibility, Section E, Materiality [8 USCIS-PM J.3(E)].

[^ 29] See *Matter of Richmond*, 26 I&N Dec. 779, 787 (BIA 2016).

[^ 30] See *Matter of Richmond*, 26 I&N Dec. 779, 787 (BIA 2016).

[^ 31] See *Matter of Richmond*, 26 I&N Dec. 779, 789 (BIA 2016).

[^ 32] See *Matter of Richmond*, 26 I&N Dec. 779, 784 (BIA 2016).

[^ 33] See *Matter of Richmond,* 26 I&N Dec. 779, 786 (BIA 2016).

[^ 34] See *Matter of Richmond,* 26 I&N Dec. 779, 784 (BIA 2016).

[^ 35] See *Matter of Richmond,* 26 I&N Dec. 779, 786-87 (BIA 2016). See *Crocock v. Holder,* 670 F.3d 400 (2nd Cir. 2012).

[^ 36] See INA 212(a)(6)(C)(ii). See *Matter of Zhang*, 27 I&N Dec. 569 (BIA 2019). Although the BIA did not address legal capacity in their decision, the BIA determined that it is not necessary to show intent to establish a false claim of U.S. citizenship. Therefore, all prior DHS guidance, memos, and opinions that provided a defense to inadmissibility based on

knowledge, age, or mental capacity are superseded by *Matter of Zhang*, including the DHS Office of General Counsel memo "False Citizenship Claims by Children: Knowledge and Legal Capacity Elements" issued December 6, 2012. USCIS applies the precedent decision, *Matter of Zhang*, to all pending adjustment of status applications, including those in which the false claim predates the decision.

[^ 37] A minor who is under the age of 18 at the time of a false claim is not exempted from inadmissibility under INA 212(a)(6)(c)(i).

[^ 38] For more information on factors the officer should consider when determining whether a person is capable of exercising judgment, see Part J, Fraud and Willful Misrepresentation, Chapter 3, Adjudicating Inadmissibility, Section D, Willfulness, Subsection 5, Misrepresentations by Minors (Under 18) or those who are Mentally Incompetent [8 USCIS-PM J.3(D)(5)].

[^ 39] See *Matter of Richmond*, 26 I&N Dec. 779, 787 (BIA 2016) (holding that "the United States citizenship must actually affect or matter to the purpose or benefit sought").

[^ 40] See *Matter of Richmond,* 26 I&N Dec. 779, 787 (BIA 2016).

[^ 41] See *Matter of Richmond*, 26 I&N Dec. 779, 787 (BIA 2016).

[^ 42] See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 4, Burden and Standards of Proof [1 USCIS-PM E.4].

[^ 43] See *Matter of Richmond*, 26 I&N Dec. 779, 787 (BIA 2016).

[^ 44] See *Matter of Barcenas-Barrera* (PDF), 25 I&N Dec. 40 (BIA 2009). See *Matter of Villanueva* (PDF), 19 I&N Dec. 101, 103 (BIA 1984).

[^ 45] See *Matter of Barcenas-Barrera* (PDF), 25 I&N Dec. 40 (BIA 2009). See *Jamieson v. Gonzales*, 424 F.3d 765 (8th Cir. 2005). See *Reid v. INS,* 420 U.S. 619 (1975).

[^ 46] See *Dakura v. Holder,* 772 F.3d 994 (4th Cir. 2014). See *Crocock v. Holder,* 670 F.3d 400, 403 (2nd Cir. 2012). See *Castro v. Att'y Gen. of U.S.,* 671 F.3d 356, 368 (3rd Cir. 2012). See *Rodriguez v. Mukasey,* 519 F.3d 773 (8th Cir. 2008). See *Kechkar v. Gonzales,* 500 F.3d 1080 (10th Cir. 2007). See *Theodros v. Gonzales,* 490 F.3d 396 (5th Cir. 2007). See *Matter of Bett* (PDF), 26 I&N Dec. 437 (BIA 2014).

[^ 47] See *Matter of Richmond,* 26 I&N Dec. 779 (BIA 2016).

[^ 48] See *Matter of Richmond,* 26 I&N Dec. 779 (BIA 2016).

[^ 49] See *Matter of Pinzon* (PDF), 26 I&N Dec. 189 (BIA 2013). See *Matter of F-* (PDF), 9 I&N Dec. 54 (BIA 1960).

[^ 50] See *Kechkar v. Gonzales,* 500 F.3d 1080 (10th Cir. 2007).

[^ 51] See Department of State Cable (no. 97-State-174342) (September 17, 1997). However, falsely claiming citizenship on behalf of another alien may make the alien inadmissible for alien smuggling. See *Matter of M-R,* 6 I&N Dec. 259, 260 (BIA 1954).

[^ 52] For more information on interpretation of the term willfully, see 9 FAM 302.9-4. For more information on factors the officer should consider when determining whether a person is capable of exercising judgment and committing intentional acts, see Part J, Fraud and Willful Misrepresentation, Chapter 3, Adjudicating Inadmissibility, Section D, Willfulness, Subsection 5, Misrepresentations by Minors (Under 18) or those who are Mentally Incompetent [8 USCIS-PM J.3(D)(5)].

[^ 53] For information on ineligibility based on illegal entry, misrepresentation and other immigration violations, see 9 FAM 302.9.

[^ 54] See *Matter of R-R-,* 3 I&N Dec. 823 (BIA 1949). See *Matter of M-* (PDF), 9 I&N Dec. 118 (BIA 1960) (also cited by *Matter of R-S-J-* (PDF), 22 I&N Dec. 863 (BIA 1999)). For more information on timely retraction, see 9 FAM 302.9.

[^ 55] See *Llanos-Senarrilos v. United States,* 177 F.2d 164, 165 (9th Cir. 1949) ("If the witness withdraws the false testimony of his own volition and without delay, the false statement and its withdrawal may be found to constitute one inseparable incident out of which an intention to deceive cannot rightly be drawn."). See *Matter of R-R-,* 3 I&N Dec. 823 (BIA 1949). See *Matter of Namio* (PDF), 14 I&N Dec. 412 (BIA 1973), referring to *Matter of M-* (PDF), 9 I&N Dec. 118 (BIA 1960) and *Llanos-Senarrilos v. United States*, 177 F.2d 164 (9th Cir. 1949).

[^ 56] See *Llanos-Senarrilos v. United States,* 177 F.2d 164, 165 (9th Cir. 1949).

[^ 57] See *Matter of Namio* (PDF), 14 I&N Dec. 412 (BIA 1973).

Chapter 3 - Adjudication

A. Evidence

For an officer to find an alien inadmissible for falsely claiming U.S. citizenship,[1] the evidence must demonstrate:

- The alien made the misrepresentation in person, in writing, or through other means to a person or entity; and
- The alien made the misrepresentation for any purpose or benefit under the Immigration and Nationality Act (INA), other federal law, or state law.[2]

There must be sufficient evidence that would lead a reasonable person to find that the alien falsely represented him or herself to be a U.S. citizen.[3] Examples of evidence include oral testimony, written testimony, or any other documentation containing information about the applicant's false claim to U.S. citizenship.[4]

In general, USCIS is required to issue a Notice of Intent to Deny (NOID) when derogatory information is uncovered during the course of the adjudication that is not known to the benefit requestor and USCIS intends to deny the benefit request on the basis of that derogatory information. The alien may be either unaware of the derogatory information or unaware of its impact on eligibility, and USCIS must provide the requestor an opportunity to rebut that information.[5]

B. Burden of Proof

The burden of proof to establish admissibility during the process of seeking an immigration benefit is on the applicant.[6] The burden never shifts to the government at any time during the adjudication process.[7]

1. No Evidence of False Misrepresentation

If there is no evidence that the applicant made a false representation of U.S. citizenship for any purpose or benefit under the INA or any other federal or state law, the officer should find that the applicant has met the burden of proof and is not inadmissible under this ground.

2. Evidence of False Misrepresentation

If there is evidence that would permit a reasonable person to conclude that the applicant is inadmissible under this ground, the officer should find that the applicant has not successfully met the burden of proof.[8] An applicant who fails to meet the burden of proof is inadmissible for falsely claiming U.S. citizenship unless the applicant is able to successfully rebut the officer's inadmissibility finding.

3. Applicant's Rebuttal Must be Clear and Beyond Doubt

If the officer determines that the applicant is inadmissible based on a false claim to U.S. citizenship, the applicant has the burden of establishing at least one of the following facts clearly and beyond doubt[9] to rebut the finding:

- The representation was not false;
- The false representation was not a representation of U.S. citizenship;
- The false representation was made prior to September 30, 1996; or
- The false representation was not made for a purpose or benefit under the INA or any other federal or state law.[10]

4. Rebutting Inadmissibility Finding

If the officer determines that the applicant has established at least one of the above facts, then the applicant has successfully rebutted the inadmissibility finding and has met the burden of proving that he or she is not inadmissible.

If the officer determines that the applicant has established none of these facts, then the applicant has not successfully rebutted the inadmissibility finding and is inadmissible.[11]

If the officer finds that the evidence for and against a finding of false claim to U.S. citizenship is of equal weight, then the applicant is inadmissible. As long as there is a reasonable evidentiary basis to conclude that an applicant is inadmissible for falsely claiming U.S. citizenship, and the applicant has not overcome that reasonable basis with evidence, then the officer should find the applicant inadmissible.

C. Civil Penalty or Criminal Conviction

Falsely claiming to be a U.S. citizen could result in a civil penalty[12] or in a criminal conviction for falsely and willfully representing to be a U.S. citizen.[13]

Inadmissibility for falsely claiming to be a U.S. citizen can be sustained simply by proving that the applicant knowingly made the false claim for any purpose or any benefit under the INA or any other federal or state law. For purposes of determining whether the applicant is inadmissible for falsely claiming U.S. citizenship, it is not necessary to establish that the applicant is the subject of a civil penalty or that the applicant has a criminal conviction for falsely and willfully representing to be a U.S. citizen.

If the officer finds that the alien has a conviction for falsely and willfully representing to be a U.S. citizen,[14] the conviction record is sufficient to establish that the applicant is inadmissible for falsely claiming U.S. citizenship.

Similarly, an order of civil penalty based on a false representation of U.S. citizenship is sufficient to establish that the applicant is inadmissible for falsely claiming to be a U.S. citizen. Fraudulent conduct other than a false claim to U.S. citizenship, however, may be the basis for a civil penalty. If the applicant was liable for a civil penalty for document fraud that does not relate to a false claim to U.S. citizenship,[15] then the civil penalty order is not an indication that the applicant is inadmissible for falsely claiming U.S. citizenship.

The civil penalty must be specifically based on a finding that the alien made a false claim to U.S. citizenship for the civil penalty order to be sufficient to establish inadmissibility for falsely claiming U.S. citizenship.

Footnotes

[^ 1] See INA 212(a)(6)(C)(ii).

[^ 2] See *Matter of Y-G- (PDF),* 20 I&N Dec. 794 (BIA 1994). See *Matter of D-L- & A-M- (PDF),* 20 I&N Dec. 409 (BIA 1991). See *Matter of L-L- (PDF),* 9 I&N Dec. 324 (BIA 1961). See Chapter 2, Determining Inadmissibility Based on False Claim to U.S. Citizenship, Section D, Any Purpose or Benefit Under the INA or Any Federal or State Law [8 USCIS-PM K.2(D)].

[^ 3] The "reasonable person" standard is drawn from *INS v. Elias-Zacarias,* 502 U.S. 478 (1992) (agency fact-finding must be accepted unless a reasonable fact-finder would necessarily conclude otherwise).

[^ 4] The Board of Immigration Appeals (BIA) recently held that Form I-9, Employment Eligibility Verification, is admissible in removal proceedings as support of a charge of inadmissibility. See *Matter of Bett (PDF),* 26 I&N Dec. 437, 441-442 (BIA 2014).

[^ 5] See 8 CFR 103.2(b)(16)(i). See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny, Subsection 4, Notices of Intent to Deny [1 USCIS-PM E.6(F)(4)].

[^ 6] See INA 291. See *Matter of Bett (PDF),* 26 I&N Dec. 437 (BIA 2014).

[^ 7] See INA 291. See *Matter of Arthur (PDF),* 16 I&N Dec. 558 (BIA 1978).

[^ 8] See *INS v. Elias-Zacarias,* 502 U.S. 478 (1992).

[^ 9] See *Matter of Bett (PDF),* 26 I&N Dec. 437, 440 (BIA 2014). See *Kirong v. Mukasey,* 529 F.3d 800, 804 (8th Cir. 2008). See *Rodriguez v. Mukasey,* 519 F.3d 773, 776 (8th Cir. 2008). See *Blanco v. Mukasey,* 518 F.3d 714, 720 (9th Cir. 2008).

[^ 10] For example, an alien falsely claiming to be a U.S. citizen during a police arrest would not meet the "purpose or benefit" requirement. See *Castro v. Attorney General,* 671 F.3d 356 (3rd Cir. 2012).

[^ 11] See *Matter of Rivero-Diaz (PDF),* 12 I&N Dec. 475 (BIA 1967). See *Matter of M-,* 3 I&N Dec. 777 (BIA 1949).

[^ 12] See INA 274C. Whenever “civil penalty” is used in this section, it refers to a civil penalty under INA 274C.

[^ 13] See 18 U.S.C. 911. Whenever such “criminal conviction” is used in this section, it refers to a conviction under 18 U.S.C. 911.

[^ 14] See *Pichardo v. INS,* 216 F. 3d 1198 (9th Cir. 2000).

[^ 15] For example, the applicant is held liable for a civil penalty based on the use of a fraudulent visa.

Chapter 4 - Exemptions, Exceptions, and Waivers

A. Applicability

This ground of inadmissibility applies to any alien seeking a benefit for which admissibility is required, unless the alien is exempt from this ground. This includes any alien seeking admission to the United States at a U.S. port of entry, any alien seeking a nonimmigrant or immigrant visa with the U.S. Department of State at a U.S. embassy or consulate outside of the United States, or any alien seeking adjustment of status.[1]

B. Exemptions

Congress determined that certain immigrant categories are exempt from the false claim to U.S. citizenship ground of inadmissibility. INA 212(a)(6)(C)(ii) does not apply to:

- Special immigrant juveniles seeking adjustment of status;[2] and
- Applicants for registry.[3]

C. Exception[4]

In 2000, Congress added a narrow statutory exception to inadmissibility for false claim to U.S. citizenship.[5] Congress made the exception apply retroactively.

The exception only applies to false claims to U.S. citizenship made on or after September 30, 1996, if the applicant satisfies the following requirements:

- Each parent of the applicant (or each adoptive parent in case of an adopted child) is or was a U.S. citizen, whether by birth or naturalization;
- The applicant permanently resided in the United States prior to attaining the age of 16; and
- The applicant reasonably believed at the time of the representation that he or she was a U.S. citizen.

Each of the applicant’s parents had to be a U.S. citizen at the time of the false claim to U.S. citizenship to meet the first requirement of this exception.[6]

There are no exceptions in the statute based solely on an applicant’s age or mental capacity at the time of the false claim to U.S. citizenship.[7]

D. Waivers

There is no waiver of the false claim ground of inadmissibility under INA 212. However, Congress authorized waivers of inadmissibility for this ground for aliens seeking adjustment of status for the following immigrant categories:

- Refugees;[8]
- Asylees;[9]
- Victims of trafficking;[10] and
- Legalization.[11]

Nonimmigrants who are inadmissible under the false claim ground of inadmissibility may seek a nonimmigrant waiver of the inadmissibility.[12]

Footnotes

[^ 1] See INA 212(a)(6)(C)(ii).

[^ 2] See INA 245(h)(2)(A).

[^ 3] Registry is a section of immigration law that enables certain aliens who have been present in the United States since January 1, 1972, the ability to apply for lawful permanent residence even if currently in the United States unlawfully. See INA 249. See 8 CFR 249.

[^ 4] See INA 212(a)(6)(C)(ii)(II).

[^ 5] See Section 201(b) of the Child Citizenship Act of 2000 (CCA), Pub. L. 106-395 (PDF), 114 Stat. 1631, 1633 (October 30, 2000).

[^ 6] See INA 212(a)(6)(C)(ii)(II).

[^ 7] See INA 212(a)(6)(C)(ii). See *Matter of Zhang*, 27 I&N Dec. 569 (BIA 2019). Although the BIA did not specifically address age or mental capacity in *Matter of Zhang*, 27 I&N Dec. 569, 571 n.4 (BIA 2019), all prior DHS guidance, memos, and opinions that provided a defense to inadmissibility based on knowledge, age, or mental capacity are superseded by *Matter of Zhang*, including the December 6, 2012 DHS Office of General Counsel memo “False Citizenship Claims by Children: Knowledge and Legal Capacity Elements.” USCIS applies the precedent decision, *Matter of Zhang*, to all pending adjustment of status applications, including those in which the false claim predates the decision.

[^ 8] See INA 209(c).

[^ 9] See INA 209(c).

[^ 10] See INA 245(l)(2)(B).

[^ 11] See INA 245A(d)(2)(B)(i).

[^ 12] See INA 212(d)(3)(A).

Part L - Documentation Requirements

Part M - Citizenship Ineligibility

Part N - Aliens Previously Removed

Part O - Aliens Unlawfully Present

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See more

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AFM Chapter 40 - Grounds of Inadmissibility under Section 212(a) of the Immigration and Nationality Act (External)

Chapter 1 - Purpose and Background [Reserved]

Chapter 2 - Reserved

Chapter 3 - Reserved

Chapter 4 - Reserved

Chapter 5 - Reserved

Chapter 6 - Effect of Seeking Admission Following Accrual of Unlawful Presence

A. Inadmissibility Based on Seeking Admission within the Statutory 3 Years or 10 Years After Departure or Removal

An alien who accrued the requisite period of unlawful presence[1] is inadmissible under section 212(a)(9)(B) of the Immigration and Nationality Act (INA) if the alien "again seeks admission" to the United States within either the statutory 3-year or 10-year period after departure or removal (whichever applies). However, an alien who "again seeks admission" after the end of the statutory 3-year or 10-year period since the alien's departure or removal (whichever applies) is not inadmissible under INA 212(a)(9)(B) based on the period of unlawful presence preceding the departure or removal.

In general, an alien who is inadmissible under INA 212(a)(9)(B) can only be admitted to the United States or obtain a grant of adjustment of status if the alien applies for, and is granted, a waiver of inadmissibility.[2]

B. Effect of Returning to the United States During the Statutory 3-Year or 10-Year Period After Departure or Removal

The statutory 3-year or 10-year period begins to run on the day of departure or removal (whichever applies) after accrual of the period of unlawful presence. This statutory period continues to run, without interruption, regardless of whether or how the alien returned to the United States during the 3-year or 10-year period. Thus, it is immaterial whether the alien has spent the applicable statutory 3-year or 10-year period in or out of the United States. As long as the alien again seeks admission[3] more than 3 or 10 years after the relevant departure or removal,[4] the alien is not inadmissible under INA 212(a)(9)(B) based on the period of unlawful presence preceding the departure or removal because the statutory 3-year or 10-year period after that departure or removal has ended.

Note however, that the manner in which the alien returned to the United States during the statutory 3-year or 10-year period may result in the accrual of a new period of unlawful presence or result in inadmissibility under other grounds.

C. Relationship Between Multiple Unlawful Presence Grounds of Inadmissibility

There are three separate inadmissibility grounds involving the accrual of unlawful presence – the 3-year unlawful presence ground,[5] the 10-year unlawful presence ground,[6] and the permanent unlawful presence ground.[7] Whether a specific inadmissibility ground applies to an alien depends on an analysis of the facts of the alien's case in light of that specific ground.

It is possible that an alien's immigration history makes the alien inadmissible under both the 3-year or 10-year unlawful presence grounds of inadmissibility and the permanent unlawful presence ground of inadmissibility. Additionally, an alien who accrued the requisite unlawful presence and who is removed from the United States may be inadmissible as an alien previously removed under INA 212(a)(9)(A)[8] and under the unlawful presence grounds, depending on the circumstances of the alien's case.

Footnotes

[^ 1] If an alien accrues more than 180 days but less than a year of unlawful presence during a single stay in the United States, departs the United States, and again seeks admission within 3 years of such departure, then the alien is inadmissible. See INA 212(a)(9)(B)(i)(I). If an alien accrues 1 year or more of unlawful presence during a single stay in the United States, departs or is removed from the United States, and again seeks admission within 10 years of such departure or removal, then the alien is inadmissible. See INA 212(a)(9)(B)(i)(II).

[^ 2] For more information on waivers, see Volume 9, Waivers and Other Forms of Relief [9 USCIS-PM]. For more information about waivers specific to the unlawful presence ground of inadmissibility, see INA 212(a)(9)(B)(v) and 8 CFR 212.7(e).

[^ 3] In determining inadmissibility under INA 212(a)(9)(B), USCIS only considers the alien's pending application for admission.

[^ 4] "Relevant departure or removal" means, in this instance, the departure or removal immediately following the accrual of the requisite unlawful presence.

[^ 5] See INA 212(a)(9)(B)(i)(I).

[^ 6] See INA 212(a)(9)(B)(i)(II).

[^ 7] See INA 212(a)(9)(C)(i)(I).

[^ 8] See INA 212(a)(9)(A). An alien who has been ordered removed is inadmissible if the alien seeks admission to the United States within a statutorily-specified period of time after removal or departure.

Part P - Aliens Present After Previous Immigration Violation

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See more

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AFM Chapter 40 - Grounds of Inadmissibility under Section 212(a) of the Immigration and Nationality Act (External)

Part Q - Practicing Polygamists, International Child Abductors, Unlawful Voters, and Tax Evaders

Volume 9 - Waivers and Other Forms of Relief

Part A - Waiver Policies and Procedures

Chapter 1 - Purpose and Background

A. Purpose

Certain aliens may not be allowed to enter or obtain status in the United States because they are inadmissible. These aliens may overcome the inadmissibility if they are eligible to apply for and receive a waiver.

USCIS, in its administration of waiver laws and policies, seeks to:

- Promote family unity and provide humanitarian results;
- Provide relief to refugees, asylees, victims of human trafficking[1] and certain criminal acts,[2] and other humanitarian and public interest applicants who seek protection or permanent residency in the United States;
- Advance the national interest by allowing aliens to be admitted to the United States if such admission could benefit the welfare of the country;
- Ensure public health and safety concerns are met by requiring that applicants satisfy all medical requirements prior to admission or, if admitted, seek any necessary treatment; and
- Weigh public safety and national security concerns against the social and humanitarian benefits of granting admission to an alien.

Considerations of family unity, humanitarian concerns, public and national interest, and national security may differ depending on the specific waiver an applicant is seeking.

B. Background

With the enactment of the Immigration and Nationality Act of 1952 (INA),[3] Congress established a variety of inadmissibility grounds to protect the interests of the United States. Congress considered waivers as a special remedy to the grounds of inadmissibility.[4]

Congress later amended the INA in 1957, easing many stricter provisions of the earlier legislation.[5] For example, it allowed certain alien relatives of U.S. citizens or lawful permanent residents (LPR) to apply for and obtain a waiver of certain grounds of exclusion or deportation (now inadmissibility or removal).[6]

When passing the 1957 amendments, Congress created exceptions to many strict provisions from the 1952 Act to promote family unity. For Congress, in many circumstances, it was more important to keep families together than to stringently enforce inadmissibility grounds.[7]

Congress tightened waiver requirements and availability once again with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[8] For example, IIRIRA made waivers of criminal inadmissibility[9] unavailable to LPRs who were convicted of an aggravated felony or who had not continuously resided in the United States for at least 7 years before initiation of removal proceedings.

IIRIRA also created new inadmissibility grounds, such as the ground of inadmissibility on account of unlawful presence, and corresponding waivers.

C. Legal Authorities

- INA 207, 8 CFR 207 - Annual admission of refugees and admission of emergency situation refugees
- INA 209, 8 CFR 209 - Adjustment of status of refugees
- INA 210, 8 CFR 210 - Special agricultural workers
- INA 211, 8 CFR 211 - Admission of immigrants into the United States
- INA 212, 8 CFR 212 - Excludable aliens
- INA 214, 8 CFR 214 - Admission of nonimmigrants

- INA 244, 8 CFR 244 - Temporary protected status
- INA 245, 8 CFR 245 - Adjustment of status of nonimmigrant to that of person admitted for permanent residence
- INA 245A, 8 CFR 245a - Adjustment of status of certain entrants before January 1, 1982, to that of person admitted for lawful residence

Footnotes

[^ 1] See INA 101(a)(15)(T).

[^ 2] See INA 101(a)(15)(U).

[^ 3] See Pub. L. 82-414 (June 27, 1952).

[^ 4] See *INS v. Errico*, 385 U.S. 214, 218 (1966), citing H.R. 1365, 82nd Cong. 128 (1952).

[^ 5] See Act of September 11, 1957, Pub. L. 85-316 (September 11, 1957).

[^ 6] The INA gives the Attorney General and the Secretary of Homeland Security statutory authority to grant waivers. Some sections of the INA, however, still refer exclusively to the "Attorney General." Under the Homeland Security Act of 2002, Pub. L. 107–296 (PDF) (November 25, 2002), the authority to grant waivers was also given to the Secretary of Homeland Security.

[^ 7] See *INS v. Errico*, 385 U.S. 214, 219-20 (1966), citing H.R. 1199, 85th Cong. 7 (1957).

[^ 8] See Pub. L. 104-208 (PDF) (September 30, 1996).

[^ 9] See INA 212(h).

Chapter 2 - Forms of Relief

A. Waivers

In general, applicants for immigration benefits must establish that they are admissible to the United States. If an applicant for an immigration benefit is inadmissible to the United States, USCIS may only grant the benefit if the applicant receives a waiver of inadmissibility or another form of relief provided in the Immigration and Nationality Act (INA).[1] In general, if the INA uses the term waiver, the applicant must apply for the waiver by filing the correct application.

USCIS may only grant a waiver if the applicant meets all statutory and regulatory requirements.

There are instances in which an officer may adjudicate a waiver without asking the applicant to file a form. For example, an officer may adjudicate certain waivers of inadmissibility for a refugee or an asylee seeking adjustment of status without the applicant filing a waiver application. In these circumstances, the officer must still clearly document the waiver determination in the record.

B. Exceptions or Exemptions

A statute may provide for an exception or exemption from a ground of inadmissibility.[2] If the alien's action or circumstance meets the requirements of an exception or exemption, then the ground of inadmissibility does not apply and the alien is not inadmissible on that ground. Unlike a waiver, an exemption or exception generally does not require that an alien file an application.

C. Consent to Reapply

Permission to reapply for admission into the United States after deportation or removal, also known as "consent to reapply," is not a waiver.[3] Consent to reapply is a distinct remedy that permits an alien to seek admission. If the statute specifies that the alien must obtain consent to reapply to overcome the inadmissibility, a waiver of inadmissibility is not a substitute for consent to reapply.[4]

Footnotes

[^ 1] See Pub. L. 82-414 (June 27, 1952).

[^ 2] Exception and exemption both mean that the specific inadmissibility ground does not apply if the applicant establishes that the terms of the exception or exemption apply.

[^ 3] See Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212) (used to seek consent to reapply). See the form instructions for more information.

[^ 4] See INA 212(a)(9)(A). See INA 212(a)(9)(C).

Chapter 3 - Review of Inadmissibility Grounds

A. Verification of Inadmissibility

Before adjudicating a waiver, the officer must verify that the applicant is inadmissible.[1] The officer must identify all inadmissibility grounds that apply, even if an immigration judge, a consular officer, Customs and Border Protection (CBP) officer, or a different USCIS officer made a prior inadmissibility determination.[2]

An applicant's file should reflect evidence of inadmissibility. Examples of evidence that may indicate an applicant is inadmissible may include but is not limited to:

- A visa refusal worksheet;
- Background check results;

- A criminal disposition;
- A sworn statement; and
- A Record of Arrests and Prosecutions sheet (police arrest record).

If the officer identifies that the applicant is inadmissible, the officer should then determine whether a waiver or other type of relief is available and whether the applicant meets the eligibility requirements for the relief.[3]

B. Grounds Included in Waiver Application

The officer must review all inadmissibility grounds that the applicant lists in the waiver application. If the applicant states that he or she is inadmissible but there is no evidence of inadmissibility in the record, then the officer should issue a Request for Evidence (RFE). The officer should request that the applicant provide a written statement explaining why the applicant thinks he or she is inadmissible. The officer should proceed with the waiver adjudication if the officer determines that the applicant is inadmissible.

An applicant may file a waiver application after another government agency, such as the Department of State or CBP, has found the applicant inadmissible. In general, USCIS accepts another government agency's finding of inadmissibility. The officer should only question another government agency's inadmissibility determination if:

- The government agency's finding was clearly erroneous; or
- The applicant has shown that he or she is clearly not inadmissible.

The officer should work with the other government agency to resolve the issue through appropriate procedures.

C. Grounds Not Included in Waiver Application

If the officer identifies additional inadmissibility grounds based on events that are not included in the waiver application, the officer should notify the applicant and the applicant's representative, if applicable. The officer should follow current USCIS guidance on the issuance of RFEs, Notices of Intent to Deny (NOID), and Denials.

Footnotes

[^ 1] For more on admissibility determinations, see Volume 8, Admissibility [8 USCIS-PM].

[^ 2] When verifying the inadmissibility, the officer may determine that the applicant is admissible and does not require a waiver. For more on admissibility determinations, see Volume 8, Admissibility [8 USCIS-PM].

[^ 3] For specific scenarios that the officer may encounter during the adjudication of a waiver, see Chapter 4, Waiver Eligibility and Evidence, Section C, Evidence [9 USCIS-PM A.4(C)].

Chapter 4 - Waiver Eligibility and Evidence

A. Eligibility Requirements

Waiver eligibility depends on whether:

- A waiver is available for the inadmissibility ground;
- The applicant meets all other statutory and regulatory provisions for the waiver; and
- A favorable exercise of discretion is warranted.[1]

An applicant must meet all statutory and regulatory requirements, including the requirements specified in the waiver application's instructions, before USCIS can approve the waiver application.[2] When the officer receives the application, the officer should ensure that it meets all of the applicable filing requirements.[3]

B. Waiver Availability

1. Waiver is Available

If an applicant is inadmissible, the officer must determine whether USCIS may waive the ground of inadmissibility and whether the applicant meets all eligibility requirements of the waiver. If the applicant is inadmissible on grounds that can be waived, the officer should determine whether the applicant meets the requirements for the waiver.[4]

2. Waiver and Consent to Reapply

An applicant who files a waiver application may also be inadmissible because of a prior removal or unlawful reentry after a previous immigration violation.[5] In these cases, the applicant is required to file an Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212), which is also called consent to reapply.

If the officer determines that the waiver is approvable, the officer should give the applicant an opportunity to file a consent to reapply application, if required. The officer should consult the consent to reapply form instructions to determine when USCIS may accept the waiver application and consent to reapply application together.

If the waiver is not approvable and the applicant did not request consent to reapply (although required), the officer should deny the waiver and not request the application for consent to reapply. If an applicant files a consent to reapply application and the officer denies the waiver application, then the officer should deny the consent to reapply application as a matter of discretion.[6]

3. No Waiver is Available

An applicant may be inadmissible for both a ground that USCIS may waive and a ground for which no waiver or other form of relief is available. In this instance, the applicant is still inadmissible on grounds that cannot be waived and approving the waiver application serves no purpose. The officer, therefore, should deny the application as a matter of discretion

because the applicant is inadmissible on grounds that cannot be waived.[7] The officer should provide the standard language regarding the availability of motions to reopen, motions to reconsider, and appeals (if applicable) in the denial notice.

C. Evidence

There is no specific type or amount of evidence necessary to establish eligibility for a waiver. Typically, the evidence should support all eligibility requirements, be specific, and come from a credible source. It should also substantiate the applicant's claims. If evidence is unavailable, the applicant should provide a reasonable explanation for its absence.[8]

1. Medical and Other Issues Requiring Specialized Knowledge

Professionals should address issues that require specialized knowledge. Physicians and other medical professionals, for example, should provide medical statements. The professional's attestation should explain how the condition or issue affects that applicant. An officer may still consider a nonprofessional's statement, but the officer should give less weight to a nonprofessional's opinion. An officer may consider medical evidence from the internet and published sources, but these sources generally cannot replace a physician's statement.

2. Family Relationships

Some waivers require that the applicant establish a qualifying familial relationship. Unless the adjudicating officer finds the underlying evidence unpersuasive, the evidence submitted as part of a previously approved petition or application based on that familial relationship is sufficient to establish the qualifying relationship for the waiver. If there is no evidence in the record establishing the qualifying relationship, then the officer must request evidence that establishes the qualifying relationship, such as marriage, birth, or adoption certificates, or other evidence as permitted by law.

Footnotes

[^ 1] See *Matter of Mendez-Moralez (PDF),* 21 I&N Dec. 296 (BIA 1996).

[^ 2] See 8 CFR 103.2. See 8 CFR 103.7. General filing requirements include proper signature; proper fee or fee waiver; translation of any foreign language evidence; proper filing location; and the initial evidence specified in the relevant regulations and instructions with the application. Forms and form instructions are available on USCIS' website at uscis.gov/forms.

[^ 3] See 8 CFR 103.2. Typically, a waiver does not require the applicant to submit biometrics. USCIS usually collects this information as part of the underlying benefit application, such as an adjustment of status application. However, if the required biometrics are outdated, then the officer must update the biometrics prior to the adjudication of a waiver.

[^ 4] See Chapter 4, Waiver Eligibility and Evidence [9 USCIS-PM A.4].

[^ 5] Inadmissible under INA 212(a)(9)(A) or INA 212(a)(9)(C).

[^ 6] See *Matter of J-F-D- (PDF),* 10 I&N Dec. 694 (Reg. Comm. 1963). See *Matter of Martinez-Torres (PDF),* 10 I&N Dec. 776 (Reg. Comm. 1964).

[^ 7] See *Matter of J-F-D- (PDF),* 10 I&N Dec. 694 (Reg. Comm. 1963). See *Matter of Martinez-Torres (PDF),* 10 I&N Dec. 776 (Reg. Comm. 1964).

[^ 8] See 8 CFR 103.2(b).

Chapter 5 - Discretion

If the applicant meets all other statutory and regulatory requirements of the waiver, the officer must determine whether to approve the waiver as a matter of discretion.[1] Meeting the other statutory and regulatory requirements alone does not entitle the applicant to relief.[2]

The discretionary determination is the final step in the adjudication of a waiver application. The applicant bears the burden of proving that he or she merits a favorable exercise of discretion.[3]

A. Discretionary Factors

The officer must weigh the social and humanitarian considerations against the adverse factors present in the applicant's case.[4]The approval of a waiver as a matter of discretion depends on whether the favorable factors in the applicant's case outweigh the unfavorable ones.[5]

The following table provides some of the factors relevant to the waiver adjudication.

Non-Exhaustive List of Factors that May Be Relevant in the Discretionary Analysis

Category	Favorable Factors	Unfavorable Factors
Waiver Eligibility	• Meeting certain other statutory requirements of the waiver, including a finding of extreme hardship to a qualifying family member, if applicable.[6] • Eligibility for waiver of other inadmissibility grounds.	Not applicable – Not meeting the statutory requirements of the waiver results in a waiver denial. A discretionary analysis is not necessary.
Family and Community Ties	• Family ties to the United States and the closeness of the underlying relationships. • Hardship to the applicant or to non-qualifying lawful permanent residents (LPRs) or U.S. citizen relatives or employers. • Length of lawful residence in the United States and status held during that residence, particularly where the applicant began residency at a young age. • Significant health concerns that affect the qualifying relative. • Difficulties the qualifying relative would be likely to face if the qualifying relative moves abroad with the applicant due to country conditions, inability	• Absence of community ties.

Category	Favorable Factors	Unfavorable Factors
	to adapt, restrictions on residence, or other factors that may be claimed. • Honorable service in the U.S. armed forces or other evidence of value and service to the community. • Property or business ties in the United States.	
Criminal History, Moral Character **(or both)**	• Respect for law and order, and good moral character, which may be evidenced by affidavits from family, friends, and responsible community representatives. • Reformation of character and rehabilitation. • Community service beyond any imposed by the courts. • Considerable passage of time since deportation or removal.	• Moral depravity or criminal tendencies reflected by an ongoing or continuing criminal record, particularly the nature, scope, seriousness, and recent occurrence of criminal activity. • Repeated or serious violations of immigration laws, which evidence a disregard for U.S. law. • Lack of reformation of character or rehabilitation. • Previous instances of fraud or false testimony in dealings with USCIS or any government agency. • Marriage to a U.S. citizen or LPR for the primary purpose of circumventing immigration laws. • Nature and underlying circumstances of the inadmissibility ground at issue, and the seriousness of the violation. • Public safety or national security concerns
Other	• Absence of significant undesirable or negative factors.	• Other indicators of an applicant's bad character and undesirability as a permanent resident of this country.

B. Discretionary Determination

When making a discretionary determination, the officer should review the entire record and give the appropriate weight to each adverse and favorable factor. Once the officer has weighed each factor, the officer should consider all of the factors cumulatively to determine whether the favorable factors outweigh the unfavorable ones. If the officer determines that the positive factors outweigh the negative factors, then the applicant merits a favorable exercise of discretion.

Example

A lengthy and stable marriage is generally a favorable factor in the discretionary analysis. On the other hand, the weight given to any possible hardship to the spouse that may occur upon separation may be diminished if the parties married after the commencement of removal proceedings with knowledge of an impending removal.[7]

Example

In general, when reviewing an applicant's employment history, an officer may consider the type, length, and stability of the employment.[8]

Example

In general, when reviewing an applicant's history of physical presence in the United States, the officer may favorably consider residence of long duration in this country, as well as residence in the United States while the applicant was of young age.[9]

Example

When looking at the applicant's presence in the United States, the officer should evaluate the nature of the presence. For example, a period of residency during which the applicant was imprisoned may diminish the significance of that period of residency.[10]

C. Cases Involving Violent or Dangerous Crimes

If an alien is inadmissible on criminal grounds involving a violent or dangerous crime, an officer may not exercise favorable discretion unless the applicant has established, in addition to the other statutory and regulatory requirements of the waiver that:

- The case involves extraordinary circumstances; or
- The denial would result in exceptional and extremely unusual hardship.[11]

Extraordinary circumstances involve considerations such as national security or foreign policy interests. Exceptional and extremely unusual hardship is substantially beyond the ordinary hardship that would be expected as a result of denial of admission, but it does not need to be so severe as to be considered unconscionable.[12] Depending on the gravity of the underlying criminal offense, a showing of extraordinary circumstances may still be insufficient to warrant a favorable exercise of discretion.[13]

Footnotes

[^ 1] If the applicant does not meet another statutory requirement of the waiver, USCIS denies the waiver and a discretionary analysis is not necessary. However, an officer may still include a discretionary analysis if the applicant's conduct is so egregious that a discretionary denial would be warranted even if the applicant had met the other statutory and regulatory requirements. Adding a discretionary analysis to a denial is also useful if an appellate body on review disagrees with the officer's conclusion that the applicant failed to meet the statutory requisites for the waiver. For more information on exercising discretion generally, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis [1 USCIS-PM E.8].

[^ 2] See *Reyes-Cornejo v. Holder,* 734 F.3d 636 (7th Cir. 2013). See *Matter of Cervantes-Gonzalez (PDF),* 22 I&N Dec. 560 (BIA 1999). See *Matter of Mendez-Moralez (PDF),* 21 I&N Dec. 296 (BIA 1996).

[^ 3] See *Matter of De Lucia (PDF),* 11 I&N Dec. 565 (BIA 1966). See *Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

[^ 4] See *Matter of Mendez-Moralez (PDF),* 21 I&N Dec. 296 (BIA 1996). Discretionary factors may also include emergencies and other unforeseen circumstances. See Volume 1, General Policies and Procedures, Part H, Emergencies or Unforeseen Circumstances, Chapter 2, Emergencies or Unforeseen Circumstances-Related Flexibilities [1 USCIS-PM H.2].

[^ 5] See *Matter of Mendez-Moralez (PDF),* 21 I&N Dec. 296 (BIA 1996) (relating to a criminal waiver under INA 212(h)(1)(B)). See *Matter of Marin (PDF),* 16 I&N Dec. 581 (BIA 1978) (relating to an INA 212(c) waiver). See *Matter of Tijam,* 22 I&N Dec. 408 (BIA 1998) (relating to a fraud or misrepresentation finding (INA 212(a)(6)(C)(i)) and the discretionary waiver under former INA 241(a)(1)(H) [renumbered as INA 237(a)(1)(H) by IIRIRA]).

[^ 6] In particular, if a finding of extreme hardship is a statutory eligibility requirement, the finding of extreme hardship permits, but does not require, a favorable exercise of discretion. Once extreme hardship is found, extreme hardship becomes a factor that weighs in favor of granting relief as a matter of discretion.

[^ 7] See *Matter of Mendez-Moralez (PDF),* 21 I&N Dec. 296 (BIA 1996). See *Ghassan v. INS,* 972 F.2d 631 (5th Cir. 1992).

[^ 8] See *Matter of Mendez-Moralez (PDF),* 21 I&N Dec. 296 (BIA 1996).

[^ 9] See *Diaz-Resendez v. INS,* 960 F.2d 493 (5th Cir. 1992).

[^ 10] See *Douglas v. INS,* 28 F.3d 241 (2nd Cir. 1994).

[^ 11] See INA 212(h). See 8 CFR 212.7(d). See *Matter of Jean (PDF),* 23 I&N Dec. 373 (A.G. 2002) (relating to a waiver of inadmissibility granted in connection with INA 209(c), refugee or asylee adjustment of status).

[^ 12] See *Matter of Monreal,* 23 I&N Dec. 56 (BIA 2001).

[^ 13] See 8 CFR 212.7(d).

Chapter 6 - Validity of an Approved Waiver

A. Extent of Waiver Validity

In general, an approved waiver is only valid for the grounds of inadmissibility specified in the application. Furthermore, a waiver is only valid for those crimes, events, incidents, or conditions specified in the waiver application. If an alien is later found inadmissible for a separate crime, event, incident or condition not already included in the approved waiver application, the alien is required to file another waiver application.

B. Length of Waiver Validity

A waiver's validity depends on the underlying immigration benefit connected to the approved waiver.

1. Certain Nonimmigrants[1]

An inadmissible applicant seeking to enter the United States as a nonimmigrant generally needs to obtain advance permission to enter the United States as a nonimmigrant.[2] Advance permission to enter as a nonimmigrant[3] despite inadmissibility is referred to as a nonimmigrant waiver. Customs and Border Protection (CBP) generally adjudicates this waiver, which is temporary if approved.[4] This temporary permission does not ordinarily carry over to other benefit categories, such as other nonimmigrant categories, immigrant categories, visas, or adjustment of status.

2. Temporary Protected Status Holders[5]

An applicant seeking temporary protected status (TPS) status in the United States may be inadmissible. In most cases, a waiver is available to a TPS applicant in connection with his or her TPS application. If USCIS approves a TPS applicant's waiver, the waiver is temporary and lasts for the duration of TPS only.[6]

3. Refugees

An inadmissible refugee must apply for a waiver before seeking admission to the United States.[7] A waiver granted to a refugee for admission to the United States is valid for purposes of seeking adjustment of status as a refugee.[8] In this case, the applicant does not have to file another waiver for the specific inadmissibility ground previously waived.[9]

There is an exception, however, for medical waivers. If USCIS grants the refugee a waiver for purposes of admission to the United States because of a Class A condition, then the refugee is required to submit to another medical examination. If the second examination reveals a Class A condition, the refugee must file another waiver when seeking adjustment of status.[10]

4. Lawful Permanent Residents

An inadmissible applicant seeking lawful permanent resident (LPR) status requires a waiver. As previously explained, the availability of a waiver depends on the specific category under which an applicant seeks LPR status.

A waiver granted in connection with any application for LPR status[11] permanently waives the ground of inadmissibility for purposes of any future immigration benefits application, including immigrant and nonimmigrant benefits. The waiver remains valid even if the LPR later abandons or otherwise loses LPR status.[12]

This rule, however, does not apply to conditional residents or conditional grants issued to K-1 and K-2 nonimmigrants.[13]

5. Conditional Permanent Residents[14]

For most conditional permanent residents,[15] the waiver becomes valid indefinitely when the conditions are removed from the permanent resident status. This is the case even if the LPR later abandons or otherwise loses LPR status.

For certain criminal waivers[16] and a waiver of fraud or willful misrepresentation,[17] the validity of a waiver automatically ends if USCIS terminates conditional residency. There is no need for a separate termination notice and the applicant cannot appeal this waiver termination. If the immigration judge determines during removal proceedings that USCIS incorrectly terminated the conditional residence, the waiver becomes effective again.[18]

6. K-1 and K-2 Nonimmigrants

If the applicant seeks a waiver to obtain a fiancé(e) visa (K-1 or K-2), the waiver's approval is conditioned upon the K-1 nonimmigrant marrying the U.S. citizen who filed the fiancé(e) petition.[19] If the K-1 nonimmigrant marries the petitioner, the approved waiver becomes valid indefinitely for any future immigration benefits application, whether immigrant or nonimmigrant.

The waiver remains valid even if the K nonimmigrant does not ultimately adjust status to an LPR or if the K nonimmigrant later abandons or otherwise loses LPR status.[20]

If the K-1 nonimmigrant does not marry the petitioner, the K-1 and K-2 (if applicable) remain inadmissible for any application or any benefit other than the proposed marriage between the K-1 and the K nonimmigrant visa petitioner.[21]

7. Inter-country Convention Adoptees

An approved waiver in conjunction with the provisional approval of a Petition to Classify Convention Adoptee as an Immediate Relative (Form I-800) is conditioned upon the issuance of an immigrant or nonimmigrant visa for the child's admission to the United States and final approval of that Form I-800. If Form I-800 or the immigrant or nonimmigrant visa application is ultimately denied, the waiver is void.[22]

Footnotes

[^ 1] Except for K, T, U, and V nonimmigrants.

[^ 2] The application is filed on Application for Advance Permission to Enter as Nonimmigrant (Form I-192).

[^ 3] See INA 212(d)(3)(A).

[^ 4] For more information on when an applicant should file this waiver with CBP and when with USCIS, see Application for Advance Permission to Enter as a Nonimmigrant (Form I-192).

[^ 5] See INA 244(c).

[^ 6] See INA 244(a) and INA 244(c). See 8 CFR 244.3 and 8 CFR 244.13. See Instructions for Application for Waiver of Grounds of Inadmissibility (Form I-601). If the applicant obtains a waiver in connection with an Application for Temporary Protected Status (Form I-821), the waiver is only valid for the TPS application. If granted, the waiver applies to subsequent TPS re-registration applications, but not to any other immigration benefit requests.

[^ 7] See INA 207(c)(3).

[^ 8] See INA 209.

[^ 9] If the refugee is seeking adjustment of status on a basis other than INA 209, the refugee must apply for a new waiver as required by that particular benefit.

[^ 10] Refugees seek adjustment of status under INA 209. For more information on Class A conditions, see Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility [8 USCIS-PM B].

[^ 11] This includes applications for an immigrant visa, fiancé(e) visa, legalization, and adjustment of status.

[^ 12] See 8 CFR 212.7(a)(4)(ii).

[^ 13] See 8 CFR 212.7(a)(4)(ii). For K-1 and K-2 nonimmigrants granted a waiver, see Subsection 6, K-1 and K-2 Nonimmigrants [9 USCIS-PM A.6(B)(6)].

[^ 14] See INA 216. See 8 CFR 212.7(a)(4)(iv).

[^ 15] Aliens lawfully admitted for permanent residence on a conditional basis. See INA 216.

[^ 16] See INA 212(h).

[^ 17] See INA 212(i).

[^ 18] See 8 CFR 212.7(a)(4)(iv).

[^ 19] See 8 CFR 212.7(a)(4)(iii).

[^ 20] See 8 CFR 212.7(a)(4)(ii).

[^ 21] See 8 CFR 212.7(a)(4)(iii).

[^ 22] See 8 CFR 204.313(g).

Chapter 7 - Denials, Appeals, and Motions

An officer must specify the reason(s) for denying any waiver in the denial notice.[1] If an officer denies the waiver based on discretion, the officer should explain how the negative factors outweigh the positive factors.

If USCIS denies a waiver application, the governing regulation may provide that the applicant may appeal the denial.[2] The officer must specify in the decision letter if the applicant may:

- File an appeal. If the decision is appealable, the officer must give the applicant proper notice of the possibility to appeal; or

- File a motion to reopen or reconsider. If USCIS approves the motion, then the officer reviews the waiver application again as if it had never been adjudicated. Therefore, USCIS issues a new decision on the waiver application following a successful motion.

USCIS may also reconsider a waiver approval or denial on its own motion at any time.[3]

Footnotes

[^ 1] See 8 CFR 103.3(a)(1)(i).

[^ 2] See 8 CFR 103.3.

[^ 3] See 8 CFR 103.5(a) and 8 CFR 212.7(a)(4)(v).

Part B - Extreme Hardship

Chapter 1 - Purpose and Background

A. Purpose

This part offers guidance concerning the adjudication of applications for those discretionary waivers of inadmissibility that require applicants to establish that refusal of their admission would result in “extreme hardship” to certain U.S. citizen or lawful permanent resident (LPR) family members.

B. Background

Under the Immigration and Nationality Act (INA),[1] admissibility is generally a requirement for admission to the United States, adjustment of status, and other immigration benefits.[2] The grounds that make aliens inadmissible to the United States are generally described in section 212 of the INA.

Several statutory provisions authorize the Secretary of Homeland Security[3] to grant discretionary waivers of particular grounds of inadmissibility for those who demonstrate that a denial of admission would result in “extreme hardship” to specified U.S. citizen or LPR family members. These specified family members are known as “qualifying relatives.”[4]

Each of these statutory provisions conditions a waiver on both a finding of extreme hardship to one or more qualifying relatives and the favorable exercise of discretion. These waiver applications are adjudicated by USCIS (and in some cases by the Department of Justice’s Executive Office for Immigration Review).[5]

The various statutory waiver provisions specify different categories of qualifying relatives and permit waivers of different inadmissibility grounds. The provisions include:

- INA 212(a)(9)(B)(v) – Provides for waiver of the 3- and 10-year inadmissibility bars for unlawful presence.[6] Qualifying relatives are limited to applicants’ U.S. citizen and LPR spouses and parents.[7]
- INA 212(h)(1)(B)[8] – Provides for waiver of inadmissibility based on crimes involving moral turpitude, multiple criminal convictions, prostitution and commercialized vice, and certain serious criminal offenses for which the alien received immunity from prosecution.[9] Also provides a waiver of inadmissibility for a controlled substance violation insofar as the violation relates to a single offense of simple possession of 30 grams or less of marijuana.[10] Qualifying relatives are limited to applicants’ U.S. citizen and LPR spouses, parents, sons, and daughters.[11]
- INA 212(i)(1) – Provides for waiver of inadmissibility for certain types of immigration fraud or willful misrepresentations of material fact.[12] For purposes of this waiver:
- Qualifying relatives are generally limited to applicants’ U.S. citizen and LPR spouses and parents.
- But if the applicant is a Violence Against Women Act (VAWA) self-petitioner, USCIS also must consider extreme hardship to the applicant himself or herself, or to a parent or child[13] who is a U.S. citizen, LPR, or otherwise a qualified alien.

The factors discussed in this guidance apply to any waiver application in which the applicant must establish extreme hardship to a qualifying relative.[14] Because the classes of individuals who may serve as qualifying relatives varies among the different waiver provisions, officers should carefully determine which individuals can serve as qualifying relatives under the relevant extreme hardship analysis.

Footnotes

[^ 1] See Immigration and Nationality Act, Pub. L. 82-414 , 66 Stat. 163 (June 27, 1952), as amended.

[^ 2] See INA 212(a) and INA 245(a).

[^ 3] See 6 U.S.C. 271(b). See Delegation No. 0150.1, “Delegation to the Bureau of Citizenship and Immigration Services” II, Z (June 5, 2003).

[^ 4] The classes of individuals who may serve as “qualifying relatives” depends on the specific text of the waiver provision involved. A U.S. citizen or LPR spouse or parent is a qualifying relative for most extreme hardship waivers. For certain other extreme hardship waivers, a U.S. citizen or LPR child, as well as an adult son or daughter, can be the qualifying relative. In the case of a K visa applicant, a U.S. citizen fiancé(e) is considered a U.S. citizen “spouse” qualifying relative. See 8 CFR 212.7(a) and 22 CFR 41.81(d) (K nonimmigrants). Finally, under some provisions, discretionary relief may be available upon a showing of extreme hardship to the applicants themselves. These include waivers of inadmissibility under INA 212(i)(1) (waiver of fraud-related inadmissibility for Violence Against Women Act (VAWA) self-petitioners), waivers of requirements for removing conditions on LPR status under INA 216(c)(4)(A), cancellation of removal under INA 240A(b)(2)(A)(v) adjudicated by the Executive Office for Immigration Review, and suspension of removal and cancellation of removal under Section 203 of Nicaraguan Adjustment and Central America Relief Act (NACARA), Pub. L. 105-100 (PDF), 111 Stat. 2160, 2196 (November 19, 1997). See 8 CFR 240.64(c) and 8 CFR 1240.64(c). This guidance addresses USCIS’ adjudication of waiver applications that require a showing of extreme hardship to specified family members, not applications based on extreme hardship to applicants themselves.

[^ 5] See 6 U.S.C. 271(b). See Delegation No. 0150.1, “Delegation to the Bureau of Citizenship and Immigration Services” II, Z (June 5, 2003).

[^ 6] See INA 212(a)(9)(B)(i).

[^ 7] A U.S. citizen fiancé(e) is a qualifying relative in the case of a K nonimmigrant applicant. See 8 CFR 212.7(a) and 22 CFR 41.81(d) (K nonimmigrants).

[^ 8] Other provisions of INA 212(h) authorize waivers of certain grounds of inadmissibility without an extreme hardship determination. See INA 212(h), INA 212(h)(1)(A), and INA 212(h)(1)(C).

[^ 9] See INA 212(a)(2)(A)(i), INA 212(a)(2)(B), INA 212(a)(2)(D), and INA 212(a)(2)(E).

[^ 10] See INA 212(a)(2)(A)(ii).

[^ 11] The son or daughter must be related to the applicant in one of the ways specified in INA 101(b)(1), but he or she does not need to be a "child" (unmarried and under 21 years of age). Because the term "son or daughter" is not restricted with respect to age or marital status, it includes children as defined in INA 101(b)(1) as well as adult or married sons and daughters.

[^ 12] See INA 212(a)(6)(C)(i).

[^ 13] The term "child" is limited to individuals who are unmarried, under 21 years of age, and related to the applicant in one of the ways specified in INA 101(b)(1).

[^ 14] Certain types of waivers utilize standards of hardship other than "extreme hardship." For example, the "exceptional hardship" waiver that applies to the foreign residence requirement for certain exchange visitors under INA 212(e) is a less demanding standard than "extreme hardship." By contrast, the "exceptional and extremely unusual hardship" standard for non-LPR cancellation of removal is more stringent that the extreme hardship standard under INA 240A(b). See *Matter of Monreal-Aguinaga (PDF)*, 23 I&N Dec. 56 (BIA 2001). This guidance specifically applies only to "extreme hardship" determinations.

Chapter 2 - Extreme Hardship Policy

A. Overview

Waivers of inadmissibility generally authorize U.S. immigration authorities to balance competing policy considerations when determining whether an alien should be admitted to the United States despite his or her inadmissibility.

On the one hand, the alien has engaged in conduct that Congress considers serious enough to render the individual inadmissible to the United States. On the other hand, Congress specifically authorized waivers of these grounds of inadmissibility for those cases in which the refusal of admission "would result in extreme hardship." To meet this "extreme hardship" requirement, the applicant must show that refusal of admission would impose more than the usual level of hardship that commonly results from family separation or relocation. Congress clearly intended the waiver to be applied for purposes of family unity and with other humanitarian concerns in mind.[1]

B. What is Extreme Hardship

The term "extreme hardship" is not expressly defined in the Immigration and Nationality Act (INA), in Department of Homeland Security (DHS) regulations, or in case law (although DHS regulations and certain Board of Immigration Appeals (BIA) decisions have provided some relevant guidance with respect to what may constitute extreme hardship in certain contexts). As the U.S. Supreme Court recognized in INS v. Jong Ha Wang, "[t]hese words are not self-explanatory, and reasonable men could easily differ as to their construction. But the [INA] commits their definition in the first instance to the Attorney General [and the Secretary of Homeland Security] and [their] delegates."[2]

Therefore, "[t]he Attorney General [and the Secretary of Homeland Security] and [their] delegates have the authority to construe 'extreme hardship' narrowly should they deem it wise to do so."[3]Conversely, "[a] restrictive view of extreme hardship is not mandated either by the Supreme Court or by [the BIA] case law."[4]

USCIS recognizes that at least some degree of hardship to qualifying relatives exists in most, if not all, cases in which individuals with the requisite relationships are denied admission. Importantly, to be considered "extreme," the hardship must exceed that which is usual or expected.[5]But extreme hardship need not be unique,[6]nor is the standard as demanding as the statutory "exceptional and extremely unusual hardship" standard that is generally applicable to non-lawful permanent resident cancellation of removal.[7]

Footnotes

[^ 1] For example, see *Matter of Lopez-Monzon (PDF)*, 17 I&N Dec. 280, 281 (BIA 1979) ("The intent of Congress in adding [the INA 212(i) waiver], which is evident from its language, was to provide for the unification of families, thereby avoiding the hardship of separation.").

[^ 2] See 450 U.S. 139, 144 (1981) (per curiam).

[^ 3] See *INS v. Jong Ha Wang*, 450 U.S. 139, 145 (1981) (per curiam).

[^ 4] See *Matter of Pilch (PDF)*, 21 I&N Dec. 627, 630 (BIA 1996). See *Matter of L-O-G- (PDF)*, 21 I&N Dec. 413, 418 (BIA 1996).

[^ 5] See 8 CFR 1240.58(b) (hardship must go "beyond that typically associated with deportation") (former suspension of deportation). The federal courts and the BIA have frequently relied on cases involving the former suspension of deportation statute when interpreting extreme hardship waiver statutes, as these statutes employed the same language. See Hassan v. INS, 927 F.2d 465, 467 (9th Cir. 1991). See *Matter of Cervantes-Gonzalez (PDF)*, 22 I&N Dec. 560, 565 (BIA 1999), aff'd, *Cervantes-Gonzales v. INS*, 244 F.3d 1001 (9th Cir. 2001).

[^ 6] See *Matter of L-O-G- (PDF)*, 21 I&N Dec. 413, 418 (BIA 1996).

[^ 7] See INA 240A(b). See *Matter of Andazola-Rivas (PDF)*, 23 I&N Dec. 319, 322, 324 (BIA 2002) (holding the "exceptional and extremely unusual hardship" standard to be "significantly more burdensome than the 'extreme hardship' standard" and intimating that the applicant "might well" have prevailed under the latter standard even though she failed under the former). See *Matter of Monreal-Aguinaga (PDF)*, 23 I&N Dec. 56, 59-64 (BIA 2001) (same).

Chapter 3 - Adjudicating Extreme Hardship Claims

A. Overview

In adjudicating a waiver request, the officer must ensure that the applicant meets all of the statutory requirements for the waiver, including the extreme hardship showing. If the applicant is eligible, the officer must then determine whether the applicant warrants a favorable exercise of discretion. In each case, the officer should analyze each part separately.

First, the applicant has the burden of proof to demonstrate by a preponderance of the evidence that he or she satisfies the statutory requirements of the waiver, including extreme hardship.[1]The applicant meets the preponderance of the evidence standard if the evidence shows that it is more likely than not that a denial of admission would result in extreme hardship to one or more qualifying relatives.[2]

The finding of extreme hardship permits, but does not require, a favorable exercise of discretion.[3]Once the officer finds extreme hardship, the officer must then determine whether the applicant has shown that he or she merits a favorable exercise of discretion.[4]

B. Adjudicative Steps

The officer should complete the following steps when adjudicating a waiver application that requires a showing of extreme hardship to a qualifying relative.[5]

Adjudication Steps for Waivers Requiring Extreme Hardship to a Qualifying Relative

Adjudication Step		For More Information
Step 1	Confirm that the waiver provision requires a showing of extreme hardship to a qualifying relative.	See Chapter 1, Purpose and Background [9 USCIS-PM B.1]
Step 2	Consistent with the applicable waiver authority, identify each person as to whom the applicant makes a claim of extreme hardship and confirm that the applicant has established the necessary family relationship for the person(s) to be qualifying relatives(s).	See Chapter 4, Qualifying Relative [9 USCIS-PM B.4]
Step 3	Evaluate the present and future hardships that each qualifying relative would experience to determine whether it is more likely than not that an applicant's refusal of admission would result in extreme hardship to the qualifying relative. This includes whether any of the particularly significant factors listed below are present. These particularly significant factors generally exceed the common consequences and often weigh heavily in support of a finding of extreme hardship.	See Chapter 5, Extreme Hardship Considerations and Factors [9 USCIS-PM B.5] See Chapter 6, Extreme Hardship Determinations [9 USCIS-PM B.6]
Step 4	If no single hardship rises to the level of "extreme," then determine whether it is more likely than not that the hardships to the qualifying relatives in the aggregate rise to the level of extreme hardship.	See Chapter 2, Extreme Hardship Policy [9 USCIS-PM B.2] See Chapter 5, Extreme Hardship Considerations and Factors [9 USCIS-PM B.5] See Chapter 6, Extreme Hardship Determinations [9 USCIS-PM B.6]
Step 5	If extreme hardship is not found, deny the application. If extreme hardship is found, determine whether based on the totality of the circumstances of the individual case, the applicant merits a favorable exercise of discretion.	See Chapter 7, Discretion [9 USCIS-PM B.7]

Footnotes

[^ 1] See INA 291 (providing that burden is on applicant for admission to prove he or she is "not inadmissible" and "entitled to the nonimmigrant [or] immigrant . . . status claimed"). See *Matter of Mendez-Moralez (PDF)*, 21 I&N Dec. 296, 299 (BIA 1996) (holding that applicant for INA 212(h)(1)(B) waiver has burden of showing that favorable exercise of discretion is warranted, "as is true for other discretionary forms of relief"). See 8 CFR 212.7(e)(7) (provisional INA 212(a)(9)(B)(v) waivers). See INA 240(c)(4)(A) (in removal proceedings, the applicant for relief has the burden of proving that he or she is statutorily eligible and merits a favorable exercise of discretion).

[^ 2] See *Matter of Chawathe (PDF)*, 25 I&N Dec. 369, 376 (AAO 2010).

[^ 3] See *Matter of Cervantes-Gonzalez (PDF)*, 22 I&N Dec. 560, 566 (BIA 1999), aff'd, *Cervantes-Gonzales v. INS*, 244 F.3d 1001 (9th Cir. 2001). See *Matter of Ngai (PDF)*, 19 I&N Dec. 245 (BIA 1984). See *Matter of Shaughnessy (PDF)*, 12 I&N Dec. 810 (BIA 1968).

[^ 4] See Chapter 7, Discretion [9 USCIS-PM B.7].

[^ 5] In most cases, there will already have been a finding of inadmissibility, either by the consular officer adjudicating a visa application, or a USCIS officer adjudicating a related application, such as an Application to Register Permanent Residence or Adjust Status (Form I-485). A formal finding of inadmissibility is not required in adjudicating an Application for Provisional Presence Waiver (Form I-601A). The officer should identify all inadmissibility grounds and confirm that the ground(s) may be waived. This chart assumes that the inadmissibility grounds have been identified and that a waiver is available.

Chapter 4 - Qualifying Relative

A. Establishing the Relationship to the Qualifying Relative

A USCIS officer must verify that the relationship to a qualifying relative exists. When the qualifying relative is the visa petitioner, an officer should use the approval of the Petition for Alien Relative (Form I-130) as proof that the qualifying relationship has been established.[1]

If the applicant's relationship to the qualifying relative has not already been established through a prior approved petition, the USCIS officer must otherwise verify that the relationship to the qualifying relative exists. Along with the waiver application, applicants should include primary evidence that supports the relationship, such as marriage certificates,[2] birth certificates, adoption papers, paternity orders, orders of child support, or other court or official documents.

If such primary evidence does not exist or is otherwise unavailable, the applicant should explain the reason for the unavailability and submit secondary evidence of the relationship, such as school records or records of religious or other community institutions. If secondary evidence is also not reasonably available, the applicant may submit written testimony from a witness or witnesses with personal knowledge of the relevant facts.[3] If evidence establishing the relationship is missing or insufficient, the officer should issue a Request for Evidence (RFE) in accordance with USCIS policy.

If the applicant claims that the qualifying relative would suffer extreme hardship in part due to the hardship that would be suffered by a non-qualifying relative, the applicant must submit evidence establishing the claimed relationships.[4] If such evidence is missing or insufficient, the officer should issue an RFE in accordance with USCIS policy.

B. Separation or Relocation

With respect to the requirement that the refusal of the applicant's admission "would result in" extreme hardship to a qualifying relative, there are 2 potential scenarios to consider. Either:

- The qualifying relative(s) may remain in the United States separated from the applicant who is denied admission (separation); or
- The qualifying relative(s) may relocate overseas with the applicant who is denied admission (relocation).

In either scenario, depending on all the facts of the particular case, the refusal of admission may result in extreme hardship to one or more qualifying relatives.

Separation may result in extreme hardship if refusal of the applicant's admission would cause hardship (for example, suffering or harm) to a qualifying relative that is greater than the common consequences of family separation.[5] When assessing extreme hardship claims based on separation, USCIS focuses on how denial of the applicant's admission would affect the qualifying relative's well-being in the United States given the separation of the qualifying relative from the applicant.

Relocation may result in extreme hardship if refusal of the applicant's admission would cause hardship (for example, suffering or harm) to a qualifying relative that is greater than the common consequences of family relocation. When assessing extreme hardship claims based on relocation, USCIS focuses on how denial of the applicant's admission would affect the qualifying relative's well-being given the qualifying relative's relocation outside the United States.

An applicant may show that extreme hardship to a qualifying relative would result from both separation and relocation.[6] However, an applicant is not required to show extreme hardship under both scenarios. An applicant may submit evidence demonstrating which of the 2 scenarios would result from a denial of admission and may establish extreme hardship to one or more qualifying relatives by showing that either relocation or separation would result in extreme hardship.[7]

If the applicant seeks to demonstrate extreme hardship based on separation or relocation, the applicant's evidence must demonstrate that the designated outcome "would result" from the denial of the waiver. The applicant may meet this burden by submitting a statement from the qualifying relative certifying under penalty of perjury that the qualifying relative would relocate or separate if the applicant is denied admission. The statement should be sufficiently detailed to adequately convey to USCIS the reasons why either separation or relocation would likely result from a denial of admission. The applicant may also submit documentation or other evidence, if available, in support of this statement.

Due to the subjective factors inherently involved in decisions involving separation or relocation, a credible statement from the qualifying relative may be the best available evidence for establishing whether he or she would separate or relocate if the applicant's admission is denied. Among other things, such decisions generally involve the weighing of many deeply personal and subjective factors that cannot be objectively assessed by others.

Qualifying relative spouses, for example, are faced with the choice of separating from their applicant spouses to remain in the United States or leaving the United States to relocate abroad with their applicant spouses. The former may involve, among other things, the significant decline in the emotional support and affection between spouses; the latter may involve leaving behind important ties to the United States, including family and friends in the country, jobs and career opportunities, educational opportunities, availability of medical care, and safety and security. Decisions based on such complex human factors may be difficult to prove other than through credible statements.

However, if the USCIS officer determines that such a statement is not plausible or credible (including because it is inconsistent with the evidence of hardship presented), the officer may request additional evidence from the applicant to support the designation that the qualifying relative would separate or relocate. In such cases, the officer must consider the subjective nature of the inquiry and the difficulty involved in proving intent in this context through documentary or other supporting evidence.

Moreover, the officer must make determinations based on the evidence and arguments presented and not on the officer's personal moral view as to whether a particular qualifying relative "ought" to either relocate or separate in an individual case. Generally, in the absence of inconsistent evidence, a credible, sworn statement from the qualifying relative of his or her intent to relocate or separate would generally suffice to demonstrate what the qualifying relative plans to do.

Ultimately, the officer must be persuaded that it is more likely than not that a qualifying relative will suffer extreme hardship resulting from the denial of admission. In a case in which the applicant chooses to rely on evidence showing that extreme hardship would result from relocation, the officer must determine based on a preponderance of the evidence that relocation would occur. The same principle applies if the applicant chooses to rely on evidence showing that extreme hardship would result from separation. If the evidence presented fails to persuade the officer, the officer should provide an opportunity for the applicant to submit additional evidence—either to show that relocation or separation would occur, or to demonstrate that extreme hardship would result under both scenarios.

Finally, special considerations may arise in cases involving those limited statutory waivers for which a child may serve as a qualifying relative.[8] In such cases, a parent who asserts that he or she will separate from a child so that the child may remain in the United States bears the burden of overcoming the general presumption that the child will relocate with the parent. Among other factors, the parent should generally be expected to explain the arrangements for the child's care and support.

The failure to provide a credible plan for the care and support of the child would cast doubt on the parent's contention that he or she will actually leave the child behind in the United States.[9] Moreover, if the parent represents that the child will be left behind, USCIS may require the parent to state that understanding in a statement made under penalty of perjury.[10] Such a statement is not required, however, if the parent credibly represents that the child will be left behind in the care of the other parent[11] (which may itself give rise to extreme hardship depending on the totality of the circumstances).

C. Effect on Extreme Hardship if Qualifying Relative Dies

Generally, the applicant must show extreme hardship to a qualifying relative who is alive at the time the waiver application is both filed and adjudicated.[12] Unless a specific exception applies, an applicant cannot show extreme hardship if the qualifying relative has died.

INA 204(l) provides the only exception. In general, INA 204(l) allows USCIS to approve, or reinstate approval of, an immigrant visa petition and certain other benefits even though the petitioner or the principal beneficiary has died. INA 204(l) also provides that it applies generally to "any related applications," thereby including applications for waivers related to immigrant visa petitions.

Under this provision, an alien who establishes that the requirements of INA 204(l) have been met may apply for a waiver even though the qualifying relative for purposes of extreme hardship has died. Moreover, in cases in which the deceased individual is both the qualifying relative for purposes of INA 204(l) and the qualifying relative for purposes of the extreme hardship determination, the death of the qualifying relative is treated as the functional equivalent of a finding of extreme hardship.[13]

Section 204(l) also applies in the case of widows and widowers of U.S. citizens whose pending or approved petition was converted to a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360),[14] including if the petition later reverts to a Form I-130 petition based on a subsequent remarriage.[15]

D. Effect of Hardship Experienced by a Person who is not a Qualifying Relative

On its own, hardship to a non-qualifying relative[16] cannot satisfy the extreme hardship requirement. In some cases, however, the hardship experienced by non-qualifying relatives can be considered as part of the extreme hardship determination, but only to the extent that such hardship affects one or more qualifying relatives.[17]

1. Hardship to the Applicant

Except for certain applicants who are Violence Against Women Act (VAWA) self-petitioners, applicants for the waivers enumerated in Chapter 1 may not meet the relevant extreme hardship requirements by establishing hardship to themselves. In cases in which applicants who are not VAWA self-petitioners submit evidence of hardship to themselves, officers should consider the alleged hardships only as they affect the applicants' qualifying relatives.

For example, consider an applicant who indicates he suffers from a medical condition for which he would be unable to obtain necessary medical treatment in his home country. The applicant provides medical documentation about his condition and Department of State (DOS) information on country conditions that corroborate his statements. Because the applicant is not a qualifying relative, his claims alone cannot meet the extreme hardship requirement of the waiver.

However, the applicant's condition and prospective situation may show that denial of his admission would have a significant emotional or financial impact on one or more qualifying relatives in the United States. The USCIS officer may consider such impacts when determining whether the qualifying relative(s) would experience extreme hardship upon the applicant's denial of admission.

2. Hardship to Other Non-Qualifying Relatives

Similarly, if the applicant claims hardship to an individual who is not a qualifying relative for purposes of the relevant waiver, the officer should consider the alleged hardship only as it affects one or more qualifying relatives.

For example, consider an applicant who is married to a U.S. citizen with whom she has a 5-year-old child with a disability. Unless the relevant waiver allows for her child to serve as a qualifying relative, the USCIS officer may not consider the hardship to the child if the applicant is denied admission. The officer, however, may consider the child's disability when assessing whether the denial of admission will cause hardship for the qualifying-relative spouse. For example, denial of admission may impact the qualifying parent's financial and emotional ability to care for the disabled child.[18] Moreover, even if such derivative hardship does not rise to the level of extreme hardship by itself, it is a factor that should be considered when determining whether the qualifying relative's hardship, considered in the aggregate, rises to the level of extreme.

E. Aggregating Hardships

To establish extreme hardship, it is not necessary to demonstrate that a single hardship, taken in isolation, rises to the level of "extreme." Rather, any relevant hardship factors "must be considered in the aggregate, not in isolation."[19] Therefore, even if no one factor individually rises to the level of extreme hardship, the USCIS officer "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation" (or, in this case, the refusal of admission).[20] Moreover, even "those hardships ordinarily associated with deportation, . . . while not alone sufficient to constitute extreme hardship, are considered in the assessment of aggregate hardship."[21]

The applicant needs to show extreme hardship to only one qualifying relative.[22] But an applicant may have more than one qualifying relative. In such cases, if there is no single qualifying relative whose hardship alone is severe enough to be found "extreme," the extreme hardship standard would be met if the combination of hardships to 2 or more qualifying relatives in the aggregate rises to the level of extreme hardship.[23]

Therefore, if the applicant demonstrates that the combined hardships that two or more qualifying relatives would suffer rise to the level of extreme hardship, the applicant has met the extreme hardship standard. If the applicant presents evidence of hardship to multiple qualifying relatives that does not rise to the level of extreme hardship to any one qualifying relative, the USCIS officer should aggregate all of their hardships to decide whether these hardships combined rise to the level of extreme hardship.[24]

Footnotes

[^ 1] An officer who has concerns about the qualifying relationship in the approved Form I-130 should consult with a supervisor.

[^ 2] This includes marriages valid under the laws of the place of marriage.

[^ 3] See 8 CFR 103.2(b)(2)(i).

[^ 4] See Section D, Effect of Hardship Experienced by a Person who is not a Qualifying Relative [9 USCIS-PM B.4(D)].

[^ 5] For discussion of the common consequences of family separation and relocation, see Chapter 5, Extreme Hardship Considerations and Factors, Section B, Common Consequences [9 USCIS-PM B.5(B)].

[^ 6] If an applicant who submits evidence related to both relocation and separation ultimately demonstrates extreme hardship with regard to only one scenario, the USCIS officer should determine, possibly through the issuance of an RFE, whether the qualifying relative has established which scenario is more likely to result from a denial of admission.

[^ 7] See, for example, *Matter of Calderon-Hernandez (PDF)*, 25 I&N Dec. 885 (BIA 2012) (remanding for determination of hardship based only on separation after immigration judge had rejected hardship based on relocation). See *Matter of Recinas (PDF)*, 23 I&N Dec 467 (BIA 2002) (consideration of hardship based only on relocation). See *Cerrillo-Perez v. INS*, 809 F.2d 1419 (9th Cir. 1987) (ordering consideration of extreme hardship based on separation after Board of Immigration Appeals found no hardship based on relocation). See *Salcido-Salcido v. INS*, 138 F.3d 1292 (9th Cir. 1998) (same). See *Mendez v. Holder*, 566 F.3d 316 (2nd Cir. 2009) (ordering consideration of hardship only under relocation). See *Figueroa v. Mukasey*, 543 F.3d 487 (9th Cir. 2008) (remanding assessment of hardship only under relocation).

[^ 8] This is authorized by statute in cases of waivers of criminal grounds under INA 212(h)(1)(B).

[^ 9] See *Matter of Ige (PDF)*, 20 I&N Dec. 880, 885 (BIA 1994) (holding that, for purposes of the former suspension of deportation, neither the parent's "mere assertion" that the child will remain in the United States nor the mere "possibility" of the child remaining is entitled to "significant weight;" rather, the Board expects evidence that "reasonable provisions will be made for the child's care and support"). See *Iturribarria v. INS*, 321 F.3d 889, 902-03 (9th Cir. 2003) (finding that in suspension of deportation case, the petitioner could not claim extreme hardship from family separation without evidence of the family's intent to separate). See *Perez v. INS*, 96 F.3d 390, 393 (9th Cir. 1996) (holding that agency properly required, as means of reducing speculation in considering extreme hardship element in a suspension of deportation case, affidavits and other evidentiary material establishing that family members "will in fact separate").

[^ 10] See *Matter of Ige (PDF)*, 20 I&N Dec. 885, 885 (BIA 1994) (requiring such an affidavit in suspension of deportation cases).

[^ 11] See *Matter of Calderon-Hernandez (PDF)*, 25 I&N Dec. 885 (BIA 2012) (concluding that when a child will stay behind with a parent in the United States, regardless of that parent's immigration status, the waiver applicant need not provide documentary evidence regarding the child's care).

[^ 12] See *Matter of Federiso (PDF)*, 24 I&N Dec. 661 (BIA 2008).

[^ 13] See AFM Chapter 10.21(c)(5), Waivers and Other Related Applications (PDF).

[^ 14] See 8 CFR 204.2(i)(1)(iv).

[^ 15] For more detailed guidance on the approval of petitions and applications after the death of a qualifying relative under INA 204(l), see Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act (PDF), issued December 16, 2010, and Approval of a Spousal Immediate Relative Visa Petition under Section 204(l) of the Immigration and Nationality Act after the Death of a U.S. Citizen Petitioner (PDF), issued November 18, 2015. See *Williams v. DHS*, 741 F.3d 1228 (11th Cir. 2014) (noting congressional intent in not expressly including a "remarriage bar" in 204(l) and finding "[t]hat a spouse eventually remarries does nothing to impugn the validity of the original I-130 beneficiary-petition or the first marriage, and leaves the surviving spouse in the same position she would have been but for the untimely passing of her husband, an event beyond her control."). USCIS applies this ruling to all cases it adjudicates.

[^ 16] For example, hardship to the applicant's child when the particular waiver provision lists only the applicant's spouse and parents as qualifying relatives.

[^ 17] See *Matter of Gonzalez Recinas (PDF)*, 23 I&N Dec. 467, 471 (BIA 2002) ("In addition to the hardship of the United States citizen children, factors that relate only to the respondent may also be considered to the extent that they affect the potential level of hardship to her qualifying relatives.").

[^ 18] See *Zamora-Garcia v. INS*, 737 F.2d 488, 494 (5th Cir. 1984) (requiring, in suspension of deportation case, "consideration of the hardship to the [qualifying applicant] posed by the possibility of separation from the [non-qualifying third party children]").

[^ 19] See *Bueno-Carrillo v. Landon*, 682 F.2d 143, 146 n.3 (7th Cir. 1982). See *Ramos v. INS*, 695 F.2d 181, 186 n.12 (5th Cir. 1983).

[^ 20] See *Matter of O-J-O- (PDF)*, 21 I&N Dec. 381, 383 (BIA 1996).

[^ 21] See *Matter of O-J-O (PDF)*-, 21 I&N Dec. 381, 383 (BIA 1996). See *Matter of Ige (PDF)*, 20 I&N Dec. 880, 882 (BIA 1994) ("Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.").

[^ 22] See, for example, INA 212(h), INA 212(i), and INA 212(a)(9)(B)(v).

[^ 23] See *Watkins v. INS*, 63 F.3d 844, 850 (9th Cir. 1995) (reversing BIA decision on ground it had failed to aggregate the "professional and social changes" of the petitioner, who was a qualifying relative under the particular statute, with the hardship to the applicant's children, who were also qualifying relatives). See *Prapavat v. INS*, 638 F.2d 87, 89 (9th Cir. 1980) (holding that extreme hardship "may also be satisfied … by showing that the aggregate hardship to two or more family members described in 8 U.S.C. 1254(a)(1) is extreme, even if the hardship suffered by any one of them would be insufficient by itself"), on rehearing, 662 F.2d 561, 562-63 (9th Cir. 1981) (per curiam) (again listing both hardships to the qualifying relative petitioners and hardships to their U.S. citizen child, holding that these hardships "must all be assessed in combination," and finding that the Board had erred in failing to do so). See *Jong Ha Wang v. INS*, 622 F.2d 1341, 1347 (9th Cir. 1980) ("[T]he Board should consider the aggregate effect of deportation on all such persons when the alien alleges hardship to more than one."), *rev'd on other grounds*, 450 U.S. 139 (1981) (per curiam). These decisions all interpreted the former suspension of deportation provision. The list of qualifying individuals (which included the petitioners themselves) whose extreme hardship sufficed under that provision differed from the lists of qualifying relatives in the waiver provisions discussed here, but the statutory language was identical in all other relevant respects ("result in extreme hardship to …").

[^ 24] Hardships that the BIA has held to be "common results" in themselves are insufficient for a finding of extreme hardship. See *Matter of Ngai*, (PDF) 19 I&N Dec. 245 (BIA 1984). A common consequence, however, when combined with other factors that alone would also have been insufficient, may meet the extreme hardship standard when considered in the aggregate. For a list of those common consequences, see Chapter 5, Extreme Hardship Considerations and Factors, Section B, Common Consequences [9 USCIS-PM B.5(B)].

Chapter 5 - Extreme Hardship Considerations and Factors

A. Totality of the Circumstances

The officer must make extreme hardship determinations based on the factors, arguments, and evidence submitted.[1] Therefore, the officer should consider any submission from the applicant bearing on the extreme hardship determination. The officer may also consider factors, arguments, and evidence relevant to the extreme hardship determination that the applicant has not specifically presented, such as those addressed in Department of State (DOS) information on country conditions[2] or other U.S. Government determinations regarding

country conditions, including a country's designation for Temporary Protected Status (TPS). Officers must base their decisions on the totality of the evidence and circumstances presented.

B. Common Consequences

The common consequences of denying admission, in and of themselves, do not warrant a finding of extreme hardship.[3] The Board of Immigration Appeals (BIA) has held that the common consequences of denying admission include, but are not limited to, the following:

- Family separation;
- Economic detriment;
- Difficulties of readjusting to life in the new country;
- The quality and availability of educational opportunities abroad;
- Inferior quality of medical services and facilities; and
- Ability to pursue a chosen employment abroad.

While extreme hardship must involve more than the common consequences of denying admission, the extreme hardship standard is not as high as the significantly more burdensome "exceptional and extremely unusual" hardship standard that that applies to other forms of immigration adjudications, such as cancellation of removal.[4]

C. Factors Must Be Considered Cumulatively

The officer must consider all factors and consequences in their totality and cumulatively when assessing whether a qualifying relative will experience extreme hardship either in the United States or abroad. In some cases, common consequences that on their own do not constitute extreme hardship may result in extreme hardship when assessed cumulatively with other factors.[5]

For example, if a qualifying relative has a medical condition that alone does not rise to the level of extreme hardship, the combination of that hardship and the common consequences of inferior medical services, economic detriment, or readjusting to life in another country may cumulatively cause extreme emotional or financial hardship for the qualifying relative when considering the totality of the circumstances.

Ordinarily, for example, the fact that medical services are less comprehensive in another country is a common consequence of denying admission; but the inferior quality of medical services, considered along with the individual's specific medical conditions, may create sufficient difficulties as to rise to the level of extreme hardship in combination with all the other consequences.

The officer must weigh all factors individually and cumulatively, as follows:

- First, the officer must consider whether any factor set forth individually rises to the level of extreme hardship under the totality of the circumstances.
- Second, if any factor alone does not rise to the level of extreme hardship, the officer must consider all factors together to determine whether they cumulatively rise to the level of extreme hardship. This includes hardships to multiple qualifying relatives.

When considering the factors, whether individually or cumulatively, all factors, including negative factors, must be evaluated in the totality of the circumstances.

D. Examples of Factors that May Support a Finding of Extreme Hardship

The chart below lists factors that an applicant might present and that would be relevant to determining whether an applicant has demonstrated extreme hardship to a qualifying relative. This list is not exhaustive; circumstances that are not on this list may also be relevant to finding extreme hardship.

The presence of one or more of the factors below in a particular case does not mean that extreme hardship would necessarily result from a denial of admission. But they are factors that may be encountered and should be considered in their totality and cumulatively in individual cases. All hardship factors presented by the applicant should be considered in the totality of the circumstances in making the extreme hardship determination.

Some of the factors listed below apply when the qualifying relative would remain in the United States without the applicant. Other factors apply when the qualifying relative would relocate abroad. Some of the factors might apply under either circumstance.

Factors and Considerations for Extreme Hardship

Factors	Considerations
Family Ties and Impact	• Qualifying relative's ties to family members living in the United States, including age, status, and length of residence of any children. • Responsibility for the care of any family members in the United States, particularly children, elderly adults, and disabled adults. • The qualifying relative's ties, including family ties, to the country of relocation, if any. • Nature of relationship between the applicant and the qualifying relative, including any facts about the particular relationship that would either aggravate or lessen the hardship resulting from separation. • Qualifying relative's age. • Length of qualifying relative's residence in the United States. • Length of qualifying relative's prior residence in the country of relocation, if any. • Prior or current military service of qualifying relative. • Impact on the cognitive, social, or emotional well-being of a qualifying relative who is left to replace the applicant as caregiver for someone else, or impact on the qualifying relative (for example, child or parent) for whom such care is required.
Social and Cultural Impact	• Loss of access to the U.S. courts and the criminal justice system, including the loss of opportunity to request or provide testimony in criminal investigations or prosecutions; to participate in proceedings to enforce labor, employment, or civil rights laws; to participate in family law proceedings, victim's compensation proceedings, or other civil proceedings; or to obtain court orders regarding protection, child support, maintenance, child custody, or visitation.

Factors	Considerations
	• Fear of persecution or societal discrimination. • Prior grant of U nonimmigrant status. • Existence of laws and social practices in the country of relocation that would punish the qualifying relative because he or she has been in the United States or is perceived to have Western values. • Access or lack of access to social institutions and structures (official and unofficial) for support, guidance, or protection. • Social ostracism or stigma based on characteristics such as sex, sexual orientation, religion, race, national origin, ethnicity, citizenship, age, political opinion, marital status, or disability.[6] • Qualifying relative's community ties in the United States and in the country of relocation. • Extent to which the qualifying relative has assimilated into U.S. culture, including language, skills, and acculturation. • Extent to which the qualifying relative would have difficulty integrating into the country of relocation, including understanding and adopting social norms and established customs, including ethical or moral codes. • Difficulty and expense of travel/communication to maintain ties between qualifying relative and applicant, if the qualifying relative does not relocate. • Qualifying relative's present inability to communicate in the language of the country of relocation, as well as the time and difficulty that learning that language would entail. • Availability and quality of educational opportunities for qualifying relative (and children, if any) in the country of relocation. • Availability and quality of job training, including technical or vocational opportunities, for qualifying relative (and children, if any) in the country of relocation.
Economic Impact	• Economic impact of applicant's departure on the qualifying relative, including the applicant's or qualifying relative's ability to obtain employment in the country of relocation. • Economic impact resulting from the sale of a home, business, or other asset. • Economic impact resulting from the termination of a professional practice. • Decline in the standard of living, including due to significant unemployment, underemployment, or other lack of economic opportunity in the country of relocation. • Ability to recoup losses, or repay student loan debt. • Cost of extraordinary needs, such as special education or training for children. • Cost of care for family members, including children and elderly, sick, or disabled parents.
Health Conditions and Care	• Health conditions and the availability and quality of any required medical treatment in the country to which the applicant would be returned, including length and cost of treatment. • Psychological impact on the qualifying relative due to either separation from the applicant or departure from the United States, including separation from other family members living in the United States. • Psychological impact on the qualifying relative due to the suffering of the applicant. • Prior trauma suffered by the qualifying relative that may aggravate the psychological impact of separation or relocation, including trauma evidenced by prior grants of asylum, refugee status, or other forms of humanitarian protection.
Country Conditions[7]	• Conditions in the country of relocation, including civil unrest or generalized levels of violence, current U.S. military operations in the country, active U.S. economic sanctions against the country, ability of country to address significant crime, environmental catastrophes like flooding or earthquakes, and other socio-economic or political conditions that jeopardize safe repatriation or lead to reasonable fear of physical harm. • Temporary Protected Status (TPS) designation.[8] • Danger Pay for U.S. government workers stationed in the country of nationality.[9] • Withdrawal of Peace Corps from the country of nationality for security reasons. • DOS Travel Warnings or Alerts, whether or not they constitute a particularly significant factor, as set forth in Part E below.

E. Particularly Significant Factors

The preceding list identifies factors that may bear on whether a denial of admission would result in extreme hardship. Below are factors that USCIS has determined often weigh heavily in support of finding extreme hardship. An applicant who seeks to demonstrate the presence of one of the enumerated circumstances must submit sufficient reliable evidence to support the existence of such circumstance(s) and show that the circumstance will cause extreme hardship to the qualifying relative. The mere presence of an enumerated circumstance does not create a presumption of extreme hardship. The ultimate determination of extreme hardship must be based on the totality of the circumstances present in the individual case.

It is important to emphasize that the enumerated circumstances listed below are specifically highlighted only because they are often likely to support findings of extreme hardship. Other hardships not enumerated may also rise to the level of extreme, even if they vary significantly than those listed below.[10]

Eligibility for an immigration benefit ordinarily must exist at the time of filing and at the time of adjudication.[11] However, considering the nature of the particularly significant factors described below, the presence of one or more of these circumstances at the time of adjudication should be considered by a USCIS officer even if the circumstance arose after the filing of the waiver request.

1. Qualifying Relative Previously Granted Iraqi or Afghan Special Immigrant Status, T Nonimmigrant Status, or Asylum or Refugee Status

If a qualifying relative was previously granted Iraqi or Afghan special immigrant status,[12] T nonimmigrant status, asylum status, or refugee status in the United States from the country of relocation and the qualifying relative's status has not been revoked, those factors would often weigh heavily in support of finding extreme hardship.[13] The existence of this circumstance normally results in hardship greater than the common consequences denying admission, whether in cases involving relocation or separation.

The prior decision to grant the qualifying relative status as an Iraqi or Afghan special immigrant, T nonimmigrant, refugee, or asylee indicates the significantly heightened risk that relocation to the country from which he or she received protection could result in retaliatory violence, persecution or other danger to the qualifying relative. This prior assessment by USCIS would often weigh heavily in support of finding extreme hardship in a case involving relocation.

The same is also true in cases involving separation. The prior assessment by USCIS with respect to the qualifying relative indicates that he or she would likely face increased difficulty returning to that country to visit the applicant, thus generally resulting in hardship that is greater than that normally present in cases involving family separation. The applicant might also show that, due to their relationship, the applicant may experience persecution or other dangers similar to those that gave rise to the qualifying relative's underlying status. The qualifying relative in such a case may suffer additional psychological trauma due to the potential for harm to the applicant in the country of relocation.

2. Qualifying Relative or Related Family Member's Disability

Cases involving disabled individuals often involve hardships that rise above the common consequences. If a government agency has made a formal disability determination[14] with regard to the qualifying relative, or with regard to a family member of the qualifying relative who is dependent on the qualifying relative for care, that factor would often weigh heavily in support of finding that either relocation or separation would result in extreme hardship under the totality of the circumstances.

In cases involving either (1) relocation of the qualifying relative with a disability or (2) relocation of both the qualifying relative and the relevant family member with a disability, the applicant will need to show that the services available to the disabled individual in the country of relocation are unavailable or significantly inferior to those available to him or her in the United States. In such cases, the disability determination would often weigh heavily in support of a finding of extreme hardship.

In cases involving separation, the applicant will need to show that the qualifying relative with a disability, or the relevant family member with a disability, generally requires the applicant's assistance for care due to the disability. Where replacement care is not realistically available and obtainable, the disability determination would often weigh heavily in support of a finding of extreme hardship.

Absent a formal disability determination, an applicant may provide other evidence that a qualifying relative or relevant individual suffers from a medical condition, whether mental or physical, that makes either travel to, or residence in, the country of relocation detrimental to the qualifying relative or family member's health or safety. Similarly, an applicant may provide other evidence that the condition of the qualifying relative requires the applicant's assistance for care.

3. Qualifying Relative's Military Service

Military service by a qualifying relative often results in hardships from denial of the applicant's admission that rise above the common consequences of denying admission. If a qualifying relative is an Active Duty member of any branch of the U.S. armed forces,[15] or is an individual in the Selected Reserve of the Ready Reserve, denial of an applicant's admission often causes psychological and emotional harm that significantly exacerbates the stresses, anxieties and other hardships inherent in military service by a qualifying relative.

This may result in an impairment of the qualifying relative's ability to serve the U.S. military, or to be quickly called into active duty in the case of reservists, which also affects military preparedness. This is often the case even if the qualifying relative's military service already separates, or will separate, him or her from the applicant. In such circumstances, the applicant's removal abroad may magnify the stress of military service to a level that would constitute extreme hardship.

4. DOS Travel Warnings

DOS issues travel warnings to notify travelers of the risks of traveling to certain foreign countries.[16] Reasons for issuing travel warnings include, but are not limited to, unstable government, civil war, ongoing intense crime or violence, or frequent terrorist attacks. A travel warning remains in place until changes in circumstances sufficiently mitigate the need for such a warning. With respect to some travel warnings, DOS advises of travel risks to a specific region or regions of the country at issue.

In some situations, DOS issues travel warnings that do more than notify travelers of the risks of traveling to a particular country or region(s) within a country. Rather, DOS affirmatively recommends against travel or affirmatively recommends that U.S. citizens depart. DOS may make such travel warnings country-wide. Such travel warnings may contain language in which:

- DOS urges avoiding all travel to the country or region because of safety and security concerns;
- DOS warns against all but essential travel to the country or region;
- DOS advises deferring all non-essential travel to the country or region; and/or
- DOS advises U.S. citizens currently in the country or region to depart.

In cases where a qualifying relative would relocate to a country or region that is the subject of such DOS recommendations against travel, the travel warning would often weigh heavily in support of a finding of extreme hardship. In assessing the dangers in the country of relocation, USCIS officers should give weight to DOS travel warnings, taking into account the nature and severity of such warnings.

Generally, the fact that the country of relocation is currently subject to a DOS country-wide travel warning against travel may indicate that a qualifying relative would face significantly increased danger if he or she were to relocate to that country with the applicant. This significantly increased danger would often support a finding of extreme hardship.

If the relevant travel warning covers only a part or region of the country of relocation, the USCIS officer must determine whether the qualifying relative would relocate to the part or region that is subject to the warning. If the officer finds that this part or region is one to which the qualifying relative plans to return despite the increased danger (for example, because of family relationships or employment opportunities), that may indicate that the qualifying relative would face significantly increased danger if he or she were to relocate to that part or region. This significantly increased danger would often support a finding of extreme hardship.

Alternatively, if the officer finds that the qualifying relative would relocate to a part of the country that is not subject to the travel warning (because of the danger in the part or region covered by the travel warning or for any other reason), that indicates that the qualifying relative would generally not face significantly increased danger upon relocation.

If the officer finds that the qualifying relative would remain in the United States while the applicant returns to a country or region that is subject to a DOS warning against travel, the officer should evaluate whether the separation may result in extreme hardship to the qualifying relative. In such cases, the officer should consider the hardship to the qualifying relative resulting from the increased danger to the applicant in the relevant country or region.

5. Substantial Displacement of Care of Applicant's Children

USCIS recognizes the importance of family unity and the ability of parents and other caregivers to provide for the well-being of children.[17] Depending on the particular facts of a case, either the continuation of one's existing caregiving duties under new and difficult circumstances or the need to assume someone else's caregiving duties can be sufficiently burdensome

to rise to the level of extreme hardship. The children do not need to be U.S. citizens or lawful permanent residents (LPRs) in such cases.[18]

In cases involving the separation of spouses in which the qualifying relative is the primary caretaker and the applicant is the primary income earner, the income earner's refusal of admission often causes economic loss to the caregiver. Although economic loss alone is generally a common consequence of a denial of admission, depending on the particular circumstances the economic loss associated with the denial of admission may create burdens on the caregiver that are severe enough to rise to the level of extreme hardship. That can occur, for example, when the qualifying relative must take on the additional burdens of primary income earner while remaining the primary caregiver. That dual responsibility may significantly disrupt the qualifying relative's ability to meet his or her own basic subsistence needs or those of the person(s) for whom the care is being provided. In such cases, the dual burden would often support a finding of extreme hardship. In addition, the qualifying relative may suffer significant emotional and psychological impacts from being the sole caregiver of the child(ren) that exceed the common consequences of being left as a sole parent.

In cases involving the separation of spouses in which the qualifying relative is the primary income earner and the applicant is the primary caretaker, the caretaker's refusal of admission can result in a substantial shift of caregiving responsibility from the applicant to the qualifying relative. Such a shift may significantly affect the qualifying relative's ability to earn income for the family; disrupt family, social, and cultural ties; or hinder the child(ren)'s psychological, cognitive, or emotional development.

The shift may also frustrate or complicate the qualifying relative's efforts to provide a healthy, stable, and caring environment for the child(ren). Such additional emotional, psychological and/or economic stress for the qualifying relative could exceed the levels of hardship that ordinarily result from family separation, and rise to the level of extreme hardship.[19]

Under either scenario discussed above, the significant shifting of caregiving or income-earning responsibilities would often weigh heavily in support a finding of extreme hardship to the qualifying relative, provided the applicant shows:

- The existence of a bona fide relationship between the applicant and the child(ren);
- The existence of a bona fide relationship between the qualifying relative and the child(ren); and
- The substantial shifting of caregiving or income-earning responsibilities under circumstances in which the ability to adequately care for the children would be significantly compromised.

To prove a bona fide relationship to the child(ren), the applicant and qualifying relative should have emotional and/or financial ties or a genuine concern and interest for the child(ren)'s support, instruction, and general welfare.[20] Evidence that can establish such a relationship includes (but is not limited to):

- Income tax returns;
- Medical or insurance records;
- School records;
- Correspondence between the parties; or
- Affidavits of friends, neighbors, school officials, or other associates knowledgeable about the relationship.

To prove the qualifying relative would take on the additional caregiving or income-earning responsibilities, the applicant needs to show that the qualifying relative either (1) is a parent of the child(ren) in question or (2) otherwise has the bona fide intent to assume those responsibilities. Evidence of such an intent could include (but is not limited to):

- Legal custody or guardianship of the child;
- Other legal obligation to take over parental responsibilities;
- Affidavit signed by qualifying relative to take over parental or other caregiving responsibilities; or
- Affidavits of friends, neighbors, school officials, or other associates knowledgeable about the qualifying relative's relationship with the children or intentions to assume parental or other caregiving responsibilities.

F. Hypothetical Case Examples

Below are hypothetical cases that can help officers determine when cases present factors that rise to the level of extreme hardship. These hypotheticals are not meant to be exhaustive or all-inclusive with respect to the facts or scenarios that may be presented for adjudication and that may give rise to extreme hardship. Although a USCIS officer presented with similar scenarios as those presented in the hypotheticals could reasonably reach the same conclusions described below, extreme hardship determinations are made on a case-by case basis in the totality of the circumstances. An extreme hardship determination will always depend on the facts of each individual case.

For purposes of the following hypotheticals, it is assumed that:

- The applicant is inadmissible under a ground that may be waived based on a showing of extreme hardship to a qualifying relative spouse or parent.[21]
- The facts asserted in the hypotheticals are supported by appropriate documentation.

Scenario 1

Tyler was admitted to the United States as a nonimmigrant 5 years ago. Three years after Tyler's entry, Tyler married Pat, a U.S. citizen spouse. Tyler seeks a waiver claiming that Pat would suffer extreme hardship if Tyler were denied admission to the United States.

Pat submits a credible, sworn statement indicating that if Tyler is refused admission, Pat would relocate to Tyler's native country. Tyler and Pat have been married for 2 years. Pat is a sales clerk. A similar job in the country of relocation would pay far less than Pat earns in the United States. In addition, although Pat has visited the country of relocation several times, Pat is not fluent in the country's language and lacks the ties that would facilitate employment opportunities and social and cultural integration.

Tyler is a skilled laborer who similarly would command a much lower salary in the country of relocation, but who was, prior to coming to the United States, gainfully employed. The couple is renting an apartment in the United States, does not own any real estate or other significant property, and has no children. Pat and Tyler do not have any other family, either in the United States or in the country of relocation.

Analysis of Scenario 1

These facts alone generally would not favor a finding of extreme hardship. The hardships to Pat, even when aggregated, include only common consequences of relocation—economic loss and the social and cultural difficulties arising mainly from Pat 's inability to speak the language fluently.

Scenario 2

The facts are the same as in Scenario 1 except that Pat (who is Tyler's U.S. citizen spouse and would relocate) has a chronic medical condition requiring regular visits to the doctor, and Tyler is an unskilled worker who would command a much lower salary in the country of relocation. In addition, Pat has family that lives nearby and is a crucial part of Tyler's support system. Pat and Tyler are also active members of their local community and have friends who often help out when Pat's family is not available. Based on the care received from the doctor and the support received from family and friends, Pat is able to manage the chronic condition.

Pat submits a credible, sworn statement that Pat will relocate with Tyler despite Pat's medical condition, and the evidence shows under the totality of the circumstances that Pat will relocate with Tyler. Pat's doctor provides a statement that confirms that Pat will continue to progress and function well if Pat keeps receiving medical treatment and the support from family and other members of Pat's existing social support network. While the doctor cannot fully attest to the availability of care in Tyler's native country, the doctor is able to attest that moving to another country and disrupting Pat 's medical care and support network will cause Tyler significant difficulties. The doctor's statement also states that Pat will likely not be able to work without the support system Pat has in the United States.

Analysis of Scenario 2

These facts would generally favor a finding of extreme hardship. The aggregate hardships to Pat now include not only the economic losses, diminution of employment opportunities, and social, cultural, and linguistic difficulties (which are generally common consequences of relocation) but also the additional medical hardship that Pat would experience if Pat relocates to Tyler's native country. The attestation of Pat's doctor expressing concerns about the disruption in medical care, the effect of losing support from Pat's family and social environment, and the possibility of Pat not being able to accept employment, would generally favor a finding of extreme hardship.

Scenario 3

Assume the facts are the same as originally presented in Scenario 1 (without the additional facts from Scenario 2), but now with the added facts that Tyler also has LPR parents who live in the United States. Pat submits a credible, sworn statement indicating that Pat would relocate with Tyler and that Tyler's LPR parents would remain in the United States. Again, when analyzing the additional evidence under the totality of the circumstances, the evidence shows Pat will still relocate with Tyler.

Tyler and Pat both have a close relationship with Tyler's parents, who are elderly and non-native English speakers. Tyler regularly transports the parents to medical appointments, translates medical and other instructions, and offers them significant emotional support. As a result of the separation from Tyler and Tyler's spouse, Tyler's parents would suffer significant emotional hardship.

Analysis of Scenario 3

Based on the totality of the evidence presented, the addition of these facts would generally favor a finding of extreme hardship. There are now 3 qualifying relatives (Tyler's U.S. citizen spouse and Tyler's two LPR parents). Although the aggregated hardships to Tyler's spouse alone (under Scenario 1) include only common consequences of a refusal of admission, aggregating those hardships with the hardships to Tyler's elderly parents, which include the potential disruption of their medical care, loss of ability to navigate their surroundings in English, and their significant emotional hardship resulting from the loss of their child's support, would generally tip the balance in favor of a finding of extreme hardship.

Scenario 4

EF has lived continuously in the United States since entering without inspection 4 years ago. She has been married to GH, her U.S. Citizen husband, for 2 years. EF seeks a waiver claiming that GH would suffer extreme hardship if EF were denied admission to the United States. GH has a moderate income, and EF works as a housecleaner for low wages. GH submits a credible, sworn statement that he would remain in the United States, and thus would separate from EF, if she is denied the waiver. Upon separating, the couple would lose the income EF earns. In addition to losing EF's income, GH is committed to sending remittances to EF once she leaves, in whatever amount GH can afford. EF and GH do not have children, and GH does not have family in the United States.

Analysis of Scenario 4

These facts alone generally would not rise to the level of extreme hardship, even if the hardships to the qualifying relative are aggregated. The hardships to GH do not rise above the common consequences of separation and economic loss.

Scenario 5

JK has lived continuously in the United States since entering without inspection 6 years ago. She married LM, her U.S. citizen husband, 2 years ago. JK seeks a waiver on the basis that LM would suffer extreme hardship if JK were denied admission to the United States. JK and LM live near LM's family and friends, and LM has spent little time traveling abroad. He does not speak the language of the country to which JK would return if she is denied admission, and LM's employment opportunities in that country would be less desirable than in the United States.

Additionally, DOS has issued a travel warning that strongly advises against travel to specific regions in the country to which JK would return, including the region where her family lives. The region-specific warning affirmatively recommends against non-essential travel to that region, citing the high rate of kidnapping and murder. LM submits a credible, sworn statement indicating that due to his recent marriage, the difficulties JK would face in her country, and his commitment to supporting her however possible, he would relocate to remain with JK if she is denied a waiver.

Analysis of Scenario 5

The totality of these circumstances generally would favor a finding of extreme hardship, significantly in light of the nature and severity of the DOS travel warning. Although the other hardships present in the case are common consequences of relocation, LM has also demonstrated that he will return to the region of a country that is the subject of the DOS travel warning, which advises against non-essential travel to that region. The travel warning recommending against travel to that particular region of that country to which LM would relocate is a particularly significant factor that would often weigh heavily in support of a finding of extreme hardship. If the travel warning were less severe or only temporary, the warning would not qualify as a particularly significant factor but would be another factor to be considered in the totality of the circumstances by the officer.

Alternatively, in some circumstances where DOS has issued travel warnings with regard to a particular region of a country, the applicant and qualifying relative may relocate to a different region of the country that is not subject to a travel warning. In such a situation, the fact of the region-specific travel warning would not itself constitute a particularly significant factor; however, the hardships arising from relocating to another region of the country remains a factor to be considered and may result in a finding of extreme hardship, based on the totality of the circumstances.[22]

Scenario 6

OP has lived continuously in the United States since entering without inspection 7 years ago. After dating and living together for 5 years, OP married her same-sex partner SQ, a U.S. citizen. OP seeks a waiver claiming that SQ would suffer extreme hardship if OP were denied admission to the United States. SQ submits a credible, sworn statement indicating that she would remain in the United States and separate from OP if the waiver is denied.

SQ owns a business in the United States, and OP has continuously supported the business, including by helping out as an office manager. SQ would not be able to keep the business running successfully without OP because of the expense of hiring an office manager. In addition, the DOS country report indicates that women in OP's country of relocation generally may not work outside the home except in an extremely limited set of professions (such as teaching) for which OP is not qualified.

The country report also indicates that same-sex marriages are not recognized in that country, that same-sex sexual conduct is illegal, and that official societal discrimination and harassment (in some circumstances even giving rise to physical threats or harm) based on sexual orientation or sex is prevalent in many areas of life.

Based on these factors, SQ fears OP would be discriminated against and potentially be at risk of physical harm based on her sexual orientation. SQ has been in therapy due to depression and anxiety after she learned that her wife may be denied admission to the United States and that her wife would have to remain in a country where she risks discrimination and physical harm. The couple does not provide other evidence of hardship.

Analysis of Scenario 6

These facts would generally favor a finding of extreme hardship. SQ would face serious economic detriment if OP is denied admission. In addition, the country reports show that SQ's marriage to OP would not be recognized in OP's native country, and that OP's marriage to a person of the same sex is a common cause for social ostracism, discrimination, and potential physical danger in OP's native country. The country reports further show that OP's access to education, employment and health care could be limited due to OP's sexual orientation and sex, thereby negatively affecting OP's subsistence.

SQ would face psychological trauma based on the fear that OP would be harassed or threatened because of her sexual orientation. SQ's trauma based on her fear that OP will be ostracized and persecuted in OP's native country based on her sexual orientation and sex are factors that in the totality of circumstances would ordinarily rise to the level of extreme hardship.

Scenario 7

TU married his U.S. citizen wife, VW, 3 years ago. TU seeks a waiver on the ground that VW would suffer extreme hardship if TU were denied admission to the United States. Before becoming a U.S. citizen, VW and some members of her family fled persecution from her native country, and they were granted asylum in the United States. TU is of the same nationality. VW submits a credible, sworn statement that she would remain in the United States and separate from TU if the waiver is denied. The evidence also supports the conclusion that the return of TU to that country would cause VW particular anxiety and psychological stress, due both to the limitations on VW's ability to visit her husband and to the harm TU may face in the country of return due to his relationship to VW.

Analysis of Scenario 7

These facts generally would favor a finding of extreme hardship. TU and VW are of the same nationality, and TU would return to the country from which VW fled. The fact that VW was previously granted asylum from the country of relocation is a particularly significant factor that would often weigh heavily in support of a finding of extreme hardship. The fact that VW and members of her family were previously granted asylum from the country of return shows that she is at risk of persecution if she were to return to that country to even visit her husband.

She has also submitted credible evidence indicating that she would suffer additional anxiety and psychological stress from the harm her husband may face due to his relationship with her and her family. The totality of these circumstances, including the particularly significant factor of VW's grant of asylum, would generally result in a finding of extreme hardship.

Scenario 8

XY married her U.S. citizen husband, ZA, 9 years ago. XY seeks a waiver on the basis that ZA would suffer extreme hardship if XY were denied admission to the United States. XY and ZA have a 3-year old son and a 2-year old daughter. XY submits credible evidence showing that she is the primary caretaker of the children and that ZA is the primary income earner. His wages are not sufficient to pay for childcare and the couple does not have family that can provide childcare for the children.

ZA submits a credible, sworn statement indicating that he will remain in the United States with their children separated from XY if the waiver is denied. The evidence also indicates that XY will have very limited employment opportunities in the country of return because of her limited education. Whatever income XY will be able to earn in the country of return will be spent on her subsistence and will be insufficient to allow her to contribute to childcare or other family needs in the United States. Due to the lack of childcare options available to ZA, he will be required to become the sole caregiver of the children, while simultaneously striving to maintain his role as the family's sole income earner.

If ZA is unable to retain his job due to the assumption of primary caregiving responsibilities, he will lose the income necessary to support his children. The dual burden of being both the primary income earner and sole caregiver will create significant psychological, emotional, and financial stresses for ZA. Additionally, the evidence shows that the displacement of childcare would impact the emotional state and development of the children, which would require further care and attention on the part of ZA.

Analysis of Scenario 8

These facts would generally favor a finding of extreme hardship. Although ZA's children are not qualifying relatives for purposes of demonstrating extreme hardship in this case, the hardship to ZA caused by becoming primarily responsible for the children's care, while maintaining his role as primary income earner, would implicate the particularly significant factor for substantial displacement of care of the applicant's children.

In this case, ZA and XY submitted credible evidence that XY cannot contribute to the family's needs, that ZA is unable to earn sufficient income for family needs if he must assume primary caregiving responsibilities, and that ZA otherwise lacks the resources or support network to replace either the primary caregiving responsibilities he would need to assume or the primary income-earning role that has been the source of the family's support.

The evidence also shows that the displacement of childcare would impact the children in a manner that would require additional care and attention by ZA and would thus further impact ZA's ability to care for his children. Absent other facts that diminish the impacts of the separation, this scenario would generally rise to the level of extreme hardship based on the totality of the circumstances.

Alternatively, this particularly significant factor may also be presented in a case where the applicant is the primary income earner and the qualifying relative is the primary caretaker of the children. If the applicant is refused admission, the qualifying relative could be required, depending on the circumstances, to take on the additional responsibilities of being the primary income earner in addition to continuing his or her role as primary caretaker.

In cases where this heightened responsibility would threaten the qualifying relative's ability to meet basic subsistence needs for the family, the significant emotional and psychological stress caused by the added burdens would often weigh heavily in support of a finding of extreme hardship.[23]

Footnotes

[^ 1] See *Matter of Cervantes-Gonzalez (PDF)*, 22 I&N Dec. 560 (BIA 1999), aff'd, *Cervantes-Gonzales v. INS*, 244 F.3d 1001 (9th Cir. 2001). See *Matter of L-O-G (PDF)*-, 21 I&N Dec. 413 (BIA 1996). See *Matter of Anderson (PDF)*, 16 I&N Dec. 596 (BIA 1978).

[^ 2] See DOS Country Reports on Human Rights Practices and DOS Travel Warnings.

[^ 3] See *Matter of Ngai (PDF)*, 19 I&N Dec. 245 (BIA 1984) ("Common results of the bar, such as separation, financial difficulties, etc. in themselves are insufficient to warrant approval of an application unless combined with much more extreme impacts").

[^ 4] See INA 240A(b)(1)(D).

[^ 5] See *Matter of O-J-O- (PDF)*, 21 I&N Dec. 381, 383 (BIA 1996).

[^ 6] The characteristics for which a person is ostracized or stigmatized may be actual or perceived (that is, the person may actually have that characteristic, or someone may perceive the person as having that characteristic).

[^ 7] The officer should consider any submitted government or nongovernmental reports on country conditions specified in the hardship claim. In the absence of any evidence submitted on country conditions, the officer may refer to DOS information on country conditions, such as DOS Country Reports on Human Rights Practices and the most recent DOS Travel Advisories, to corroborate the claim. See Volume 1, General Policies and Procedures, Part H, Emergencies or Unforeseen Circumstances, Chapter 2, Emergencies or Unforeseen Circumstances-Related Flexibilities [1 USCIS-PM H.2].

[^ 8] For more information on TPS, see the USCIS website.

[^ 9] See 5 U.S.C. 5928. See DOS' Danger Pay Allowance Regulations webpage.

[^ 10] See Section D, Examples of Factors that Might Support Finding of Extreme Hardship [9 USCIS-PM B.5(D)].

[^ 11] See 8 CFR 103.2(b)(1).

[^ 12] See, for example, Division F, Title VI of the Omnibus Appropriations Act of 2009, Pub. L. 111-8 (PDF), 123 Stat. 524, 807 (March 11, 2009). See Section 1244 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181 (PDF), 122 Stat. 3, 396 (January 28, 2008). See Section 1059 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-163 (PDF), 119 Stat. 3136, 3443 (January 6, 2006), as amended by Pub. L. 110-36 (PDF), 121 Stat. 227 (June 15, 2007).

[^ 13] Although it is unlikely that a qualifying relative would have been granted withholding of removal under INA 241(b)(3) or withholding or deferral of removal under the Convention Against Torture (CAT), if a qualifying relative was previously granted such a form of relief, this would often weigh heavily in support of a finding of extreme hardship to that qualifying relative, similar to situations involving qualifying relatives described in this particularly significant factor.

[^ 14] Federal agency programs focusing on individuals with disabilities generally rely on definitions found in their authorizing legislation. These definitions may be unique to an agency's program.

[^ 15] See 10 U.S.C. 101. The term "armed forces" means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

[^ 16] See DOS Travel Warnings.

[^ 17] The term "child" includes those related to the applicant by birth, adoption, marriage, legal custody, or guardianship.

[^ 18] In this scenario, the children are assumed to be under age 21. See INA 101(b)(1) and INA 101(c)(1).

[^ 19] These scenarios are not exhaustive. For example, even when a qualifying relative is not the primary caretaker or breadwinner. Nonetheless, the loss of the applicant's contribution to caretaking or support may have consequences that rise to the level of extreme hardship to the qualifying relative based on the totality of the circumstances.

[^ 20] USCIS applies a similar principle when assessing whether there is a bona fide relationship between a father and his child born out of wedlock. See INA 101(b)(1)(D) and 8 CFR 204.2(d)(2)(iii).

[^ 21] None of these examples involves a waiver authority where the child is a qualifying relative under the Immigration and Nationality Act (INA). For more on qualifying relatives, see Chapter 4, Qualifying Relative [9 USCIS-PM B.4].

[^ 22] If the entire country is the subject of a travel warning that affirmatively recommends against travel or residence, the particularly significant factor will exist and would often weigh heavily in support of a finding of extreme hardship. For more on travel warnings, see Section E, Particularly Significant Factors, Subsection 4, DOS Travel Warnings [9 USCIS-PM B.5(E)(4)].

[^ 23] For more on substantial displacement of care, see Section E, Particularly Significant Factors, Subsection 5, Substantial Displacement of Care of Applicant's Children [9 USCIS-PM B.5(E)(5)].

Chapter 6 - Extreme Hardship Determinations

A. Evidence

Most instructions to USCIS forms list the types of supporting evidence that applicants may submit with those forms.[1] The instructions to the relevant waiver forms describe some of the extreme hardship factors that may be considered, along with certain possible types of supporting evidence that may be submitted. USCIS accepts any type of probative evidence, including, but not limited to:

- Expert opinions;

- Medical or mental health documentation and evaluations by licensed professionals;
- Official documents, such as birth certificates, marriage certificates, adoption papers, paternity orders, orders of child support, and other court or official documents;
- Photographs;
- Evidence of employment or business ties, such as payroll records or tax statements;
- Bank records and other financial records;
- Membership records in community organizations, confirmation of volunteer activities, or records related to cultural affiliations;
- Newspaper articles and reports;
- Country reports from official and private organizations;
- Personal oral testimony;[2] and
- Affidavits, statements that are not notarized but are signed "under penalty of perjury" as permitted by 28 U.S.C. 1746, or letters from the applicant or any other person.

If the applicant indicates that certain relevant evidence is not available, the applicant must provide a reasonable explanation for the unavailability, along with available supporting documentation.[3] Depending on the country where the applicant is from, is being removed to, or resides, certain evidence may be unavailable. If the applicant alleges that documentary evidence such as a birth certificate is unavailable, the officer may consult the Department of State (DOS) Foreign Affairs Manual,[4] when appropriate, to verify whether these particular documents are ordinarily unavailable in the relevant country.[5]

B. Burden of Proof and Standard of Proof

The applicant bears the burden of proving that the qualifying relative would suffer extreme hardship. He or she must establish eligibility for a waiver by a preponderance of the evidence.[6] If the applicant submits relevant, probative, and credible evidence that leads the USCIS officer to believe that it is "more likely than not" that the assertion the applicant seeks to prove is true, then the applicant has satisfied the preponderance of the evidence standard of proof as to that assertion.[7]

The mere assertion of extreme hardship alone does not establish a credible claim. Individuals applying for a waiver of inadmissibility should provide sufficient evidence to support and substantiate assertions of extreme hardship to the qualifying relative(s). Each assertion should be accompanied by evidence that substantively supports the claim absent a convincing explanation why the evidence is unavailable and could not reasonably be obtained. The officer should closely examine the evidence to ensure that it supports the applicant's claim of hardship to the qualifying relative.

To illustrate, an applicant who claims that the qualifying relative has severe, ongoing medical problems will not likely be able to establish the existence of these problems without providing medical records documenting the qualifying relative's condition. Officers cannot substitute their medical opinion for a medical professional's opinion; instead the officer must rely on the expertise of reputable medical professionals.

A credible, detailed statement from a doctor may be more meaningful in establishing a claim than dozens of test results that are difficult for the officer to decipher. However, nothing in such a case changes the requirement that all evidence submitted by applicants should be considered to evaluate the totality of the circumstances.

Similarly, if the applicant claims that the qualifying relative will experience severe financial difficulties, the applicant will not likely be able to establish these difficulties without submitting financial documentation. This could include, but is not limited to, bank account statements, employment and income records, tax records, mortgage statements, leases, and proof of any other financial liabilities or earnings.

If not all of the required initial evidence has been submitted, or the officer determines that the totality of the evidence submitted does not meet the applicable standard of proof, the officer should issue a Request for Evidence (RFE) in accordance with USCIS policy.

In considering whether the applicant's evidence is sufficient to meet the applicant's burden of proof, the officer will consider whether the applicant has complied with applicable requirements to submit information and supporting documentation and whether the evidence is credible, persuasive, and refers to specific facts sufficient to demonstrate that the burden of proof has been satisfied and that applicant warrants a favorable exercise of discretion. In considering whether the applicant's evidence is credible, the officer will consider the totality of the circumstances and all relevant factors and should take into account the inherent plausibility and internal and external consistency of the evidence and any inaccuracies or falsehoods in the evidence.

If evidence in the record leads the officer to reasonably believe that undocumented assertions of the extreme hardship claim are true, the officer may accept the assertion as sufficient to support the extreme hardship claim. The preponderance of the evidence standard does not require any specific form of evidence; it requires the applicant to demonstrate only that it is more likely than not that the refusal of admission will result in extreme hardship to the qualifying relative(s). Any evidence that satisfies that test will suffice.[8]

If the officer finds that the applicant has met the above burden of showing extreme hardship to one or more qualifying relatives, the officer should proceed to the discretionary determination.[9] If the officer ultimately finds that the applicant has not met the above burden, the waiver application must be denied.

Footnotes

[^ 1] A waiver that requires a showing of extreme hardship to a qualifying relative is currently submitted on an Application for Waiver of Grounds of Inadmissibility (Form I-601) or an Application for Provisional Unlawful Presence Waiver (Form I-601A).

[^ 2] An officer who interviews an applicant or other witness in person must place the witness under oath or affirmation before beginning the interview and must note in the record that the person was placed under oath along with the date and place of the interview. The officer should also take notes or record the testimony.

[^ 3] See 8 CFR 103.2(b).

[^ 4] See the DOS website.

[^ 5] See also DOS Bureau of Consular Affairs website for more information on birth certificates under reciprocity by country.

[^ 6] See *Matter of Chawathe (PDF)*, 25 I&N Dec. 369 (AAO 2010) (identifying preponderance of the evidence as the standard for immigration benefits generally, in that case naturalization).

[^ 7] See *Matter of Chawathe (PDF)*, 25 I&N Dec. 369, 376 (AAO 2010) (preponderance of the evidence means more likely than not).

[^ 8] For more detailed guidance on how to interpret the requirement that the refusal of admission "would result in" extreme hardship to the qualifying relative, see Chapter 2, Extreme Hardship Policy, Section B, What is Extreme Hardship [9 USCIS-PM B.2(B)].

[^ 9] See Chapter 7, Discretion [9 USCIS-PM B.7].

Chapter 7 - Discretion

A finding of extreme hardship permits but never compels a favorable exercise of discretion. If the officer finds the requisite extreme hardship, the officer must then determine whether USCIS should grant the waiver as a matter of discretion based on an assessment of the positive and negative factors relevant to the exercise of discretion. The family relationships to U.S. citizens or lawful permanent residents and a finding of extreme hardship to one or more of those family members are significant positive factors to consider.[1]

For purposes of exercising discretion, a finding of extreme hardship that is sufficient to warrant a favorable exercise of discretion to grant a waiver of the unlawful presence grounds of inadmissibility may not be sufficient to warrant a favorable exercise of discretion with respect to crime- or fraud-related grounds of inadmissibility. The conduct that triggered the applicant's inadmissibility, such as a criminal conviction[2] or underlying fraud,[3] is an important negative factor to consider. The officer should weigh all positive factors against all negative factors. Ultimately, if the positive factors outweigh the negative factors, the officer should approve the waiver; otherwise, the waiver should be denied.[4]

Footnotes

[^ 1] See *Matter of Mendez-Moralez (PDF)*, 21 I&N Dec. 296 (BIA 1996).

[^ 2] In cases where applicants who have been convicted of violent or dangerous crimes apply for waivers under INA 212(h)(1)(B) [formerly INA 212(h)(2)], discretion generally will not be favorably exercised unless either there are "extraordinary circumstances" (for example those relating to national security or foreign policy) or the applicant demonstrates "exceptional and extremely unusual hardship." Depending on the gravity of the offense, even a showing of extraordinary circumstances does not guarantee a favorable exercise of discretion. See 8 CFR 212.7(d).

[^ 3] See *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 30-32 (1996). See *Matter of Cervantes-Gonzalez (PDF)*, 22 I&N Dec. 560, 568-69 (BIA 1999), *aff'd*, *Cervantes-Gonzales v. INS*, 244 F.3d 1001 (9th Cir. 2001).

[^ 4] For more information on exercising discretion generally, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis [1 USCIS-PM E.8].

Part C - Family Unity, Humanitarian Purposes, or Public or National Interest

Part D - Health-Related Grounds of Inadmissibility

Chapter 1 - Purpose and Background

A. Purpose

USCIS balances public health interests against family unity and the needs of the applicant in adjudicating waivers of medical inadmissibility. For this reason, one of the terms and conditions imposed on all applicants with the grant of a waiver is to receive treatment so that the medical condition no longer poses a public health risk.

B. Background

A medical examination is generally required for all immigrant visa and some nonimmigrant visa applicants, as well as for refugees, and adjustment of status applicants. The purpose of the medical examination is to determine if an applicant has a medical condition(s) that renders him or her inadmissible to the United States.

Generally, applicants establish their admissibility on medical grounds by submitting a Report of Immigration Medical Examination and Vaccination Record (Form I-693), or Medical Examination for Immigrant or Refugee Applicant (1991 TB Technical Instructions) (Form DS-2053) or Medical Examination for Immigrant or Refugee Applicant (2007 TB Technical Instructions) (Form DS-2054), and related worksheets.[1]

Civil surgeons or panel physicians complete these documents after the medical examination of the applicant,[2] certifying the presence or absence of physical or mental conditions that may render the applicant inadmissible. Two types of certifications may indicate to USCIS that the applicant may be inadmissible: a "Class A" and a "Class B" condition.

A Class A condition is conclusive evidence that an applicant is inadmissible on health-related grounds. A Class B condition, unlike a Class A condition, does not make an applicant inadmissible on health-related grounds but may lead the officer to conclude that the applicant is inadmissible on other grounds (such as public charge).[3]

Before 1957, no waiver was available to applicants inadmissible on health-related grounds. The Immigration Act of 1957 created the first waiver provision for those afflicted with tuberculosis who had close relatives in the United States.[4] In addition, the 1965 amendments to the INA authorized the waiver of inadmissibility and admission of certain applicants in this category who had close relatives in the United States.[5]

The Immigration Act of 1990[6] relaxed the requirements for a familial relationship before a medical waiver could be granted. In addition, over time, other provisions were added to the 1952 Immigration Act that allowed for other waivers of medical grounds depending on the immigration benefit sought.

C. Scope

If an applicant is inadmissible because of a medical condition,[7] he or she may have a waiver available. The availability of a waiver depends on the legal provisions governing the immigration benefit the applicant seeks.

This Part C only addresses the processes used for the medical waiver available to persons seeking an immigrant visa or adjustment of status based on a family or employment-based petition.[8] All medical grounds of inadmissibility have a corresponding waiver under this section except for inadmissibility based on drug abuse or addiction.[9]

Applicants for other immigration benefits categories, such as refugees and asylees seeking adjustment,[10] Legalization or SAW applicants,[11] or applicants under other special programs, may have additional or other means to waive grounds of medical inadmissibility, including inadmissibility for drug abuse or addiction.[12]

Many of the processes mentioned in this Part C are also applicable to other medical waivers, such as those obtained by asylees or refugees seeking adjustment of status.

D. Legal Authorities

- INA 212(a)(1) – Health-Related Grounds
- INA 212(g) – Bond and Conditions for Admission of Alien Excludable on Health-Related Grounds
- 8 CFR 212.7 – Waiver of Certain Grounds of Inadmissibility

E. Forms Used When Applying For a Medical Waiver

Applicants for the immigration benefits listed below may apply for a medical waiver by using the following USCIS forms:[13]

Applying for Waiver of Health-Related Ground of Inadmissibility

Immigration Benefits Category	Statutory Authority for Waiver	Relevant Form
Adjustment of status or immigrant visa	INA 212(g)	Application for Waiver of Grounds of Inadmissibility (Form I-601) (submit with the applicable fee unless waived), see Fee Schedule (Form G-1055)
Admission as refugee under INA 207	INA 207(c)(3)	Application by Refugee for Waiver of Grounds of Excludability (Form I-602) (no fee associated)
Refugee or asylee applying for adjustment of status under INA 209	INA 209(c)	
Legalization under INA 245A	INA 245A(d)(2)(B)(i)	Application for Waiver of Grounds of Inadmissibility Under Sections 245A or 210 of the Immigration and Nationality Act (Form I-690) (with the applicable fee unless waived), see Fee Schedule (Form G-1055)
Special Agricultural Workers (SAW) under INA 210	INA 210(c)(2)(B)(i)	
T and U nonimmigrant visa	INA 212(d)(13) and INA 212(d)(14)	Application for Advance Permission to Enter as Nonimmigrant (Form I-192) (No applicable fee)
Other nonimmigrant visa	INA 212(d)(3)(A)	Application for Advance Permission to Enter as Nonimmigrant (Form I-192) (submit with the applicable fee unless waived), see Fee Schedule (Form G-1055)

F. Role of Centers for Disease Control and Prevention (CDC)

Any waiver application to overcome a medical ground of inadmissibility (other than lack of a required vaccination) must be sent to the U.S. Department of Health and Human Services (HHS), Centers for Disease Control and Prevention (CDC) for review before USCIS can determine whether to grant or deny the waiver.

CDC's favorable response does not constitute a waiver approval. The purpose of CDC's review is to ensure that

- The civil surgeon or panel physician examined, diagnosed, and classified the applicant according to the Technical Instructions; and
- The applicant (or person assuming the responsibility on behalf of the applicant) has identified a suitable health care provider in the United States who will provide medical care and treatment for the medical condition if a waiver is granted.

CDC's response, however, carries significant weight in determining what terms, conditions, or controls should be placed on the waiver, and whether USCIS should approve the waiver.

Footnotes

[^ 1] As of October 1, 2013, panel physicians only use DS-2054.

[^ 2] See INA 212 and INA 232.

[^ 3] See Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility [8 USCIS-PM B] for more information on Class A and B conditions.

[^ 4] See Pub. L. 85-316 (PDF) (September 11, 1957).

[^ 5] See Pub. L. 89-236 (PDF) (October 3, 1965).

[^ 6] See Pub. L. 101-649 (PDF) (November 29, 1990).

[^ 7] Under INA 212(a)(1)(A), four categories of medical conditions may render an applicant inadmissible: (1) Communicable disease of public health significance; (2) For immigrants, failure to show proof of required vaccinations; (3) Physical or mental disorder with associated harmful behavior; (4) Drug abuse or addiction. See Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility [8 USCIS-PM B] for more information.

[^ 8] Under INA 212(g).

[^ 9] See INA 212(g), which specifically waives INA 212(a)(1)(A)(i)-INA 212(a)(1)(A)(iii) but omits reference to INA 212(a)(1)(A)(iv).

[^ 10] Under INA 209.

[^ 11] Under INA 245A and INA 210.

[^ 12] For example, an asylee or a refugee seeking adjustment of status who is found to be a drug abuser or addict may apply for a waiver of inadmissibility under INA 209(c). INA 209(c) waivers are not addressed in this Part.

[^ 13] For further information on waivers other than the medical waiver described in this Part, please see the program-specific waiver chapters in this volume. While these other waivers may be briefly discussed in this chapter, more detailed discussion can be found in the program-specific waiver chapters in this volume.

Chapter 2 - Waiver of Communicable Disease of Public Health Significance

A. General

The INA authorizes USCIS to exercise discretion in deciding whether to waive inadmissibility based on a communicable disease of public health significance.[1] USCIS may grant this waiver in accordance with such terms, conditions,[2] and controls, if any, that USCIS considers appropriate after consultation with the Secretary of HHS.[3] This includes the grant of a waiver based on requiring payment of a bond.

Once the officer has verified that the applicant is inadmissible because of a communicable disease of public health significance and requires a waiver,[4] the officer must go through the following steps to adjudicate the waiver application:

- Determine whether the applicant meets the eligibility requirements of the waiver;
- Consult with CDC; and
- Determine whether the waiver is warranted as a matter of discretion.

B. Special Note on HIV

As of January 4, 2010, HIV infection is no longer defined as a communicable disease of public health significance according to HHS regulations.[5] Therefore, HIV infection does not make an applicant inadmissible if the immigration benefit is adjudicated on or after January 4, 2010, even if the applicant filed the immigration benefit application before January 4, 2010. Officers should administratively close any HIV waiver application that is filed before January 4, 2010 but adjudicated on or after January 4, 2010.

C. Waiver Eligibility and Adjudication

1. Qualifying Relationship

To be eligible for the waiver, the applicant must be one of the following:

- The spouse, parent, child, unmarried son or daughter,[6] or minor unmarried lawfully adopted child[7] of:
  - A U.S. citizen,
  - A person lawfully admitted for permanent residence, or
  - A person who has been issued an immigrant visa.
- Eligible for classification as a self-petitioning spouse or child.[8]
- The fiancé(e) of a U.S. citizen or the fiancé(e)'s child.

The officer should verify that the existence of the appropriate relationship is well supported in the applicant's file.

2. Documentation for CDC's Review

As stated above, USCIS can only grant this waiver after it has consulted with CDC. However, CDC's review of necessary documents does not constitute a waiver approval. CDC may recommend that USCIS should make the waiver subject to appropriate terms, conditions, or controls.

To obtain CDC's review of a waiver application, the officer should forward the following documents to CDC:

- A cover letter that identifies the USCIS office requesting the review;
- A copy of the waiver application (including the TB supplement,[9] if applicable) that contains all the required signatures, excluding the supporting documentation that is not medically relevant;[10]
- A copy of the medical examination documentation;[11]
- Copies of all other medical reports, laboratory results, and evaluations regardless of whether they are connected to the communicable disease of public health significance.

3. Sending Documents to CDC

Officers should email the documents to cdcqap@cdc.gov.

To request expedited review, officers should indicate in the subject line of the email to CDC that the request is “Urgent.”

4. CDC Response

Once CDC receives and reviews the documents, CDC will forward a response letter with its recommendation to the requesting USCIS office.

CDC’s usual processing time for review and response to the requesting USCIS office is approximately 4 weeks. If CDC’s response appears delayed, the officer may contact CDC at cdcqap@cdc.gov to obtain a status update.

Upon receipt, the officer should review CDC’s response letter to determine next steps.

If CDC’s response letter indicates that CDC was satisfied with the initial documentation and that it does not require additional information, then the officer may proceed to the next step of the waiver adjudication. If CDC was not satisfied with the documentation, it may request additional information or recommend additional conditions to be met before the waiver may be granted. In such a case, the officer should issue a Request for Evidence (RFE) for the applicant to provide the additional information or to demonstrate that he or she made the arrangements required by CDC.

If CDC requests it, the officer will need to submit the information obtained through the RFE to CDC to determine whether the additional information is sufficient. CDC will provide a response letter to the requesting USCIS office advising if the additional information is sufficient.[12]

Once CDC indicates no additional information is needed, the officer may proceed with the next step of the waiver adjudication.

5. Discretion

As is generally the case for waivers, a waiver for communicable diseases of public health significance requires an officer to consider whether the grant of the waiver is warranted as a matter of discretion. Hardship to a qualifying relative is not required for this waiver.[13]

CDC’s response in support of granting the waiver should ordinarily be sufficient to warrant a favorable exercise of discretion for the grant of the waiver. However, if an applicant declares openly his or her unwillingness to commit to treatment, the waiver may be denied as a matter of discretion.[14] If CDC does not issue a favorable recommendation, the officer generally should not grant the waiver as a matter of discretion.

By statute, it is USCIS’s decision whether to make the waiver subject to terms, conditions, or controls. A CDC recommendation concerning terms, conditions, or controls on the granting of the waiver ordinarily carries great persuasive weight.

Once a final decision (approval or denial) is made on the waiver, the officer should inform CDC of the decision. The officer should provide a brief statement indicating the final action and date of the action and forward it to CDC by emailing cdcqap@cdc.gov.

D. Step-by-Step Checklist

Step-by-Step Checklist	
Step 1	Check for qualifying relationship to determine whether the applicant is eligible for the waiver.
Step 2	Gather the necessary documentation for CDC review.
Step 3	Send documentation to CDC.
Step 4	Review CDC response.
Step 5	Analyze whether the waiver should be granted as a matter of discretion.
Step 6	Inform CDC of waiver decision.

Footnotes

[^ 1] See INA 212(g)(1) and INA 212(a)(1)(A)(i). INA 212(g)(1) was also amended to include a specific provision for battered immigrants. See Section 1505(d) of the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. 106-386 (PDF), 114 Stat. 1464, 1526 (October 28, 2000). For more information on the inadmissibility determination based on communicable disease of public health significance, see Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility, Chapter 6, Communicable Diseases of Public Health Significance [8 USCIS-PM B.6].

[^ 2] A condition of granting a waiver for an applicant with a communicable disease of public health significance, such as tuberculosis, is that the applicant must agree to see a doctor immediately upon admission and make arrangements to receive private or public medical care for that disease. This requirement is reflected, for example, in the Application for Waiver of Grounds of Inadmissibility (Form I-601), TB Supplement.

[^ 3] See INA 212(g)(1)(B).

[^ 4] Note that an applicant who has been determined to have a Class A condition involving a communicable disease of public health significance may successfully complete treatment. If, after treatment, the civil surgeon or panel physician certifies that the applicant now has a Class B condition, the applicant is no longer inadmissible and does not need a waiver.

[^ 5] See 42 CFR 34.2(b) as amended by 74 FR 56547 (November 2, 2009).

[^ 6] USCIS interprets the references to “unmarried son or daughter” as embracing both those sons and daughters who qualify as “children” because they are not yet 21 years old and sons and daughters who are over 21, so long as they are not married.

[^ 7] USCIS interprets “minor unmarried lawfully adopted child” as a clarifying, not as a restricting, provision. Therefore, an applicant is eligible to apply for this waiver if he or she qualifies as the “child” of a citizen or permanent resident (or a person who has received an immigrant visa) under any provision of INA 101(b)(1). This includes, but is not limited to, both children adopted abroad to be admitted in class IR3 or IH3 and children whose adoption will be finalized in the United States to be admitted in class IR4 or IH4.

[^ 8] Under INA 204(a)(1)(A)(iii) or INA 204(a)(1)(A)(iv) or INA 204(a)(1)(B)(ii) or INA 204(a)(1)(B)(iii), including derivative children of the person. This includes self-petitioning spouses and children eligible for classification under INA 204(a)(1)(A)(v) or INA 204(a)(1)(B)(iv).

[^ 9] TB is currently the only communicable disease of public health significance that requires a supplement.

[^ 10] For instance, evidence of the family relationship.

[^ 11] Report of Immigration Medical Examination and Vaccination Record (Form I-693); Medical Examination for Immigrant or Refugee Applicant (1991 TB Technical Instructions) (Form DS-2053) or the Medical Examination for Immigrant or Refugee Applicant (2007 TB Technical Instructions) (Form DS-2054), and related worksheets.

[^ 12] For Class A TB waivers, CDC’s response letter will provide a specific recommendation whether CDC supports the granting of a waiver.

[^ 13] See INA 212(g)(1).

[^ 14] If CDC certifies that an applicant who obtained an INA 212(g) waiver has failed to comply with any terms, conditions, or controls on the waiver, the applicant is subject to removal per INA 237(a)(1)(C)(ii). The U.S. health care provider treating the particular condition should provide a summary of the applicant’s initial evaluation to CDC or notify CDC that the applicant has failed to report for care. Generally, no further follow-up is required by the officer.

Chapter 3 - Waiver of Immigrant Vaccination Requirement

A. General

An applicant seeking an immigrant visa at a U.S. consulate or an applicant seeking adjustment of status in the United States who is found inadmissible for not being vaccinated[1] may be eligible for the following waivers:

- The applicant has, by the date of the decision on the visa or adjustment application, received vaccination against the vaccine-preventable disease(s) for which he or she had previously failed to present documentation;[2]
- The civil surgeon or panel physician certifies that such vaccination would not be medically appropriate;[3] or
- The requirement of such a vaccination would be contrary to the applicant’s religious beliefs or moral convictions.[4]

Each of these waivers has its own requirements.[5] Unlike some other waivers, no qualifying relative is required for the applicant to be eligible for a waiver of the immigrant vaccination requirement.

The first two waivers are often referred to as “blanket waivers.” USCIS grants blanket waivers if a health professional indicates that an applicant has received the required vaccinations or is unable to receive them for medical reasons. If USCIS grants blanket waivers, the applicant does not have to file a form or pay a fee.

The waiver on account of religious or moral objection must be filed on the appropriate form[6] and accompanied by the correct fee.[7]

B. Use of Panel Physician’s or Civil Surgeon's Report

The determination whether an applicant is inadmissible for lack of having complied with the vaccination requirement is made by reviewing the panel physician’s or civil surgeon’s vaccination assessment in the medical examination report.[8]

C. Blanket Waiver for Missing Vaccination Documentation[9]

Applicants who received the vaccinations for which documents were missing when they initially applied for adjustment of status or for an immigrant visa may be given a blanket waiver.

A streamlined procedure applies for this waiver; no form is needed. If a required vaccine is lacking, the officer should issue a Request for Evidence (RFE). The RFE should instruct the applicant to return to the civil surgeon for corrective action that demonstrates the applicant has received the required vaccine(s).

If the RFE response demonstrates that the missing vaccine(s) was received, the officer will deem the waiver granted. No annotation is needed on either the medical exam form, or any related form or worksheet.

D. Blanket Waiver if Vaccine is Not Medically Appropriate[10]

1. Situations Specified in the Law[11]

If the civil surgeon or the panel physician certifies that a vaccine is not medically appropriate for one or more of the following reasons, the officer may grant a blanket waiver (without requesting a form and fee):

- The vaccine is not age appropriate;
- The vaccine is contraindicated;
- There is an insufficient time interval to complete the vaccination series; or
- It is not the flu season, or the vaccine for the specific flu strain is no longer available.

Once the civil surgeon or panel physician annotates that the vaccine(s) is not medically appropriate, no further annotation is needed and the officer may proceed with granting the waiver. The civil surgeon’s or panel physician’s annotation on the vaccination assessment sufficiently documents that the requirements for the waiver have been met; the officer does not need to make any further annotation on the vaccination report.

2. Nationwide Vaccination Shortage[12]

USCIS may grant a blanket waiver in the case of a vaccination shortage only if CDC recommends that USCIS should do so, and USCIS has published the appropriate guidance on its website. CDC only makes such a recommendation to USCIS after verifying that there is indeed a nationwide vaccination shortage and issuing the appropriate statement on its website for civil surgeons. In turn, USCIS issues the appropriate statement on its website.

Additionally, civil surgeons should annotate “not routinely available” on the Report of Immigration Medical Examination and Vaccination Record (Form I-693) if the COVID-19 vaccine is not routinely available in the state where the civil surgeon practices. In addition, if the vaccine is available to the applicant but due to limited supply, it would cause significant delay for the applicant to receive the vaccination, then the civil surgeon should also annotate “not routinely available” on Form I-693.[13] USCIS may grant a blanket waiver in these cases.

The term “nationwide vaccine shortage” does not apply to the medical examination conducted by a panel physician overseas. If a vaccine is not available in the applicant’s country, the panel physician annotates the vaccination assessment with the term “not routinely available.” If an officer encounters this annotation, the officer may grant a blanket waiver based on this annotation alone.

E. Waiver due to Religious Belief or Moral Conviction[14]

1. General

USCIS may grant this waiver when the applicant establishes that compliance with the vaccination requirements would be contrary to his or her religious beliefs or moral convictions. Unlike other waivers of medical grounds of inadmissibility, there is no requirement that CDC review this waiver.

If, upon review of the medical documentation, the officer finds that the applicant is missing a vaccine and a blanket waiver is not available, the officer should ask the applicant why the vaccine is missing. The officer may request clarification during an interview or by sending an RFE.

If the applicant indicates that he or she does not oppose vaccinations based on religious beliefs or moral convictions, the applicant may be inadmissible if he or she refuses to obtain the missing vaccine(s). The officer should issue an RFE if the applicant is willing to obtain the vaccine.

If the applicant indicates that he or she opposes vaccinations, the officer should inform the applicant of the possibility of the waiver. The officer should explain the basic waiver requirements for a religious belief or moral conviction waiver, as outlined below. The officer should, at that time, issue an RFE[15] for the waiver application.

Upon receipt of the waiver documentation, the officer should proceed with the adjudication of the waiver.

2. Requirements

With the adjudication of this waiver, USCIS has always taken particular caution to avoid any perceived infringement on personal beliefs and First Amendment rights to free speech and religion. To best protect the public health, USCIS, in consultation with CDC, has established the following three requirements that an applicant (or, if the applicant is a child, the applicant’s parents) has to demonstrate through documentary evidence:

The applicant must be opposed to all vaccinations in any form.[16]

The applicant has to demonstrate that he or she opposes vaccinations in all forms; the applicant cannot “pick and choose” between the vaccinations. The fact that the applicant has received certain vaccinations but not others is not automatic grounds for the denial of a waiver. Instead, the officer should consider the reasons provided for having received those vaccines.

For example, the applicant's religious beliefs or moral convictions may have changed substantially since the date the particular vaccinations were administered, or the applicant is a child who may have already received certain vaccinations under the routine practices of an orphanage. These examples do not limit the officer’s authority to consider all credible circumstances and accompanying evidence.

The objection must be based on religious beliefs or moral convictions.

This second requirement should be handled with sensitivity. On one hand, the applicant's religious beliefs must be balanced against the benefit to society as a whole. On the other hand, the officer should be mindful that vaccinations offend certain persons' religious beliefs.

The religious belief or moral conviction must be sincere.

To protect only those beliefs that are held as a matter of conscience, the applicant must demonstrate that he or she holds the belief sincerely, and in subjective good faith of an adherent. Even if these beliefs accurately reflect the applicant's ultimate conclusions about vaccinations, they must stem from religious or moral convictions, and must not have been framed in terms of a particular belief so as to gain the legal remedy desired, such as this waiver.

While an applicant may attribute his or her opposition to a particular religious belief or moral conviction that is inherently opposed to vaccinations, the focus of the waiver adjudication should be on whether that claimed belief or moral conviction is truly held, that is, whether it is applied consistently in the applicant’s life.

The applicant does not need to be a member of a recognized religion or attend a specific house of worship. Note that the plain language of the statute refers to religious beliefs or moral convictions, not religious or moral establishments.

It is necessary to distinguish between strong religious beliefs or moral convictions and mere preference. Religious beliefs or moral convictions are generally defined by their ability to cause an adherent to categorically disregard self-interest in favor of religious or moral tenets. The applicant has the burden of establishing a strong objection to vaccinations that is based on religious beliefs or moral convictions, as opposed to a mere preference against vaccinations.

3. Evidence

The applicant’s objection to the vaccination requirement on account of religious belief or moral conviction may be established through the applicant’s sworn statement. In this statement, the applicant should state the exact nature of those religious beliefs or moral convictions and establish how such beliefs would be violated or compromised by complying with the vaccination requirements.

Additional corroborating evidence supporting the background for the religious belief or moral conviction, if available and credible, should also be submitted by the applicant and considered by the officer. For example, regular participation in a congregation can be established by submitting affidavits from other members in the congregation, or evidence of regular volunteer work.

The officer should consider all evidence submitted by the applicant.

4. Discretion

As is generally the case for waivers, a waiver of the vaccination requirement requires an officer to consider whether the grant of the waiver is warranted as a matter of discretion.

A favorable exercise of discretion is generally warranted if the applicant establishes that he or she objects to the vaccination requirement on account of religious beliefs or moral convictions.

F. Step-by-Step Checklist

A blanket waiver may be available to the applicant. The officer should check whether the applicant is eligible for a blanket waiver before proceeding to this checklist.

Adjudication Vaccination Requirement Waiver Based on Religious Beliefs or Moral Convictions

Step	If YES …	If NO …
Step 1: Review the evidence for any indication that the applicant opposes the vaccination requirement based on religious beliefs or moral convictions.	Explain (during the interview or through an RFE) the waiver requirements and request that the applicant file a waiver, if he or she has not already done so. Proceed to Step 3.	RFE or interview to ascertain reasons why vaccines were not given. Proceed to Step 2A.
Step 2A: Did the applicant oppose the vaccines?	Explain to the applicant (at interview or through RFE) the waiver requirements and request that the applicant file a waiver if not already done so. Proceed to Step 3.	Proceed to Step 2B.
Step 2B: Is the applicant willing to obtain the missing vaccine?	Issue an RFE for corrective action of the vaccination assessment. Upon receipt of response to RFE, determine whether the vaccine requirement has been met. If the applicant is still missing vaccines, and no blanket waiver is available, begin at Step 1 again.	Applicant is inadmissible based on INA 212(a)(1)(A)(ii) (irrespective of the grant of any blanket waivers).
Step 3: Review the waiver application to determine whether the applicant opposes the vaccination requirement **in any form.**	Proceed to Step 4.	The waiver should be denied and the applicant is inadmissible based on INA 212(a)(1)(A)(ii)(irrespective of the grant of any blanket waivers).
Step 4: Review the waiver application to determine whether the applicant opposes the vaccination requirement on account of religious belief or moral conviction.	Proceed to Step 5.	The waiver should be denied and the applicant is inadmissible based on INA 212(a)(1)(A)(ii)(irrespective of the grant of any blanket waivers).
Step 5: Analyze whether the waiver application reflects that the applicant's belief is sincere.	Proceed to Step 6.	The waiver should be denied and the applicant is inadmissible based on INA 212(a)(1)(A)(ii)(irrespective of the grant of any blanket waivers).
Step 6: Analyze whether the waiver should be granted as a matter of discretion; ordinarily, the finding that the applicant holds sincere religious or moral objections should be sufficient for a grant of the waiver.	Grant the waiver.	The waiver should be denied and the applicant is inadmissible based on INA 212(a)(1)(A)(ii)(irrespective of the grant of any blanket waivers).

Footnotes

[^ 1] See INA 212(a)(1)(A)(ii).

[^ 2] See INA 212(g)(2)(A).

[^ 3] See INA 212(g)(2)(B).

[^ 4] See INA 212(g)(2)(C).

[^ 5] These waivers are described in more detail in Section C, Blanket Waiver for Missing Vaccination Documentation [9 USCIS-PM D.3(C)]; Section D, Blanket Waiver if Vaccine is Not Medically Appropriate [9 USCIS-PM D.3(D)]; and Section E, Waiver due to Religious Belief or Moral Conviction [9 USCIS-PM D.3(E)].

[^ 6] See Volume 9, Waivers and Other Forms of Relief, Part D, Health-Related Grounds of Inadmissibility [9 USCIS-PM D].

[^ 7] See Fee Schedule (Form G-1055).

[^ 8] See Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility [8 USCIS-PM B] for more information on the admissibility determination.

[^ 9] See INA 212(g)(2)(A).

[^ 10] See INA 212(g)(2)(B).

[^ 11] See Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility, Chapter 9, Vaccination Requirement [8 USCIS-PM B.9].

[^ 12] See Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility, Chapter 9, Vaccination Requirement [8 USCIS-PM B.9] for more information on blanket waivers based on a nationwide vaccination shortage.

[^ 13] For more information, see the CDC Requirements for Immigrant Medical Examinations: COVID-19 Technical Instructions for Civil Surgeons.

[^ 14] See INA 212(g)(2)(C).

[^ 15] An officer should only issue one RFE, requesting all the necessary information, including the request for the waiver application.

[^ 16] The requirement that the religious or moral objection must apply to all vaccines has been in effect since 1997. The former INS created this policy in light of principles developed regarding conscientious objection to the military draft and challenges to State-mandated vaccinations for public school students.

Chapter 4 - Waiver of Physical or Mental Disorder Accompanied by Harmful Behavior

A. General

If the applicant has a physical or mental disorder and behavior associated with the disorder that poses, may pose, or has posed a threat to the property, safety, or welfare of the applicant or others, the applicant must file a waiver to overcome this ground of inadmissibility.[1]

The officer should remember that the physical or mental disorder alone (that is, without associated harmful behavior) or harmful behavior alone (without it being associated with a mental or physical disorder) is not sufficient to find the applicant inadmissible on health-related grounds.

USCIS may grant this discretionary waiver in accordance with such terms, conditions, and controls (if any) that USCIS imposes after consulting with the Secretary of Health and Human Services (HHS).[2] A condition could include the payment of a bond.

A common condition of granting a waiver for an applicant with a physical or mental disorder with associated harmful behavior is that the applicant must agree to see a U.S. health care provider immediately upon admission and make arrangements to receive care and treatment.

The officer must determine whether the applicant is eligible for the waiver, consult with CDC, and determine whether the waiver is warranted as a matter of discretion.

B. Waiver Eligibility and Adjudication

1. Qualifying Relationship

Unlike waivers for communicable diseases of public health significance, waivers for physical or mental disorders with associated harmful behaviors do not require a qualifying relationship.

2. Documentation for CDC's Review

As noted above, USCIS can only grant this waiver after it has consulted with CDC. However, CDC's review of the necessary documents does not constitute a waiver approval. CDC may recommend that USCIS should make the waiver subject to appropriate terms, conditions, or controls.

To obtain CDC's review of a waiver application, the officer should forward the following documents to CDC:

- A cover letter that identifies the USCIS office requesting the review;
- A copy of the waiver application that contains all the required signatures, excluding the supporting documentation that is not medically relevant;[3]
- A copy of the medical examination documentation;[4]
- A copy of the supporting medical report, if provided, detailing the physical or mental disorder that is associated with the harmful behavior and the physician's recommendation regarding the course and prospects of the treatment;[5] and
- Copies of all other medical reports, laboratory results, and evaluations regardless of whether they are connected to the mental or physical disorder with associated harmful behavior.

3. Sending Documents to CDC

Officers should email the documents to cdcqap@cdc.gov.

To request expedited review, officers should indicate in the subject line of the email to CDC that the request is "Urgent."

4. CDC Response

Once the documents are received by CDC, the documents are reviewed by CDC's consultant psychiatrist and CDC will forward a response letter with its recommendation to the requesting USCIS office.

CDC's usual processing time for review and response to the requesting USCIS office is approximately 4 weeks. If CDC's response appears delayed, the officer may contact CDC at cdcqap@cdc.gov to obtain a status update.

Upon receipt, the officer should review CDC's response to determine next steps.

If CDC agrees in its response that the applicant has a Class A condition, CDC will send to the USCIS requesting office CDC 4.422-1 forms, Statements in Support of Application for Waiver of Inadmissibility Under Section 212(a)(1)(A)(iii)(I) or 212(a)(1)(A)(iii)(II) of the Immigration and Nationality Act. The officer must provide the CDC 4.422-1 forms[6] to the applicant (or the applicant's sponsor) for completion. Once the CDC forms are completed and returned to USCIS, the officer must return the completed forms to CDC for review and endorsement.

Once CDC receives the completed forms, it reviews them to determine whether the applicant has identified an appropriate U.S. health care provider and that the health care provider has completed the forms. If the appropriate U.S. health care provider has been identified, CDC will endorse the forms and return them to the requesting USCIS office.

If CDC's response indicates that the applicant is "Class B" or "no Class A or B," it is CDC's recommendation that the applicant does not require a waiver for the medical condition.

If CDC's response indicates that additional information is needed in order to complete the review, the officer should issue a Request for Evidence (RFE) for the applicant to provide additional information as specified by CDC. The officer should submit the information obtained through the RFE to CDC. CDC will provide a response to USCIS regarding the additional

information. Once CDC indicates that no additional information is needed, the officer may proceed with the adjudication of the waiver.

5. Discretion

As is generally the case for waivers, a waiver for mental or physical conditions with associated harmful behavior requires an officer to consider whether the grant of the waiver is warranted as a matter of discretion.[7]

CDC's review and endorsement of the identified U.S. health care provider should ordinarily be sufficient to warrant a favorable exercise of discretion for the grant of the waiver. However, if an applicant declares openly his or her unwillingness to commit to treatment, the waiver may be denied as a matter of discretion.[8] If CDC does not favorably endorse the identified U.S. health care provider, the officer should generally not grant the waiver as a matter of discretion.

By statute, it is USCIS's decision whether to make the waiver subject to terms, conditions or controls. A CDC recommendation concerning terms, conditions, or controls on the granting of the waiver ordinarily has great persuasive weight, but is not binding on USCIS.

USCIS should inform CDC of the decision (approval or denial) of the waiver. The officer does so by completing the CDC response letter, that CDC provided when it returned the endorsed CDC forms to the officer, and emailing cdcqap@cdc.gov.

C. Step-by-Step Checklist

Step-by-Step Checklist	
Step 1	Gather the necessary documentation for CDC review.
Step 2	Send documentation to CDC.
Step 3	Review CDC response.
Step 4	If applicable, have CDC 4.422.1 forms completed by the applicant and return them for endorsement by CDC.
Step 5	Analyze whether the waiver should be granted as a matter of discretion.

Footnotes

[^ 1] See INA 212(a)(1)(A)(iii). See Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility [8 USCIS-PM B] for more information on the inadmissibility determination based on physical or mental disorders with associated harmful behavior.

[^ 2] See INA 212(g)(3).

[^ 3] For instance, evidence of the family relationship.

[^ 4] Report of Immigration Medical Examination and Vaccination Record (Form I-693); Medical Examination for Immigrant or Refugee Applicant (1991 TB Technical Instructions) (Form DS-2053) or the Medical Examination for Immigrant or Refugee Applicant (2007 TB Technical Instructions) (Form DS-2054), and related worksheets.

[^ 5] The Instructions to Form I-601 detail the contents that should be included in the doctor's report.

[^ 6] The CDC 4.422-1 forms are used to identify an appropriate U.S. health care provider for the waiver applicant. The forms are generated for the specific waiver applicant by CDC. Part II must be completed by U.S. health care provider and Part III must be completed by the applicant and/or the applicant's sponsor.

[^ 7] Neither a qualifying relationship nor a finding of hardship is required.

[^ 8] If CDC certifies that a person who obtained an INA 212(g) waiver has failed to comply with any terms, conditions, or controls on the waiver, the person is subject to removal per INA 237(a)(1)(C)(ii). The U.S. health care provider treating the particular condition should provide a summary of the applicant's initial evaluation to CDC as provided on CDC 4.422-1 form. Generally, no further follow-up is required by the officer.

Chapter 5 - Waiver of Drug Abuse and Addiction

A. Adjustment of Status and Immigrant Visa Applicants

In general, no waiver is available for adjustment of status and immigrant visa applicants who are found inadmissible because of drug abuse or drug addiction.[1]

B. Remission

Although a waiver is unavailable for health-related inadmissibility due to drug abuse or addiction, an applicant may still overcome this inadmissibility if his or her drug abuse or addiction is found to be in remission. After being found inadmissible due to drug abuse or drug addiction, an applicant may undergo a re-examination at a later date at his or her own cost. If, upon re-examination, the civil surgeon or panel physician certifies, per the applicable HHS regulations and CDC's Technical Instructions, that the applicant is in remission, the applicant is no longer inadmissible as a drug abuser or addict.

Footnote

[^ 1] There are specific statutory provisions that permit USCIS to waive this ground, such as those applying to asylees and refugees seeking adjustment, and Legalization and SAW applicants. These waivers are specific to those classes of immigrants and are outside the scope of this chapter, which focuses only on waivers available under INA 212(g). See Volume 8, Admissibility, Part B, Health-Related Grounds of Inadmissibility [8 USCIS-PM B] for more information on inadmissibility on account of drug abuse or drug addiction.

Part E - Criminal and Related Grounds of Inadmissibility

Part F - Fraud and Willful Misrepresentation

Chapter 1 - Purpose and Background

A. Purpose

An applicant who is inadmissible for fraud or willful misrepresentation may be eligible for a waiver.[1] A waiver of inadmissibility allows an applicant to enter the United States or obtain an immigration benefit despite having been found inadmissible.

The purpose of a waiver for inadmissibility due to fraud or willful misrepresentation[2] is to:

- Provide humanitarian relief and promote family unity;
- Ensure the applicant merits favorable discretion based on positive factors outweighing the applicant's fraud or willful misrepresentation and any other negative factors; and
- Allow the applicant to overcome the inadmissibility or removability ground.

B. Background

Prior to September 30, 1996, a waiver was available to applicants who could show either:

- More than 10 years had passed since the date of the fraud or willful misrepresentation; or
- The applicant's U.S. citizen or lawful permanent resident (LPR) parents, spouse, or children would suffer extreme hardship if the applicant was refused admission to the United States.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[3] limited the availability of the waiver and eliminated the possibility of applying for a waiver if more than 10 years have passed.[4] A waiver is now available only to applicants who can demonstrate extreme hardship to:

- U.S. citizen parent or spouse;
- An LPR parent or spouse;
- A U.S. citizen fiancé(e);[5] or
- In the case of a Violence Against Women Act (VAWA) self-petitioner: the VAWA self-petitioner, or his or her U.S. citizen, LPR, or qualified alien parent or child.

IIRIRA made other changes that play a role in the waiver adjudication. IIRIRA modified the inadmissibility provision[6] by creating two inadmissibility grounds within the same provision:

- Inadmissibility for fraud or willful misrepresentation;[7] and
- Inadmissibility for falsely claiming U.S. citizenship on or after September 30, 1996.[8]

The waiver[9] discussed in this Part G only applies to applicants who are inadmissible for fraud or willful misrepresentation.[10]

Inadmissibility based on a false claim to U.S. citizenship made on or after September 30, 1996[11] cannot be waived through a waiver for fraud or willful misrepresentation.[12] However, because IIRIRA's changes were not retroactive, applicants who falsely claimed U.S. citizenship before September 30, 1996, are considered inadmissible for fraud or willful misrepresentation and may still seek the fraud or willful misrepresentation waiver.

C. Scope

The availability of a waiver of inadmissibility based on fraud or willful misrepresentation depends on the immigration benefit the applicant is seeking. The guidance in this Policy Manual part only addresses the processes used for the fraud or willful misrepresentation waiver[13] available to applicants listed in the table below.

Classes of Applicants Eligible to Apply for Waiver under INA 212(i)
Applicants seeking:
• An immigrant visa or adjustment of status based on a family-based petition or as a VAWA self-petitioner
• An immigrant visa or adjustment of status based on an employment-based petition
• A nonimmigrant K visa (fiancé(e)s of U.S. citizens and their accompanying minor children, foreign spouses, and step-children of U.S. citizens)
• A nonimmigrant V visa (spouses and unmarried children under age 21, or step-children of lawful permanent residents)

Applicants seeking other immigration benefits may have different means to waive inadmissibility for fraud or willful misrepresentation.

D. Legal Authorities

- INA 212(a)(6)(C)(i) – Illegal Entrants and Immigration Violators - Misrepresentation[14]
- INA 212(i) – Admission of Immigrant Excludable for Fraud or Willful Misrepresentation of Material Fact

E. Applicants Who May Have a Waiver Available

The chart below details who may apply for a waiver of inadmissibility based on fraud or willful misrepresentation and the relevant form. This chart includes waivers under INA 212(i) as well as waivers of inadmissibility for fraud or willful misrepresentation under other provisions of the INA.

Available Waiver of Inadmissibility Based on Fraud or Willful Misrepresentation

Applicant Category		Relevant Form
Applicants for adjustment of status, immigrant visas, and K and V nonimmigrant visas seeking waiver under INA 212(i)	Form I-601	Application for Waiver of Grounds of Inadmissibility
Temporary Protected Status (TPS) applicants seeking waiver under INA 244(c)	Form I-601	Application for Waiver of Grounds of Inadmissibility
Applicants for admission as refugees under INA 207	Form I-602	Application by Refugee for Waiver of Grounds of Inadmissibility
Refugees and asylees applying for adjustment of status under INA 209[15]	Form I-602	Application by Refugee for Waiver of Grounds of Inadmissibility
Legalization applicants under INA 245A	Form I-690	Application for Waiver of Grounds of Inadmissibility
Special Agricultural Workers (SAW) under INA 210	Form I-690	Application for Waiver of Grounds of Inadmissibility
Nonimmigrants, including T and U[16] visa applicants (but not K and V nonimmigrants)	Form I-192	Application for Advance Permission to Enter as Nonimmigrant

1. Immigrants, Adjustment of Status Applicants, and K and V Visa Applicants

USCIS has the discretion to waive inadmissibility based on fraud or willful misrepresentation[17] for:

- A VAWA self-petitioner seeking adjustment of status;
- An immigrant visa applicant who is the spouse, son, or daughter of a U.S. citizen or LPR;
- An adjustment of status applicant who is the spouse, son, or daughter of a U.S. citizen or LPR;
- A V visa applicant who is the spouse, son, or daughter of a U.S. citizen or LPR;
- A K visa applicant who is the fiancé(e) of a U.S. citizen, or the applicant's children;[18] and
- A K-3 or K-4 visa applicant.[19]

The instructions to Form I-601 and the USCIS website detail when and where the applicant should file the waiver.[20]

2. Refugees

An applicant seeking admission as a refugee and who is inadmissible for fraud or willful misrepresentation may seek a waiver.[21] The waiver may be approved if the grant serves humanitarian purposes, family unity, or other public interests. The waiver is processed overseas as part of the refugee package.

3. Asylee and Refugee Based Adjustment Applicants

At the time of adjustment, asylees and refugees seeking adjustment of status may apply for a waiver of inadmissibility for fraud or willful misrepresentation.[22] The waiver can be approved if the grant serves humanitarian purposes, family unity, or other public interests. Under current USCIS policy, the officer has the discretion to grant the waiver with or without a waiver application for certain grounds of inadmissibility.

Waiver applications for refugees are usually adjudicated overseas before the applicant is admitted in the refugee classification. However, if the refugee is inadmissible based on actions that occurred prior to or after admission, the refugee can apply for a waiver when seeking adjustment.

4. Legalization and SAW Applicants

Legalization applicants[23] and Special Agricultural Workers (SAW) applicants[24] may be granted a waiver of inadmissibility based on fraud or willful misrepresentation if the grant serves humanitarian purposes, family unity, or other public interests.[25]

5. Nonimmigrants, including T and U Nonimmigrant Visa Applicants

An applicant seeking admission as a nonimmigrant and who is inadmissible for fraud or willful misrepresentation may obtain a waiver for advance permission to enter the United States.[26] This waiver is granted at the discretion of the Secretary of Homeland Security.

If the applicant is seeking a nonimmigrant visa (other than K, T, U, and V) overseas, the applicant must apply for the waiver through a U.S. Consulate. The Customs and Border Protection (CBP) Admissibility Review Office (ARO) adjudicates the waiver.[27] If the applicant is not required to have a visa (other than visa waiver applicants) and is applying for the waiver at the U.S. border, the application is filed with CBP.[28]

If the applicant is applying for a T or U nonimmigrant visa, the applicant must always file the waiver application with USCIS.

If the applicant is applying for a K or V nonimmigrant visa, the applicant is generally treated as if he or she is an intending immigrant. Therefore, the applicant must file a waiver application with USCIS if inadmissible for fraud or willful misrepresentation.[29] If USCIS grants the waiver, DOS will grant a nonimmigrant waiver[30] without CBP involvement.

Footnotes

[^ 1] See INA 212(a)(6)(C)(i).

[^ 2] See INA 212(a)(6)(C)(i).

[^ 3] See Section 349 of IIRIRA, Division C of Pub. L. 104-208 (PDF), 110 Stat. 3009, 3009-639 (September 30, 1996).

[^ 4] Under INA 212(i). The applicable law for the adjudication of an INA 212(i) waiver is the law in effect on the date of the decision on the waiver application. See *Matter of Cervantes-Gonzalez (PDF)*, 22 I&N Dec. 560, 563 (BIA 1999).

[^ 5] A fiancé(e) is not yet the spouse of a U.S. citizen. However, K inadmissibility issues are generally addressed as if the fiancé(e) were seeking admission as an immigrant. See 22 CFR 41.81(d). See *Matter of Sesay*, 25 I&N Dec. 431 (BIA 2011). As discussed below, the grant of an INA 212(i) waiver to a K nonimmigrant fiancé(e) or fiancé(e) child is conditioned on the fiancé(e)'s actually marrying the citizen petitioner. See 8 CFR 212.7(a)(4)(iii).

[^ 6] See INA 212(a)(6)(C).

[^ 7] See INA 212(a)(6)(C)(i).

[^ 8] See INA 212(a)(6)(C)(ii), as implemented by Section 344(a) of IIRIRA, Division C of Pub. L. 104-208 (PDF), 110 Stat. 3009, 3009-637 (September 30, 1996).

[^ 9] Under INA 212(i).

[^ 10] See INA 212(a)(6)(C)(i).

[^ 11] IIRIRA made September 30, 1996 the effective date of the new INA 212(a)(6)(C)(ii). See Section 344(c) of IIRIRA, Division C of Pub. L. 104-208 (PDF), 110 Stat. 3009, 3009-637 (September 30, 1996).

[^ 12] See INA 212(i). Some separate adjustment mechanisms, such as INA 209 (for refugees and asylees) may have more broadly available waivers that could apply to an applicant who is inadmissible under INA 212(a)(6)(C)(ii). For example, INA 209(c) allows the waiver of many grounds of inadmissibility, and does not list INA 212(a)(6)(C)(ii) as a ground that cannot be waived.

[^ 13] This guidance only addresses the waiver under INA 212(i). The fraud or willful misrepresentation waiver discussed in this guidance is also available to applicants who obtained, or attempted to obtain, a benefit based on falsely claiming U.S. citizenship before September 30, 1996.

[^ 14] This includes false claims to U.S. citizenship made before September 30, 1996.

[^ 15] If the officer has sufficient information in the file to determine whether the ground can be waived, then no form is required.

[^ 16] T nonimmigrant status is for victims of human trafficking. U nonimmigrant status is for victims of certain criminal activity.

[^ 17] Under INA 212(i).

[^ 18] A fiancé(e) is not yet the spouse of the U.S. citizen. K inadmissibility issues, however, are generally addressed as if the fiancé(e) were seeking admission as an immigrant. See 22 CFR 41.81(d). See *Matter of Sesay*, 25 I&N Dec. 431 (BIA 2011). As discussed below, the grant of an INA 212(i) waiver to a K nonimmigrant fiancé(e) or fiancé(e) child is conditioned on the fiancé(e)'s actually marrying the citizen petitioner.

[^ 19] Foreign spouses or step-children of U.S. citizens.

[^ 20] For information on the adjudication of these waivers, see Chapter 2, Adjudication of Fraud and Willful Misrepresentation Waivers [9 USCIS-PM F.2].

[^ 21] These applicants seek a waiver under INA 207.

[^ 22] These applicants seek a waiver under INA 209.

[^ 23] See INA 245A and any legalization-related class settlement agreements.

[^ 24] See INA 210.

[^ 25] For more information on waivers for legalization applicants, see INA 245A(d)(2)(B)(i). See 8 CFR 245a.2(k), and 8 CFR 245a.18. For more information on waivers for SAW applicants, see INA 210(c)(2)(B)(i).

[^ 26] These applicants seek relief under INA 212(d)(3).

[^ 27] See INA 212(d)(3)(A)(i).

[^ 28] See Customs and Border Protection website for more information.

[^ 29] See INA 212(i).

[^ 30] See INA 212(d)(3).

Chapter 2 - Adjudication of Fraud and Willful Misrepresentation Waivers

A. Eligibility

An applicant inadmissible for fraud or willful misrepresentation may be eligible for a waiver. Before adjudicating the waiver, the officer should determine if the applicant is inadmissible for fraud or willful misrepresentation.[1]

If inadmissible, the applicant must meet the following requirements before a waiver can be granted:

- The applicant must show that denial of admission to or removal from the United States would result in extreme hardship to his or her qualifying relative (or if the applicant is a VAWA self-petitioner, to himself or herself); and
- The applicant must show that a favorable exercise of discretion is warranted.[2]

General Guidelines for Adjudication of Fraud and Willful Misrepresentation Waivers	
Step 1	Determine whether the applicant is a VAWA self-petitioner or has established the relationship to the qualifying relative.
Step 2	Determine whether the applicant has demonstrated that his or her qualifying relative (or the applicant himself or herself, if a VAWA self-petitioner) would suffer extreme hardship if the applicant were denied admission to or removed from the United States as a result of the denial of the waiver.
Step 3	Determine whether the waiver should be granted as a matter of discretion, particularly whether positive equities such as humanitarian relief to a qualifying relative and family unity overcome negative factors such as fraud and willful misrepresentation.

B. Waiver Adjudication

1. Determine Whether the Applicant Has a Qualifying Relative

For cases other than VAWA self-petitioners, the applicant must have a qualifying relative who is either the applicant's:

- U.S. citizen parent or spouse;
- Lawful permanent resident (LPR) parent or spouse; or
- U.S. citizen fiancé(e) petitioner (for K-1 or K-2 visa applicants only).

U.S. citizen or LPR children are not qualifying relatives.

A VAWA self-petitioner does not need a qualifying relative, since the VAWA self-petitioner may claim extreme hardship to himself or herself. The VAWA self-petitioner may also claim extreme hardship to a U.S. citizen, LPR, or qualified alien parent or child.[3]

The evidence needed to establish that an applicant has a qualifying relative is generally the same as the evidence required to establish the underlying relationship for a relative or fiancé(e) visa petition.

2. Make an Extreme Hardship Determination

An applicant must demonstrate that his or her qualifying relative (or the applicant himself or herself, if a VAWA self-petitioner) would suffer extreme hardship if the applicant were refused admission to or removed from the United States as a result of the denial of the waiver.

If the applicant fails to establish extreme hardship, then the officer must deny the waiver application because the applicant has not met the statutory requirements of the waiver. Before denying the waiver, the officer should follow standard operating procedures regarding issuance of a Request for Evidence or Notice of Intent to Deny.

In general, a finding that the applicant has not shown extreme hardship is sufficient to support a denial of the waiver application. If the applicant has not established extreme hardship, then it is unnecessary to determine whether the waiver would have been granted as a matter of discretion. There may be instances, however, where the applicant's past actions were so egregious that the officer may want to note in the decision that even if extreme hardship were found, the application would be denied as a matter of discretion.

If the applicant has established extreme hardship, the officer should proceed with the discretionary determination.

3. Analyze Whether the Waiver Should Be Granted as a Matter of Discretion

A fraud or willful misrepresentation waiver generally requires an officer to consider whether granting the waiver is warranted as a matter of discretion. The officer should determine whether the applicant's positive factors outweigh the negative factors.

The finding of extreme hardship experienced by a qualifying relative (or the VAWA self-petitioner himself or herself) is the first positive factor for consideration. The underlying fraud or willful misrepresentation itself is the first negative factor to consider.[4] The nature, seriousness, and underlying circumstances of the fraud or willful misrepresentation may influence the weight given to this negative factor. Considerations include, but are not limited to:

- The facts and circumstances surrounding the fraud or willful misrepresentation;
- The reasons and motivations of the applicant when the fraud or willful misrepresentation was committed;
- Age or mental capacity of the applicant when the fraud was committed;
- Whether the applicant has engaged in a pattern of fraud or whether it was merely an isolated act of misrepresentation;[5] and
- The nature of the proceedings in which the applicant committed the fraud or willful misrepresentation.[6]

Footnotes

[^ 1] For more on inadmissibility for fraud and willful misrepresentation, see Volume 8, Admissibility, Part J, Fraud and Willful Misrepresentation [8 USCIS-PM J].

[^ 2] Once found inadmissible, the underlying fraud or willful misrepresentation is not considered again until the officer determines whether the waiver is warranted as a matter of discretion. For more information, see Chapter 3, Effect of Granting a Waiver [9 USCIS-PM G.3].

[^ 3] See INA 212(i), INA 204(a)(1)(A)(iii), and INA 204(a)(1)(A)(iv).

[^ 4] See I*NS v. Yueh-Shaio Yang*, 519 U.S. 26 (1996). See *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999).

[^ 5] See *INS v. Yueh-Shaio Yang*, 519 U.S. 26 (1996).

[^ 6] In *Matter of Tijam*, 22 I&N Dec. 408, 413 (BIA 1998), the Board of Immigration Appeals (BIA) stated that it considered making false statements under oath during the naturalization process to be an extremely serious adverse factor because of the government's interest in maintaining the integrity of that process.

Chapter 3 - Effect of Granting a Waiver

A. Validity of an Approved Waiver

If the waiver[1] is granted, then, except for K-1 and K-2 nonimmigrants and conditional permanent residents,[2] the grant permanently waives fraud or willful misrepresentation included in the application for purposes of any future immigration benefits application, whether immigrant or nonimmigrant. The waiver remains valid even if the alien later abandons or otherwise loses lawful permanent resident (LPR) status.[3]

For conditional permanent residents,[4] the waiver only becomes valid indefinitely if and when the conditions are removed from his or her permanent resident status. Conversely, termination of the conditional permanent resident status also terminates the validity of the waiver.[5]

A waiver applies only to the specific grounds of inadmissibility and related crimes, events or incidents specified in the waiver application.[6] If, in the future, the applicant is found inadmissible for a separate incident of fraud or willful misrepresentation not already included in an approved waiver application, he or she will be required to file another waiver application. USCIS may reconsider an approval of a waiver at any time if it is determined that the decision has been made in error.[7]

B. Conditional Grant of a Waiver to K-1 or K-2 Nonimmigrant Visa Applicants

If the applicant seeks a waiver to obtain a fiancé(e) visa (K-1 or K-2), the waiver's approval is conditioned upon the K-1 nonimmigrant marrying the U.S. citizen who filed the fiancé(e) petition.[8] The waiver becomes permanent once the K-1 marries the petitioner, as discussed in the section on validity of an approved waiver.[9]

If the K-1 nonimmigrant does not marry the petitioner, the K-1 and K-2 (if applicable) will remain inadmissible for purposes of any application for a benefit on any basis other than the proposed marriage between the K-1 and the K nonimmigrant visa petitioner.[10]

C. Inadmissibility Based on Documentary Requirements[11]

If an applicant procured an immigration benefit by fraud or willful misrepresentation, the applicant may also be inadmissible for lack of documentary requirements at the time of entry. When an applicant is granted a waiver for fraud or willful misrepresentation, inadmissibility based on lack of documentary requirements at the time of entry is also implicitly waived.

Example

An applicant misrepresents a material fact during the overseas nonimmigrant visa application process. The Department of State, however, grants the applicant a visa. Later, the applicant applies for adjustment of status. During the adjustment interview, an officer discovers the misrepresentation and finds applicant inadmissible for both willful misrepresentation[12] and failure to comply with documentary requirements.[13] The applicant then applies for a waiver of inadmissibility for willful misrepresentation.[14] Approval of the waiver has the effect of waiving inadmissibility for willful misrepresentation and for the lack of a valid visa at the time of entry.

Footnotes

[^ 1] See INA 212(i).

[^ 2] For K-1 and K-2 nonimmigrants granted a waiver, see Section B, Conditional Grant of a Waiver to K-1 or K-2 Nonimmigrant Visa Applicants [9 USCIS-PM F.3(B)].

[^ 3] See 8 CFR 212.7(a)(4)(ii).

[^ 4] Aliens lawfully admitted for permanent residence on a conditional basis. See INA 216.

[^ 5] See 8 CFR 212.7(a)(4)(iv).

[^ 6] See 8 CFR 212.7(a)(4)(i).

[^ 7] See 8 CFR 212.7(a)(4)(v).

[^ 8] See 8 CFR 212.7(a)(4)(iii).

[^ 9] See Section A, Validity of an Approved Waiver [9 USCIS-PM F.3(A)].

[^ 10] See 8 CFR 212.7(a)(4)(iii).

[^ 11] See INA 212(a)(7).

[^ 12] See INA 212(a)(6)(C)(i).

[^ 13] See INA 212(a)(7)(B)(i) (for example, for not possessing a valid nonimmigrant visa).

[^ 14] See INA 212(i).

Part G - Unlawful Presence

Part H - Provisional Unlawful Presence

Part I - Immigrant Membership in Totalitarian Party

Part J - Alien Smuggling

Part K - Aliens Subject to Civil Penalty

Part L - Refugees and Asylees

Part M - Temporary Protected Status Applicants

Part N - Special Immigrant Juvenile Adjustment Applicants

Part O - Victims of Trafficking

Chapter 1 - Purpose and Background [Reserved]

Chapter 2 - Waivers for Victims of Trafficking

A. Inadmissibility

Victims of a severe form of trafficking in persons applying for T nonimmigrant status[1] must demonstrate that they are admissible to the United States.[2] This is also true for applicants for derivative T nonimmigrant status.[3]

Applicants for T nonimmigrant status are not subject to the public charge ground of inadmissibility.[4]

If an applicant is subject to one or more grounds of inadmissibility, the applicant may apply for a discretionary waiver of the ground(s) by filing an Application for Advance Permission to Enter as a Nonimmigrant (Form I-192).[5] If the applicable standard is met and a favorable exercise of discretion is warranted, USCIS may waive all inadmissibility grounds for applicants for T nonimmigrant status under either INA 212(d)(3)(A)(ii)or INA 212(d)(13), except:

- Espionage or sabotage - INA 212(a)(3)(A)(i)(I);
- Any other security-related unlawful activity - INA 212(a)(3)(A)(ii);
- Overthrow of the U.S. government - INA 212(a)(3)(A)(iii);
- Adverse foreign policy impact - INA 212(a)(3)(C); and
- Participants in Nazi persecution or genocide - INA 212(a)(3)(E)(i)-(ii).[6]

B. Waivers

1. Waiver Authority

For T nonimmigrant applicants, waivers are available under two sections of the Immigration and Nationality Act (INA):

- INA 212(d)(13), which provides USCIS with discretion to waive grounds of inadmissibility specific to T nonimmigrant status applications; and
- INA 212(d)(3)(A)(ii), which provides USCIS discretion to waive certain grounds of inadmissibility for nonimmigrants based on a general balancing of positive and negative discretionary factors.

The table below outlines common grounds of inadmissibility USCIS encounters for which a waiver is requested under these two legal authorities. If an applicant meets the requirements of the legal standard, the officer must also determine whether to approve the waiver as a matter of discretion.[7]

T Nonimmigrants: Common Grounds of Inadmissibility and Corresponding Waivers

Inadmissibility Ground	Waiver Available?	Legal Authority and Standard
• Health-related (INA 212(a)(1))	Yes	In the national interest (INA 212(d)(13)(B)(i)) General balancing of positive and negative discretionary factors (INA 212(d)(3)(A)(ii))
• Unlawful presence bars (INA 212(a)(9)(A) and INA 212(a)(9)(C)(i)(II)) • Illegal entrants and immigration violators (INA 212(a)(6)) • Documentation requirements (INA 212(a)(7))	Yes	In the national interest and connection to victimization (INA 212(d)(13)(B)(ii)) General balancing of positive and negative discretionary factors (INA 212(d)(3)(A)(ii))
• Criminal grounds (INA 212(a)(2))	Yes	In the national interest and connection to victimization (INA 212(d)(13)(B)(ii)) General balancing of positive and negative discretionary factors (INA 212(d)(3)(A)(ii))
• Terrorist activities (INA 212(a)(3)(B)) • Terrorist organization membership (INA 212(a)(3)(F))	Yes	General balancing of positive and negative discretionary factors (INA 212(d)(3)(A)(ii))
• Other security-related unlawful activity (INA 212(a)(3)(A)(ii))	No	Grounds of inadmissibility (INA 212(a))

Footnotes

[^ 1] For more information about T nonimmigrant status, see Volume 3, Humanitarian Protection and Parole, Part B, Victims of Trafficking [3 USCIS-PM B].

[^ 2] See INA 212(a). See 8 CFR 214.1(a)(3)(i).

[^ 3] See 8 CFR 214.211(a).

[^ 4] See INA 212(d)(13)(A). See 8 CFR 212.16(b).

[^ 5] See INA 212(d)(13)(B). See 8 CFR 212.16.

[^ 6] See INA 212(d)(13)(B) and INA 212(d)(3)(A)(ii).

[^ 7] See Part A, Waiver Policies and Procedures, Chapter 5, Discretion [9 USCIS-PM A.5].

Chapter 3 - INA 212(d)(13) Waivers

A. Waiver Eligibility

Because the waiver authority in INA 212(d)(13) was specifically created for T nonimmigrant applicants, USCIS first considers whether an applicant is eligible for a waiver under this section.[1]

In adjudicating INA 212(d)(13) waiver requests, there are two possible legal standards for an officer to consider, depending on which ground of inadmissibility applies:

- Health-related grounds of inadmissibility under INA 212(a)(1); or
- All other grounds of inadmissibility.

If the applicant is inadmissible based on health-related grounds, USCIS considers whether it is in the national interest to exercise its discretion to waive this ground of inadmissibility.[2]

For all other grounds of inadmissibility that are waivable under INA 212(d)(13), USCIS considers both the national interest and whether the activities rendering the applicant inadmissible were caused by, or were incident to, the victimization suffered due to being a victim of trafficking.[3]

USCIS cannot grant a waiver under INA 212(d)(13) for grounds other than health-related grounds unless the applicant establishes that the activities rendering the applicant inadmissible were caused by, or were incident to, the victimization.[4]

B. Discretionary Analysis

If the officer determines that the applicant has met the legal standard for a waiver under INA 212(d)(13), the officer must still determine whether the waiver should be granted as a matter of discretion.[5] The applicant bears the burden of demonstrating that USCIS should favorably exercise discretion.[6]

The INA provides that in the case of T nonimmigrants, if the Secretary of Homeland Security “considers it to be in the national interest to do so,” the Secretary may waive the application of certain grounds of inadmissibility.[7] Neither Congress nor legacy Immigration and Naturalization Service defined the term “national interest” in either the Immigration and Nationality Act (INA) or the regulations in order to leave the application of this test as flexible and broad as possible.

Factors officers may consider in determining whether a waiver is in the national interest include, but are not limited to:

- Details of the applicant’s victimization;
- Level of victim’s cooperation with law enforcement;
- Contributions to public safety by strengthening the ability of law enforcement to investigate and prosecute criminal activity;
- Contributions to the community;
- Family unity; and
- Risk of harm if returned to home country.

The officer must weigh the social and humanitarian considerations against the adverse factors present in the applicant’s case.[8] The approval of a waiver as a matter of discretion depends on whether the favorable factors in the applicant's case outweigh the unfavorable ones.[9]

In cases involving violent or dangerous crimes, USCIS only exercises favorable discretion in extraordinary circumstances, unless the criminal activities were caused by, or were incident to, the victimization that the applicant suffered as a result of being trafficked.[10]

C. Ineligible for INA 212(d)(13) Waiver

If an officer determines that the applicant is not eligible for a waiver under INA 212(d)(13), the officer must consider whether the applicant meets the legal standard and warrants a favorable exercise of discretion under the INA 212(d)(3)(A)(ii) nonimmigrant waiver.

Footnotes

[^ 1] See INA 212(d)(13)(B) (providing waiver authority specific to T nonimmigrants in addition to any other waivers that may be available).

[^ 2] See INA 212(d)(13)(B). See 8 CFR 212.16(b)(1).

[^ 3] See INA 212(d)(13)(B). See 8 CFR 212.16(b)(2).

[^ 4] See INA 212(d)(13)(B). See 8 CFR 212.16(b)(2).

[^ 5] See INA 212(d)(13)(B) (indicating that INA 212(d)(13) waivers are only granted as a matter of discretion).

[^ 6] See *Matter of De Lucia (PDF)*, 11 I&N Dec. 565 (BIA 1966). See *Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

[^ 7] See INA 212(d)(13)(B).

[^ 8] See *Matter of Mendez-Moralez (PDF)*, 21 I&N Dec. 296 (BIA 1996).

[^ 9] For a non-exhaustive list of relevant factors to consider in the discretionary analysis, see Part A, Waiver Policies and Procedures, Chapter 5, Discretion, Section A, Discretionary Factors [9 USCIS-PM A.5(A)]. See *Matter of Mendez-Moralez (PDF)*, 21 I&N Dec. 296 (BIA 1996) (relating to a criminal waiver under INA 212(h)(1)(B)). See *Matter of Marin (PDF)*, 16 I&N Dec. 581 (BIA 1978) (relating to an INA 212(c) waiver). See *Matter of Tijam (PDF)*, 22 I&N Dec. 408 (BIA 1998) (relating to a fraud or misrepresentation finding (INA 212(a)(6)(C)(i)) and the discretionary waiver under former INA 241(a)(1)(H) (renumbered as INA 237(a)(1)(H) by IIRIRA)).

[^ 10] See 8 CFR 212.16(b)(3).

Chapter 4 - INA 212(d)(3) Waivers

A. When to Consider INA 212(d)(3) Waiver

USCIS considers whether the applicant may be eligible for a discretionary waiver under INA 212(d)(3)[1] if the applicant is ineligible for a waiver under INA 212(d)(13), such as in the following circumstances:

- An applicant cannot establish that the conduct rendering the applicant inadmissible is connected to the trafficking; or
- The applicant is inadmissible under a ground not covered by INA 212(d)(13) but that is covered by INA 212(d)(3), which includes:
  - Certain security and related grounds (INA 212(a)(3));[2]
  - International child abduction(INA 212(a)(10)(C));[3] and
  - Former citizens who renounced citizenship to avoid taxation (INA 212(a)(10)(E)).[4]

B. Discretionary Analysis

The INA 212(d)(3) waiver analysis is a purely discretionary determination, and the analysis involves balancing social and humanitarian considerations against adverse factors.

In addition to considering a broad range of discretionary factors,[5] officers should also consider the following factors, as specifically outlined by the Board of Immigration Appeals, in determining whether to approve or deny an INA 212(d)(3) waiver:

- The risk of harm to society if the applicant is admitted;
- The seriousness of the applicant's prior immigration law or criminal law violations, if any; and
- The reasons for wishing to enter the United States.[6]

In addition to these factors, officers should take into account as a positive factor that the applicant has suffered a severe form of human trafficking in persons and has complied with any reasonable law enforcement requests for assistance.

Footnotes

[^ 1] U.S. Department of State (DOS) also adjudicates waiver applications. For more information on DOS waiver processing, see 9 FAM 305.4, Processing Waivers.

[^ 2] See INA 212(a)(3).

[^ 3] See INA 212(a)(10)(C).

[^ 4] See INA 212(a)(10)(E).

[^ 5] See Part A, Waiver Policies and Procedures, Chapter 5, Discretion [9 USCIS-PM A.5].

[^ 6] See *Matter of Hranka (PDF)*, 16 I&N Dec. 491 (BIA 1978).

Chapter 5 - Waivers for T Nonimmigrants Applying for Adjustment of Status

A. General

To be eligible to adjust status to lawful permanent residence, all T nonimmigrants must establish that they are admissible to the United States at the time of adjudication of the Application to Register Permanent Residence or Adjust Status (Form I-485) or be granted a waiver of inadmissibility for any grounds not already waived in connection with the underlying Application for T Nonimmigrant Status (Form I-914) or Application for Derivative T Nonimmigrant Status (Form I-914, Supplement A).[1]

If a ground of admissibility applies but was waived in connection with the underlying T nonimmigrant status application, officers do not re-adjudicate the waiver decision and consider the inadmissibility waived for purposes of the adjustment application.

B. Grounds of Inadmissibility Not Previously Waived

If there are inadmissibility grounds that existed before approval of the underlying T nonimmigrant status that were not disclosed or addressed at the time of adjudication, the officer should consider whether revocation of the approval of T nonimmigrant status is appropriate. As part of that process, USCIS examines whether the inadmissibility can be waived based on the record or, if there is insufficient evidence in the record to waive the inadmissibility, the officer issues a Notice of Intent to Revoke.

Principal and derivative T nonimmigrant applicants for adjustment of status who are inadmissible based on a pre-existing ground not previously waived in connection with the application for T nonimmigrant status must file an Application for Waiver of Grounds of Inadmissibility (Form I-601).[2] The applicant should submit any additional evidence that is relevant to the exercise of discretion.[3]

C. Waivers for Grounds of Inadmissibility

USCIS has the authority under INA 245(l)(2) to waive any ground of inadmissibility for T nonimmigrant applicants for adjustment of status, with the exception of the following:

- Security and related grounds - INA 212(a)(3);
- International child abduction - INA 212(a)(10)(C); and
- Renunciation of U.S. citizenship to avoid taxation - INA 212(a)(10)(E).[4]

T nonimmigrant applicants for adjustment of status may apply for any other waivers of inadmissibility for which they may be eligible, in addition to INA 245(l)(2).

1. Health-Related Inadmissibility Grounds

The standard for waiving health-related[5] inadmissibility grounds is whether a waiver is in the national interest as a matter of discretion.[6]

2. Other Inadmissibility Grounds

For other grounds of inadmissibility, the standard is whether:

- It is in the national interest to waive the inadmissibility ground; and
- The activities rendering the applicant inadmissible were caused by, or were incident to, the T-1 principal applicant's trafficking victimization.[7]

3. Unlawful Presence Inadmissibility Grounds

If an applicant is inadmissible only for their unlawful presence[8] in the United States and the trafficking was at least one central reason for their unlawful presence,[9] and they are not inadmissible on any other grounds, it is not necessary to file Form I-601.[10] However, the applicant must submit evidence sufficient to demonstrate that the victimization suffered was at least one central reason for the unlawful presence in the United States. Such evidence may include:

- Personal statement;
- Psychologist report;
- Medical records; or
- Affidavits from relevant third parties.

The victimization does not need be the sole reason for the unlawful presence, but the nexus between the victimization and the unlawful presence must be more than tangential, incidental, or superficial.[11]

4. Exemption from Public Charge Ground of Inadmissibility

There is a statutory exemption from the public charge ground of inadmissibility[12] for victims who apply for T nonimmigrant status.[13] This exemption also applies to T nonimmigrant adjustment of status applicants.[14] If, however, a T nonimmigrant is applying for adjustment of status based on an employment-based petition that requires an Affidavit of Support Under Section 213A of the INA (Form I-864), the applicant must submit an affidavit of support as described in INA 212(a)(4)(D).[15]

5. Summary of Waivers Available to T Nonimmigrant Adjustment Applicants

Waivers of Inadmissibility Available to T Nonimmigrant Adjustment Applicants

Legal Authority	Waiver Available for	Standard
INA 245(l)(2)(A)	INA 212(a)(1) (health related)	In the national or public interest
INA 245(l)(2)(B)	All other grounds of inadmissibility except: • INA 212(a)(3)(A) (espionage, sabotage, or export of sensitive technology or information) • INA 212 (a)(3)(B) (terrorist activities) • INA 212(a)(3)(C) (adverse foreign policy considerations) • INA 212(a)(3)(D) (immigrant membership in totalitarian party) • INA 212(a)(3)(E) (participation in Nazi persecution, genocide, or the commission of any acts of torture or extrajudicial killing) • INA 212(a)(10)(C) (international child abductors) • INA 212(a)(10)(E) (renunciation of U.S. citizenship to avoid taxation)	In the national or public interest and caused by or incident to victimization

D. Waiver Analysis for Non-Health Related Grounds of Inadmissibility

Step One: Caused by or Incident to Victimization

The first step in determining whether a waiver is warranted is to determine whether the applicant has established that the activities rendering them inadmissible were caused by, or were incident to, the T-1 principal applicant's victimization as a result of being trafficked.[16] Derivative family members applying for adjustment of status may be ineligible for a waiver under INA 245(l)(2)(B) if they are unable to establish a nexus to the principal's victimization.

If an officer determines that the applicant has not established the connection between the activities and the victimization, the officer does not proceed to step two and denies the waiver application.

Step Two: National Interest Standard

The next step in determining whether a waiver is warranted is to determine whether it is in the national interest to grant the waiver.

"National interest" is not defined in the law or regulation but is interpreted broadly based on the purpose of the program, as established by Congress. Congress created T nonimmigrant status to provide immigration protection to alien victims of trafficking and to provide a tool for law enforcement to investigate and prosecute trafficking and other crimes by providing legal status for victims who cooperate.[17]

Factors USCIS considers in determining whether a waiver is in the public or national interest include, but are not limited to:

- Nature of the applicant's victimization;
- Level of victim's cooperation with law enforcement;
- Contributions to public safety by strengthening the ability of law enforcement to investigate and prosecute criminal activity;
- Contributions to the community;
- Family unity; and

- Risk of harm if the applicant is returned to their home country.

If an officer determines that the applicant has not established that it is in the national interest for USCIS to grant a waiver, the officer denies the waiver application.

Step Three: Discretionary Analysis

If the officer determines that the applicant has established that it is in the national interest for USCIS to grant a waiver, the officer must still determine whether the waiver should be granted as a matter of discretion.[18] The discretionary determination is the final step in the adjudication of a waiver application. The applicant bears the burden of establishing that they merit a favorable exercise of discretion.[19]

The officer must weigh the social and humanitarian considerations against the adverse factors present in the applicant's case.[20] The approval of a waiver as a matter of discretion depends on whether the favorable factors in the applicant's case outweigh the unfavorable ones.[21]

Footnotes

[^ 1] See INA 245(l)(2). See 8 CFR 245.23(a)(4) and 8 CFR 245.23(b)(4).

[^ 2] If there is a T derivative adjustment applicant with a non-health-related inadmissibility ground that was not waived at the time of the derivative T nonimmigrant grant, and the inadmissibility basis has no nexus to the T-1 principal's victimization, then the T derivative applicant may be ineligible for a waiver under INA 245(l)(2).

[^ 3] See Part A, Waiver Policies and Procedures, Chapter 4, Waiver Eligibility and Evidence, Section C, Evidence [9 USCIS-PM A.4(C)], for a discussion of evidence that can be submitted.

[^ 4] See INA 245(l)(2). See 8 CFR 212.18(b).

[^ 5] See INA 212(a)(1).

[^ 6] See INA 245(l)(2)(A).

[^ 7] See INA 245(l)(2)(A). See 8 CFR 212.18(b).

[^ 8] See INA 212(a)(9)(B)(i).

[^ 9] See INA 212(a)(9)(B)(iii).

[^ 10] See 8 CFR 245.23(c)(4).

[^ 11] See 8 CFR 245.23(c)(4).

[^ 12] See INA 212(a)(4).

[^ 13] See 8 CFR 212.23(a)(17).

[^ 14] See 8 CFR 212.23(a)(18).

[^ 15] See 8 CFR 212.23(b).

[^ 16] See INA 245(l)(2)(A). The requirement to establish a connection to victimization is not required for waivers requested for health-related inadmissibility grounds. See 8 CFR 212.18(b).

[^ 17] See 22 U.S.C. 7101 (PDF).

[^ 18] See INA 245(l)(2) (indicating that waivers are granted as a matter of discretion).

[^ 19] See *Matter of De Lucia* (PDF), 11 I&N Dec. 565 (BIA 1966). See *Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

[^ 20] See *Matter of Mendez-Moralez* (PDF), 21 I&N Dec. 296 (BIA 1996).

[^ 21] See *Matter of Mendez-Moralez* (PDF), 21 I&N Dec. 296 (BIA 1996) (relating to a criminal waiver under INA 212(h)(1)(B)). See *Matter of Marin* (PDF), 16 I&N Dec. 581 (BIA 1978) (relating to an INA 212(c) waiver). See *Matter of Tijam* (PDF), 22 I&N Dec. 408 (BIA 1998) (relating to a fraud or misrepresentation finding (INA 212(a)(6)(C)(i)) and the discretionary waiver under former INA 241(a)(1)(H) (redesignated as INA 237(a)(1)(H) by IIRIRA)). For a non-exhaustive list of relevant factors to consider in the discretionary analysis, see Part A, Waiver Policies and Procedures, Chapter 5, Discretion, Section A, Discretionary Factors [9 USCIS-PM A.5(A)].

Chapter 6 - Adjudication and Post-Adjudication Matters

A. Approval

If USCIS determines that the applicant is eligible for a waiver and warrants a favorable exercise of discretion, USCIS approves the waiver application. Approval notices for waivers of inadmissibility list the specific grounds USCIS waived. Inadmissibility grounds waived in connection with an application for T nonimmigrant status are not considered waived for purposes of any other immigration benefit request or travel-related purpose, except for purposes of adjustment under INA 245(l).[1]

B. Denial

If USCIS determines that the applicant is not eligible for a waiver or does not warrant a favorable exercise of discretion, USCIS denies the waiver application and notifies the applicant of the reasons for the denial in writing.

C. Appeal of Waivers

Applicants may not appeal USCIS' decision to deny a nonimmigrant waiver sought in connection with an application for T nonimmigrant status.[2] However, the applicant may file a motion to reopen or reconsider a denied waiver application using the Notice of Appeal or Motion (Form I-290B).[3] An applicant may file a new waiver application in appropriate cases,[4] such as when there is new evidence relevant to the waiver consideration.

Applicants may appeal USCIS' decision to deny an application for a waiver of inadmissibility sought in connection with an application to adjust status.[5] USCIS notifies the applicant in writing of the reasons for the denial and of the right to appeal the decision to the Administrative Appeals Office (AAO).[6]

D. Revocation of Waivers

USCIS, at any time, may revoke a waiver previously granted as part of the application for T nonimmigrant status or adjustment of status under INA 212(a) or INA 212(d).[7] There is no appeal of a decision to revoke a waiver.[8]

Footnotes

[^ 1] For example, in the case of a waiver sought in connection with an application for adjustment of status under INA 245(a). See Part A, Waiver Policies and Procedures, Chapter 6, Validity of an Approved Waiver, Section B, Length of Waiver Validity, Subsection 1, Certain Nonimmigrants [9 USCIS-PM A.6(B)(1)].

[^ 2] See 8 CFR 212.16(c).

[^ 3] See 8 CFR 103.5.

[^ 4] See 8 CFR 212.16(c).

[^ 5] See 8 CFR 245.23(i).

[^ 6] See 8 CFR 103.3.

[^ 7] See 8 CFR 212.18(d) and 8 CFR 212.16(d).

[^ 8] See 8 CFR 212.16(d) and 8 CFR 212.18(d).

Part P - Crime Victims

Part Q - Violence Against Women Act Applicants

Part R - Other Waivers and Provisions Overcoming Inadmissibility

Part S - Consent to Reapply

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures.

See more

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures. We are working quickly to update and incorporate all of the AFM content into the USCIS Policy Manual, the agency's centralized online repository for immigration policies. Until then, we have moved any remaining AFM content to its corresponding Policy Manual Part. To the extent that a provision in the Policy Manual conflicts with remaining AFM content or Policy Memoranda, the updated information in the Policy Manual prevails. If you have questions or concerns about any discrepancies among these resources, contact PolicyFeedback@uscis.dhs.gov.

AFM Chapter 43 - Consent to Reapply After Deportation or Removal (External)

Volume 10 - Employment Authorization

Part A - Employment Authorization Policies and Procedures

Chapter 1 - Purpose and Background

A. Purpose

Aliens in the United States must obtain employment authorization before they may lawfully work in the country. Working without authorization may lead to a number of negative consequences, such as DHS terminating the person's immigration status, being barred from adjusting status to lawful permanent residence, and DHS removing the person from the United States.[1]

Certain aliens automatically obtain employment authorization by virtue of their immigration status. Others must affirmatively apply for employment authorization with USCIS. If USCIS approves an Application for Employment Authorization (Form I-765), USCIS also issues an employment authorization document (EAD) as evidence of a person's authorization to work in the United States.

B. Background

In 1986, Congress enacted the Immigration Reform and Control Act (IRCA)[2] in an effort to deter illegal immigration to the United States. One of Congress' strategies was to discourage unauthorized employment, which Congress concluded was a significant magnet for illegal immigration. Because of IRCA, employers must now verify the identity and eligibility of employees to work in the United States. The U.S. government imposes penalties on employers that knowingly employ persons not authorized to work in this country or that fail to comply with verification requirements. The immigration laws provide the Secretary of Homeland Security with authority to authorize employment in the United States for eligible aliens and to place restrictions and conditions on both employment authorization and endorsements evidencing such authorization.

Regulations promulgated under IRCA introduced Employment Eligibility Verification (Form I-9) to ensure that all employees present documentary proof to prospective employers of their eligibility to accept employment in the United States.[3] Federal law requires that every employer who recruits, refers for a fee, or hires a person for employment in the United States must complete Form I-9, which requires employers to verify the employee's identity and employment authorization. To that end, some employers use E-Verify to conduct such verifications.[4]

In implementing IRCA, legacy Immigration and Naturalization Service (INS) created the EAD to provide certain classes of aliens with evidence of their authorization to work in the United States.[5] Regulations outline which classes of aliens are automatically authorized to work in the United States by virtue of their immigration status and which classes must apply to request employment authorization.[6]

C. Legal Authorities

- INA 103 – Powers and duties of the Secretary
- INA 274A – Unlawful employment
- 8 CFR 274a Subpart B – Employment authorization

Footnotes

[^ 1] DHS may terminate an alien's immigration status if it determines the alien worked without authorization in violation of the conditions of the immigration status. See INA 237(a)(1) (violation of status as deportability ground). For more information on unlawful employment as a bar to adjustment, see Volume 7, Adjustment of Status, Part B, 245(a) Adjustment, Chapter 6, Unauthorized Employment – INA 245(c)(2) and INA 245(c)(8) [7 USCIS-PM B.6]. See INA 245(c)(2) and INA 245(c)(8).

[^ 2] See Pub. L. 99-603 (PDF) (November 6, 1986).

[^ 3] See 8 CFR 274a.2. For information on who must complete Form I-9, see Handbook for Employers M-274, Chapter 2, Who Must Complete Form I-9.

[^ 4] E-Verify is a web-based system through which employers electronically confirm the employment eligibility of their employees. Employers enter information from an employee's Form I-9 and E-Verify compares the information to records available to DHS and the Social Security Administration. For more information, see the E-Verify website.

[^ 5] Some aliens authorized to work may be issued other documentation as evidence of employment authorization to present to employers in compliance with IRCA.

[^ 6] See 8 CFR 274a.12.

Chapter 2 - Eligibility Requirements

Whether or not an alien is authorized to work in the United States depends on the alien's immigration status or circumstances.[1] The regulations outline three classes of eligibility for employment authorization:

- Authorization to work for any employer, as well as to engage in self-employment, based on immigration status or circumstances;[2]
- Authorization to work for a specific employer based on immigration status or circumstances;[3] and
- Authorization to work for any employer, as well as to engage in self-employment, upon approval, in the discretion of USCIS, of an Application for Employment Authorization (Form I-765).[4]

A. Authorized to Work for Any Employer Based on Status or Circumstances

1. Aliens Who Must Apply for Documentation of Employment Authorization

Certain aliens are authorized to work in the United States without restriction based on their underlying immigration status or circumstances.[5] However, aliens seeking employment in the United States must present an acceptable document or combination of documents to their employer as evidence of both identity and employment authorization.[6] In general, most aliens authorized to work for any employer based on their status or circumstance must apply to USCIS for a document evidencing employment authorization.

The following aliens are authorized to work in the United States without restriction, based on their status or circumstance, but generally must apply to USCIS for a document evidencing employment authorization if seeking employment in the United States:[7]

- Refugees;[8]
- Certain Afghan parolees and certain Ukrainian parolees;[9]
- Fiancé(e)s of U.S. citizens or children of such fiancé(e)s (K-1 or K-2 nonimmigrants);[10]
- Parents or dependent children of aliens granted LPR status based on being an employee of a recognized international organization (or such an employee's family member);[11]
- Citizens of Palau;[12]
- Aliens granted withholding of deportation or removal;[13]
- Aliens under Deferred Enforced Departure (DED);[14]
- Aliens granted temporary protected status (TPS);[15]
- Aliens granted voluntary departure under the Family Unity Program or granted Family Unity benefits;[16]
- V nonimmigrants; and
- Aliens granted Commonwealth of the Northern Mariana Islands (CNMI) resident status (employment authorization is limited to the CNMI).[17]

Generally, aliens in the above categories need to submit Form I-765 to USCIS with the appropriate fee, in accordance with the form instructions,[18] to receive an Employment Authorization Document (EAD) as evidence of such authorization if they intend to work in the United States.[19]

2. Aliens Who Do Not Need to Apply for Documentation of Employment Authorization

The following aliens are authorized to work in the United States without restriction, based on their status or circumstance, and generally do not need to apply to USCIS for a document evidencing employment authorization if seeking employment in the United States because the documentation they receive showing their status or circumstance may generally also be

used to show employment authorization:

- Lawful permanent residents (LPRs) (with or without conditions);[20]
- Lawful temporary residents;[21]
- Asylees;[22]
- Citizens of Micronesia or the Marshall Islands;[23]
- Spouses of U.S. citizens or children of such spouses (K-3 or K-4 nonimmigrants);[24]
- Victims of severe forms of trafficking in persons (T-1 nonimmigrants);[25]
- Spouses of principal E nonimmigrants;[26]
- Spouses of principal L-1 nonimmigrants;[27] and
- Victims of qualifying criminal activity (U-1 nonimmigrants)[28] and certain qualifying family members (U-2, U-3, U-4, and U-5 nonimmigrants).[29]

Although these aliens are not required to apply to USCIS for a document evidencing employment authorization, they must still present acceptable evidence of identity and employment authorization when seeking employment in the United States.[30]

Documentation DHS Issues as Evidence of Employment Authorization

LPRs may present a Permanent Resident Card (Form I-551), a foreign passport that contains a temporary I-551 stamp, or a temporary I-551 notation on a machine-readable visa as evidence of both identity and employment authorization.[31]

Asylees, spouses of U.S. citizens or children of such spouses (K-3 and K-4 nonimmigrants), victims of severe forms of trafficking in persons (T-1 nonimmigrants), spouses of E nonimmigrants (E-1S, E-2S, or E-3S nonimmigrants) with limited exceptions,[32] spouses of L nonimmigrants (L-2S nonimmigrants), and victims of qualifying criminal activity (U-1 nonimmigrants) and certain qualifying family members (U-2, U-3, U-4, and U-5 nonimmigrants) may present their Arrival/Departure Record (Form I-94)[33] as acceptable evidence of employment authorization under List C of Employment Eligibility Verification (Form I-9).[34]

However, aliens seeking employment in the United States who present their Form I-94 to an employer as evidence of employment authorization must also present a document to show evidence of identity.[35] The Form I-94 is not evidence of identity and for the categories of aliens listed above can be presented as evidence of employment authorization.

To obtain a document evidencing both identity and employment authorization, these aliens may apply for an EAD, with the appropriate fee (or request a fee waiver), if applicable. However, certain categories of aliens are automatically issued an EAD showing both identity and employment authorization based on their status and are not required to apply separately for an EAD.[36]

B. Authorized to Work for Specific Employer Based on Status or Circumstances

The following nonimmigrants and parolees are automatically authorized to work for a specific employer based on their particular nonimmigrant status or parole:[37]

- Foreign government officials (A-1 or A-2 nonimmigrants), or employees of such official (A-3 nonimmigrants);[38]
- Foreign government officials in transit (C-2 or C-3 nonimmigrants);[39]
- Treaty traders (E-1 nonimmigrants) or treaty investors (E-2 nonimmigrants);[40]
- Students (F-1 nonimmigrants) who are seeking:[41]
  - On-campus employment;
  - Curricular practical training;
  - An EAD based on a STEM Optional Practical Training (OPT) extension,[42] and whose timely filed Form I-765 or successor form is pending and whose employment authorization and accompanying Form I-766 or successor form was issued based on post-completion OPT;[43] or
  - H-1B nonimmigrant status and whose duration of status and employment authorization have been extended as provided in regulations;[44]
- Representatives of an international organization (G-1, G-2, G-3, or G-4 nonimmigrants)[45] and their personal employees (G-5 nonimmigrants);[46]
- Temporary workers or trainees (H-1, H-2, or H-3 nonimmigrants);[47]
- Representatives of foreign information media (I nonimmigrants);[48]
- Exchange visitors (J-1 nonimmigrants);[49]
- Intra-company transferees (L-1 nonimmigrants);[50]
- "Aliens of extraordinary ability in sciences, arts, education, business, or athletics" (O-1 nonimmigrants), "and an accompanying alien" (O-2 nonimmigrants);[51]
- Athletes, artists, or entertainers (P-1, P-2, or P-3 nonimmigrants) and essential support personnel;[52]
- International cultural exchange visitors (Q-1 nonimmigrants);[53]
- Religious workers (R-1 nonimmigrants);[54]
- North Atlantic Treaty Organization (NATO) civilian employees[55] and their personal employees;[56]
- United States-Mexico-Canada Agreement (USMCA) professionals (TN nonimmigrants);[57]
- Temporary workers[58] who filed a Petition for a Nonimmigrant Worker (Form I-129);[59]
- CNMI investors (E-2 nonimmigrants);[60]
- CNMI transitional workers (CW-1 nonimmigrants);[61]
- "Nonimmigrant treaty alien[s] in a specialty occupation" (E-3 nonimmigrants);[62] and
- "Alien[s] paroled" as an entrepreneur for the period of authorized parole.[63]

Nonimmigrants authorized to work for a specific employer based on status or circumstances are not required to file a Form I-765 to obtain authorization to work in the United States; they receive employment authorization automatically once they are admitted into the United States in, or change to, the qualifying nonimmigrant status or parole. These aliens are, however, subject to certain restrictions as a condition of their status or parole. Generally, they are only allowed to work for the employer named in their respective nonimmigrant petition or parole application and only allowed to perform the type of work specified in their petition or application.[64] Certain classes of nonimmigrants may continue their employment with the same

employer for up to 240 days after the expiration of a prior authorized period of stay, provided they are the beneficiary of a timely filed petition or application for an extension of stay using the Petition for a Nonimmigrant Worker (Form I-129) or Application to Extend/Change Nonimmigrant Status (Form I-539).[65]

C. Aliens Required to Apply for Employment Authorization

The following aliens are not authorized to work incident to their immigration status or circumstance but may request employment authorization from USCIS:[66]

- Alien spouses or unmarried dependent children or sons or daughters of a foreign government official (A-1 or A-2 nonimmigrants) who present an endorsement from the U.S. Department of State;[67]
- Alien spouses or unmarried dependent sons or daughters of alien employees of the Coordination Council for North American Affairs, also known as Taipei Economic and Cultural Representative Office (TECRO) (E-1 nonimmigrants);[68]
- Aliens in nonimmigrant student (F-1 nonimmigrant) status who:
  - Are seeking pre-completion optional practical training, authorization to engage in up to 12 months of post-completion Optional Practical Training (OPT), or a 24-month STEM OPT extension;
  - Have been offered employment under the sponsorship of an international organization; or
  - Are seeking employment because of severe economic hardship;[69]
- Alien spouses or unmarried dependent children or sons or daughters of representatives of international organization (G-1, G-3, or G-4 nonimmigrants);[70]
- Alien spouses or minor children of an exchange visitor (J-2 nonimmigrants);[71]
- Students (M-1 nonimmigrants) seeking employment for practical training;[72]
- Dependents of NATO-1 through NATO-6 nonimmigrants;[73]
- Applicants for asylum;[74]
- Applicants for adjustment of status under INA 245;[75]
- Applicants for cancellation of removal;[76]
- Most parolees;[77]
- Alien spouses of an E-2 CNMI investor;[78]
- Aliens granted deferred action;[79]
- Registry applicants based on continuous residence since January 1, 1972;[80]
- Certain visitors for business (B-1 nonimmigrants) who are the personal or domestic servants[81] of a:
  - Nonimmigrant employer;[82] or
  - U.S. citizen.[83]
- Certain visitors for business (B-1 nonimmigrants) employed by a foreign airline;[84]
- Applicants under a final order of deportation or removal, including deferral of removal under the Convention against Torture (CAT);[85]
- Applicants with pending applications for TPS;[86]
- Applicants for adjustment as a special agricultural worker;[87]
- Witnesses or informants and their qualified family members (S nonimmigrants);[88]
- Applicants for legalization under INA 245A;[89]
- Applicants for adjustment under the Legal Immigration Family Equity (LIFE) Act;[90]
- Derivative family members of victims of a severe form of trafficking in persons (T-2, T-3, T-4, T-5, and T-6 nonimmigrants);[91]
- Spouses of certain H-1B nonimmigrants;[92]
- Violence Against Women Act (VAWA) self-petitioners and derivative beneficiaries;[93]
- Spouses of entrepreneur parolees;[94] and
- Principal beneficiaries of an approved Immigrant Petition for Alien Workers (Form I-140) facing compelling circumstances[95] and their spouse or children.[96]

These aliens are not automatically authorized to work and must have an EAD from USCIS as evidence of their authorization to work in the United States. Upon approval of Form I-765, the alien's type and location of employment is unrestricted.

Footnotes

[^ 1] There are no age restrictions for requesting an Employment Authorization Document (EAD, Form I-766); the EAD functions as an identity document for some aliens.

[^ 2] See 8 CFR 274a.12(a).

[^ 3] See 8 CFR 274a.12(b).

[^ 4] See 8 CFR 274a.12(c). See *Matter of Tong (PDF)*, 16 I&N Dec. 593, 593 (BIA 1978).

[^ 5] See 8 CFR 274a.12(a). Employment authorization under this category may not necessarily be associated with an immigration status. For example, aliens who have received voluntary departure or withholding of deportation do not have an immigration status, but the provision of law under which they are permitted to be in the United States also provides employment authorization.

[^ 6] See INA 274A(b). See 8 CFR 274a.2.

[^ 7] See 8 CFR 274a.12(a).

[^ 8] Including those paroled into the United States as a refugee for a period of time. See 8 CFR 274a.12(a)(3)-(4). For those admitted as refugees or those paroled into the United States as refugees, a Form I-94 is a valid receipt establishing identity and employment authorization for a period of 90 days for purposes of Employment Eligibility Verification (Form I-9). See 8 CFR 274a.2(b)(1)(vi)(C). For guidance USCIS has given employers regarding this document as acceptable DHS-issued evidence of employment authorization for Form I-9 completion, see Handbook for Employers (M-274), Section 4.4, Acceptable Receipts and Section 7.3, Refugees and Asylees.

[^ 9] DHS has decided as a matter of policy to provide the benefit of employment authorization incident to parole akin to what is normally accorded to refugees (as well as a no-fee initial and replacement of an initial Employment Authorization Document) to certain Afghan parolees and certain Ukrainian parolees so that they receive similar treatment as refugees, which aligns with the spirit of legislation that states that certain Afghan parolees and certain Ukrainian parolees “shall be eligible for . . . other benefits available to refugees . . . .” See Section 2502(b) of the Extending Government Funding and Delivering Emergency Assistance Act, Pub. L. 117-43 (PDF), 135 Stat. 344, 377 (September 30, 2021), amended by Section 1501 of Division M of the Consolidated Appropriations Act of 2023, Pub. L. 117-328 (PDF), 136 Stat. 4459, 5189 (December 29, 2022), and Section 401(b) of the Additional Ukraine Supplemental Appropriations Act, Pub. L. 117-128 (PDF), 136 Stat. 1211, 1218 (May 21, 2022). An unexpired Form I-94 is an acceptable receipt for Form I-9 that establishes identity and employment authorization for a period of up to 90 days from the date of hire (or in the case of reverification, the date employment authorization expires) for Ukrainian parolees with a class of admission of UHP, Afghan parolees with a class of admission of OAR, Ukrainians paroled between February 24, 2022 and September 30, 2023 whose Form I-94 indicates Ukraine as the country of citizenship and contains a class of admission of DT, and Afghans paroled on or after July 31, 2021 whose Form I-94 lists Afghanistan as the country of citizenship and contains a class of admission of PAR. For guidance USCIS has given employers regarding this document as acceptable DHS-issued evidence of employment authorization for Form I-9 completion, see Handbook for Employers (M-274), Section 4.4, Acceptable Receipts.

[^ 10] See 8 CFR 274a.12(a)(6).

[^ 11] See 8 CFR 274a.12(a)(7) (N-8 and N-9 nonimmigrants).

[^ 12] See 8 CFR 274a.12(a)(8).

[^ 13] See 8 CFR 274a.12(a)(10).

[^ 14] See 8 CFR 274a.12(a)(11). DED is in the President’s discretion to authorize as part of the President's constitutional power to conduct foreign relations. Although DED is not a specific immigration status, aliens covered by DED are not subject to removal from the United States, usually for a designated period of time.

[^ 15] See 8 CFR 274a.12(a)(12).

[^ 16] See 8 CFR 274a.12(a)(13)-(14).

[^ 17] See 48 U.S.C. 1806(e)(6)(A)(iv)(V)-(VI).

[^ 18] See 8 CFR 274a.13. For more information, see the Application for Employment Authorization (Form I-765) webpage.

[^ 19] See 8 CFR 274a.12(a).

[^ 20] See 8 CFR 274a.12(a)(1).

[^ 21] See 8 CFR 274a.12(a)(2).

[^ 22] See 8 CFR 274a.12(a)(5).

[^ 23] Aliens from the Federated States of Micronesia (FSM) or Republic of the Marshall Islands (RMI) admitted as nonimmigrants and who have an FSM or RMI passport might not need to apply for a document evidencing employment authorization. These individuals may present their passport, along with a Form I-94 or Form I-94A, as evidence of both identity and employment authorization. See 8 CFR 274a.2(b)(1)(v)(A)(6).

[^ 24] See 8 CFR 274a.12(a)(9).

[^ 25] See 8 CFR 274a.12(a)(16).

[^ 26] See INA 214(e)(2). As of January 30, 2022, an unexpired Form I-94 notated with E-1S, E-2S, or E-3S nonimmigrant status is acceptable as evidence of employment authorization for dependent spouses under List C of Form I-9. Form I-94 for dependents solely notated with E-1, E-2, E-2C, E-3, E-3D, or E-3R nonimmigrant status is insufficient to evidence employment authorization. Not all spouses of principal E nonimmigrants are considered employment authorized incident to status; exceptions apply. For more information, see Part B, Specific Categories, Chapter 2, Employment Authorization for Certain H-4, E, and L Nonimmigrant Dependent Spouses [10 USCIS-PM B.2].

[^ 27] See INA 214(c)(2)(E). As of January 30, 2022, an unexpired Form I-94 notated with L-2S nonimmigrant status is acceptable as evidence of employment authorization for dependent spouses under List C of Form I-9. Form I-94 for dependents solely notated with L-2 nonimmigrant status is insufficient to evidence employment authorization. For more information, see Part B, Specific Categories, Chapter 2, Employment Authorization for Certain H-4, E, and L Nonimmigrant Dependent Spouses [10 USCIS-PM B.2].

[^ 28] See 8 CFR 274a.12(a)(19).

[^ 29] See 8 CFR 274a.12(a)(20). For guidance USCIS has given regarding acceptable DHS-issued evidence of employment authorization that U derivative employees may present to their employers completing Form I-9, see Handbook for Employers (M-274), Section 7.8, T and U Nonimmigrant Status.

[^ 30] See INA 274A(b). See 8 CFR 274a.2.

[^ 31] For guidance USCIS has provided to employers regarding these documents as acceptable DHS-issued evidence of employment authorization for Form I-9 completion, see Handbook for Employers (M-274), Section 7.1, Lawful Permanent Residents (LPR).

[^ 32] This does not apply to dependents (including spouses) of Employees of the Taipei Economic and Cultural Representative Office (TECRO) and Taipei Economic and Cultural Offices (TECO), who continue to be required to apply for employment authorization per 8 CFR 274a.12(c)(2). Further, this does not apply to spouses of Long-Term Investors in the Commonwealth of the Northern Mariana Islands (E-2 CNMI Investors) who are also required to apply for employment authorization per 8 CFR 274a.12(c)(12). Additionally, as noted in 8 CFR 214.2(e)(23)(x)(B), spouses of E-2 CNMI investors who obtained such status based upon a Foreign Retiree Investment Certificate are not eligible for work authorization.

[^ 33] For more information on Form I-94, see Volume 11, Travel and Identity Documents, Part F, Arrival-Departure Records [11 USCIS-PM F].

[^ 34] In some situations, DHS has designated certain Forms I-94 as evidence of employment eligibility. For guidance USCIS has given employers regarding this document as acceptable DHS-issued evidence of employment authorization for Form I-9 completion, see Handbook for Employers (M-274), Section 7.3, Refugees and Asylees, Section 7.8, T and U Nonimmigrant Status, Section 7.9, Other Temporary Workers, and Section 13.0, Acceptable Documents for Verifying Employment Authorization and Identity.

[^ 35] See 8 CFR 274a.2(b)(1)(v). For guidance USCIS has given employers regarding the acceptable documents to establish identity and employment authorization for Form I-9 completion, see Handbook for Employers (M-274), Section 13.0, Acceptable Documents for Verifying Employment Authorization and Identity.

[^ 36] For example, LPRs, lawful temporary residents, affirmative asylees, trafficking victims (T-1 nonimmigrants), and crime victims (U-1 nonimmigrants) do not need to file Form I-765 to receive an EAD.

[^ 37] See 8 CFR 274a.12(b).

[^ 38] See 8 CFR 274a.12(b)(1)-(2).

[^ 39] See 8 CFR 274a.12(b)(3).

[^ 40] See 8 CFR 274a.12(b)(5).

[^ 41]For information concerning the employment of F students, see Volume 2, Nonimmigrants, Part F, Students (F, M), Chapter 6, Employment [2 USCIS-PM F.6].

[^ 42] See 8 CFR 274a.12(c)(3)(i)(C).

[^ 43] See 8 CFR 274a.12(c)(3)(i)(B).

[^ 44] See 8 CFR 214.2(f)(5)(vi). See 8 CFR 274a.12(b)(6).

[^ 45] See 8 CFR 274a.12(b)(7).

[^ 46] See 8 CFR 274a.12(b)(8).

[^ 47] See 8 CFR 274a.12(b)(9).

[^ 48] See 8 CFR 274a.12(b)(10).

[^ 49] See 8 CFR 274a.12(b)(11).

[^ 50] See 8 CFR 274a.12(b)(12).

[^ 51] See 8 CFR 274a.12(b)(13).

[^ 52] See 8 CFR 274a.12(b)(14).

[^ 53] See 8 CFR 274a.12(b)(15).

[^ 54] See 8 CFR 274a.12(b)(16).

[^ 55] See 8 CFR 274a.12(b)(17).

[^ 56] See 8 CFR 274a.12(b)(18).

[^ 57] See 8 CFR 274a.12(b)(19).

[^ 58] See 8 CFR 214.2(h)(1)(ii)(C).

[^ 59] See 8 CFR 274a.12(b)(21).

[^ 60] See 8 CFR 274a.12(b)(22).

[^ 61] See 8 CFR 274a.12(b)(23).

[^ 62] See 8 CFR 274a.12(b)(25).

[^ 63] See 8 CFR 274a.12(b)(37).

[^ 64] See 8 CFR 214.1(e). See 8 CFR 212.19(g).

[^ 65] See 8 CFR 274a.12(b)(20).

[^ 66] See 8 CFR 274a.12(c). 8 CFR 274a.12(c) may not be comprehensive. Other authorities may exist for some categories of aliens whom USCIS may authorize to work in the United States following an application for and approval of employment authorization. For example, see INA 204(a)(1)(K) (Violence Against Women Act self-petitioners).

[^ 67] See 8 CFR 274a.12(c)(1).

[^ 68] See 8 CFR 274a.12(c)(2).

[^ 69] See 8 CFR 274a.12(c)(3). For information concerning the employment of F students, see Volume 2, Nonimmigrants, Part F, Students (F, M), Chapter 6, Employment [2 USCIS-PM F.6].

[^ 70] See 8 CFR 274a.12(c)(4).

[^ 71] See 8 CFR 274a.12(c)(5).

[^ 72] See 8 CFR 274a.12(c)(6). For information concerning the employment of M students, see Volume 2, Nonimmigrants, Part F, Students (F,M), Chapter 6, Employment [2 USCIS-PM F.6].

[^ 73] See 8 CFR 274a.12(c)(7).

[^ 74] See 8 CFR 274a.12(c)(8).

[^ 75] See 8 CFR 274a.12(c)(9).

[^ 76] See 8 CFR 274a.12(c)(10).

[^ 77] See 8 CFR 274a.12(c)(11). However, entrepreneurs paroled under 8 CFR 212.19 are employment authorized with a specific employer incident to their parole. See 8 CFR 274a.12(b)(37). In addition, USCIS has decided as a matter of policy to provide the benefit of employment authorization incident to parole akin to what is normally accorded to refugees (as well as a no-fee initial and replacement of an initial Employment Authorization Document) to certain Afghan parolees and certain Ukrainian parolees so that they receive similar treatment as refugees, which aligns with the spirit of legislation that states that certain Afghan parolees and certain Ukrainian parolees "shall be eligible for . . . other benefits available to refugees . . . ." See Section 2502(b) of the Extending Government Funding and Delivering Emergency Assistance Act, Pub. L. 117-43 (PDF), 135 Stat. 344, 377 (September 30, 2021), amended by Section 1501 of Division M of the Consolidated Appropriations Act of 2023, Pub. L. 117-328 (PDF), 136 Stat. 4459, 5189 (December 29, 2022), and Section 401(b) of the Additional Ukraine Supplemental Appropriations Act, Pub. L. 117-128 (PDF), 136 Stat. 1211, 1218 (May 21, 2022).

[^ 78] See 8 CFR 274a.12(c)(12).

[^ 79] See 8 CFR 274a.12(c)(14).

[^ 80] See 8 CFR 274a.12(c)(16).

[^ 81] See 8 CFR 274a.12(c)(17).

[^ 82] See 8 CFR 274a.12(c)(17)(i).

[^ 83] See 8 CFR 274a.12(c)(17)(ii).

[^ 84] See 8 CFR 274a.12(c)(17)(iii).

[^ 85] See 8 CFR 274a.12(c)(18).

[^ 86] See 8 CFR 274a.12(c)(19).

[^ 87] Under INA 210. See 8 CFR 274a.12(c)(20).

[^ 88] See 8 CFR 274a.12(c)(21).

[^ 89] See 8 CFR 274a.12(c)(22).

[^ 90] See Title XI of Pub. L. 106-553 (PDF) (December 21, 2000). See 8 CFR 274a.12(c)(24).

[^ 91] See 8 CFR 274a.12(c)(25).

[^ 92] See 8 CFR 274a.12(c)(26).

[^ 93] See INA 204(a)(1)(K). See INA 204(a)(1)(D)(i)(II). See INA 204(a)(1)(D)(i)(IV). See Title IV of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322 (PDF), 108 Stat. 1796, 1902 (September 13, 1994) as amended by Title V of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386 (PDF), 114 Stat. 1464, 1518 (October 28, 2000) and Title VIII of the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162 (PDF), 119 Stat. 2960, 3053 (January 5, 2006) (providing self-petitioners eligibility for employment authorization).

[^ 94] See 8 CFR 274a.12(c)(34). See 8 CFR 212.19(h)(3).

[^ 95] See 8 CFR 274a.12(c)(35).

[^ 96] See 8 CFR 274a.12(c)(36).

Chapter 3 - Documentation and Evidence [Reserved]

Chapter 4 - Adjudication

A. General

Once USCIS accepts the Application for Employment Authorization (Form I-765), USCIS reviews the application for completeness and submission of the required initial evidence.[1] In reviewing the Form I-765, USCIS ensures that the fee was paid, a fee waiver was granted, or a fee exemption applies. USCIS also reviews the application to determine the applicant's identity, current immigration status, and employment authorization eligibility category.

If an alien fails to specify the employment authorization eligibility category on the application, USCIS reviews the file to determine the proper category. If USCIS is unable to determine the category, USCIS may issue a Request for Evidence (RFE) to provide the applicant the opportunity to specify the proper category.

If the alien is eligible for employment authorization, which may include, if applicable, meriting a favorable exercise of discretion USCIS approves the application and issues an Employment Authorization Document (EAD) on Form I-766.

In applicable cases, USCIS considers factors involving circumstances where an alien has endorsed, promoted, supported, or otherwise espoused the views of an anti-American or terrorist organization or group, including those who support or promote antisemitic terrorism, antisemitic terrorist organizations, and antisemitic ideologies, to be an overwhelmingly negative factor in any applicable case involving USCIS discretionary analysis. Accordingly, USCIS enforces all relevant immigration laws to the maximum degree, including the use of discretion, to deny the benefit request involving such cases.[2]

B. Determining Identity and Eligibility

There are two elements common to all eligibility categories that USCIS must consider when adjudicating Form I-765: identity and eligibility verification. Additionally, applications filed under 8 CFR 274a.12(c), with limited exceptions, are considered in the exercise of discretion.[3]

1. Identity Verification

To grant employment authorization, and issue an EAD, or both, USCIS must verify the applicant's identity. USCIS may therefore require an applicant to appear at a USCIS Application Support Center to provide biometrics.[4]

2. Eligibility Verification

USCIS must verify that the applicant meets the requirements of one of the categories eligible for employment authorization, an EAD, or both and has submitted evidence establishing eligibility.[5] The specific type of evidence varies by eligibility category. In general, supporting evidence to establish eligibility includes, but is not limited to:

- Visa(s) issued to applicant;
- Arrival-Departure Record (Form I-94);[6]
- Documents to establish a qualifying relationship; and
- Documents that establish a qualifying pending or approved application, such as a Notice of Action (Form I-797).

Generally, USCIS issues written notices in the form of an RFE or Notice of Intent to Deny (NOID) to request missing initial[7] or additional evidence.[8]

C. Decision

1. Approval

Once USCIS determines the applicant has established identity and eligibility for employment authorization including, if applicable, warranting a favorable exercise of discretion, USCIS approves Form I-765 and orders production of the EAD.[9]

The approval of Form I-765 does not grant the applicant an immigration status; it simply provides authorization to work and accompanying evidence of such authorization, or evidence of authorization to work where an alien is already authorized to work by virtue of the applicant's immigration status or circumstance.

Validity Period

Employment authorization and EAD validity periods are generally determined based on the eligibility category that is granted. USCIS determines validity periods as established by regulations, policy, or Federal Register Notices. When requests for employment authorization, an EAD, or both are based upon an underlying period of admission or status, the validity period generally coincides with that authorized period of admission or status. When USCIS calculates the validity dates based on a set number of years, USCIS issues the EAD with the length of time allowed, minus 1 day.

The below charts illustrate the maximum validity period that may be granted for requests for initial employment authorization, EAD, or both and requests to renew employment authorization, EAD, or both. For employment authorization incident to status, the validity period is assigned to the document issued evidencing an alien's authorization to work in the United States and does not limit the period of employment authorization while the alien maintains status.[10]

Employment Authorization Incident to Status

Category 8 CFR 274a.12	Purpose	Maximum Initial Validity Period	Maximum Renewal Validity Period
(a)(2)	Lawful temporary resident	43 months[11]	2 years
(a)(3)	Admitted as a refugee[12]	5 years	5 years
(a)(4)	Paroled as a refugee[13]	Duration of parole, not to exceed 5 years	Duration of parole, not to exceed 5 years
(a)(5)	Granted asylum[14]	5 years	5 years
(a)(6)	K-1 fiance(e) or K-2 child	Period of authorized stay[15]	Remainder of 90-day period of admission
(a)(7)	Parent and child of N-8 or N-9 nonimmigrant[16]	1 year	1 year
(a)(8)	Citizen of Micronesia, the Marshall Islands or Palau	5 years	5 years
(a)(9)	K-3 spouse or K-4 dependent	2 years[17]	2 years[18]
(a)(10)	Granted withholding of deportation or removal	5 years	5 years
(a)(11)	Deferred extended voluntary departure or deferred enforced departure	Variable[19]	Variable[20]
(a)(12)	Temporary protected status (TPS)[21]	Variable, length of TPS designation, or any TPS renewals and TPS extensions	Variable, length of TPS designation, or any TPS renewals and TPS extensions
(a)(13)	Granted voluntary departure under Family Unity Program of IMMACT 90[22]	2 years[23]	2 years[24]
(a)(14)	Legal Immigration Family Equity (LIFE) Act Family Unity grantee[25]	Variable, not to exceed 2 years[26]	Variable, not to exceed 2 years[27]

Category 8 CFR 274a.12	Purpose	Maximum Initial Validity Period	Maximum Renewal Validity Period
(a)(15)	V-1, V-2, or V-3 nonimmigrant	Duration of V-1, V-2, and V-3 status, not to exceed 2 years	Duration of V-1, V-2, and V-3 status, not to exceed 2 years[28]
(a)(16)	Victims of human trafficking (T-1 nonimmigrant)	Duration of T-1 nonimmigrant status[29]	Duration of T-1 nonimmigrant status[30]
(a)(17)	Spouse of E1, E-2, and E-3	Duration of E-1, E-2, and E-3 status	Duration of E-1, E-2, and E-3 status
(a)(18)	Spouse of L-1 nonimmigrant	Variable, up to end date of L-2 status, not to exceed principal's L-1 status	Variable, up to end date of L-2 status, not to exceed principal's L-1 status
(a)(19)	Victims of qualifying criminal activity (U-1 nonimmigrant)	Duration of U-1 nonimmigrant status[31]	Duration of U-1 nonimmigrant status[32]
(a)(20)	Family members of victims of qualifying criminal activity (U-2, U-3, U-4, or U-5 nonimmigrant)[33]	Duration of U-2, U-3, U-4, or U-5 nonimmigrant status	Duration of U-2, U-3, U-4, or U-5 nonimmigrant status[34]

Aliens Who Must Apply for Employment Authorization

Category 8 CFR 274a.12	Purpose	Maximum Initial Validity Period	Maximum Renewal Validity Period
(c)(1)	Dependent of a diplomat or foreign government official (A-1 or A-2)[35]	3 years or tour of duty end date on Form I-566, whichever is less	3 years or tour of duty end date on Form I-566, whichever is less
(c)(2)	Dependent of Taipei Economic and Cultural Representative Office (TECRO) (E-1)[36]	3 years or end of principal E-1 status, whichever is less	3 years or end of principal E-1 status, whichever is less
(c)(3)(A)	Student pre-completion Optional Practical Training (OPT)	Variable, 12 months, date recommended by Designated School Official (DSO), or date course of study ends, whichever is earlier	Renewal not authorized
(c)(3)(B)	Student post-completion OPT	Variable, up to 12 months	Renewal not authorized
(c)(3)(C)	Student STEM OPT	24 months[37]	Renewal not authorized
(c)(3)(ii)	Off-campus employment – qualifying international organization	Variable, up to 12 months[38]	Variable, up to 12 months
(c)(3)(iii)	Off-campus employment – student severe economic hardship under 8 CFR 214.2(f)(9)(ii)(C)	Variable, up to 1 year[39]	Variable, up to 1 year[40]
(c)(3)(iii)	Off-campus employment – student severe economic hardship under 8 CFR 214.2(f)(9)(ii)(A) (special student relief)	Variable[41]	Variable[42]
(c)(4)	Spouse or unmarried child, son or daughter of an employee of an international organization (G-1, G-3, or G-4)[43]	3 years or tour of duty end date on Form I-566, whichever is less	3 years or tour of duty end date on Form I-566, whichever is less
(c)(5)	Dependent spouse or minor child of a J-1 exchange visitor	2 years or end of principal J-1 status, whichever is less	2 years or end of principal J-1 status, whichever is less
(c)(6)	Nonacademic or vocational student (M-1) post-completion OPT	6 months, not to exceed recommendation on Certificate of Eligibility for Nonimmigrant Student Status (Form I-20) or 1 month for each 4 months of completed full-time studies, whichever is earlier[44]	Renewal not authorized
(c)(7)	Dependent of NATO-1 through NATO-7 employee	3 years, not to exceed tour of duty listed on Form I-566	3 years, not to exceed tour of duty listed on Form I-566
(c)(8)	Pending application for asylum or withholding of deportation or removal	5 years	5 years
(c)(9)	Pending application for adjustment of status under INA 245[45]	5 years	5 years
(c)(10)	Pending application for suspension of deportation, cancellation of removal, or relief under the Nicaraguan Adjustment and Central American Relief Act (NACARA)[46]	5 years	5 years
(c)(11)	Parole[47]	Variable, to end date of the parole period	Variable, to end date of the parole period
(c)(12)	Spouse of E-2 CNMI investor[48]	End of principal E-2 CNMI Investor status not to exceed 2 years	End of principal E-2 CNMI Investor status not to exceed 2 years

Category 8 CFR 274a.12	Purpose	Maximum Initial Validity Period	Maximum Renewal Validity Period
(c)(14)	Deferred action (non-Deferred Action for Childhood Arrivals (DACA))	Variable, end date of deferred action period[49]	Variable, end date of deferred action period[50]
(c)(16)	Applicant for creation of record of lawful admission	1 year	1 year
(c)(17)(i)	Domestic employee of nonimmigrant employer[51]	1 year or validity of B-1, whichever is less	1 year or validity of B-1, whichever is less
(c)(17)(ii)	Domestic employee of U.S. citizen abroad[52]	1 year or validity of B-1, whichever is less	1 year or validity of B-1, whichever is less
(c)(17)(iii)	B-1 foreign airline employee[53]	1 year or validity of B-1, whichever is less	1 year or validity of B-1, whichever is less
(c)(18)	Final order of removal with order of supervision[54]	1 year	1 year
(c)(19)	Application for TPS pending[55]	Variable, length of TPS designation, or any TPS renewals and TPS extensions	Variable, length of TPS designation, or any TPS renewals and TPS extensions
(c)(20)	Pending application under INA 210	1 year	1 year
(c)(21)	S nonimmigrant law enforcement witness or informant[56]	Variable, up to 3 years[57]	Variable, up to 3 years
(c)(22)	Pending application under INA 245A	1 year	1 year
(c)(24)	Pending application for LIFE Act Legalization[58]	1 year	1 year
(c)(25)	Family members of victims of human trafficking (T-2, T-3, T-4, T-5, or T-6 nonimmigrant)	Duration of T-2, T-3, T-4, T-5, or T-6 nonimmigrant status	Duration of T-2, T-3, T-4, T-5, or T-6 nonimmigrant status
(c)(26)	H-4 nonimmigrant spouse of a H-1B nonimmigrant	Variable, up to end date of H-4 status, not to exceed principal's H-1B status	Variable, up to end date of H-4 status, not to exceed principal's H-1B status
(c)(27)	Abused spouse of A nonimmigrant[59]	2 years	2 years
(c)(28)	Abused spouse of E nonimmigrant[60]	2 years	2 years
(c)(29)	Abused spouse of G nonimmigrant[61]	2 years	2 years
(c)(30)	Abused spouse of H nonimmigrant[62]	2 years	2 years
(c)(31)	Violence Against Women Act (VAWA) self-petitioner	2 years	2 years
(c)(33)	Granted DACA[63]	Variable, 2 years or end date of deferred action period, whichever is earlier	Variable, 2 years or end date of deferred action period, whichever is earlier
(c)(34)	Spouse of entrepreneur parolee under 8 CFR 212.19(h)(3)	Variable, up to end date of parole	Variable, up to end date of parole
(c)(35)	Form I-140 beneficiary with compelling circumstances	1 year	1 year
(c)(36)	Dependents of (c)(35)	1 year	1 year
(c)(37)	CNMI long-term residents	5 years	5 years

USCIS considers various factors when establishing validity periods for EADs, including the validity period of the underlying immigration status or circumstance, anticipated adjudication timeframes for pending immigration benefits, and the periodic need to reevaluate eligibility for employment authorization, EAD, or both, and to ensure that such aliens continue to pose no known security risk to the United States.

The validity date of the initial EAD begins on the date of approval. Generally, the same applies to Form I-765 renewal requests.

Validity Period for Replacements

USCIS approves a replacement EAD for the same validity dates and category as the original EAD.

Validity Period for Age Outs

For certain categories[64] where the applicant is a dependent child and will reach the age of 21 during the established validity period, USCIS provides an EAD expiration date that is the day before the applicant's 21st birthday.

2. Denial

If USCIS cannot verify the applicant's identity, the applicant fails to establish eligibility (including, if applicable, failing to warrant a favorable exercise of discretion) or abandons the application, USCIS denies the application. When USCIS denies Form I-765, USCIS notifies the applicant in writing of the decision and the reasons for denial.[65] There is no appeal from a denial of a Form I-765. However, an applicant may submit a motion to reopen or reconsider.[66] Furthermore, denial of Form I-765 does not preclude the applicant from filing again if eligibility for employment authorization can be established.

D. Early Filing

If an applicant files for a renewal EAD more than 180 days before the current EAD expires and USCIS approves such request, USCIS generally does not backdate or postdate the renewal EAD in relation to the current EAD's validity period.

E. Automatic Termination and Revocation on Notice

Employment authorization automatically terminates if the applicant is no longer eligible due to certain circumstances outlined in the regulations.[67] No further action or notice by USCIS is necessary in the case of automatic termination.[68]

A notice of intent to revoke (NOIR)[69] is necessary upon a determination that:

- The statement of material facts contained in the application was not true and correct;
- The applicant violated the terms and conditions of the approved application;
- The basis for the EAD is no longer valid;[70] or
- USCIS approved the application in error.

A response with countervailing evidence may be submitted within 15 days from the date of service of the NOIR.

F. Withdrawing Application

An applicant may withdraw Form I-765 at any time before USCIS makes a final decision on the application.[71] Any request to withdraw must be made in writing to the USCIS office listed on the receipt notice for Form I-765. The applicant or an authorized representative with a properly filed Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28) must sign the withdrawal request.

G. Motion to Reopen or Reconsider

An applicant may submit a motion to reopen or a motion to reconsider by filing a Notice of Appeal or Motion (Form I-290B) within 30 days of the denial (33 days if denial notice was mailed to the applicant). Motions to reopen or reconsider are typically adjudicated by the same office that adjudicated Form I-765. USCIS issues a written decision on a motion to reopen or reconsider.

An officer denies a motion if the applicant does not meet the motion requirements or has not submitted evidence to overcome the denial grounds. The written denial explains why the motion did not overcome the denial grounds.

An officer approves a motion and reopens the Form I-765 if the applicant meets the motion requirements and has submitted evidence to overcome all reasons for the original denial.[72]

If USCIS reopens the case, an officer may approve the Form I-765 or issue a new denial. In all cases where USCIS denies the application for reasons not contained in the original decision, USCIS first issues a NOID to provide the applicant with an opportunity to review and rebut the additional denial grounds.[73]

When USCIS reopens the case but ultimately denies the Form I-765, the 30-day period during which the applicant may file a new motion restarts.

H. Effect of Motion or Appeal on Underlying Application or Petition

The applicant is eligible to apply for employment authorization in cases where the applicant's eligibility for employment authorization is based on an underlying application so long as that application remains pending. Generally, in cases where USCIS denies the underlying application, the applicant remains eligible for employment authorization if the applicant timely appeals or submits a motion to reopen the decision, and the appeal or motion remains pending. If USCIS grants a motion to reopen or an appeal on the underlying application, the applicant is eligible for employment authorization if all other requirements are met.

If an applicant appeals an unfavorable decision from an application for relief from removal from the immigration judge (IJ) to the Board of Immigration Appeals (BIA), the application for relief from removal is considered pending. If the BIA sustains the IJ's decision, however, the denial becomes administratively final, and the application may no longer serve as a basis for employment authorization.

I. Automatic Extensions of Employment Authorization Documents

Aliens in certain employment eligibility categories who file Form I-765, to renew their EADs, may receive automatic extensions of their expiring EAD.[74]

Footnotes

[^ 1] For a list of required initial evidence, see Instructions for Form I-765 and the Checklist of Required Initial Evidence for Form I-765 webpage.

[^ 2] See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis [1 USCIS-PM E.8]. For a list of factors that should be considered in the discretionary analysis, See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis, Section C, Adjudicating Discretionary Benefits, Subsection 2, Identifying Discretionary Factors [1 USCIS-PM E.8(C)(2)].

[^ 3] See 8 CFR 274a.13(a)(1). See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis [1 USCIS-PM E.8]. For a list of factors that should be considered in the discretionary analysis, See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis, Section C, Adjudicating Discretionary Benefits, Subsection 2, Identifying Discretionary Factors [1 USCIS-PM E.8(C)(2)].

[^ 4] See 8 CFR 103.2(b)(9). For further guidance on biometrics, see Volume 1, General Policies and Procedures, Part C, Biometrics Collection and Security Checks [1 USCIS-PM C].

[^ 5] See 8 CFR 103.2(b)(1).

[^ 6] CBP implemented an electronic, automated I-94 process whereby CBP issues an electronic Form I-94. See Arrival/Departure Forms: I-94 and I-94W webpage for more information.

[^ 7] See 8 CFR 103.2(b)(1).

[^ 8] For further guidance on evidence, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence [1 USCIS-PM E.6].

[^ 9] With limited exceptions, applications under 8 CFR 274a.12(c) are granted in the discretion of USCIS. See 8 CFR 274a.13(a)(1). In such cases, USCIS also determines whether the application should be granted in the exercise of discretion.

[^ 10] See 8 CFR 274a.12(a).

[^ 11] Initial EAD validity period starts the day of adjudication of Application for Status as a Temporary Resident Under Section 245A of the Immigration and Nationality Act (Form I-687).

[^ 12] See INA 207.

[^ 13] See INA 207.

[^ 14] See INA 208.

[^ 15] See INA 101(a)(15)(K)(i).

[^ 16] See INA 101(a)(27)(I).

[^ 17] Validity period for EADs within this category is to expiration date of Arrival-Departure Record (Form I-94) or to the end of Application to Extend/Change Nonimmigrant Status (Form I-539) validity period not to exceed 2 years.

[^ 18] Extension of stay is granted in 2-year intervals awaiting approval of Petition for Alien Relative (Form I-130).

[^ 19] Based on Presidential declaration.

[^ 20] Based on Presidential declaration.

[^ 21] See INA 244A(b).

[^ 22] Initial EAD is automatically issued upon approval of Application for Family Unity Benefits (Form I-817). Applicants filing under this category should only file Form I-765 if seeking a replacement EAD that was lost, stolen, mutilated, or destroyed, or that contain an error. For more information on how to request a replacement, see Volume 11, Travel and Identity Documents, Part A, Secure Identity Documents Policies and Procedures, Chapter 3, Reissuance of Secure Identity Documents [11 USCIS-PM A.3].

[^ 23] All Form I-817 validity period.

[^ 24] All Form I-817 validity period.

[^ 25] Initial and renewal EADs are automatically issued upon approval of Application for Family Unity Benefits (Form I-817). Applicants filing under this category should only file Form I-765 if seeking a replacement EAD that was lost, stolen, mutilated, or destroyed, or that contain an error. For more information on how to request a replacement, see Volume 11, Travel and Identity Documents, Part A, Secure Identity Documents Policies and Procedures, Chapter 3, Reissuance of Secure Identity Documents [11 USCIS-PM A.3].

[^ 26] See Section 1504 of the LIFE Act Amendments of 2000, Pub. L. 106-554 (PDF), 114 Stat. 2763, 2763A-325 (December 21, 2000). See 8 CFR 245a.34(c).

[^ 27] See Section 1504 of the LIFE Act Amendments of 2000, Pub. L. 106-554 (PDF), 114 Stat. 2763, 2763A-325 (December 21, 2000). See 8 CFR 245a.34(c).

[^ 28] If visa is extended.

[^ 29] Initial EAD is automatically issued upon approval of the Application for T Nonimmigrant Status (Form I-914). Applicants filing under this category should only file Form I-765 if seeking a replacement EAD that was lost, stolen, mutilated, or destroyed, or that contain an error. For more information on how to request a replacement, see Volume 11, Travel and Identity Documents, Part A, Secure Identity Documents Policies and Procedures, Chapter 3, Reissuance of Secure Identity Documents [11 USCIS-PM A.3].

[^ 30] Renewal EAD issuance is based on an approved Application to Extend/Change Nonimmigrant Status (Form I-539) extending T-1 nonimmigrant status.

[^ 31] If the alien is in the United States, the initial EAD is automatically issued upon approval of the Petition for U Nonimmigrant Status (Form I-918). Applicants filing under this category should only file Form I-765 if Form I-918 was approved while the applicant was residing outside of the United States, has been lawfully admitted to the United States as a U-1 nonimmigrant, and now seeks to obtain an EAD as evidence of employment authorization. U-1 nonimmigrants may also file Form I-765 if seeking a replacement EAD that was lost, stolen, mutilated, or destroyed, or that contain an error. For more information on how to request a replacement, see Volume 11, Travel and Identity Documents, Part A, Secure Identity Documents Policies and Procedures, Chapter 3, Reissuance of Secure Identity Documents [11 USCIS-PM A.3].

[^ 32] Renewal EAD issuance is based on an approved Application to Extend/Change Nonimmigrant Status (Form I-539) extending U nonimmigrant status.

[^ 33] Derivative U nonimmigrants are employment authorized incident to status, however an EAD is not automatically issued. If a derivative U nonimmigrant seeks to obtain an EAD as evidence of employment authorization, the derivative may file Form I-765.

[^ 34] Renewal EAD issuance is based on an approved Application to Extend/Change Nonimmigrant Status (Form I-539) extending U nonimmigrant status.

[^ 35] See 8 CFR 214.2(a)(2).

[^ 36] See 8 CFR 214.2(e).

[^ 37] No more than two lifetime OPT extensions may be authorized.

[^ 38] Validity period may not exceed program end date.

[^ 39] See 8 CFR 214.2(f)(9)(ii)(D). Employment authorization is not to exceed the recommendation from the designated school official (DSO) or the student's program end date. However, USCIS may grant special student relief (SSR) applicants employment authorization for periods longer than 1 year, dependent on the validity period of the Federal Register notice.

[^ 40] See 8 CFR 214.2(f)(9)(ii)(D). Renewal of the employment authorization is not to exceed the recommendation from the DSO or the F-1 student's program end date.

[^ 41] By notice in the Federal Register, USCIS may grant SSR applicants employment authorization for the duration of the Federal Register notice, although this period of authorization is not to exceed the F-1 student's academic program end date. For more information on SSR, see Volume 2, Nonimmigrants, Part F, Students (F, M), Chapter 6, Employment, Section C, Severe Economic Hardship Due to Emergent Circumstances [2 USCIS-PM F.6(C)].

[^ 42] By notice in the Federal Register, USCIS may grant SSR applicants employment authorization for the duration of the Federal Register notice, not to exceed the F-1 student's academic program end date. For more information on SSR, see Volume 2, Nonimmigrants, Part F, Students (F, M), Chapter 6, Employment, Section C, Severe Economic Hardship Due to Emergent Circumstances [2 USCIS-PM F.6(C)].

[^ 43] See 8 CFR 214.2(g), and who presents an endorsement from an authorized representative from DOS.

[^ 44] The alien may be employed only in an occupation or vocation directly related to the alien's course of study as recommended by the endorsement of the designated school official on Form I-20.

[^ 45] Certain other types of adjustment applicants may also apply for employment authorization under the (c)(9) category, such as applicants seeking to adjust under the Cuban Adjustment Act, Pub. L. 89-732 (PDF) (November 2, 1966), as amended, and applicants seeking to adjust status under other public laws. For more information, see the Form I-765 instructions and USCIS.gov.

[^ 46] Includes two types of applicants who may be eligible for employment authorization: an applicant who filed an Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Section 203 of Public Law 105-100 (NACARA) (Form I-881) and the application remains pending with the asylum office or with Executive Office for Immigration Review (EOIR), and an applicant who filed an Application for Suspension of Deportation (Form EOIR-40), or Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents (Form EOIR-42B) directly with EOIR.

[^ 47] See INA 212(d)(5)(A). See 8 CFR 212.5. However, DHS has decided as a matter of policy to provide the benefit of employment authorization incident to parole akin to what is normally accorded to refugees (as well as a no-fee initial and replacement of an initial Employment Authorization Document) to certain Afghan parolees and certain Ukrainian parolees so that they receive similar treatment as refugees, which aligns with the spirit of legislation that states that certain Afghan parolees and certain Ukrainian parolees "shall be eligible for . . . other benefits available to refugees . . . ." See Section 2502(b) of the Extending Government Funding and Delivering Emergency Assistance Act, Pub. L. 117-43 (PDF), 135 Stat. 344, 377 (September 30, 2021), amended by Section 1501 of Division M of the Consolidated Appropriations Act of 2023, Pub. L. 117-328 (PDF), 136 Stat. 4459, 5189 (December 29, 2022), and Section 401(b) of the Additional Ukraine Supplemental Appropriations Act, Pub. L. 117-128 (PDF), 136 Stat. 1211, 1218 (May 21, 2022). Consequently, individuals covered by these circumstances are employment authorized incident to parole. For more information on employment eligibility for aliens, see Chapter 2, Eligibility Requirements [10 USCIS-PM A.2].

[^ 48] CNMI refers to the Commonwealth of the Northern Mariana Islands. This category includes a spouse of a long-term investor in the CNMI other than an E-2 CNMI investor who obtained such status based on a foreign retiree investment certificate. See 8 CFR 214.2(e)(23).

[^ 49] Generally, the alien must establish an economic necessity for employment, see 8 CFR 274a.12(c)(14). However, principal petitioners for U nonimmigrant status and their qualifying family members living in the United States do not need to submit proof of economic necessity to receive a bona fide determination EAD under category (c)(14) as there is a presumption of economic necessity. See U Nonimmigrant Status Bona Fide Determination Process FAQs.

[^ 50] Generally, the alien must establish an economic necessity for employment, see 8 CFR 274a.12(c)(14). However, principal petitioners for U nonimmigrant status and their qualifying family members living in the United States do not need to submit proof of economic necessity to receive a bona fide determination EAD under category (c)(14) as there is a presumption of economic necessity. See U Nonimmigrant Status Bona Fide Determination Process FAQs.

[^ 51] Includes a nonimmigrant visitor for business (B-1) who is a personal or domestic employee of an alien admitted as a nonimmigrant. See 8 CFR 214.2(b), (e), (f), (h), (i), (j), (l), (m), (o), (p), (q), (r) or under INA 214(e).

[^ 52] Includes a B-1 nonimmigrant who is the domestic employee of a U.S. citizen who has a permanent foreign home or is stationed in a foreign country, and who is temporarily visiting the United States.

[^ 53] Includes a B-1 nonimmigrant who is an employee of a foreign airline engaged in international transport.

[^ 54] Includes an alien with a final order of deportation or removal, and who is released on an order of supervision. See INA 241(a)(3).

[^ 55] See INA 244.

[^ 56] Includes a principal nonimmigrant witness or informant in S classification and qualified dependent family members.

[^ 57] Evidentiary requirements and validity time frame is determined by law enforcement agency (LEA) need.

[^ 58] See Section 1104 of the LIFE Act Amendments, Pub. L. 106-554 (PDF), 114 Stat. 2763, 2763A-325 (December 21, 2000).

[^ 59] Initial and renewal requests for employment authorization under this category are adjudicated on Application for Employment Authorization for Abused Nonimmigrant Spouse (Form I-765V).

[^ 60] Initial and renewal requests for employment authorization under this category are adjudicated on Form I-765V.

[^ 61] Initial and renewal requests for employment authorization under this category are adjudicated on Form I-765V.

[^ 62] Initial and renewal requests for employment authorization under this category are adjudicated on Form I-765V.

[^ 63] This covers the eligibility category for employment authorization based on a grant of deferred action. See 8 CFR 274a.12(c)(14). The (c)(33) code is used to distinguish DACA from other forms of deferred action.

[^ 64] See 8 CFR 274a.12(c)(5) and 8 CFR 274a.12(c)(35).

[^ 65] See 8 CFR 103.3.

[^ 66] See Section G, Motion to Reopen or Reconsider [10 USCIS-PM A.4(G)]. See Notice of Appeal or Motion (Form I-290B). See 8 CFR 103.5.

[^ 67] See 8 CFR 274a.14.

[^ 68] See 8 CFR 274a.14(a)(2).

[^ 69] See 8 CFR 274a.14(b).

[^ 70] For example, for a Form I-765 filed on the basis of an Application to Register Permanent Residence or Adjust Status (Form I-485), and USCIS denied the Form I-485.

[^ 71] See 8 CFR 103.2(b)(6).

[^ 72] See 8 CFR 103.5.

[^ 73] See 8 CFR 103.2(b)(16). Generally, USCIS issues a statutory denial without prior issuance of a Request for Evidence (RFE) or a NOID on any application, petition, or request that does not have any basis upon which the applicant may be approved.

[^ 74] For more information on automatic EAD extension requirements, see 4.4 Automatic Extensions of Employment Authorization Documents (EADs) in Certain Circumstances in the USCIS Handbook for Employers M-274. For eligible automatic extension EAD categories, see the Automatic Employment Authorization (EAD) Extension webpage.

Chapter 5 - Reserved

Chapter 6 - Card Production and Card Correction [Reserved]

Chapter 7 - Post-Decision Actions [Reserved]

Part B - Specific Categories

Chapter 1 - Purpose and Background

For a few select categories of aliens, the Immigration and Nationality Act (INA) grants employment authorization outright or directs the Secretary to authorize employment and provide an endorsement of that authorization.[1] For other categories of aliens, the INA provides that the Secretary may grant employment authorization and provide an endorsement of that authorization.[2]

DHS regulations at 8 CFR 274a.12 set forth the following categories:

- Aliens authorized to work in the United States incident to their immigration status (8 CFR 274a.12(a));
- Aliens who are authorized to work in the United States but only for a specific employer (8 CFR 274a.12(b)); and
- Aliens who fall within a category that the Secretary has determined must apply for employment authorization and may receive employment authorization as a matter of discretion (8 CFR 274a.12(c)).

For most aliens in the first category seeking an Employment Authorization Document (EAD, Form I-766) and those in the last category seeking both employment authorization and an EAD, an application generally must be filed with USCIS with the appropriate fee (unless waived), and in accordance with the instructions to the Application for Employment Authorization (Form I-765).[3]

Footnotes

[^ 1] See, for example, INA 210(a)(4) (authorizing employment for special agricultural workers); INA 214(c)(2)(E) (directing the Secretary to authorize the employment of spouses of L nonimmigrants and provide an employment authorized endorsement); INA 214(e)(2) (directing the Secretary to authorize the employment of spouses of E treaty traders and investor and provide an employment authorized endorsements); and INA 214(3)(B) (directing the Secretary to provide U nonimmigrants employment authorization). In addition, see INA 274A(h)(3)(A) (defining “unauthorized alien” as not including lawful permanent residents).

[^ 2] For example, Congress has authorized that the Secretary may choose to authorize employment to aliens like applicants for asylum (INA 208(d)(2)), spouses and children of A, G, E-3, and H nonimmigrants who have been battered or subjected to extreme cruelty (INA 106(a)), those with pending, bona fide petitions for U nonimmigrant status (INA 214(p)(6)), and the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA) (Division A, Title IX of Pub. L. 105-277 (PDF) (October 21, 1998)). Most other discretionary employment authorization is established by regulation and is based on the Secretary’s statutory authority under INA 103(a), as well as the provision at INA 274A(h)(3).

[^ 3] See 8 CFR 274a.13. See the Application for Employment Authorization (Form I-765).

Chapter 2 - Employment Authorization for Certain H-4, E, and L Nonimmigrant Dependent Spouses

As of November 12, 2021, USCIS considers certain E-1, E-2, E-3 and L-2 nonimmigrant dependent spouses employment authorized incident to status.[1]

To obtain an Employment Authorization Document (EAD or Form I-766) evidencing both identity and employment authorization, such dependent spouses may file an Application for Employment Authorization (Form I-765).

E and L spouses are issued an Arrival-Departure Record (Form I-94) by USCIS or U.S. Customs and Border Protection (CBP).[2] As of January 30, 2022, USCIS and CBP began issuing Forms I-94 with the following new Class of Admission (COA) codes for certain E and L spouses: E-1S, E-2S, E-3S, and L-2S. The application of these new COA codes distinguishes dependent spouses from dependent children, who are not employment authorized incident to status. An unexpired Form I-94 notated with E-1S, E-2S, E-3S, or L-2S nonimmigrant status is acceptable as evidence of employment authorization under List C of Form I-9.

USCIS generally provides notices to E and L spouses with a Form I-94 issued by USCIS before January 30, 2022 that was notated with E-1, E-2, E-3, E-3D, E-3R, or L-2 nonimmigrant status that state they were identified as an employment authorized spouse and may use the notice, in combination with their Form I-94 issued by USCIS as evidence of employment authorization. Such notice, together with an unexpired Form I-94 reflecting E-1, E-2, E-3, E-3D, E-3R, or L-2 nonimmigrant status, is acceptable as evidence of employment authorization under List C of Form I-9.[3]

Notwithstanding this change, E and L spouses may continue to apply for an EAD to obtain evidence of identity and employment authorization by properly filing Form I-765, with the appropriate fee, if applicable.

Validity Period

USCIS has discretion to establish a specific validity period for employment authorization, though not to exceed certain amounts of time in some circumstances.[4] USCIS generally grants the EAD with a validity period that aligns with the applicant's Form I-94 expiration date, not to exceed 2 years for E and L dependent spouses, or 3 years for H-4 dependent spouses.

Applications to Renew Employment Authorization, EADs, and Automatic Extensions

Beginning November 12, 2021, the EAD of an E and L dependent spouse, and employment authorization and EAD of an H-4 dependent spouse, will be automatically extended for a period of up to 180 days if:

- The dependent spouse properly filed an Application for Employment Authorization (Form I-765) for a renewal of their E, L, or H-4 dependent spouse-based EAD before the current EAD expired;[5] and
- The dependent spouse has an unexpired Form I-94 indicating valid E, L, or H-4 derivative status.

Any such automatic extension will terminate automatically on the earlier of:

- The end of the validity period of the nonimmigrant status, as shown on the Form I-94;
- The approval or denial of the application to renew the previous EAD using Form I-765; or
- 180 days from the date of the expiration of the previous EAD.

The following combination of documents evidence the automatic extension of the previous EAD:

- The facially expired previous EAD stating Category A17, A18, or C26, as applicable;
- A Notice of Action (Form I-797C) for Form I-765 with Class requested in the same category as the expired EAD (either "(a)(17)," "(a)(18)," or "(c)(26)," as applicable), and showing that the renewal application was filed before the EAD expired; and
- An unexpired Arrival-Departure Record (Form I-94) reflecting H-4, E, or L derivative status, as applicable.

With this document combination, the expired EAD is considered unexpired and acceptable as evidence of identity and employment authorization for completion of Employment Eligibility Verification (Form I-9). Reverification of employment authorization is required at the end of the automatic extension period.

Footnotes

[^ 1] This policy does not apply to dependents (including spouses) of Employees of the Taipei Economic and Cultural Representative Office (TECRO) and Taipei Economic and Cultural Offices (TECO), who continue to be required to apply for employment authorization per 8 CFR 274a.12(c)(2). Further, this policy does not apply to spouses of Long-Term Investors in the Commonwealth of the Northern Mariana Islands (E-2 CNMI Investors) who are also required to apply for employment authorization per 8 CFR 274a.12(c)(12). Additionally, as noted in 8 CFR 214.2(e)(23)(x)(B), spouses of E-2 CNMI investors who obtained such status based upon a Foreign Retiree Investment Certificate are not eligible for work authorization.

[^ 2] For additional information on Form I-94, see CBP's I-94 Website: Travel Records for U.S. Visitors.

[^ 3] This process of USCIS sending a supplemental notice is not available for Forms I-94 issued by CBP because USCIS cannot issue documents on behalf of CBP.

[^ 4] See 8 CFR 274a.12.

[^ 5] The renewal application and the current EAD should reflect the same "Class requested," either "(a)(17)," "(a)(18)," or "(c)(26)."

Chapter 3 - Certain Employment-Based Immigrants in Compelling Circumstances

USCIS may grant employment authorization to certain nonimmigrants on the pathway to permanent residence if USCIS determines that compelling circumstances exist and the applicant merits a favorable exercise of discretion.[1] While the regulation does not define compelling circumstances or define the situations that could trigger them, this provision is generally meant to address situations in which the nonimmigrant is no longer able to continue employment with their employer and faces serious harm constituting compelling circumstances beyond that which is normally associated with job loss.

This discretionary temporary employment authorization provides nonimmigrants who are the beneficiaries of certain approved employment-based immigrant visa petitions, but who face compelling circumstances, the ability to remain in the United States and continue in an authorized period of stay.[2]

A. Eligibility

For an applicant to be eligible for an Employment Authorization Document (EAD) based on compelling circumstances, the applicant must meet the following eligibility requirements:

- The principal applicant is the principal beneficiary of an approved Immigrant Petition for Alien Workers (Form I-140) in either the 1st, 2nd, or 3rd employment-based preference category;
- The principal applicant is in valid E-3, H-1B, H-1B1, O-1, or L-1 nonimmigrant status or authorized grace period[3] at the time the applicant files the Application for Employment Authorization (Form I-765);
- The principal applicant has not filed an Application to Register Permanent Residence or Adjust Status (Form I-485);
- An immigrant visa is not available to the principal applicant based on the applicant's priority date according to the relevant Final Action Date in the U.S. Department of State (DOS)'s Visa Bulletin in effect at the time the applicant files Form I-765;
- The applicant and their dependents provide biometrics, as required;
- The applicant and their dependents have not been convicted of a felony or two or more misdemeanors; and

- USCIS determines, as a matter of discretion, that the principal applicant demonstrates compelling circumstances that justify the issuance of employment authorization.[4]

B. Compelling Circumstances

The applicant must establish compelling circumstances for all initial requests. The regulations do not define compelling circumstances.[5] Officers therefore have discretion on a case-by-case basis to determine whether compelling circumstances exist. The applicant should submit an explanation of the compelling circumstances supported by evidence with the application.

In general, compelling circumstances are situations outside a principal applicant's control that adversely affect the principal applicant's ability to continue employment for the petitioning employer and justify the issuance of an EAD.

The following non-exhaustive examples illustrate how certain situations could lead to a finding that compelling circumstances exist.

Serious Illness and Disability

A principal applicant or their dependent faces a serious illness or disability that substantially changes employment circumstances, such as requiring them to move to a different geographic area for their or a dependent's treatment, or the illness or disability otherwise reduces or adversely affects the principal applicant's ability to continue their previously approved employment.

Leaving the United States would likely result in additional medical issues and interrupt the individual's treatment plan and prognosis. A move to another part of the country to ensure proper medical care is just one example of compelling circumstances resulting from a serious illness or disability of the principal applicant or their family member.

Applicants in this situation or another situation involving serious illness and disability should provide an explanation supported by evidence such as medical records and any relevant information relating to their inability to continue in their nonimmigrant worker status.

Employer Dispute or Retaliation

A principal applicant is involved in a dispute regarding their employer's alleged illegal or other forms of abusive conduct. The dispute may take the form of a whistleblower action, litigation, or other documented dispute. If the employer retaliated against the principal applicant, the applicant should submit evidence to substantiate the claim of employer retaliation, as evidence of retaliation may support a finding that compelling circumstances exist. Employer retaliation is not limited to a termination of employment. The retaliation may take any form that adversely affects the principal applicant's ability to continue employment, including harassment.[6]

Applicants involved in an employer dispute or claiming employer retaliation should provide an explanation supported by evidence such as complaint details, correspondence with the employer, or legal filings.

Other Substantial Harm to the Applicant

The principal applicant is unable to timely extend or otherwise maintain status, or obtain another nonimmigrant status, and would suffer substantial harm as a result. This harm may be financial or may be due to an inability to return to their home country due to conditions there.

Financial hardship to the principal applicant may rise to the level of compelling circumstances when coupled with circumstances beyond those typically associated with job loss. Job loss may be sufficient to establish financial hardship depending on the individual circumstances. For example, the loss of health insurance may rise to this level for a principal applicant or their dependents facing extended illness or requiring extensive medical treatment.

Applicants should provide an explanation supported by evidence such as financial records and bona fide cost estimates demonstrating the inherent financial hardship facing the applicant if made to depart the United States, coupled with specialty needs of the applicant or family members. Evidence in this example could also include the applicant's priority date, as well as other factors such as school or higher education enrollment records, mortgage records, long-term lease records, or documentation regarding home country conditions, as applicable.

Significant Disruption to the Employer

Compelling circumstances need not involve termination of the principal applicant. A principal applicant who is unexpectedly unable to timely extend or change status to continue employment with the employer and has no other basis to continue that employment may be eligible for a compelling circumstances-based EAD if the principal applicant's departure would cause the employer substantial disruption.

Applicants should provide an explanation supported by evidence from their employer that demonstrates that, due to the principal applicant's knowledge or experience, their loss would negatively impact projects and result in significant monetary loss or other disruption to the employer.

Approval of an application for employment authorization based on compelling circumstances requires that the principal applicant is facing compelling circumstances and that they are unable to continue employment with the petitioning employer, and that due to the compelling circumstances, the result to the applicant is harm beyond that which is normally associated with job loss.

For example, reaching the maximum statutory or regulatory period of allowed nonimmigrant status does not, without compounding factors, constitute compelling circumstances. An officer may consider this factor in determining whether the applicant merits a favorable exercise of discretion.[7]

Likewise, USCIS generally does not consider unemployment or job loss, in and of itself, to be a compelling circumstance unless the principal applicant can show additional circumstances that compound the hardship ordinarily associated with job loss.

As an example, a principal applicant with an approved immigrant visa petition in an oversubscribed visa category or chargeability area who has lived in the United States for a considerable period of time, and has school-aged children and a mortgage, may face compelling circumstances if, due to job loss, the family may otherwise be forced to sell their home for a loss, pull the children out of school, and relocate to their home country. Note that not all of these elements (lengthy time in the United States, mortgage, and school-age children) are necessary for a case-by-case finding of compelling circumstances based on substantial harm to the applicant.

C. Validity

USCIS may grant initial employment authorization based on compelling circumstances for up to 1 year.[8]

D. Spouse and Children

The spouse and children of a nonimmigrant who receives a compelling circumstances-based EAD are also eligible to apply for a compelling circumstances-based EAD if the qualifying relationship exists both at the time of filing and adjudication. The principal nonimmigrant's EAD must be valid for the spouse and children to receive their own.

A spouse or child may file an application for a compelling circumstances-based EAD concurrently with the principal nonimmigrant's application, but USCIS may not approve the spouse or child's application before approving the principal nonimmigrant's application. Each dependent must establish eligibility and satisfy all filing requirements. The validity period of a spouse or child's compelling circumstances-based EAD may not exceed the principal nonimmigrant's approval period.[9]

A spouse or child who files an application for a compelling circumstances-based EAD must provide biometrics and must not have been convicted of a felony or two or more misdemeanors.

E. Renewal Applications

EADs based on compelling circumstances may be renewed in 1-year increments. A renewal application must be filed before the expiration of the previous EAD. Compelling circumstances-based EADs are not eligible for automatic extensions.[10]

USCIS may approve a renewal application for a compelling circumstances-based EAD if the principal applicant continues to have a Form I-140 approved on their behalf, and either:

- Compelling circumstances exist, and an immigrant visa is still not available for issuance based on the applicant's priority date according to the relevant Final Action Date in the DOS's Visa Bulletin in effect at the time the applicant files the renewal application. The compelling circumstances at the time of the renewal application may be different from the initial compelling circumstances shown; or
- The difference between the applicant's priority date and the Final Action Date for the applicant's preference category and country of chargeability is 1 year or less according to the DOS Visa Bulletin in effect on the date the applicant filed the renewal application. In other words, under this option, the applicant's priority date cannot be more than 1 year earlier or 1 year later than the DOS cut-off date in the Visa Bulletin applicable to the applicant's preference category and country of chargeability in effect on the date the applicant filed the renewal application.

The spouse and children of a principal applicant may apply to renew employment authorization if the qualifying relationship exists both at the time of filing and adjudication, and the principal applicant's renewal application has been approved. The spouse and children may apply concurrently with the principal applicant, but their applications cannot be approved until after the principal applicant's application has been approved.

Neither the principal applicant nor their spouse or children need to be in a valid nonimmigrant status when seeking renewal of employment authorization based on compelling circumstances.

If approved, a renewal of the compelling circumstances-based EAD is valid for 1 year. The validity period of a spouse or child's compelling circumstances-based EAD may not exceed the principal applicant's approval period.

F. Period of Authorized Stay

USCIS considers an applicant with a valid EAD based on compelling circumstances to be in a period of authorized stay by the Secretary of Homeland Security. In addition, USCIS considers the time during which the EAD application was pending to be a period of authorized stay. Therefore, the applicant generally does not accrue unlawful presence during the validity period of the EAD or during the pendency of a timely filed non-frivolous application.[11]

An alien who departs the United States to apply for a nonimmigrant or immigrant visa at a consular post abroad while working using the compelling circumstances-based employment authorization does not trigger the unlawful presence grounds of inadmissibility, as long as the alien is not subject to those grounds of inadmissibility from other circumstances.[12]

As noted above, a period of authorized stay is distinguishable from nonimmigrant status. Individuals who are in a period of authorized stay but are not in a nonimmigrant status may therefore, depending on the facts, be ineligible for a change or adjustment of status for failing to maintain a lawful status.[13] However, individuals in an authorized period of stay do not accrue unlawful presence, so they may subsequently leave the United States to apply for an immigrant or nonimmigrant visa at a consular post abroad, without triggering the unlawful presence grounds of inadmissibility (as long as they have not otherwise accrued periods of unlawful presence).[14]

Footnotes

[^ 1] See 8 CFR 204.5(p).

[^ 2] An alien in a period of authorized stay is protected from accruing unlawful presence for inadmissibility purposes. See INA 212(a)(9)(B) and INA 212(a)(9)(C). However, compelling circumstances-based employment authorization is not a lawful immigration status.

[^ 3] See 8 CFR 214.1(l)(1) and 8 CFR 214.1(l)(2).

[^ 4] See 8 CFR 204.5(p).

[^ 5] See 8 CFR 204.5(p)(1)(iii). DHS did not establish a bright-line definition because such a definition could limit DHS's flexibility to recognize the various circumstances that could be considered compelling. See 81 FR 82398, 82428 (PDF) (Nov. 18, 2016).

[^ 6] In January 2023, DHS announced that alien workers who fall within the scope of a labor agency investigation or enforcement action may access a streamlined and expedited deferred action request process which allows them to concurrently file an Application for Employment Authorization (Form I-765). See the DHS Support of the Enforcement of Labor and Employment Laws webpage. Workers who avail themselves of this process are not precluded from seeking a compelling circumstances-based EAD.

[^ 7] See 8 CFR 204.5(p).

[^ 8] See 8 CFR 204.5(p)(4)(ii).

[^ 9] See 8 CFR 204.5(p)(2).

[^ 10] See 8 CFR 274a.13(d). For more information, see the Automatic Employment Authorization Document (EAD) Extension webpage.

[^ 11] See 81 FR 82398, 82439 (PDF) (Nov. 18, 2016). If the application for employment authorization based on compelling circumstances is ultimately denied, then the applicant is not considered to be in a period of authorization stay during the pendency of the application.

[^ 12] See 81 FR 82398, 82425 (PDF) (Nov. 18, 2016).

[^ 13] Applicants are generally barred from adjusting status under INA 245(a) if they are in an unlawful immigration status at the time of filing. See INA 245(c)(2). See Volume 7, Adjustment of Status, Part B, 245(a) Adjustment, Chapter 3, Unlawful Immigration Status at Time of Filing (INA 245(c)(2)) [7 USCIS-PM B.3]. Applicants are also generally barred from adjusting status under INA 245(a) in an employment-based category if they are not in a lawful nonimmigrant status at the time of filing. See INA 245(c)(7). See Volume 7, Adjustment of Status, Part B, 245(a) Adjustment, Chapter 5, Employment-Based Applicant Not in Lawful Nonimmigrant Status (INA 245(c)(7)) [7 USCIS-PM B.5].

[^ 14] For more information on immigrant visa processing, see DOS's NVC Processing webpage.

Chapter 4 - Reserved

Volume 11 - Travel and Identity Documents

Part A - Secure Identity Documents Policies and Procedures

Chapter 1 - Purpose and Background

A. Purpose

USCIS issues a variety of documents that establish identity and immigration status in the United States. These include, but are not limited to, Employment Authorization Documents, travel documents, Permanent Resident Cards, and naturalization and citizenship certificates.

B. Background

In 1946, the U.S. government began issuing different types of registration documents based on an alien's status in the United States. The Identification Card for the Use of Resident Citizen in the United States (Form I-179; later known as Form I-197) was introduced in 1960 to provide naturalized U.S. citizens living along the Mexican border with identification to facilitate border crossings between the United States and Mexico. Legacy Immigration and Naturalization Service (INS) guidance provided that the identification card could only be issued in certain districts of the Southwest United States. The card was issued until February 1973.[1]

Lawful permanent resident (LPR) cards were first issued as Form I-151. Between 1952 and 1977, legacy INS issued 17 different re-designs of the card. In 1977, the Permanent Resident Card (PRC) (Form I-551) replaced Form I-151 as evidence of LPR status. In 1989, legacy INS introduced a new version of the PRC with a 10-year validity period.[2]

USCIS currently issues a number of documents for travel and identity purposes. These secure identity documents often serve multiple purposes; they may also be used as proof of an alien's immigration status, employment authorization, and as travel authorization.[3]

USCIS has also increased the security, integrity, and efficiency of secure identity document delivery, and maintains better tracking and accuracy of delivery. Various USCIS initiatives work to confirm that secure identity documents are delivered to the right address and person, an important step in the delivery of sensitive documents, which may be subject to abuse.[4]

C. Legal Authorities

- 8 CFR 103.2 - Submission and adjudication of benefit requests
- 8 CFR 103.8 - Service of decisions and other notices
- 8 CFR 103.16 - Collection, use and storage of biometric information

Footnotes

[^ 1] Although Forms I-179 and I-197 are no longer issued by USCIS, valid existing cards continue to be acceptable documentation of U.S. citizenship. See 8 CFR 235.10.

[^ 2] Except for conditional permanent residents, who are issued Forms I-551 with an expiration date of 2 years, after the date on which the person became a conditional permanent resident.

[^ 3] For more information, see USCIS to Issue Employment Authorization and Advance Parole Card for Adjustment of Status Applicants: Questions and Answers

[^ 4] USCIS previously was unable to confirm the status of the delivery of secure identity documents, the accuracy of the delivery address, or who signed for the document. This left USCIS vulnerable to persons seeking to obtain sensitive immigration documents by theft or other illicit means. Advances in USCIS' delivery of sensitive documents have significantly reduced this risk.

Chapter 2 - USCIS-Issued Secure Identity Documents

A. Personal Information Used on Secure Identity Documents

USCIS issues a variety of secure identity documents that establish identity and immigration status in the United States. Personal information included on USCIS-issued secure identity documents includes, but is not limited to, a benefit requestor's biometrics, full legal name, date and country of birth, sex, and A-number.

1. Biometrics

USCIS has general authority to require and collect biometrics from any applicant, petitioner, sponsor, derivative, dependent, beneficiary, or requestor filing for any immigration, citizenship, and naturalization benefit.[1]

If the benefit request filed requires biometrics, and the requestor is in the United States, USCIS schedules a biometric services appointment at a local Application Support Center (ASC).[2] If the benefit requestor is outside of the United States, biometrics are captured by a USCIS international office, a U.S. embassy or consulate, or a U.S. military facility. The biometrics

collected from the benefit requestor allow USCIS to verify identity and conduct national security and criminal history background checks. USCIS also uses the benefit requestor's biometric information for the initial issuance or replacement of a secure identity document.

2. Full Legal Name

All USCIS-issued secure identity documents contain the benefit requestor's full legal name.[3] Documents USCIS issues do not include nicknames. They do not contain initials, unless an initial appears on the official birth certificate, or the requestors legally changed their name to include an initial.

USCIS does not suspend the adjudication of a benefit request pending a court determination of a name change or other efforts by the requestor to establish a new legal name. USCIS creates secure identity documents using the legal name in place when the benefit request is decided. If the applicant's name changes after filing, USCIS only issues the resulting identity document, if any, in the new name if the applicant provides supporting documentation of the name change before USCIS makes a decision on the benefit.[4]

Name Changes

If requestors change their name after USCIS issues the secure identity document, the requestor may file an application, with the appropriate fee,[5] to request USCIS re-issue the secure identity document with the new name.[6] The requestor must provide sufficient evidence of the name change. USCIS does not have legal authority to change a person's name. Requestors who changed their name must submit evidence that they completed any name change procedure according to the relevant U.S. state or foreign law.[7] The name change may or may not be recorded on the birth certificate, marriage certificate, or other vital document record.[8]

3. Date of Birth

In general, the official date of birth is the date recorded on the requestor's birth certificate. USCIS recognizes dates of birth based on the Gregorian calendar in the following order: month, day, and year. Some foreign countries issue documents with the date of birth in a different order.[9] Most translations should have the date in the order of the month, day, and year. However, officers should verify the order of a translated date before issuing documents to avoid discrepancies.

If there is a discrepancy between a translated birth certificate and other government-issued documentation, the requestor must provide compelling evidence that the date of birth on the birth certificate is incorrect or miscalculated. For naturalization certificates, USCIS cannot change a recorded date of birth, except to correct a USCIS clerical error.[10]

4. Sex

USCIS issues certain documents indicating the benefit requestor's sex.[11] USCIS does not leave the benefit requestor's sex blank on such documents.

B. Delivery of Secure Identity Documents

USCIS mails secure identity documents through the U.S. Postal Service (USPS) to the address provided on a benefit request, unless the requestor requested that USCIS send any secure identity document to the U.S. business address of the attorney of record or accredited representative.[12]

In general, USCIS only sends secure identity documents to U.S. addresses. The requestor may, however, request that any secure identity document be sent to a designated military or diplomatic address for pickup in a foreign country, if permitted.[13] For example, certain travel documents (such as reentry permits and refugee travel documents) may be sent to a U.S. embassy or consulate or USCIS international office for the requestor to pick up, if this request is made when the requestor files the benefit application.[14]

C. Tracking Delivery

Benefit requestors may track the delivery status of their secure identity document by signing up for a Case Status Online account to obtain a tracking number. With a tracking number, requestors may also register for Informed Delivery through USPS to get previews of mail in transit.[15]

D. Making Address Changes

Aliens must report any change of address within 10 days of moving within the United States or its territories.[16] If a mailing address changes after a benefit request is filed, the requestor should update it online with USCIS and USPS as soon as possible to ensure he or she receives any secure identity documents USCIS sends in the mail. If more than one application or petition is pending, the requestor should ensure that USCIS updates the address on all pending benefit requests.

Requestors should use the USPS Look Up a Zip Code tool to ensure they are providing a complete address using the standard abbreviations and formatting recognized by USPS.

Footnotes

[^ 1] See 8 CFR 103.2(b)(9). See 8 CFR 103.16.

[^ 2] For more information, see Preparing for Your Biometric Services Appointment.

[^ 3] See 8 CFR 320.3(b)(1)(viii)-(ix), 8 CFR 322.3(b)(1)(xiii) and 8 CFR 338.1(b). See 6 CFR 37.3 for the full legal name description in the REAL ID Act, Pub. L. 109-13 (PDF) (May 11, 2005). USCIS uses the name provided in the benefit request, or otherwise submitted in connection with the request while the request is pending, so long as USCIS can verify the name. For more information on what USCIS considers a legal name for purposes of verifying identifying information as part of the adjudication of the benefit request, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 5, Verification of Identifying Information, Section A, Full Legal Name [1 USCIS-PM E.1(A)]. Certain USCIS electronic systems have character limitations which could result in a shortened name (if the name is too long) or a name without hyphens on USCIS-produced secure documents.

[^ 4] For more information, see the Updating or Correcting Your Documents webpage.

[^ 5] See Fee Schedule (Form G-1055).

[^ 6] See Chapter 3, Reissuance of Secure Identity Documents [11 USCIS-PM A.3].

[^ 7] There may be instances in which evidence of a name change is unobtainable because of country conditions or personal circumstances. In some situations, USCIS permits such requestors to submit secondary evidence or affidavits to establish their identity. Any affidavit should explain the reasons primary evidence is unavailable. For more information on identity

documents that cannot be obtained in particular countries and during specific time periods, see the U.S. Department of State's U.S. Visa: Reciprocity and Civil Documents by Country webpage. Requestors of certain humanitarian benefits may be able to establish with testimony alone that they completed any name change procedure according to relevant law.

[^ 8] See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 5, Verification of Identifying Information, Section A, Full Legal Name [1 USCIS-PM E.5(A)].

[^ 9] Most western countries follow the Gregorian calendar. Other countries follow different calendars including the Hebrew (lunisolar calendar); Islamic (lunar calendar); and Julian (solar calendar). The calendars differ on days, months, and years.

[^ 10] See 8 CFR 338.5. USCIS may, however, change the date of birth on a certificate of citizenship for a person who has a U.S. court order or similar state vital record changing the date of birth. See Volume 12, Citizenship & Naturalization, Part K, Certificates of Citizenship and Naturalization, Chapter 4, Application for Replacement of Naturalization/Citizenship Document [12 USCIS-PM K.4].

[^ 11] For more information, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 5, Verification of Identifying Information, Section B, Personal Information, Subsection 2, Sex [1 USCIS-PM E.5(B)(2)].

[^ 12] See 8 CFR 103.2(b)(19)(iii). A benefit requestor may also request to change, through written notice to USCIS, that USCIS mail the secure identity document to him or her instead of the attorney of record or legal representative.

[^ 13] For more information regarding mailing secure identity documents overseas, see Travel Documents and Emergency Travel.

[^ 14] In general, if a requestor applies for advance parole while in the United States, and departs the United States before the advance parole document is issued, the requestor may be found inadmissible to the United States upon return, or even if admitted, may be found to have abandoned his or her application. There is no process for a requestor outside the United States traveling on a valid advance parole document or combo card (a card that combines an employment authorization document (EAD) and advance parole document) to apply for a replacement of a lost or stolen advance parole document to enable him or her to return the United States. In these cases, the requestor should contact the closest USCIS international office or U.S. embassy or consulate.

[^ 15] For more information on how to track the delivery of secure identity documents, see How to Track Delivery of Your Notice or Secure Identity Document (or Card).

[^ 16] See INA 265. See How to Change Your Address.

Chapter 3 - Reissuance of Secure Identity Documents

A. General

Benefit requestors may file to renew their USCIS-issued secure identity documents that have expired or replace ones that have been lost, stolen, mutilated, or destroyed, or that contain an error.

The following table provides general information on how to request that USCIS reissue certain secure identity documents.

How to Request Replacement or Renewal of USCIS-Issued Secure Identity Documents

Secure Identity Document	How to Request Replacement or Renewal
Permanent Resident Card (PRC)	• Complete and properly file an Application to Replace Permanent Resident Card (Form I-90) with USCIS, with appropriate fees (if required),[1] in accordance with the Form I-90 instructions.[2] • An LPR who is temporarily outside the United States for less than 1 year and who is not in possession of a valid PRC (for example, it was lost, stolen, or destroyed) may properly file an Application for Travel Document (Carrier Documentation) (Form I-131A) to request documentation to demonstrate to an airline or other transportation carrier that he or she is authorized to travel to the United States.[3]
Employment Authorization Document (EAD)	• If inside the United States, complete and properly file an Application for Employment Authorization (Form I-765)[4] with USCIS, with appropriate fees (if required).[5] • There is no process to seek a replacement EAD, including a combo card (employment and travel authorization documented on a single card), outside the United States.
Reentry permit	• If inside the United States, complete and properly file an Application for Travel Documents, Parole Documents, and Arrival/Departure Records (Form I-131) with USCIS, with appropriate fees.[6] An LPR who is temporarily outside the United States for less than 2 years and who is not in possession of a valid PRC (for example, it was lost, stolen, or destroyed) may properly file an Application for Travel Document (Carrier Documentation) (Form I-131A) to request documentation to demonstrate to an airline or other transportation carrier that he or she is authorized to travel to the United States.[7]
Advance parole document	• If inside the United States, complete and properly file an Application for Travel Documents, Parole Documents, and Arrival/Departure Records (Form I-131) with USCIS, with appropriate fees.[8] • There is no process to seek a replacement advance parole document, including a combo card (employment and travel authorization documented on a single card), outside the United States. In cases where an advance parole document was lost, stolen, or destroyed while overseas, requestors should contact the closest USCIS international office or U.S. embassy or consulate.
Refugee travel document	• Whether inside or outside the United States, complete and properly file an Application for Travel Documents, Parole Documents, and Arrival/Departure Records (Form I-131) with USCIS, with appropriate fees.

Secure Identity Document	How to Request Replacement or Renewal
Certificate of Citizenship or Certificate of Naturalization	• Whether inside or outside the United States, complete and properly file an Application for Replacement Naturalization/Citizenship Document (Form N-565).[9]

B. Reissuing Non-Deliverable Secure Identity Documents

USCIS receives a number of secure identity documents returned by the U.S. Postal Service (USPS) after attempting delivery. Reasons for return range from USPS error (such as misdirected mail or correct address not recognized) to requestor error (such as an untimely address change). Benefit requestors who believe their secure identity documents have been returned to USCIS as non-deliverable may contact the USCIS Contact Center. In some instances, USCIS may be able to attempt a second delivery to the original address.

1. Background

Historically, the management of secure identity documents, including storage, remailing, and destruction, occurred at multiple sites across USCIS with each location having a separate staff performing Post Office Non-Deliverables (PONDS) functions in accordance with local policies. In 2016, USCIS undertook an initiative to reduce the handling of secure identity documents, more clearly define the scope of PONDS duties, and create a more consistent and manageable process. The Office of Intake and Document Production (OIDP) established a centralized PONDS Unit at the Lee's Summit Production Facility in June 2017, which now oversees all PONDS operations.

Between June 2017 and October 2017, PONDS data showed 95 percent of secure identity documents were successfully re-mailed to requestors within 60 business days of being returned to USCIS. For documents that were unsuccessfully re-mailed, USCIS had previously kept documents for 365 calendar days. In 2018, USCIS began retaining non-deliverable secure identity documents returned to USCIS for 60 business days, or 12 weeks, before destroying them.[10]

Before secure identity documents are destroyed, PONDS Unit staff must search all relevant data systems to see if a new address exists. If a new address exists, USCIS re-mails the card to the new address. If no new address exists, USCIS destroys the card and updates its status in applicable systems as destroyed, in accordance with PONDS procedures.

2. Reissuing Secure Identity Documents

In certain circumstances, USCIS reissues secure identity documents if the original identity document was not successfully delivered to the requestor and has been subsequently destroyed. Depending on the scenario, USCIS may require the requestor to properly file a new form with fee for USCIS to reissue the secure identity document.

New Application and Fees Not Required

Generally, if USCIS-issued secure identity documents were non-deliverable due to USPS errors, USCIS may reissue the secure identity document without requiring a new application and fee.

However, lawful permanent residents and conditional permanent residents must always file Form I-90 to request a replacement PRC.[11] In some cases, USCIS would not require a new fee.[12]

The table below provides common (but not comprehensive) non-delivery scenarios involving USPS errors.

Common Non-Delivery Scenarios Involving USPS Errors

Scenario	Example	New Application and Applicable Fee Required?[13]
USPS lost, misdirected, or destroyed mail.[14]	N/A	No
USPS incorrectly marked as deceased but requestor is not deceased.	N/A	No
USPS incorrectly marked yellow label on undeliverable envelope.	USPS label indicates requestor does not reside at address; however, requestor does.	No
USPS did not recognize a good address for requestor.	N/A	No

Generally, if USCIS-issued secure identity documents were non-deliverable due to USCIS or certain other errors, USCIS may reissue the secure identity document without requiring a new application and fee. The table below provides common (but not comprehensive) non-delivery scenarios involving USCIS and other errors.

Common Non-Delivery Scenarios Involving USCIS and Other Errors

Scenario	Example	New Application and Applicable Fee Required? [15]
Requestor updated address timely but USCIS incorrectly entered address into data systems.	Requestor enters "123 Presidential Avenue" and USCIS erroneously enters "123 Residential Avenue."	No
Requestor updated address timely but USCIS updated address after 48 hour document production hold and before undeliverable document was returned to USCIS as undeliverable.	N/A	No
Certain USCIS systems errors.	N/A	No

New Application and Fees Required

Generally, if USCIS-issued secure identity documents were non-deliverable due to requestor error, USCIS reissues the secure identity document only upon receiving a new application and fee.[16] The table below provides common (but not comprehensive) non-delivery scenarios involving requestor errors.

Common Non-Delivery Scenarios Involving Requestor Errors

Scenario	Example	New Application and Applicable Fee Required?
Requestor submitted untimely address change.	• Requestor updated address well after the 10-day timeframe set by INA 265 and after USCIS mailed his or her secure identity document, but the secure identity document was not returned to USCIS as undeliverable. • Requestor updated address after his or her secure identity document was returned to USCIS as undeliverable and destroyed.	Yes, requestor must resubmit completed application with fee.
Requestor updated address timely, but gave incomplete or incorrect address.	• Instead of “123 Main Street,” requestor entered “Main Street 123” or “213 Main Street.” • Requestor omitted apartment or suite number or included incorrect apartment or suite number. • Requestor misspelled a part of the address, such as “123 Brandway” instead of “123 Broadway.” • Requestor listed the wrong state or zip code. • Requestor provided an invalid USPS address.	Yes, requestor must resubmit completed application with fee.
Requestor provided future address, not current address.	N/A	Yes, requestor must resubmit completed application with fee.
Requestor did not accept mail.	N/A	Yes, requestor must resubmit completed application with fee.

Footnotes

[^ 1] See Fee Schedule (Form G-1055).

[^ 2] See 8 CFR 264.5. See 8 CFR 103.7. There are certain conditions when USCIS may issue an Alien Documentation, Identification and Telecommunications (ADIT) stamp in place of a new Permanent Resident Card (PRC). One such condition may be applying for naturalization at least 6 months before the expiration of the PRC. Lawful permanent residents in this circumstance may contact the USCIS Contact Center for more information on how to obtain an ADIT stamp instead of filing Form I-90.

[^ 3] The transportation letter does not replace the PRC. LPRs must still complete and properly file Form I-90 to obtain a replacement PRC.

[^ 4] For more information on when a new Form I-765 and fee is required, see the Employment Authorization Document webpage.

[^ 5] See Fee Schedule (Form G-1055).

[^ 6] See Fee Schedule (Form G-1055).

[^ 7] The transportation letter does not replace the reentry permit. LPRs must complete and properly file Form I-131 upon reentry into the United States to obtain a replacement reentry permit.

[^ 8] In general, if a requestor applies for advance parole while in the United States, and departs the United States before the advance parole document is issued, the requestor may be found inadmissible to the United States upon return, or even if admitted, may be found to have abandoned his or her application.

[^ 9] For more information, see Volume 12, Citizenship and Naturalization, Part K, Certificates of Citizenship and Naturalization, Chapter 4, Application for Replacement of Naturalization/Citizenship Document [12 USCIS-PM K.4].

[^ 10] An economic analysis found that retention of non-deliverable secure identity documents for longer than 60 days costs USCIS more than production of a new identity document.

[^ 11] See 8 CFR 264.5.

[^ 12] For additional information on required fees, see Fee Schedule (Form G-1055). See Volume 1, General Policies and Procedures, Part H, Emergencies or Unforeseen Circumstances, Chapter 2, Emergencies or Unforeseen Circumstances-Related Flexibilities [1 USCIS-PM H.2].

[^ 13] Applicants seeking a replacement of a PRC must always file Form I-90 to request a replacement card. See 8 CFR 264.5. However, in some cases, such as the scenarios described in the table, USCIS would not require a new fee. See Fee Schedule (Form G-1055).

[^ 14] For more information, see Find Missing Mail.

[^ 15] Applicants seeking a replacement of a PRC must always properly file Form I-90 to request a replacement card. See 8 CFR 264.5. However, in some cases, such as the scenarios described in the table, USCIS would not require a new fee. See Fee Schedule (Form G-1055).

[^ 16] Unless the requestor qualifies for a fee exemption or fee waiver. See Fee Schedule (Form G-1055). See Request for Fee Waiver (Form I-912).

Part B - Permanent Resident Cards

Chapter 1 - Purpose and Background

A. Purpose

A lawful permanent resident (LPR) is an alien who the U.S. government has lawfully authorized to permanently live in the United States.[1] LPRs are issued a Permanent Resident Card (PRC)[2] as evidence of identity and status in the United States.[3]

B. Background

In general, LPRs initially receive a PRC after USCIS approves their Application to Register Permanent Residence or Adjust Status (Form I-485) or after U.S. Customs and Border Protection admits them into the United States as an LPR following consular processing abroad.[4] LPRs 18 years of age and over are required to carry their PRCs (or other equivalent proof of registration) at all times.[5]

LPRs use the Application to Replace Permanent Resident Card (Form I-90) to request that USCIS replace their PRC.[6] Form I-90 should also be used to obtain a PRC when an applicant has been automatically converted to permanent resident status.[7] Eligible LPRs also use Form I-90 to request taking up "commuter status" or to resume actual residence in the United States after having been in commuter status.[8]

History

The principle of registering and fingerprinting aliens was established in the Alien Registration Act of 1940 (Smith Act).[9] The Smith Act required all aliens in the United States 14 years of age or older who remained in the United States 30 days or longer to register and be fingerprinted with the U.S. government before such 30 days were over, whether they were present lawfully or unlawfully, temporarily or permanently. These registered aliens were issued an Alien Registration Receipt Card (Form AR-3).

Alien Registration Receipt Card (Form AR-3).

Courtesy of the USCIS History Office and Library.

This card was later revised as AR-3A and AR-103.

In 1946, the U.S. government began issuing different types of registration documents based upon the status of the alien in the United States. LPRs were issued Form I-151 (Alien Registration Receipt Card), which contained a green tint and led to the card being commonly referred to as a "green card."

In 1977, the PRC (Form I-551) replaced the Form I-151 as evidence of LPR status. In 1989, the Immigration and Naturalization Service (INS) introduced the second version of the PRC, usually with an expiration date of 10 years after the date of issuance.[10] USCIS has continued to improve the PRC by using the latest tamper-resistant technology.[11]

C. Legal Authorities

- INA 101(a)(20) – Definition of lawfully admitted for permanent residence
- INA 262 – Registration of aliens
- INA 264 – Forms for registration and fingerprinting
- 8 CFR 264.5 – Application for a replacement Permanent Resident Card
- 8 CFR 211.5 – Alien commuters

Footnotes

[^ 1] Certain LPRs may commence or continue to reside in Mexico or Canada and commute to their place of employment in the United States. For more information, see Chapter 4, Commuter Cards [11 USCIS-PM B.4].

[^ 2] A Permanent Resident Card is also called a Form I-551 or a green card.

[^ 3] Certain aliens obtain lawful permanent residence on a conditional basis and are known as conditional permanent residents. A person (and his or her children) whose qualifying marriage to their petitioning spouse is less than 2 years old at the time of admission or adjustment of status obtain lawful permanent residence on a conditional basis. See INA 216. Immigrant investors (and their spouses and children) may also obtain lawful permanent residence on a conditional basis based on qualifying entrepreneurship. See INA 216A. See Volume 6, Immigrants, Part G, Investors [6 USCIS-PM G].

[^ 4] For information on consular processing, see Volume 7, Part A, Adjustment of Status Policies and Procedures, Chapter 1, Purpose and Background, Section A, Purpose [7 USCIS-PM A.1(A)].

[^ 5] See INA 264(e).

[^ 6] Form I-90 generally may not be used to request an initial PRC. For example, aliens who are granted LPR status by an immigration judge, or an LPR mother who needs a PRC for a child (under 2 years of age) born while the mother was temporarily abroad, should not file Form I-90 to request an initial PRC. The USCIS field office with jurisdiction over such an applicant's residence may be able to assist the applicant to obtain an initial PRC at an INFOPASS appointment. For more information, applicants may call the USCIS Contact Center at 1-800-375-5283 (TTY for applicants who are deaf, hard of hearing, or have a speech disability: 1-800-767-1833).

[^ 7] For example, special agricultural workers who automatically adjusted to permanent residence based on INA 210 must file Form I-90 in order to obtain a PRC.

[^ 8] For more information, see Chapter 4, Commuter Cards [11 USCIS-PM B.4].

[^ 9] See 54 Stat. 670 (June 28, 1940).

[^ 10] Exceptions to a 10-year card include, for example, conditional permanent residents for whom legacy INS began issuing Forms I-551 with an expiration date of 2 years after the date on which the person became a conditional permanent resident under the Immigration Marriage Fraud Amendments of 1986, Pub. L. 99-639 (PDF) (November 10, 1986). See Chapter 2,

Replacement of Permanent Resident Card, Section C, Conditional Permanent Residents [11 USCIS-PM B.2(C)] for more information.

[^ 11] For example, in May 2017, USCIS began issuing redesigned permanent resident cards with enhanced security features.

Chapter 2 - Replacement of Permanent Resident Card

A. Eligibility Requirements

Lawful permanent residents (LPRs) are entitled to evidence of status in the United States. LPRs are eligible for replacement of their Permanent Resident Card (PRC) if they meet requirements, including but not limited to, the following:

- Properly file the Application to Replace Permanent Resident Card (Form I-90);
- Establish identity;
- Establish LPR or conditional permanent resident (CPR)[1] status; and
- Otherwise meet the eligibility requirements to receive a replacement PRC.

Maintaining LPR or CPR Status

LPR status generally begins from the date the government admits an alien to the United States as an LPR or grants or recognizes LPR status. LPR status ends if and when rescinded by USCIS,[2] terminated in removal proceedings,[3] or the status is abandoned.[4] Similarly, CPR status generally begins from the date the government admits a person to the United States as a CPR or grants CPR status. CPR status ends if and when rescinded or terminated.[5] For example, CPRs may lose status if they do not apply to remove conditions, if they do not meet certain requirements to remove the conditions on their status during the required time period, or if USCIS denies a petition to remove conditions.[6]

LPRs Applying for Naturalization

LPRs (and CPRs) 18 years of age and over are required to carry their PRCs (or other proof of registration).[7] Applying for naturalization does not change this requirement.

B. Lawful Permanent Residents in Proceedings

LPRs in deportation, exclusion, or removal proceedings are entitled to evidence of LPR status until ordered excluded, deported, or removed.[8]

If an LPR is in proceedings, USCIS reviews the Form I-90 and totality of the evidence in the record to determine if a new PRC will be issued or if the applicant will receive evidence of status in the form of a temporary permanent resident document.[9]

C. Conditional Permanent Residents

A CPR is an alien admitted for permanent residence on a conditional basis for a period of 2 years because the alien sought LPR status:

- Based on a marriage of less than 2 years;[10] or
- As an investor.[11]

CPRs are issued PRCs by USCIS with an expiration date of 2 years from the date of obtaining permanent resident status. CPRs whose status is not expiring within 90 days may file a Form I-90 to replace a PRC for the reasons provided in the form instructions. If a CPR is eligible to receive a replacement card, the expiration date of the replacement card will be the same as that of the prior card (2 years from the date of becoming a CPR).

In general, a CPR is not eligible to file a Form I-90 for any reason during the 90-day period before the second anniversary of obtaining permanent resident status.[12] The expiration date on the PRC should be the second anniversary of the alien obtaining permanent resident status. This ensures the CPR files the appropriate petition to remove the conditions during the 90-day period before the second anniversary of obtaining permanent resident status.[13] The receipt notice for such a petition to remove conditions serves to extend evidence of CPR status while the petition to remove conditions is pending. The receipt notice, when presented with the expired PRC, may be used to prove employment authorization and authorization to return to the United States after temporary foreign travel.

If a CPR files a Form I-90 during the 90 days before the expiration of conditional status, USCIS denies the application and advises the applicant to file the appropriate petition to remove the conditions.

D. Documentation and Evidence

1. Form

An Application to Replace Permanent Resident Card (Form I-90) must be used by an LPR to request replacement of a PRC expiring within 6 months.[14] Additional reasons for which LPRs must file Form I-90 include, but are not limited to, replacement of a lost, stolen, destroyed, or mutilated PRC, or when the LPR's name or other biographic information has legally changed since issuance of the PRC.[15]

CPRs may use Form I-90 to request replacement of a PRC that is not expiring within 90 days for reasons that include, but are not limited to, replacement of a lost, stolen, destroyed, or mutilated PRC, or when the CPR's name or other biographic information has legally changed since issuance of the PRC.[16] CPRs may not use Form I-90 to request removal of the conditions on residence.[17]

The Form I-90 instructions include a full list of reasons to request replacement of a PRC and further information on filing requirements for each reason. An applicant must file Form I-90 according to the form instructions. Applicants can access the current edition of the form on the USCIS website.

2. Fees

An applicant should refer to the Fee Schedule (Form G-1055) for the appropriate fees required for filing a Form I-90. Any required fees must be submitted at the time of filing.[18]

3. Filing Location

An applicant may submit a Form I-90 by mail or electronic filing as indicated in the form instructions. However, applicants may not file online if they are requesting a fee waiver.

4. Required Evidence

An applicant should refer to the Form I-90 instructions for required initial evidence based on the particular reason for which he or she is seeking a replacement card. For example, if an applicant requests a replacement PRC because the existing card has incorrect data because of DHS error, the applicant must submit proof of the correct name or biographical data and return the original PRC with the incorrect data to USCIS when filing Form I-90.

E. Biometrics

1. Application Support Center Appointments

Replacement of a PRC requires submission of biometrics at the USCIS Application Support Center (ASC) servicing the applicant's place of residence in the United States.[19] USCIS generally schedules the applicant for a biometrics appointment after receiving a properly filed application. USCIS notifies the applicant of an appointment by sending the applicant a Notice of Action (Form I-797C) stating the date, time, and location of the appointment.

For purposes of a request to replace a PRC, USCIS generally collects the following biometrics from the applicant: photograph, signature, and fingerprints.[20]

When an applicant appears at an ASC[21] to provide biometrics, the ASC may take actions that include, but are not limited to, the following:

- Verifying applicant identity;
- Verifying biographic changes, if applicable;[22] and
- Capturing biometrics.

2. Rescheduling Requests and Failure to Appear

If an applicant fails to appear for the scheduled biometrics appointment, his or her Form I-90 is considered abandoned and may be denied, unless USCIS receives a properly filed change of address or rescheduling request before the scheduled appointment.

Biometrics must be completed within 90 days of the biometrics appointment described in the initial Form I-797C. The application may be denied for abandonment if biometrics are not completed within this timeframe. If an applicant is unable to appear for the initial scheduled date, the applicant may request to reschedule the appointment along with a sufficient explanation for the applicant's inability to appear on that date. The applicant should submit the rescheduling request before the scheduled appointment, otherwise USCIS may deny the application for failure to appear at a scheduled biometrics appointment. The applicant should follow the instructions on the Form I-797C to request rescheduling.

F. Temporary Evidence of Permanent Resident Status

LPRs are entitled to evidence of status.[23] In some cases, LPRs may require temporary evidence of LPR status. For example, a new LPR may require temporary evidence of status while waiting to receive his or her initial PRC or a Form I-90 applicant may require temporary evidence of status while waiting to receive his or her replacement PRC.[24] USCIS may also provide temporary evidence of status to LPRs in deportation, exclusion, or removal proceedings.[25]

1. I-90 Receipt Notice Includes Extension of Permanent Resident Card Validity

USCIS sends a receipt notice (Notice of Action (Form I-797)) to applicants who properly file a Form I-90 to replace their expiring PRC. The notice serves as proof of USCIS' receipt of the applicant's Form I-90. The notice also serves as evidence of USCIS' extension of the validity of the applicant's PRC for the time period specified in the notice (when the LPR presents the notice together with the PRC).[26] In these cases, the notice combined with the expiring or expired PRC serve as evidence of LPR status and may be used to prove employment authorization and authorization to return to the United States after temporary foreign travel.[27]

2. Other Temporary Evidence of Permanent Resident Status

USCIS may issue temporary evidence of LPR status in other formats, such as an Alien Documentation, Identification and Telecommunication (ADIT) stamp (also known as an I-551 stamp). For example, LPRs who are not in possession of their PRC may need an ADIT stamp as temporary evidence of LPR status and employment authorization.

LPRs whose Form I-90 is still pending adjudication and whose PRC and extension notice have expired, may also request documentation of status for travel, employment, or other purposes. USCIS determines if the requestor should receive an ADIT stamp and has the discretion to determine the validity period based on the LPR's situation.

LPRs may obtain an ADIT stamp by calling the USCIS Contact Center to schedule an appointment with a USCIS field office. An officer may only place an ADIT stamp on Arrival/Departure Record (Form I-94) or in an unexpired passport.

G. Adjudication

1. Lawful Permanent Resident Status

The officer reviews evidence submitted by the applicant to verify that the applicant is an LPR. An officer verifies an applicant's status using USCIS systems and records.

2. Security Checks

Officers should ensure biographic and biometric security checks are completed, and remain valid through adjudication of the application.

3. Requests for Evidence and Interviews

Officers may issue Requests for Evidence for an application to replace a PRC.[28] In some cases, USCIS may refer a Form I-90 applicant to a field office for an interview.[29]

4. Decision

Approval

USCIS may approve a Form I-90 if the applicant meets the following requirements:

- The application is signed or certified via internet filing;
- All applicable fees have been paid (unless waived or not required);
- The applicant established his or her identity;
- The applicant is an LPR or CPR;
- Biometric requirements have been completed and remain valid at the time of the decision; and
- The applicant established all other eligibility criteria for the specific basis he or she filed Form I-90.

If the officer approves the Form I-90, USCIS sends both the approval notice and the new PRC to the applicant's U.S. mailing address.[30] PRCs cannot be mailed to addresses outside the United States.[31]

Denial

USCIS may deny an application to replace a PRC if the applicant fails to:

- Establish LPR or CPR status;
- Submit biometrics;
- Establish his or her identity;
- Attend an interview (if required); or
- Otherwise meet the eligibility criteria applicable to his or her Form I-90.

If the officer denies the Form I-90, the applicant cannot appeal the decision.[32] However, the applicant may file a motion to reopen or reconsider. A denial also does not preclude the applicant from filing a new Form I-90 if he or she can establish eligibility.

H. Motions to Reopen or Reconsider

1. Requested by Applicant

To request a motion to reopen or motion to reconsider a denial, an applicant must file a Notice of Appeal or Motion (Form I-290B)[33] with applicable fee, unless waived or not required.[34] An applicant should follow the current form instructions to properly file a motion.

An applicant has 30 days[35] from the date of the decision to submit a motion. Officers may use discretion to excuse failure to file a motion to reopen within this time period if the applicant demonstrates the delay was reasonable and beyond the control of the applicant.[36]

2. Service Motion to Reopen

A Service motion to reopen is initiated by USCIS to reopen a case in order to change the decision or to correct information for card production. When USCIS initiates a Service motion, an officer issues a formal notice to the applicant advising him or her that the case has been reopened. If the new decision is favorable to the applicant, the officer updates appropriate systems and generates an automatic approval notice separate from the motion.

If the decision is unfavorable to the applicant, an officer provides 30 days[37] for the applicant to submit information in support of his or her case. USCIS may extend the time period for good cause shown.[38] If the applicant does not wish to submit any information relating to the motion, the applicant may waive the 30-day period.[39] If the applicant fails to submit the required information within the allocated timeframe or the information the applicant submits does not overcome the grounds for denial, an officer may proceed to make a final determination on the motion and change the decision on the Form I-90, if applicable. A new period for an applicant to file a motion to reopen or reconsider[40] begins from the date of issuance of the new adverse decision on the Form I-90.

Footnotes

[^ 1] See INA 216 and INA 216A.

[^ 2] See INA 246.

[^ 3] See INA 240.

[^ 4] For example, if an alien files a Record of Abandonment of Lawful Permanent Resident Status (Form I-407). See INA 101(a)(13)(C)(i).

[^ 5] See INA 216. See INA 216A. See INA 246.

[^ 6] See INA 216(c) and INA 216A(c). USCIS may also terminate a CPR's status if, during the 2-year conditional resident period, USCIS determines the qualifying marriage or entrepreneurship that formed the basis of the conditional permanent residence was improper. See INA 216(b) and INA 216A(b).

[^ 7] See INA 264(e).

[^ 8] See 8 CFR 264.5(g) ("Issuance of evidence of permanent residence to an alien who had permanent resident status when the proceedings commenced shall not affect those proceedings").

[^ 9] For more information, see Section F, Temporary Evidence of Permanent Resident Status, Subsection 2, Other Temporary Evidence of Permanent Resident Status [11 PM-USCIS B.2(F)(2)].

[^ 10] See INA 216.

[^ 11] Also known as the employment-based 5th preference (EB-5) category. See INA 216A.

[^ 12] If the CPR has been misclassified and should have been admitted or adjusted status as an LPR without conditions on their permanent residence, the misclassified CPR may file a Form I-90 even within the 90-day period before the second anniversary of obtaining permanent resident status.

[^ 13] See Petition to Remove Conditions on Residence (Form I-751) or Petition by Investor to Remove Conditions on Permanent Resident Status (Form I-829). See 8 CFR 216.4 or 8 CFR 216.6.

[^ 14] See 8 CFR 264.5. See Form I-90 instructions.

[^ 15] See 8 CFR 264.5(b). See Form I-90 instructions for a full list of reasons. LPRs must also use Form I-90 to request a replacement of a prior edition of the alien registration card issued on Form AR-3, AR-103, or I-151. See 8 CFR 264.5(c).

[^ 16] See 8 CFR 264.5(d). See Form I-90 instruction for a full list of reasons.

[^ 17] A CPR whose card is expiring may apply to have the conditions on residence removed in accordance with 8 CFR 216.4 or 8 CFR 216.6.

[^ 18] For information on fee waivers, see the Request for Fee Waiver (Form I-912).

[^ 19] Form I-90 applicants who are commuters may be issued a Request for Evidence of a U.S. address for USCIS to use to schedule the location of a biometric services appointment.

[^ 20] For more information, see Preparing for Your Biometric Services Appointment.

[^ 21] If an applicant is temporarily outside of the United States due to U.S. military or government orders, he or she should refer to the form instructions to determine if biometrics are required for the filing, which would require a properly completed Form FD-258 (fingerprint card) and a passport-style photo with the application. See Form I-90 instructions for more information.

[^ 22] The ASC may verify portions of the name, date of birth, and sex.

[^ 23] See INA 264(d).

[^ 24] See 8 CFR 264.5(h).

[^ 25] See 8 CFR 264.5(g) ("Issuance of evidence of permanent residence to an alien who had permanent resident status when the proceedings commenced shall not affect those proceedings"). See Section B, Lawful Permanent Residents in Proceedings [11 USCIS-PM B.2(B)].

[^ 26] Before January 2021, USCIS issued an extension sticker on an applicant's current PRC if the applicant had a pending Form I-90 to replace an expiring PRC to allow for time to process the new card. As of that date, USCIS began phasing out issuing extension stickers and, instead, started issuing revised notices. See the USCIS.gov news alert.

[^ 27] For more information on travel documents for LPRs, see U.S. Customs and Border Protection's Carrier Information Guide.

[^ 28] For more information on Requests for Evidence, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 29] See 8 CFR 103.2(b)(9).

[^ 30] Applicants may use Case Status Online to check on the status of their Form I-90. If Case Status Online indicates that USCIS has mailed a new PRC, the applicant should be provided with a U.S. Postal Service (USPS) tracking number. If Case Status Online and the USPS tracking number indicate a PRC has been mailed and delivered, but the applicant has not received the PRC, the applicant should inquire with USPS immediately. For more information, see the Form I-90 webpage. A PRC issued to a commuters is mailed to the port-of-entry designated by an applicant. For more information, see Chapter 4, Commuter Cards [11 USCIS-PM B.4].

[^ 31] Applicants temporarily outside of the United States due to U.S. military or government orders may be serviced by the U.S. armed forces or U.S. diplomatic postal systems.

[^ 32] See 8 CFR 264.5(f).

[^ 33] See 8 CFR 103.5(a).

[^ 34] See Fee Schedule (Form G-1055).

[^ 35] If the decision is mailed to the applicant, the applicant has 33 days from the date of the denial letter to submit the motion. See 8 CFR 103.8(b).

[^ 36] See 8 CFR 103.5(a)(1)(i).

[^ 37] If the decision is mailed to the applicant, the applicant has 33 days from the date of the decision letter to submit information in support of his or her case. See 8 CFR 103.8(b).

[^ 38] See 8 CFR 103.5(a)(5)(ii).

[^ 39] See 8 CFR 103.5(a)(5).

[^ 40] See Notice of Appeal or Motion (Form I-290B).

Chapter 3 - Expired Permanent Resident Cards

To deter fraud and enhance security, USCIS field offices generally collect expired Permanent Resident Cards (PRCs) encountered through the normal course of business, unless the PRC has an unexpired extension sticker or a valid receipt notice to be used with the expired PRC as evidence of continuing LPR status.

Offices that have collected expired cards should follow agency procedures to update applicable systems and destroy the expired cards.

Chapter 4 - Commuter Cards

Under normal circumstances, a lawful permanent resident (LPR) is considered to have abandoned his or her status if he or she moves to another country with the intent to reside there permanently. However, in certain situations, an LPR may commence or continue to reside in a foreign contiguous territory and commute to the United States for employment.[1] This administrative grant of "commuter status" is only available to LPRs living in Canada or Mexico.

The two types of commuters are as follows:

- Those who commute for regular employment in the United States; and
- Those who enter to perform seasonal work in the United States, but whose presence in the United States is for 6 months or less, in the aggregate, during any continuous 12-month period (seasonal commuters or seasonal workers).

LPRs must use the Application to Replace Permanent Resident Card (Form I-90) to take up commuter status or when taking up actual residence in the United States after having been a commuter.[2] Commuters receive a Permanent Resident Card (PRC) that indicates their status as a commuter. Commuters must also use Form I-90 to replace their commuter PRCs.[3]

A. Eligibility Requirements

1. Obtaining Commuter Status

To be eligible for commuter status, an applicant must meet the following requirements:

- Establish LPR status;
- Establish he or she lives in Canada or Mexico;[4] and
- Establish employment in the United States within the 6 months before filing.

Evidence of employment may include, but is not limited to:

- Employment pay stubs showing employment in the United States; or
- An employment letter on company letterhead showing current employment in the United States.

Applicants should refer to the Form I-90 instructions for further information on evidentiary requirements. Upon approval, USCIS issues the applicant a PRC indicating status as a commuter.[5]

2. Removing Commuter Status

A commuter who begins residing in the United States after having been a commuter must use Form I-90 to request to remove commuter status from his or her PRC. The commuter should submit evidence of a U.S. address with Form I-90. Evidence may include, but is not limited to, a lease agreement, property deed, or utility bill(s) dated within the 6 months before filing Form I-90. Applicants should refer to the Form I-90 instructions for further information on evidentiary requirements.

A seasonal worker is presumed to be residing in the United States if he or she is present in the United States for more than 6 months, in the aggregate, during any continuous 12-month period. In such a case, the seasonal worker is no longer eligible for commuter status.[6]

B. Loss of Permanent Resident Status for Commuters[7]

A commuter who has been out of regular employment in the United States for a continuous period of 6 months loses LPR status.[8] However, an exception applies when employment in the United States was interrupted for reasons beyond the person's control (other than lack of a job opportunity) or when the commuter can demonstrate that he or she has worked 90 days in the United States during the 12-month period before the application for admission into the United States at a port of entry.[9]

Footnotes

[^ 1] See 8 CFR 211.5(a).

[^ 2] See 8 CFR 264.5(b)(5).

[^ 3] See Chapter 2, Replacement of Permanent Resident Card [11 USCIS-PM B.2] for general information.

[^ 4] See 8 CFR 211.5(a).

[^ 5] The PRC cannot be mailed outside the United States; therefore, the commuter must designate his or her usual port-of-entry (POE) on the Form I-90 so that his or her PRC may be mailed to the designated POE for pick-up. Customs and Border Protection (CBP) also issues a Commuter Status Card (Form I-178) that must be carried while traveling across the border. The Form I-178 is valid for 6 months and must be renewed with CBP at 6-month intervals. Renewal requires presenting proof of ongoing employment in the United States.

[^ 6] See 8 CFR 211.5(a).

[^ 7] See 8 CFR 211.5(b).

[^ 8] See 8 CFR 211.5(b).

[^ 9] See 8 CFR 211.5(b).

Part C - Reentry Permits

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures.

See more

In May 2020, USCIS retired its Adjudicator's Field Manual (AFM), a collection of our immigration policies and procedures. We are working quickly to update and incorporate all of the AFM content into the USCIS Policy Manual, the agency's centralized online repository for immigration policies. Until then, we have moved any remaining AFM content to its corresponding

Policy Manual Part. To the extent that a provision in the Policy Manual conflicts with remaining AFM content or Policy Memoranda, the updated information in the Policy Manual prevails. If you have questions or concerns about any discrepancies among these resources, contact PolicyFeedback@uscis.dhs.gov.

AFM Chapter 52 - Reentry Permits (External)

Part D - Refugee Travel Documents

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AFM Chapter 53 - Refugee Travel Documents (External)

Part E - Advance Parole Documents

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AFM Chapter 54 - Advance Parole Documents and Boarding Letters (External)

Part F - Arrival-Departure Records

Chapter 1 - Purpose and Background

A. Purpose and Background

DHS issues an Arrival/Departure Record (Form I-94) to certain non-resident aliens upon their arrival in the United States or when they change status or extend their stay in the United States.[1] DHS uses Form I-94 to document arrival and departure and provide evidence of the terms of admission or parole. While some aliens are still issued a paper Form I-94, many are not; instead, U.S. Customs and Border Protection (CBP) creates an electronic Form I-94 record.[2]

B. Legal Authorities

- 8 CFR 1.4 - Definition of Form I-94
- 8 CFR 264.6 - Application for a nonimmigrant arrival-departure record

Footnotes

[^ 1] In addition, the USCIS Asylum Division issues Form I-94 to persons granted asylum at an asylum office. In certain circumstances, USCIS also issues Form I-94 as temporary evidence of a Permanent Resident Card (Form I-551) to persons granted lawful permanent resident (LPR) status. Asylees and those who have Form I-94 as a temporary Form I-551 cannot use the Application for Replacement/Initial Nonimmigrant Arrival-Departure Document (Form I-102) to replace a lost, mutilated, or destroyed Form I-94. Instead, they must contact a USCIS field office or the asylum office with jurisdiction over their current residence to obtain a replacement or corrected Form I-94. Those who obtained derivative asylee status through a Refugee/Asylee Relative Petition (Form I-730) may file a Form I-102 to obtain a replacement or corrected Form I-94.

[^ 2] Before April 30, 2013, CBP issued aliens admitted or paroled at an airport or seaport a paper Form I-94. On April 30, 2013, CBP automated the I-94 process to create an electronic Form I-94 for an alien arriving at an airport or seaport.

Chapter 2 - Application for Replacement/Initial Nonimmigrant Arrival-Departure Record (Form I-102)

A. Eligibility Requirements

An alien issued an electronic Arrival/Departure Record (Form I-94) may obtain a paper version of Form I-94 by visiting the U.S. Customs and Border Protection (CBP) I-94 Website: Travel Records for U.S. Visitors. An alien who cannot access his or her electronic Form I-94 records and needs a replacement of any of the following forms may generally request one by filing an Application for Replacement/Initial Nonimmigrant Arrival-Departure Document (Form I-102):[1]

- Form I-94;
- Nonimmigrant Visa Waiver Arrival/Departure Record (Form I-94W); or
- Crewman's Landing Permit (Form I-95).

An alien cannot use Form I-102 if he or she was not properly inspected and admitted at a port of entry or if he or she is seeking to correct an improper inspection (through oversight or error on the part of the government).[2]

1. Replacing a Lost, Stolen, Mutilated, or Destroyed Arrival-Departure Record

An alien uses Form I-102 to apply for the replacement of a lost, stolen, mutilated, or destroyed Form I-94, Form I-94W, or Form I-95.

An alien who was not issued Form I-94 when he or she was admitted as a nonimmigrant (for example, a Canadian citizen who was admitted as a nonimmigrant visitor or Mexican citizen who was admitted using a Border Crossing Card (Form DSP-150)), but now requires one, may also file the Form I-102.[3]

2. Correcting Inaccurate Information on Arrival-Departure Records

At times, USCIS may have issued Form I-94, Form I-94W, or Form I-95 with incorrect information. In such cases, an alien may file Form I-102 to correct information on the form issued by USCIS. However, if CBP issued Form I-94, Form I-94W, or Form I-95 with incorrect information, the alien must contact CBP to correct the information.[4]

If USCIS made the error on Form I-94, Form I-94W, or Form I-95 through no fault of the applicant, the applicant is not required to submit the fee when filing Form I-102. However, if the error is based on information that the applicant provided or failed to provide to USCIS or the U.S. Department of State, the applicant must submit the filing fee when filing Form I-102.[5]

Examples of incorrect information may include:

- Misspelled name;
- Incorrect or inverted dates of birth;
- Incorrect class of admission code;
- Incorrect expiration dates; and
- Missing or incorrect duration of stay.

B. Filing and Evidence

The applicant must properly file the Form I-102 at the appropriate filing location, complete and sign the application, pay the filing fee (if required), and submit all required initial evidence, according to the instructions to Form I-102.[6] If requesting replacement of a mutilated card, the applicant must submit the original card.[7]

If seeking a correction, the applicant must submit the original Form I-94, Form I-94W, or Form I-95; an explanation of the incorrect information; and any evidence to verify the correct information.[8] USCIS only issues a replacement arrival-departure document with the applicant's legal name and does not issue a replacement arrival-departure document containing a nickname.[9]

C. Adjudication

The officer must conduct a records check and review the supporting evidence to verify the information provided by the applicant regarding the initial inspection and admission or parole, such as the date, place, and manner of entry.[10]

1. Review Supporting Documentation

Officers review the completed form and the evidence submitted in support of the Form I-102.

The applicant has the burden of proof to establish eligibility and should support the request for a replacement document with some evidence of admission or parole, such as a copies of the passport biographical data page and page with admission stamp, or a copy of the original Form I-94, Form I-94W, or Form I-95 (or the original damaged form itself). Lacking such evidence, an applicant may submit a statement explaining the facts of admission and reasons why other evidence is unavailable.

2. Verification

In addition to reviewing the initial evidence submitted by the applicant, the officer must verify arrival, departure, and current status through electronic systems or manual checks when necessary.

3. Requests for Evidence and Interviews

Officers may issue Requests for Evidence for Form I-102 when necessary.[11] In general, USCIS does not require interviews for Form I-102 applicants; however, USCIS may interview the applicant if he or she is claiming arrival as a nonimmigrant who was not issued Form I-94 or if there are doubts regarding the applicant's claims.

The officer should be alert for honest errors in the information the applicant provides. For example, if the applicant was inspected at a pre-flight inspection station outside the United States, he or she may have provided incorrect information regarding his or her place of arrival.

D. Decision

Approval

Form I-102 is not a discretionary application, and there is no requirement to verify maintenance of status or determine admissibility. If USCIS records and documentary evidence submitted by the applicant support the claimed admission or parole, the officer must approve the application. USCIS then notifies the applicant of the approval along with the replacement Form I-94, Form I-94W, or Form I-95.[12]

Denial

If the evidence does not demonstrate the claimed admission or parole, or if the record shows that the requested I-94, I-94W, or I-95 was fraudulently obtained, the officer denies the application and sends written notice to the applicant.[13] While there is no appeal from an adverse decision on Form I-102, the applicant may seek a motion to reopen or reconsider by filing a Notice of Appeal or Motion (Form I-290B).[14] If appropriate, the officer should follow USCIS procedures for placing the applicant into removal proceedings if the period to file a motion has elapsed.

Footnotes

[^ 1] In general, this includes aliens who entered the United States as nonimmigrants, parolees, asylees, refugees, and certain aliens who entered under the Compact of Free Association between the United States and the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau. See Application for Replacement/Initial Nonimmigrant

Arrival-Departure Document (Form I-102). Asylees and those who have Form I-94 as a temporary Form I-551 cannot use the Application for Replacement/Initial Nonimmigrant Arrival-Departure Document (Form I-102) to replace a lost, mutilated, or destroyed Form I-94. Instead, they must contact a USCIS field office or the asylum office with jurisdiction over their current residence to obtain a replacement or corrected Form I-94. Those who obtained derivative asylee status through a Refugee/Asylee Relative Petition (Form I-730) may file a Form I-102 to obtain a replacement or corrected Form I-94. An alien who was not issued Form I-94 when the alien was admitted as a nonimmigrant military member of the U.S. armed forces, a participant in a North Atlantic Treaty Organization (NATO) or civil component or a participant in a Partnership for Peace military program under the Status of Forces Agreement (SOFA), may request an initial Form I-94 for no fee.

[^ 2] See 8 CFR 101.2. For more information, see Volume 7, Adjustment of Status, Part O, Registration, Chapter 2, Presumption of Lawful Admission Despite Errors Occurring at Entry [7 USCIS-PM O.2].

[^ 3] See 8 CFR 264.6(a)(3).

[^ 4] To have information corrected by CBP, an alien should go to the nearest CBP port of entry or the nearest CBP deferred inspection office. See CBP's Locate a Port of Entry webpage for locations and hours of operation.

[^ 5] See Fee Schedule (Form G-1055)

[^ 6] For general filing requirements and procedures, see Volume 1, General Policies and Procedures, Part B, Submission of Benefit Requests [1 USCIS-PM B]. For filing location information, see the Direct Filing Addresses for Form I-102, Application for Replacement/Initial Nonimmigrant Departure Document webpage. For filing fee information, see the Fee Schedule (Form G-1055).

[^ 7] See instructions to Form I-102.

[^ 8] See instructions to Form I-102.

[^ 9] For additional information on the use of personal information on USCIS documents, see Part A, Secure Identity Documents Policies and Procedures, Chapter 2, USCIS-Issued Secure Identity Documents, Section A, Personal Information Used on Secure Identity Documents [11 USCIS-PM 2.A].

[^ 10] USCIS may only issue a replacement Form I-94, Form I-94W, or Form I-95 for the applicant's most recent entry. USCIS does not issue a replacement arrival document for a prior admission (for example, if the applicant has already departed the United States). Exceptions exist for nonimmigrants readmitted to the United States without a new Form I-94. See 8 CFR 214.1(b)(4).

[^ 11] For more information on Requests for Evidence, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 12] See 8 CFR 103.2(b)(19).

[^ 13] See 8 CFR 103.3(a)(1)(i).

[^ 14] See 8 CFR 103.5(a).

Volume 12 - Citizenship and Naturalization

Part A - Citizenship and Naturalization Policies and Procedures

Chapter 1 - Purpose and Background

A. Purpose

The United States has a long history of welcoming immigrants from all parts of the world. The United States values the contributions of immigrants who continue to enrich this country and preserve its legacy as a land of freedom and opportunity. USCIS is proud of its role in maintaining our country's tradition as a nation of immigrants and will administer immigration and naturalization benefits with integrity.

U.S. citizenship is a unique bond that unites people around civic ideals and a belief in the rights and freedoms guaranteed by the U.S. Constitution. The promise of citizenship is grounded in the fundamental value that all persons are created equal and serves as a unifying identity to allow persons of all backgrounds, whether native or foreign-born, to have an equal stake in the future of the United States.

This volume of the USCIS Policy Manual explains the laws and policies that govern U.S. citizenship and naturalization.

USCIS administers citizenship and naturalization law and policy by:

- Providing accurate and useful information to citizenship and naturalization applicants;
- Promoting an awareness and understanding of citizenship; and
- Adjudicating citizenship and naturalization applications in a consistent and accurate manner.

Accordingly, USCIS reviews benefit request for citizenship and naturalization to determine whether:

- Foreign-born children of U.S. citizens by birth or naturalization meet the eligibility requirements before recognizing their acquisition or derivation of U.S. citizenship.
- Persons applying for naturalization based on their time as lawful permanent residents meet the eligibility requirements to become U.S. citizens.
- Persons applying for naturalization based on their marriage to a U.S. citizen meet the eligibility requirements for naturalization through the provisions for spouses of U.S. citizens.
- Members of the U.S. armed forces and their families are eligible for naturalization and ensure that qualified applicants are naturalized expeditiously through the military provisions.
- Persons working abroad for certain entities, to include the U.S. Government, meet the eligibility requirements for certain exceptions to the general naturalization requirements.

Volume 12, Citizenship and Naturalization, contains detailed guidance on the requirements for citizenship and naturalization.

Volume 5, Adoptions, Part F, Citizenship for Adopted Children, clarifies how citizenship provisions apply to adopted children.

Volume 12: Citizenship and Naturalization

Volume 12 Parts		Guidance
Part A	Citizenship and Naturalization Policies and Procedures	General policies and procedures relating to citizenship and naturalization
Part B	Naturalization Examination	Naturalization examination, to include security checks, interview and eligibility review
Part C	Accommodations	Accommodations and modifications that USCIS may provide in the naturalization process
Part D	General Naturalization Requirements	General naturalization requirements that apply to most lawful permanent residents
Part E	English and Civics Testing and Exceptions	Testing for educational requirements for naturalization
Part F	Good Moral Character	Good moral character for naturalization and the related permanent and conditional bars
Part G	Spouses of U.S. Citizens	Spouses of U.S. citizens who reside in the United States or abroad
Part H	Children of U.S. Citizens	Children of U.S. citizens who may have acquired or derived citizenship stateside or abroad
Part I	Military Members and their Families	Provisions based on military service for members of the military and their families
Part J	Oath of Allegiance	Oath of Allegiance for naturalization, to include modifications and waivers
Part K	Certificates of Citizenship and Naturalization	Issuance and replacement of Certificates of Citizenship and Certificates of Naturalization
Part L	Revocation of Naturalization	General procedures for revocation of naturalization (denaturalization)

B. Background

Upon the adoption of the U.S. Constitution in 1787, the first U.S. citizens were granted citizenship status retroactively as of 1776. Neither an application for citizenship, nor the taking of an Oath of Allegiance was required at that time.[1] Persons only needed to remain in the United States at the close of the war and the time of independence to show that they owed their allegiance to the new Government and accepted its protection.

The following key legislative acts provide a basic historical background for the evolution of the general eligibility requirements for naturalization as set forth in the Immigration and Nationality Act (INA).

Evolution of Naturalization Requirements Prior to the Immigration and Nationality Act (INA) of 1952

Act	Statutory Provisions
Naturalization Act of 1790	• Established uniform rule of naturalization and oath of allegiance • Established two year residency requirement for naturalization • Required good moral character of all applicants
Naturalization Act of 1798	• Permitted deportation of aliens considered dangerous • Increased residency requirements from 2 years to 14 years
Naturalization Act of 1802	• Reduced residency requirement from 14 years to 5 years
Naturalization Act of 1891	• Rendered polygamists, persons suffering from contagious disease and persons convicted of a “misdemeanor involving moral turpitude” ineligible for naturalization.
Naturalization Act of 1906	• Standardized naturalization procedures • Required knowledge of English language for citizenship • Established the Bureau of Immigration and Naturalization
The Alien Registration Act of 1940	• Required the registration and fingerprinting of all aliens in the United States over the age of 14 years

C. Legal Authorities

- INA 103; 8 CFR 103 – Powers and duties of the Secretary, the Under Secretary, and the Attorney General
- INA 310; 8 CFR 310 – Naturalization authority
- INA 312; 8 CFR 312 – Educational requirements for naturalization
- INA 316; 8 CFR 316 – General requirements for naturalization
- INA 332; 8 CFR 332 – Naturalization administration; executive functions
- INA 336; 8 CFR 336 – Hearings on denials of applications for naturalization
- INA 337; 8 CFR 337 – Oath of renunciation and allegiance
- 8 CFR 2 – Authority of the Secretary of the Department of Homeland Security

Footnote

[^ 1] See Frank G. Franklin, The Legislative History of Naturalization in the United States; From the Revolutionary War to 1861 (Chicago: The University of Chicago Press, 1906).

Chapter 2 - Becoming a U.S. Citizen

A person may derive or acquire U.S. citizenship at birth. Persons who are born in the United States and subject to the jurisdiction of the United States are citizens at birth. Persons who are born in certain territories of the United States also may be citizens at birth. In general, but subject in some cases to other requirements, including residence requirements as of certain dates, this includes persons born in:

- Puerto Rico on or after April 11, 1899;[1]
- Canal Zone or the Republic of Panama on or after February 26, 1904;[2]
- Virgin Islands on or after January 17, 1917;[3]
- Guam born after April 11, 1899;[4] or
- Commonwealth of the Northern Mariana Islands (CNMI) on or after November 4, 1986.[5]

Persons born in American Samoa and Swains Island are generally considered nationals but not citizens of the United States.[6]

In addition, persons who are born outside of the United States may be U.S. citizens at birth if one or both parents were U.S. citizens at their time of birth. Persons who are not U.S. citizens at birth may become U.S. citizens through naturalization. Naturalization is the conferring of U.S. citizenship after birth by any means whatsoever, including acquisition of citizenship. Persons may acquire citizenship after birth, but before the age of 18, through their U.S. citizen parents.

In general, an applicant files a naturalization application and then USCIS grants citizenship after adjudicating the application. In some cases, a person may be naturalized by operation of law. This is often referred to as deriving citizenship. In either instance, the applicant must fulfill all of the requirements established by Congress. In most cases, a person may not be naturalized unless he or she has been lawfully admitted to the United States for permanent residence.

Deciding to become a U.S. citizen is one of the most important decisions an immigrant can make. Naturalized U.S. citizens share equally in the rights and privileges of U.S. citizenship. U.S. citizenship offers immigrants the ability to:

- Vote in federal elections;
- Travel with a U.S. passport;
- Run for elective office where citizenship is required;
- Participate on a jury;
- Become eligible for federal and certain law enforcement jobs;
- Obtain certain state and federal benefits not available to aliens;
- Obtain citizenship for minor children born abroad; and
- Expand and expedite their ability to bring family members to the United States.

Footnotes

[^ 1] See INA 302.

[^ 2] See INA 303. If the person was born in the Canal Zone, he or she acquired U.S. citizenship at birth if born between February 26, 1904 and October 1, 1979, and one parent was a U.S. citizen at the time of the person's birth. The Canal Zone ceased to exist on October 1, 1979. See the so-called Torrijos–Carter Treaties (September 7, 1977). If the person was born in the Republic of Panama, but not in the Canal Zone, one parent must have been a U.S. citizen parent employed by the U.S. Government, or by the Panama Railroad Company, at the time of the person's birth.

[^ 3] See INA 306.

[^ 4] See INA 307.

[^ 5] See Section 303 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. 94-241 (PDF), 90 Stat. 263, 266 (March 24, 1976) (48 U.S.C. 1801 note). In addition, certain persons in the CNMI who were born before November 4, 1986, and their children if under age 18 on that date, became U.S. citizens at that time. See Section 301 of Pub. L. 94-241 (PDF), 90 Stat. 263, 265-66 (March 24, 1976) (48 U.S.C. 1801 note). In addition, the Department of State will issue U.S. passports to persons born in the Northern Mariana Islands between January 9, 1978 and November 3, 1986, pursuant to a judicial decision holding that such persons are U.S. citizens. See *Sabangan v. Powell*, 375 F. 3d 818 (9th Cir. 2004).

[^ 6] See INA 308.

Chapter 3 - USCIS Authority to Naturalize

It has long been established that Congress has the exclusive authority under its constitutional power to establish a uniform rule of naturalization and to enact legislation under which citizenship may be conferred upon persons.[1] Before 1991, naturalization within the United States was a judicial function exercised since 1790 by various courts designated in statutes enacted by Congress under its constitutional power to establish a uniform rule of naturalization.

As of October 1, 1991, Congress transferred the naturalization authority to the Attorney General (now the Secretary of DHS).[2] USCIS is authorized to perform such acts as are necessary to properly implement the Secretary's authority.[3] In certain cases, an applicant for naturalization may choose to have the Oath of Allegiance[4] administered by USCIS or by an eligible court with jurisdiction. Eligible courts may choose to have exclusive authority to administer the Oath of Allegiance.

Footnotes

[^ 1] See *Chirac v. Chirac*, 15 U.S. 259 (1817).

[^ 2] See INA 310(a).

[^ 3] See INA 310.

[^ 4] See INA 337(a).

Part B - Naturalization Examination

Chapter 1 - Purpose and Background

A. Purpose

USCIS conducts an investigation and examination of all naturalization applicants to determine whether an applicant meets all pertinent eligibility requirements to become a U.S. citizen. The investigation and examination process encompasses all factors relating to the applicant's eligibility:[1]

- Completion of security and criminal background checks;
- Review of the applicant's complete immigration record;
- In-person interview(s) with oral and written testimony;
- Testing for English and civics requirements; and
- Qualification for a disability exception.

USCIS officers have authority to conduct the investigation and examination.[2] The authority includes the legal authority for certain officers to administer the Oath of Allegiance, obtain oral and written testimony during an in-person interview, subpoena witnesses, and request evidence.[3]

The applicant has the burden of establishing eligibility by a preponderance of the evidence throughout the examination.[4] The officer must resolve any pending issues and obtain all of the necessary information and evidence to make a decision on the application. Uniformity in decision-making and application processing is vital to the integrity of the naturalization process. Consistency in the decision-making process enhances USCIS' goal to ensure that the relevant laws and regulations are applied accurately to each case.

B. Background

Beginning in 1906, a complete examination and questioning under oath was required of the "petitioner" (now "applicant") for naturalization and his or her witnesses at the final hearing for naturalization in court.[5] Congress amended the statute in 1940 to include English language requirements and a provision for questioning applicants on their understanding of the principles of the Constitution.[6]

Today, USCIS conducts an investigation and examination of all applicants for naturalization to determine their eligibility for naturalization, including the applicant's lawful admission for permanent residence, ability to establish good moral character, attachment to the Constitution, residence and physical presence in the United States, and the English and civics requirements for naturalization.

C. Legal Authorities

- INA 310; 8 CFR 310 – Naturalization authority
- INA 312; 8 CFR 312 – Educational requirements for naturalization
- INA 316; 8 CFR 316 – General requirements for naturalization
- INA 332; 8 CFR 332 – Procedural and administrative provisions; executive functions
- INA 335; 8 CFR 335 – Investigation and examination of applicant
- INA 336; 8 CFR 336 – Hearings on denials of naturalization application

Footnotes

[^ 1] See INA 335. See 8 CFR 335.1 and 8 CFR 335.2.

[^ 2] See INA 335(b). See 8 CFR 332.1 and 8 CFR 335.2. The authority is delegated by the Secretary of the Department of Homeland Security.

[^ 3] See INA 332, INA 335, and INA 337. See 8 CFR 332, 8 CFR 335, and 8 CFR 337.

[^ 4] See 8 CFR 316.2(b).

[^ 5] In 1981, Congress enacted legislation which eliminated the character witness requirements of naturalization, though USCIS has the authority to subpoena witnesses if necessary.

[^ 6] See the Nationality Act of 1940, Pub. L. 76-853, 54 Stat. 1137 (October 14, 1940).

Chapter 2 - Background and Security Checks

A. Background Investigation

USCIS conducts an investigation of the applicant upon his or her filing for naturalization. The investigation consists of certain criminal background and security checks.[1] The background and security checks include collecting fingerprints and requesting a "name check" from the Federal Bureau of Investigations (FBI). In addition, USCIS conducts other inter-agency criminal background and security checks on all applicants for naturalization. The background and security checks apply to most applicants and must be conducted and completed before the applicant is scheduled for his or her naturalization interview.[2]

B. Fingerprints

1. Fingerprint Requirement

USCIS must collect fingerprint records as part of the background check process on applicants for naturalization regardless of their age.[3] In general, applicants receive a biometric service appointment at a local Application Support Center (ASC) for collection of their biometrics (fingerprints, photographs, and signature).[4]

USCIS notifies applicants in writing to appear for fingerprinting after filing the naturalization application. Fingerprints are valid for 15 months from the date of processing by the FBI. An applicant abandons his or her naturalization application if the applicant fails to appear for the fingerprinting appointment without good cause and without notifying USCIS.[5]

Previously, USCIS had waived the fingerprint requirements for applicants 75 years old or older because it was difficult to capture readable fingerprints from this age group. As a result, applicants 75 years old or older were not required to appear at an ASC. Electronic processing of applications and improved technology now allows USCIS to capture fingerprints for applicants of all ages and enhances the ability to confirm identity and perform required background checks.[6]

Once an ASC collects an applicant's biometrics, USCIS submits the records to the FBI for a full criminal background check.[7] The response from the FBI that a full criminal background check has been completed includes confirmation that:

- The applicant does not have an administrative or a criminal record;
- The applicant has an administrative or a criminal record; or
- The applicant's submitted fingerprint records have been determined unclassifiable for the purpose of conducting a criminal background check and have been rejected.

Accommodations

USCIS makes special arrangements to accommodate the needs of applicants who are unable to attend an appointment, including applicants with disabilities and homebound or hospitalized applicants. All domestic USCIS facilities are accessible to applicants with disabilities. Applicants who are homebound or hospitalized may request an accommodation when unable to appear at an ASC for biometrics processing. Applicants should submit a copy of the appointment notice and medical documentation verifying the need for an in-home appointment with the local field office.

Applicants who need to request an accommodation for their appointment can submit a request online or call the USCIS Contact Center at any time at 800-375-5283 (TDD: 800-767-1833).[8]

2. Fingerprint Waivers

Applicants with Certain Medical Conditions

An applicant may qualify for a waiver of the fingerprint requirement if the applicant is unable to provide fingerprints because of a medical condition, to include birth defects, physical deformities, skin conditions, and psychiatric conditions. Only certain USCIS officers are authorized to grant a fingerprint waiver.

An officer responsible for overseeing applicant fingerprinting may grant the waiver in the following situations:

- The officer has met with the applicant in person;
- The officer or authorized technician has attempted to fingerprint the applicant; and
- The officer determines that the applicant is unable to be fingerprinted at all or is unable to provide a single legible fingerprint.

An applicant who is granted a fingerprint waiver must bring local police clearance letters covering the relevant period of good moral character to his or her naturalization interview. All clearance letters become part of the record. In cases where the applicant is granted a fingerprint waiver or has two unclassifiable fingerprint results, the officer must take a sworn statement from the applicant covering the period of good moral character.

An officer should not grant a waiver if the waiver is solely based on:

- The applicant has fewer than 10 fingers;
- The officer considers that the applicant's fingerprints are unclassifiable; or
- The applicant's condition preventing the fingerprint capturing is temporary.

An officer's decision to deny a fingerprint waiver is final and may not be appealed.

C. FBI Name Checks

The FBI conducts "name checks" on all naturalization applicants, and disseminates the information contained in the FBI's files to USCIS in response to the name check requests. The FBI's National Name Check Program (NNCP) includes a search against the FBI's Universal Index (UNI), which contains personnel, administrative, applicant, and criminal files compiled for law enforcement purposes. The FBI disseminates the information contained in the FBI's files to USCIS in response to the name check requests.

The FBI name check must be completed and cleared before an applicant for naturalization is scheduled for his or her naturalization interview. A definitive FBI name check response of "NR" (No Record) or "PR" (Positive Response) is valid for the duration of the application for which they were conducted. Definitive responses used to support other applications are valid for 15 months from the FBI process date. A new name check is required in cases where the final adjudication and naturalization have not occurred within that timeframe or the name check was processed incorrectly.

Footnotes

[^ 1] See INA 335. See 8 CFR 335.1.

[^ 2] See 8 CFR 335.2(b).

[^ 3] See 8 CFR 103.2(b)(9), 8 CFR 335.1, and 8 CFR 335.2. See Part I, Military Members and their Families, Chapter 6, Required Background Checks [12 USCIS-PM I.6], for guidance on the background and security check procedures for members or veterans of the U.S. armed forces.

[^ 4] See 8 CFR 103.2(a).

[^ 5] See 8 CFR 103.2(b)(13)(ii). See Chapter 4, Results of the Naturalization Examination [12 USCIS-PM B.4].

[^ 6] See INA 335. See 8 CFR 335.1.

[^ 7] See 8 CFR 335.2(b).

[^ 8] See USCIS web pages on Homebound Processing and How to Request Special Accommodation.

Chapter 3 - Naturalization Interview

A. Roles and Responsibilities

1. USCIS Officers

Authority to Conduct Examination

USCIS officers have authority to conduct the investigation and examination, to include the naturalization interview.[1] The officer should introduce him or herself and explain the purpose of the naturalization examination and place the applicant under oath at the start of the interview.

USCIS' authority includes the legal authority for officers to:

- Place an applicant under oath;
- Obtain oral and written testimony during an in-person interview;
- Subpoena witnesses;
- Request evidence; and
- Administer the Oath of Allegiance (when delegated by the Field Office Director).

Questions on Eligibility

An officer's questioning of an applicant during the applicant's naturalization interview must cover all of the requirements for naturalization.[2] In general, the officer's questions focus on the information in the naturalization application. The officer may ask any questions that are pertinent to the eligibility determination. The officer should provide the applicant with suitable opportunities to respond to questions in all instances.

In general, the officer's questions may include, but are not limited to, the following questions:

- Biographical information, to include marital history and military service;
- Admission and length of time as a lawful permanent resident (LPR);
- Absences from the United States after becoming an LPR;
- Places of residence and employment history;
- Knowledge of English and of U.S. history and government (civics);
- Moral character and any criminal history;
- Attachment to the principles of the U.S. Constitution;
- Affiliations or memberships in certain organizations;
- Willingness to take an Oath of Allegiance to the United States; and
- Any other topic pertinent to the eligibility determination.

In most cases, the officer conducting the naturalization interview administers the required tests relating to the applicant's ability to read and write English, and his or her knowledge of U.S. history and government (civics), unless the applicant is exempt.[3] The officer who conducts the naturalization interview and who determines the applicant's ability to speak and understand English is not required to also administer the English reading and writing, and civics tests. Accordingly, a different officer may administer the tests.

Grounding Decisions on Applicable Laws

An officer must analyze the facts of each case to make a legally sound decision on the naturalization application. The officer must base his or her decision to approve or deny the application on the relevant laws, regulations, precedent decisions, and agency guidance:

- The Immigration and Nationality Act (INA) is the primary source of pertinent statutory law.[4]
- The corresponding regulations explain the statutes further and provide guidance on how the statutes are applied.[5]
- Precedent decisions have the force of law and are binding on cases within the jurisdiction of the court or appellate body making the decision.[6]
- USCIS guidance provides the agency's policies and procedures supporting the laws and regulations. The USCIS Policy Manual is the primary source for agency guidance.[7]

2. Authorized Representatives

An applicant may request the presence and counsel of a representative, to include attorneys or other representatives, at the applicant's in-person interview. The representative must submit to USCIS a properly completed notice of entry of appearance.[8]

In cases where an applicant requests to proceed without the assistance of a representative, the applicant must sign a waiver of representation. If the applicant does not want to proceed with the interview without his or her representative, the officer must reschedule the interview. Officers should consult with a supervisor if the representative fails to appear for multiple scheduled interviews.

The representative's role is to ensure that the applicant's legal rights are protected. A representative may advise his or her client on points of law but should not respond to questions the officer has directed to the applicant.

An applicant may be represented by any of the following:

- Attorneys in the United States;[9]
- Certain law students and law graduates not yet admitted to the bar;[10]
- Certain reputable individuals who are of good moral character, have a pre-existing relationship with the applicant and are not receiving any payment for the representation;[11]
- Accredited representatives from organizations accredited by the Board of Immigration Appeals (BIA);[12]
- Accredited officials of the government to which a person owes allegiance;[13] or
- Attorneys outside the United States.[14]

No other person may represent an applicant.[15]

3. Interpreters

An interpreter may be selected either by the applicant or by USCIS in cases where the applicant is permitted to use an interpreter. The interpreter must:

- Translate what the officer and the applicant say word for word to the best of his or her ability without providing the interpreter's own opinion, commentary, or answer; and
- Complete an interpreter's oath and privacy release statement and submit a copy of his or her government-issued identification at the naturalization interview.

A disinterested party should be used as an interpreter. If the USCIS officer is fluent in the applicant's native language, the officer may conduct the examination in the applicant's language of choice.

USCIS reserves the right to disqualify an interpreter provided by the applicant if an officer considers that the integrity of the examination is compromised by the interpreter's participation.

B. Preliminary Review of Application

A USCIS officer who is designated to conduct the naturalization interview should review the applicant's "A-file" and naturalization application before the interview. The A-file is the applicant's record of his or her interaction with USCIS, legacy Immigration and Naturalization Service (INS), and other governmental organizations with which the applicant has had proceedings pertinent to his or her immigration record. The officer addresses all pertinent issues during the naturalization interview.

1. General Contents of A-File

The applicant's A-file may include the following information along with his or her naturalization application:

- Documents that show how the applicant became an LPR;
- Other applications or forms for immigration benefits submitted by the applicant;
- Correspondence between USCIS and the applicant;
- Memoranda and forms from officers that may be pertinent to the applicant's eligibility;
- Materials such as any criminal records,[16] correspondence from other agencies, and investigative reports and enforcement actions from DHS or other agencies.

2. Jurisdiction for Application[17]

In most cases, the USCIS office having jurisdiction over the applicant's residence at the time of filing has the responsibility for processing and adjudicating the naturalization application.[18] An officer should review whether the jurisdiction of a case has changed because the applicant has moved after filing his or her naturalization application. The USCIS office may transfer the application to the appropriate office with jurisdiction when appropriate.[19] In addition, an applicant for naturalization as a battered spouse of a U.S. citizen[20] or child may use a different address for safety which does not affect the jurisdiction requirements.

In cases where an officer becomes aware of a change in jurisdiction during the naturalization interview, the officer may complete the interview and then forward the applicant's A-file with the pending application to the office having jurisdiction. The officer informs the applicant that the application's jurisdiction has changed. The applicant will receive a new appointment notice from the current office with jurisdiction.

3. Results of Background and Security Checks[21]

An officer should ensure that all of the appropriate background and security checks have been conducted on the naturalization applicant. The results of the background and security checks should be included as part of the record.

4. Other Documents or Requests in the Record

Requests for Accommodations or Disability Exceptions

USCIS accommodates applicants with disabilities by making modifications to the naturalization examination process.[22] An officer reviews the application for any accommodations request, any oath waiver request, or for a medical disability exception from the educational requirements for naturalization.[23]

Previous Notice to Appear, Order to Show Cause, or Removal Order

An officer reviews an applicant's record and relevant databases to identify any current removal proceedings or previous proceedings resulting in a final order of removal from the United States. If an applicant is in removal proceedings, a Notice to Appear or the previously issued "Order to Show Cause" may appear in the applicant's record.[24] USCIS denies any naturalization application from an applicant who is in removal proceedings, except for certain cases involving naturalization based on military service.[25]

The officer should deny the naturalization application if the applicant has already received a final order of removal from an immigration judge, unless:

- The applicant was removed from the United States and later reentered with the proper documentation and authorization; or
- The applicant is filing for naturalization under the military naturalization provisions.[26]

C. Initial Naturalization Examination

All naturalization applicants must appear for an in-person examination before a USCIS officer after filing an Application for Naturalization (Form N-400).[27] The applicant's examination includes both the interview and the administration of the English and civics tests. The applicant's interview is a central part of the naturalization examination. The officer conducts the interview with the applicant to review and examine all factors relating to the applicant's eligibility.

The officer places the applicant under oath and interviews the applicant on the questions and responses in the applicant's naturalization application.[28] The initial naturalization examination includes:

- An officer's review of information provided in the applicant's naturalization application;
- The administration of tests on the educational requirements for naturalization;[29] and
- An officer's questions relating to the applicant's eligibility for naturalization.[30]

The applicant's written responses to questions on his or her naturalization application are part of the documentary record signed under penalty of perjury. The written record includes any amendments to the responses in the application that the officer makes in the course of the naturalization interview as a result of the applicant's testimony. The amendments, sworn affidavits, and oral statements and answers document the applicant's testimony and representations during the naturalization interview(s).

At the officer's discretion, he or she may record the interview by a mechanical, electronic, or videotaped device, may have a transcript made, or may prepare an affidavit covering the testimony of the applicant.[31] The applicant or his or her authorized attorney or representative may request a copy of the record of proceedings through the Freedom of Information Act (FOIA).[32]

The officer provides the applicant with a notice of results at the end of the examination regardless of the outcome.[33] The notice provides the outcome of the examination and should explain what the next steps are in cases that are continued.[34]

D. Subsequent Re-examination

USCIS may schedule an applicant for a subsequent examination (re-examination) to determine the applicant's eligibility.[35] During the re-examination:

- The officer reviews any evidence provided by the applicant in a response to a Request for Evidence issued during or after the initial interview.
- The officer considers new oral and written testimony and determines whether the applicant meets all of the naturalization eligibility requirements, to include re-testing the applicant on the educational requirements (if necessary).

In general, the re-examination provides the applicant with an opportunity to overcome deficiencies in his or her naturalization application. Where the re-examination is scheduled for failure to meet the educational requirements for naturalization during the initial examination, the subsequent re-examination is scheduled between 60 and 90 days from the initial examination.[36]

If the applicant is unable to overcome the deficiencies in his or her naturalization application, the officer denies the naturalization application. An applicant or his or her authorized representative may request a USCIS hearing before an officer on the denial of the applicant's naturalization application.[37]

E. Expediting Applications from Certain SSI Beneficiaries

USCIS will expedite naturalization applications filed by applicants:

- Who are within 1 year or less of having their Supplemental Security Income (SSI) benefits terminated by the Social Security Administration (SSA); and
- Whose naturalization application has been pending for 4 months or more from the date of receipt by USCIS.

Although USCIS will prioritize processing of these applications, each applicant is still required to meet all eligibility requirements for naturalization at the time of filing. Applicants, who have pending applications, must inform USCIS of the approaching termination of benefits by InfoPass appointment or by United States postal mail or other courier service by providing:

- A cover letter or cover sheet to explain that SSI benefits will be terminated within 1 year or less and that their naturalization application has been pending for 4 months or more from the date of receipt by USCIS; and
- A copy of the applicant's most recent SSA letter indicating the termination of their SSI benefits. (The USCIS A-number must be written at the top right of the SSA letter).

Applicants who have not filed their naturalization application may write “SSI” at the top of page one of the application. Applicants should include a cover letter or cover sheet along with their application to explain that their SSI benefits will be terminated within 1 year or less.

Footnotes

[^ 1] See INA 335(b). See 8 CFR 335.2.

[^ 2] See Part D, General Naturalization Requirements [12 USCIS-PM D].

[^ 3] See Part E, English and Civics Testing and Exceptions [12 USCIS-PM E].

[^ 4] See Pub. L. 82-414 (June 27, 1952), as amended.

[^ 5] See Title 8 of the Code of Federal Regulations (8 CFR). Most of the corresponding regulations have been promulgated by legacy INS or USCIS.

[^ 6] Precedent decisions are judicial decisions that serve as an authority for deciding an immigration matter. Precedent decisions are decisions designated as such by the Board of Immigration Appeals (BIA), Administrative Appeals Office (AAO), and appellate court decisions. Decisions from district courts are not precedent decisions in other cases.

[^ 7] The Adjudicator’s Field Manual (AFM) and policy memoranda also serve as key sources for guidance on topics that are not covered in the Policy Manual.

[^ 8] See 8 CFR 335.2(a). The representative must use the Notice of Entry of Appearance as Attorney or Representative (Form G-28).

[^ 9] See 8 CFR 292.1(a)(1).

[^ 10] See 8 CFR 292.1(a)(2).

[^ 11] See 8 CFR 292.1(a)(3).

[^ 12] See 8 CFR 292.1(a)(4). See 8 CFR 292.2.

[^ 13] See 8 CFR 292.1(a)(5).

[^ 14] See 8 CFR 292.1(a)(6). In naturalization cases, attorneys licensed only outside the United States may represent an applicant only when the naturalization proceeding can occur overseas and where DHS allows the representation as a matter of discretion. Attorneys licensed only outside the United States cannot represent an applicant whose naturalization application is processed solely within the United States unless the attorney also qualifies under another representation category.

[^ 15] See 8 CFR 292.1(e).

[^ 16] For example, a Record of Arrest and Prosecution (“RAP” sheet).

[^ 17] See Part D, General Naturalization Requirements, Chapter 6, Jurisdiction, Place of Residence, and Early Filing [12 USCIS-PM D.6].

[^ 18] An applicant who is a student or a member of the U.S. armed forces may have different places of residence that may affect the jurisdiction requirement. See 8 CFR 316.5(b).

[^ 19] See 8 CFR 335.9.

[^ 20] See INA 319(a).

[^ 21] See Chapter 2, Background and Security Checks [12 USCIS-PM B.2].

[^ 22] See Part C, Accommodations [12 USCIS-PM C].

[^ 23] See Part E, English and Civics Testing and Exceptions, Chapter 3, Medical Disability Exception (N-648) [12 USCIS-PM E.3]. See Part J, Oath of Allegiance, Chapter 3, Oath of Allegiance Modifications and Waivers [12 USCIS-PM J.3].

[^ 24] An Order to Show Cause was the notice used prior to enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. 104–208 (PDF), 110 Stat. 3009 (September 30, 1996).

[^ 25] See INA 328(b)(2) (applicants currently in the U.S. armed forces and eligible for military naturalization under INA 328(a)). See INA 329(b)(1) (applicants eligible for military naturalization under INA 329(a)). See Part D, General Naturalization Requirements, Chapter 2, Lawful Permanent Resident Admission for Naturalization [12 USCIS-PM D.2].

[^ 26] See INA 328(b)(2). See INA 329(b)(1).

[^ 27] See 8 CFR 335.2(a).

[^ 28] If an applicant is unable to undergo any part of the naturalization examination because of a physical or developmental disability or mental impairment, a legal guardian, surrogate or an eligible designated representative completes the naturalization process for the applicant. See Part J, Oath of Allegiance, Chapter 3, Oath of Allegiance Modifications and Waivers [12 USCIS-PM J.3].

[^ 29] See Part E, English and Civics Testing and Exceptions [12 USCIS-PM E]. USCIS may administer the test separately from the interview.

[^ 30] See the relevant Volume 12 [12 USCIS-PM] part for the specific eligibility requirements for each naturalization provision.

[^ 31] See 8 CFR 335.2(c).

[^ 32] The applicant or authorized attorney or representative may request a copy of the record of proceedings by filing a Freedom of Information/Privacy Act Request (Form G-639).

[^ 33] The officer must use the Naturalization Interview Results (Form N-652).

[^ 34] See Chapter 4, Results of the Naturalization Examination [12 USCIS-PM B.4].

[^ 35] A USCIS field office may allow the applicant to provide documentation by mail in order to overcome any deficiencies without scheduling the applicant to come in person for another interview.

[^ 36] See 8 CFR 335.3(b) (Re-examination no earlier than 60 days from initial examination). See 8 CFR 312.5(a) (Re-examination for educational requirements scheduled no later than 90 days from initial examination). In cases where an applicant does not meet the educational requirements for naturalization during the re-examination, USCIS denies the application. See Part E, English and Civics Testing and Exceptions, Chapter 2, English and Civics Testing [12 USCIS-PM E.2].

[^ 37] See Chapter 6, USCIS Hearing and Judicial Review [12 USCIS-PM B.6]. See Section A, Roles and Responsibilities [12 USCIS-PM B.3(A)], for a list of authorized representatives. See 8 CFR 292.1.

Chapter 4 - Results of the Naturalization Examination

USCIS has 120 days from the date of the initial naturalization interview to issue a decision. If the decision is not issued within 120 days of the interview, an applicant may request judicial review of his or her application in district court. The officer must base his or her decision on the laws, regulations, precedent decisions, and governing policies.

The officer may:

- Approve the application;
- Continue the examination without making a decision (if more information is needed), if the applicant needs to be rescheduled, or for other relevant reasons; or
- Deny the application.

The officer must provide the applicant with a notice of results at the end of the interview regardless of the outcome. The notice should address the outcome of the interview and the next steps involved for continued cases.[1]

A. Approval of Naturalization Application

If an officer approves a naturalization application, the application goes through the appropriate internal procedures before the USCIS office schedules the applicant to appear at a ceremony for the administration of the Oath of Allegiance.[2] The internal procedures include a “re-verification” procedure where all approved applications are reviewed for quality. The officer who conducts the re-verification is not the same officer who conducts the interview. While the officer conducting the re-verification process does not adjudicate the application once again, the officer may raise any substantive eligibility issues.

USCIS does not schedule an applicant for the Oath of Allegiance in cases where USCIS receives or identifies potentially disqualifying information about the applicant after approval of his or her application.[3] If USCIS cannot resolve the disqualifying information and the adjudicating officer finds the applicant ineligible for naturalization, USCIS then issues a motion to reopen and re-adjudicates the naturalization application.

B. Continuation of Examination

1. Continuation to Request Evidence

An officer issues the applicant a written Request for Evidence if additional information is needed to make an accurate determination on the naturalization application.[4] In general, USCIS permits a period of 30 days for the applicant to respond to a Request for Evidence.[5]

The Request for Evidence should include:

- The specific documentation or information that the officer is requesting;
- The ways in which the applicant may respond; and
- The date by which the applicant has to reply.

The applicant must respond to the Request for Evidence within the timeframe specified by the officer. If the applicant timely submits the evidence as requested, the officer makes a decision on the applicant’s eligibility. If the applicant fails to submit the evidence as requested, the officer may adjudicate the application based on the available evidence.[6]

2. Scheduling Subsequent Re-examination

If an applicant fails any portion of the naturalization test, an officer must provide the applicant a second opportunity to pass the test within 60 to 90 days after the initial examination unless the applicant is statutorily ineligible for naturalization based on other grounds.[7] An officer should also schedule a re-examination in order to resolve any issues on eligibility.

The outcome of the re-examination determines whether the officer conducting the second interview continues, approves, or denies the naturalization application.[8]]

If the applicant fails to appear for the re-examination and USCIS does not receive a timely or reasonable request to reschedule, the officer should deny the application based on the applicant’s failure to meet the educational requirements for naturalization. The officer also should include any other areas of ineligibility within the denial notice.

C. Denial of Naturalization Application

USCIS must deny a naturalization application when an applicant does not meet all eligibility requirements under the law. Furthermore, USCIS cannot consider the naturalization application of an applicant who is in removal proceedings. Therefore, effective November 18, 2020, when a removal proceeding is pending against a naturalization applicant, USCIS denies the naturalization application under INA 318, except for certain cases involving naturalizations based on military service.[9]

The officer should deny the naturalization application if the applicant has already received a final order of removal from an immigration judge, unless:

- The applicant was removed from the United States and later reentered with the proper documentation and authorization; or
- The applicant is filing for naturalization under the military naturalization provisions.[10]

If an officer denies a naturalization application, the officer must issue the applicant and his or her attorney or representative a written denial notice no later than 120 days after the initial interview on the application.[11] The written denial notice should include:

- A clear and concise statement of the facts in support of the decision;
- Citation of the specific eligibility requirements the applicant failed to demonstrate; and
- Information on how the applicant may request a hearing on the denial.[12]

The table below provides certain general grounds for denial of the naturalization application. An officer should review the pertinent parts of this volume that correspond to each ground for denial and its related eligibility requirement for further guidance.

General Grounds for Denial of Naturalization Application (Form N-400)

Failure to Establish…	Citation
Lawful Admission for Permanent Residence	• INA 316(a)(1) • INA 318 • 8 CFR 316.2(a)(2)
Continuous Residence	• INA 316(a)(2) • INA 316(b) • 8 CFR 316.2(a)(3) • 8 CFR 316.5(c)
Physical Presence	• INA 316(a) • 8 CFR 316.2(a)(4)
3 Months of Residence in State or Service District	• INA 316(a) • 8 CFR 316.2(a)(5)
Good Moral Character	• INA 316(a)(3) • INA 316(e) • INA 101(f) • 8 CFR 316.10
Attachment and Favorable Disposition to the Good Order and Happiness of the United States	• INA 316(a)(3) • 8 CFR 316.11
Understanding of English (Including Reading, Writing, and Speaking)	• INA 312(a)(1) • 8 CFR 312.1
Knowledge of U.S. History and Government	• INA 312(a)(2) • 8 CFR 312.2
Lack of Prosecution	• INA 335(e) • 8 CFR 335.7

D. Administrative Closure, Lack of Prosecution, Withdrawal, and Applications Not Held in Abeyance

1. Administrative Closure for Failing to Appear at Initial Interview

An applicant abandons their application if the applicant fails to appear for their initial naturalization examination without good cause and without notifying USCIS of the reason for non-appearance within 30 days of the scheduled appointment. In the absence of timely notification by the applicant, an officer may administratively close the application without making a decision on the merits.[13]

An applicant may request to reopen an administratively closed application without fee by submitting a written request to USCIS within 1 year from the date the application was closed.[14] The date of the applicant's request to reopen an application becomes the date of filing the naturalization application for purposes of determining eligibility for naturalization.[15]

If the applicant does not request reopening of an administratively closed application within 1 year from the date the application was closed, USCIS:

- Considers the naturalization application abandoned; and
- Dismisses the application without further notice to the applicant.[16]

2. Failing to Appear for Subsequent Re-examination or to Respond to Request for Evidence

If the applicant fails to appear at the subsequent re-examination or fails to respond to a Request for Evidence within 30 days, the officer must adjudicate the application on the merits.[17] This includes cases where the applicant fails to appear at a re-examination or to provide evidence as requested.

An officer should consider any good cause exceptions provided by the applicant for failing to respond or appear for an examination in adjudicating a subsequent motion to reopen.

3. Withdrawal of Application

The applicant may request, in writing, to withdraw his or her application. The officer must inform the applicant that the withdrawal by the applicant constitutes a waiver of any future hearing on the application. If USCIS accepts the withdrawal, the applicant may submit another application without prejudice. USCIS does not send any further notice regarding the application.

If the District Director does not consent to the withdrawal, the officer makes a decision on the merits of the application.[18]

4. Applications Not Held in Abeyance if Applicant is in Removal Proceedings

USCIS cannot consider the naturalization application of an applicant who is in removal proceedings. Effective November 18, 2020, when a removal proceeding is pending against a naturalization applicant, USCIS denies the naturalization application under INA 318 and the naturalization application is not held in abeyance, except for certain applications for naturalization based on military service.[19]

Footnotes

[^ 1] The officer issues a Notice of Examination Results (Form N-652).

[^ 2] See Part J, Oath of Allegiance [12 USCIS-PM J].

[^ 3] See 8 CFR 335.5. See Chapter 5, Motion to Reopen [12 USCIS-PM B.5].

[^ 4] The officer issues a Request for Evidence on Form N-14.

[^ 5] See 8 CFR 335.7. The applicant has up to three more days after the 30-day period for responding to an RFE in cases where USCIS has mailed the request. See 8 CFR 103.8(b). For more information on timeframes and responses to Requests for Evidence, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 6] See 8 CFR 335.7.

[^ 7] See 8 CFR 312.5(a). See 8 CFR 335.3(b).

[^ 8] See Part E, English and Civics Testing and Exceptions, Chapter 2, English and Civics Testing [12 USCIS-PM E.2].

[^ 9] See INA 328(b)(2) (applicants currently in the U.S. armed forces and eligible for military naturalization under INA 328(a)). See INA 329(b)(1) (applicants eligible for military naturalization under INA 329(a)). See Part D, General Naturalization Requirements, Chapter 2, Lawful Permanent Resident Admission for Naturalization [12 USCIS-PM D.2].

[^ 10] See INA 328(b)(2). See INA 329(b)(1).

[^ 11] See INA 335(d). See 8 CFR 336.1(a). See 8 CFR 335.7.

[^ 12] See 8 CFR 336.1(b). See Chapter 6, USCIS Hearing and Judicial Review [12 USCIS-PM B.6].

[^ 13] See 8 CFR 103.2(b)(13)(ii), 8 CFR 335.6(a), and 8 CFR 335.6(b). For more information on timeframes and responses, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)]. Military applicants, however, generally may file a motion to reopen at any time. See Part I, Military Members and their Families [12 USCIS-PM I].

[^ 14] See 8 CFR 335.6(b). See Chapter 5, Motion to Reopen [12 USCIS-PM B.5]. For more information on filing timeframes, see Volume 1, General Policies and Procedures, Part B, Submission of Benefit Requests, Chapter 6, Submitting Requests, Section D, Filing Periods Ending on Weekends or Federal Holidays [1 USCIS-PM B.6(D)].

[^ 15] See 8 CFR 335.6(b).

[^ 16] See 8 CFR 335.6(c).

[^ 17] See INA 335(e). See 8 CFR 335.7. For more information on timeframes and responses to Requests for Evidence, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 18] See INA 335(e). See 8 CFR 335.10.

[^ 19] See INA 328(b)(2) (applicants currently in the U.S. Armed Forces and eligible for military naturalization under INA 328(a)). See INA 329(b)(1) (applicants eligible for military naturalization under INA 329(a)). See Part D, General Naturalization Requirements, Chapter 2, Lawful Permanent Resident Admission for Naturalization [12 USCIS-PM D.2].

Chapter 5 - Motion to Reopen

A. USCIS Motion to Reopen

An officer must execute a motion to reopen a previously approved naturalization application if:

- USCIS receives or identifies disqualifying derogatory information about the applicant after approval of his or her application prior to the administration of the Oath of Allegiance;[1] or
- An applicant fails to appear for at least two ceremonies to take the Oath of Allegiance without good cause.[2]

USCIS notifies the applicant in writing about the receipt of derogatory information or multiple failures to appear through the motion to reopen. The applicant has 15 days to respond to the motion to reopen and overcome the derogatory information or provide good cause for failing to appear at the Oath ceremony.[3]

If the applicant overcomes the derogatory information and qualifies for naturalization, the officer denies the motion to reopen and schedules the applicant for the Oath of Allegiance. If the applicant is unable to overcome the derogatory information, the officer grants the motion to reopen and denies the application on its merits.[4]

USCIS must not schedule an applicant for the administration of the Oath of Allegiance if USCIS receives or identifies disqualifying derogatory information. USCIS must not administer the Oath of Allegiance to the applicant until the matter is resolved favorably.

An applicant who fails to appear for at least two ceremonies to administer the Oath of Allegiance without good cause abandons his or her intent to be naturalized. USCIS considers multiple failures to appear to be equivalent to receipt of derogatory information after the approval of a naturalization application.[5]

B. Motion to Reopen Administratively Closed Application

An applicant may request to reopen an administratively closed naturalization application with USCIS by submitting a written request to USCIS within one year of the date the applicant's application was administratively closed.[6] The applicant is not required to pay any additional fees. USCIS considers the date of the applicant's request to reopen an application as the filing date of the naturalization application for purposes of determining eligibility for naturalization.[7] USCIS sends the applicant a notice approving or denying the motion to reopen.

Footnotes

[^ 1] See 8 CFR 335.5.

[^ 2] See 8 CFR 337.10.

[^ 3] See 8 CFR 335.5. For more information on timeframes and responses, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 4] See 8 CFR 336.1.

[^ 5] See 8 CFR 337.10.

[^ 6] Generally, military applicants may file a motion to reopen at any time. See Part I, Military Members and their Families, Chapter 6, Required Background Checks, Section C, Ways Service Members may Meet Fingerprint Requirement [12 USCIS-PM I.6(C)].

[^ 7] See 8 CFR 335.6(b). For more information on timeframes and responses, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

Chapter 6 - USCIS Hearing and Judicial Review

A. Hearing Request

An applicant or his or her authorized representative[1] may request a USCIS hearing before an officer on the denial of the applicant's naturalization application. The applicant or authorized representative must file the request with USCIS within 30 days after the applicant receives the notice of denial.[2]

B. Review of Timely Filed Hearing Request

1. Hearing Scheduled within 180 Days

Upon receipt of a timely hearing request, USCIS schedules the hearing within 180 days. The hearing should be conducted by an officer other than the officer who conducted the original examination or the officer who denied the application. The officer conducting the hearing must be classified at a grade level equal to or higher than the grade of the examining officer.[3]

2. Review of Application

An officer may conduct a de novo review of the applicant's naturalization application or may utilize a less formal review procedure based on:

- The complexity of the issues to be reviewed or determined; and
- The necessity of conducting further examinations essential to the naturalization requirements.[4]

A de novo review means that the officer makes a new and full review of the naturalization application.[5]

An officer conducting the hearing has the authority and discretion to:

- Review all aspects of the naturalization application and examine the applicant anew;
- Review any record, file or report created as part of the examination;

- Receive new evidence and testimony relevant to the applicant's eligibility; and
- Affirm the previous officer's denial or re-determine the decision in whole or in part.

The officer conducting the hearing:

- Affirms the findings in the denial and sustains the original decision to deny;
- Re-determines the original decision but denies the application on newly discovered grounds of ineligibility;[6] or
- Re-determines the original decision and reverses the original decision to deny, and approves the naturalization application.

3. English and Civics Testing at Hearing

In hearings involving naturalization applications denied on the basis of failing to meet the educational requirements (English and civics),[7] officers must administer any portion of the English or civics tests that the applicant previously failed. Officers provide only one opportunity to pass the failed portion of the tests at the hearing.

C. Improperly Filed Hearing Request

1. Untimely Filed Request

If an applicant files a hearing request over 30 days after receiving the denial notice (33 days if notice was mailed by USCIS[8]), USCIS considers the request improperly filed. If an applicant's untimely hearing request meets either the motion to reopen or motion to reconsider requirements, USCIS will treat the hearing request as a motion.[9] USCIS renders a decision on the merits of the case in such instances. If the request does not meet the motion requirements, USCIS rejects the request without refund of filing fee.[10]

Hearing Request Treated as a Motion to Reopen

USCIS treats an untimely request for a hearing as a motion to reopen if the applicant presents new facts and evidence. If the application or petition was denied due to abandonment, the request must be filed with evidence that the decision was in error because:

- The requested evidence leading to the denial was not material to the issue of eligibility;
- The required initial evidence was submitted with the application, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or
- USCIS sent the relevant correspondence to the wrong address or the applicant filed a timely change of address before USCIS sent the correspondence.[11]

Hearing Request Treated as a Motion to Reconsider

USCIS handles an untimely hearing request for a hearing as a motion to reconsider if:

- The applicant explains the reasons for reconsideration;
- Pertinent precedent decisions establish that the decision to deny was based on an incorrect application of law or USCIS policy; and
- The applicant establishes that the decision to deny was incorrect based on the evidence of record at the time of the decision.[12]

2. Requests Improperly Filed by Unauthorized Persons or Entities

USCIS considers a hearing request improperly filed if an unauthorized person or entity files the request.[13] USCIS rejects these requests without refund of filing fee.[14]

3. Requests Improperly Filed by Attorneys or Authorized Representatives

USCIS considers a hearing request improperly filed if an attorney or representative files the request without properly filing a notice of entry of appearance entitling that person to represent the applicant. The officer must ask the attorney or representative to submit a proper filed notice within 15 days.[15]

If the attorney or representative replies with a properly executed notice within 15 days, the officer should handle the hearing request as properly filed. If the attorney or representative fails to do so, the officer may nevertheless make a new decision favorable to the applicant through the officer's own motion to reopen without notifying the attorney or representative.[16]

D. Judicial Review

A naturalization applicant may request judicial review before a United States district court of his or her denied naturalization application after USCIS issues the decision following the hearing with a USCIS officer.[17] The applicant must file the request before the United States District Court having jurisdiction over the applicant's place of residence. The district court reviews the case de novo and makes its own findings of fact and conclusions of law.

Footnotes

[^ 1] See Chapter 3, Naturalization Interview, Section A, Roles and Responsibilities [12 USCIS-PM B.3(A)], for a list of authorized representatives. See 8 CFR 292.1.

[^ 2] See INA 336(a). See 8 CFR 336.2. See the Request for Hearing on a Decision in Naturalization Proceedings under Section 336 of the INA (Form N-336).

[^ 3] See 8 CFR 336.2(b).

[^ 4] See 8 CFR 336.2(b).

[^ 5] The term "de novo" is Latin for "anew." In this context, it means the starting over of the application's review.

[^ 6] In re-determining the decision, the officer may take any action necessary, including issuing a Request for Evidence (RFE) or a Notice of Intent to Deny (NOID).

[^ 7] See INA 312. See 8 CFR 312. See Part E, English and Civics Testing and Exceptions [12 USCIS-PM E].

[^ 8] See 8 CFR 103.8(b). For more information on filing timeframes, see Volume 1, General Policies and Procedures, Part B, Submission of Benefit Requests, Chapter 6, Submitting Requests, Section D, Filing Periods Ending on Weekends or Federal Holidays [1 USCIS-PM B.6(D)].

[^ 9] See 8 CFR 336.2(c)(2)(ii).

[^ 10] See 8 CFR 336.2(c)(2)(i).

[^ 11] See 8 CFR 103.5(a)(2).

[^ 12] See 8 CFR 103.5(a)(3).

[^ 13] See Chapter 3, Naturalization Interview, Section A, Roles and Responsibilities [12 USCIS-PM B.3(A)], for a list of authorized representatives. See 8 CFR 292.1.

[^ 14] See 8 CFR 336.2(c)(1)(i).

[^ 15] See 8 CFR 336.2(c)(1)(ii). See Form G-28.

[^ 16] See 8 CFR 336.2(c)(1)(ii) and 8 CFR 103.5(a)(5)(i).

[^ 17] See INA 310(c). See INA 336(a).

Part C - Accommodations

Chapter 1 - Purpose and Background

A. Purpose

USCIS accommodates naturalization applicants with disabilities by making modifications to the naturalization process.[1] USCIS aims to provide applicants with disabilities an equal opportunity to successfully complete the process. While USCIS is not required to make major modifications that would result in a fundamental change to the naturalization process or an undue burden for the agency, USCIS makes every effort to provide accommodations to naturalization applicants with disabilities.[2]

- USCIS evaluates disability accommodation requests on a case-by-case basis as accommodations vary according to the nature of the applicant's disability. In determining what type of accommodation is necessary, USCIS gives primary consideration to the requests of the person with a disability.
- USCIS provides applicants with the requested accommodation or an effective alternative that addresses the unique needs of the applicant where appropriate.[3]

Applicants may request an accommodation at the time of filing their naturalization application or at any other time during the naturalization process.[4]

B. Background

The Rehabilitation Act requires all federal agencies to provide reasonable accommodations to persons with disabilities in the administration of their programs and benefits.[5] USCIS does not exclude persons with disabilities from its programs or activities based on their disability. The Rehabilitation Act and the implemented DHS regulations[6] require USCIS to provide accommodations that assist an applicant with a disability to have an equal opportunity to participate in its programs, to include the naturalization process.

C. Difference between Accommodations and Waivers

Accommodations are different from statutory waivers or exceptions. For example, if an officer grants an applicant a waiver for a naturalization educational requirement, the applicant is exempt from meeting that educational requirement. An accommodation is a modification of an existing practice or procedure that will enable an applicant with a disability to participate in the naturalization process.

The accommodation does not exempt the applicant from the obligation to satisfy any applicable requirement for naturalization. The accommodation is a modification to the way in which the applicant may establish that he or she meets the requirement.[7]

D. Legal Authorities

- Section 504 of the Rehabilitation Act of 1973 – Nondiscrimination under federal grants[8]
- 29 U.S.C. 794 – Nondiscrimination under federal grants and programs
- 6 CFR 15 – Enforcement of nondiscrimination on the basis of disability in programs or activities conducted by DHS
- 8 CFR 334.4 – Investigation and report if applicant is sick or disabled

Footnotes

[^ 1] See 6 CFR 15.3 for the applicable definitions relating to enforcement of nondiscrimination on the basis of disability in programs or activities conducted by DHS.

[^ 2] See A Guide to Interacting with People Who Have Disabilities (PDF).

[^ 3] See, for example, 6 CFR 15.50 and 6 CFR 15.60.

[^ 4] In some cases, applicants with physical impairments such as blindness or low vision or hearing loss may have submitted a medical disability exception form (Form N-648) along with their naturalization application to request an exception from the English and civics tests as they may be unable to take the tests, even with an accommodation. See Part E, English and

Civics Testing and Exceptions, Chapter 3, Medical Disability Exception (Form N-648) [12 USCIS-PM E.3].

[^ 5] See Section 504 of the Rehabilitation Act of 1973, Pub. L. 93-112 (PDF), 87 Stat. 355, 394 (September 26, 1973). See 29 U.S.C. 794(a). The Act prohibits qualified persons with a disability from being excluded from participation in, denied the benefits of, or being subjected to discrimination under any programs or activities conducted by federal agencies solely on the basis of their disability.

[^ 6] See 6 CFR 15.

[^ 7] The accommodations discussed in this part are distinguished from the oath waiver process by which the applicant's complete examination is conducted by a legal guardian or surrogate appointed by a court of law, or an eligible designated representative. See Part J, Oath of Allegiance, Chapter 3, Oath of Allegiance Modifications and Waivers [12 USCIS-PM J.3].

[^ 8] See Pub. L. 93-112 (PDF), 87 Stat. 355, 394 (September 26, 1973).

Chapter 2 - Accommodation Policies and Procedures

USCIS has established policies and procedures for handling and processing accommodation requests, which include:

- Providing information locally as needed on how to request accommodations;
- Designating a point-of-contact to handle accommodation requests whenever possible;
- Responding to inquiries and reviewing accommodation requests timely;
- Establishing internal processes for receiving and for properly filing requests; and
- Processing requests and providing accommodations whenever appropriate.

A. Requesting an Accommodation

1. Submitting the Request

It is the applicant's responsibility to request an accommodation in advance, each time an accommodation is needed. Generally, the applicant, his or her attorney or accredited representative, or legal guardian should request an accommodation concurrently with the filing of the naturalization application. However, an applicant may also call the USCIS Contact Center at 1-800-375-5283 (TTY: 1-800-767-1833), use the online accommodations request form in order to request an accommodation, or request an accommodation with the field office at any time during the naturalization process.

2. Timeliness of Request

The field office's ability to provide an accommodation on the date that it is needed may be affected by the timeliness of the accommodation request. Some types of accommodations do not require advance notice and can be immediately provided. This may include a USCIS employee speaking loudly or slowly to an applicant, or allowing additional time for an applicant to answer during the examination. Other types of accommodations may be difficult to provide without advance planning. This may include providing a sign language interpreter, additional time for the examination, or scheduling an applicant for an off-site examination.

B. Documentation and Evidence

USCIS evaluates each request for an accommodation on a case-by-case basis. While an applicant is not required to include documentation of his or her medical condition, there may be rare cases where documentation is needed to evaluate the request.[1]

C. Providing Accommodations as Requested

If an accommodation is warranted, a field office should provide the accommodation on the date and time the applicant is scheduled for his or her appearance. The field office should aim to provide the requested accommodation without having to reschedule the applicant's appointment. If an accommodation cannot be provided for the scheduled appointment, the applicant and his or her attorney or accredited representative should be notified as soon as possible. The applicant's appointment should be rescheduled within a reasonable period of time.

Footnote

[^ 1] Officers should contact local USCIS counsel prior to contacting the applicant and his or her attorney or accredited representative for further information.

Chapter 3 - Types of Accommodations

There are many types of accommodations that USCIS provides for applicants with disabilities.[1] Accommodations typically relate to the following:

- Naturalization interview;
- Naturalization test; and
- Oath of Allegiance.

Each accommodation may apply to any aspect of the naturalization process as needed, to include any pre-examination procedures.

USCIS recognizes that some applicants may only require one accommodation, while others may need more. Some applicants may need one accommodation at a particular stage of the naturalization process and may require the same or another type of accommodation at a later date.

A. Accommodations for the Naturalization Examination

Field offices are able to make modifications to provide accommodations during the naturalization examination to applicants with disabilities. The table below serves as a quick reference guide listing common examples of accommodations to the naturalization examination for applicants with disabilities. The paragraphs that follow the table provide further guidance on each accommodation example.

Accommodations for the Naturalization Examination

Accommodation	Explanation
Extending examination time and breaks	Some applicants with disabilities may need more time than is regularly scheduled for the examination
Providing sign language interpreters or other aids for deaf or hard of hearing applicants	Deaf or hard of hearing applicants may need a sign language interpreter, or other accommodation, to complete the examination
Allowing relatives to attend the examination and assist in signing forms	Presence of a relative may have a calming effect, and such persons may assist applicants who are unable to sign or make any kind of mark
Legal guardian, surrogate, or designated representative at examination	Some applicants are unable to undergo an examination because of a physical or developmental disability or mental impairment
Allowing nonverbal communication	Applicants may be unable to speak sufficiently to respond to questions but may be able to communicate in nonverbal ways
Off-site examination	Some applicants may be unable to appear at the field office because of their disability

1. Extending Examination Time and Breaks

An officer may provide additional time for the examination and allow breaks if necessary for applicants with disabilities who have requested that type of accommodation. USCIS recognizes that some applicants may need more time than is regularly scheduled.

2. Providing Accommodations for Deaf or Hard of Hearing Applicants

In determining what type of auxiliary aid is necessary for deaf or hard of hearing applicants, USCIS gives primary consideration to the requests of the person with a disability.

Unless the applicant chooses to bring his or her own sign language interpreter, the field office must provide a sign language interpreter for a deaf or hard of hearing applicant upon his or her request.[2]

The Rehabilitation Act requires USCIS to make an effective accommodation for the person's disability, and USCIS cannot transfer the accommodation burden back to the person. For example, if the person uses the sign language Pidgin English, USCIS must provide an interpreter who uses Pidgin English if one is reasonably available. USCIS cannot tell the person it will provide an American Sign Language (ASL) interpreter and require the person to provide an interpreter to translate between Pidgin English and ASL.[3]

The officer should use any communication aids for the deaf or hard of hearing where available, permit the applicant to read lips, and allow the applicant to answer the officer's questions in writing, as needed.

3. Allowing Relatives and Others to Attend Examinations and Assist in Signing Forms

In cases where an applicant has a disability, the officer may allow an applicant's family member, legal guardian, or other person to attend the examination with the applicant. The presence of such a person or persons may help the applicant to remain calm and responsive during the examination. However, if the presence of such person or persons becomes disruptive to the examination, the officer may at any time remove the person from the examination and reschedule the examination if the applicant is unable to proceed at that time.

An officer may allow the person accompanying the applicant to repeat the officer's questions in cases where such repetition facilitates the applicant's responsiveness. An applicant's mark is acceptable as the applicant's signature on the naturalization application or documents relating to the application when an applicant is unable to sign. A family member may assist an applicant to sign, initial, or make a mark when completing the attestation on the naturalization application. Except as provided below, a family member or other person may not sign the naturalization application for the applicant.

4. Legal Guardian, Surrogate, or Designated Representative at Examinations

Currently, all applicants for naturalization are required to appear in person and give testimony under oath as to their eligibility for naturalization.[4] When an applicant is unable to undergo an examination because of a physical, developmental disability, or mental impairment, a legal guardian, surrogate, or an eligible designated representative completes the naturalization process for the applicant. USCIS waives the Oath of Allegiance and the legal guardian, surrogate, or designated representative attests to the applicant's eligibility for naturalization. In addition to oath waiver, this process may require accommodations including off-site examinations.[5]

Persons eligible to act on behalf of the applicant include:

- A person who a proper court has designated as the applicant's legal guardian or surrogate and who is authorized to exercise legal authority over the applicant's affairs; or
- In the absence of a legal guardian or surrogate, a U.S. citizen, spouse, parent, adult son or daughter, or adult brother or sister who is the primary custodial caregiver and who takes responsibility for the applicant.

USCIS will only recognize one designated representative in the following order of priority:

- Legal guardian or surrogate (highest priority);
- U.S. citizen spouse;
- U.S. citizen parent;
- U.S. citizen adult son or daughter;
- U.S. citizen adult brother or sister (lowest priority).

If there is a priority conflict between the persons seeking to represent the applicant and the persons share the same degree of familial relationship, USCIS gives priority to the party with seniority in age.

The person acting on behalf of the applicant must provide proof of legal guardianship, or documentation to establish the familial relationship, such as a birth certificate, marriage certificate, or adoption decree. In addition, the person must provide documentation to establish that he or she has the primary custodial care and responsibility for the applicant (for example, income tax returns, Social Security Administration documents, and affidavits from other relatives). A spouse, parent, adult son or daughter, or adult brother or sister who is not the legal guardian or surrogate must provide evidence of U.S. citizenship.

5. Allowing Nonverbal Communication

An officer may accept forms of nonverbal communication, such as blinking, head shaking or nodding, tapping, or other effective forms of nonverbal communication during the naturalization examination. The officer should also allow the applicant to point to answers on the application and allow the applicant to write out the answers to the civics test if the applicant is not able to communicate verbally. Prior to the start of the naturalization examination, the officer, the applicant, and the applicant's representative (if any) should agree to the form of communication.

6. Off-Site Examination

An officer may conduct a naturalization examination in an applicant's home or other residence such as a nursing home, hospice, hospital, or senior citizens center when appropriate.[6] This applies to cases where the applicant's illness or disability makes it medically unsuitable for him or her to appear at the field office in person.

B. Accommodations for the Naturalization Test

An applicant with a disability may require an accommodation to take the English and civics tests. The officer should use the appropriate accommodation to meet the applicant's particular needs. In addition, some applicants with disabilities may qualify for an exception to these requirements for naturalization.[7]

The table below serves as a quick reference guide listing common examples of accommodations to the naturalization test for applicants with disabilities. The paragraphs that follow the table provide further guidance on each accommodation.[8]

Accommodations for the Naturalization Test

Accommodation	Explanation
Providing reading tests in large print or braille	Applicants who have low vision or are blind or deafblind may need large print or braille in order to be able to read the test.
Oral writing test	Applicants with physical impairments or with limited use of their hands may be able to complete the writing test orally if they cannot write the sentences.
Allowing nonverbal communication	Applicants may be able to communicate in nonverbal ways if they cannot respond verbally to questions.[9]
Providing sign language interpreters	Deaf or hard of hearing applicants may need a sign language interpreter to complete the tests.

1. Providing Reading Test in Large Print or Braille

An officer should provide the current reading naturalization test version in large print or braille for applicants who have low vision or are blind or deafblind.[10] To request large print or braille-related or other accommodations, applicants should call the USCIS Contact Center at 1-800-375-5283 (TTY: 800-767-1833), use the online accommodations request form in order to request an accommodation, or request an accommodation with the field office at any time during the naturalization process.

2. Oral Writing Test

An officer should administer the writing portion of the naturalization test orally for applicants with physical impairments, which cause limited or no use of their hands in a way as to preclude the applicant's ability to write. The applicant may satisfy the writing requirements by spelling out the words from the writing test.

3. Allowing Nonverbal Communication

An officer may accept forms of nonverbal communication, such as blinking, head shaking or nodding, tapping, or other effective forms of nonverbal communication during the naturalization examination. The officer should also allow the applicant to point to answers on the application and allow the applicant to write out the answers to the civics test if the applicant is not able to communicate verbally. Prior to the start of the naturalization examination, the officer, the applicant, and the applicant's representative (if any) should agree to the form of communication.

4. Providing Sign Language Interpreters

In determining what type of accommodation is necessary for deaf or hard of hearing applicants, USCIS gives primary consideration to the requests of the person with a disability.

The field office must provide a sign language interpreter for a deaf or hard of hearing applicant upon his or her request.[11] An applicant may bring an interpreter of his or her choosing. To request a sign language interpreter, applicants should call the USCIS Contact Center at 1-800-375-5283 (TTY: 800-767-1833), use the online accommodations request form in order to request an accommodation, or request an accommodation with the field office at any time during the naturalization process.

The officer should use any communication aids for the deaf or hard of hearing where available, permit the applicant to read lips, and allow the applicant to answer the officer's questions in writing, as needed.

C. Accommodations for the Oath of Allegiance

A disability or medical impairment may make it difficult for some applicants to take the Oath of Allegiance at the oath ceremony. The table below lists examples of accommodations to the Oath of Allegiance. The paragraphs that follow the table provide further guidance on each accommodation. Some applicants may qualify for a waiver of the Oath of Allegiance.[12]

Accommodations for the Oath of Allegiance

Accommodation	Explanation
Simplifying language for assent to the oath	Applicants with disabilities may need simpler language to show they assent to the oath
Expedited scheduling for oath	Applicants with disabilities may be unable to attend a later ceremony because of their condition
Providing sign language interpreter at oath	Deaf or hard of hearing applicants may need a sign language interpreter to participate in the ceremony
Off-site administration of oath	Applicants with disabilities may be unable to attend the court or field office ceremony because of their condition

1. Simplifying Language for Assent to the Oath

An officer may question the applicant about the Oath of Allegiance in a clear, slow manner and in simplified language if the applicant presents difficulty understanding questions regarding the oath. This approach allows the applicant to understand and assent to the Oath of Allegiance and understand that he or she is becoming a U.S. citizen.

2. Expedited Scheduling for Oath

A field office should expedite administration of the Oath of Allegiance for an applicant who is unable to attend a ceremony at a later time because of his or her medical impairment. The expedited process may include a ceremony on the same day or an off-site visit.

3. Providing Sign Language Interpreter at Oath

A field office should provide a sign language interpreter for an applicant who is deaf or hard of hearing or permit the applicant to use his or her own interpreter during an administrative oath ceremony or for a judicial ceremony where a court is unable to provide a sign language interpreter.

4. Off-Site Administration of Oath

A field office should administer the Oath of Allegiance immediately following the off-site examination for an applicant who is unable to attend because of his or her medical condition. Some applicants may have appeared at the field office for the examination, but due to a deteriorating condition are unable to attend the oath ceremony. In such cases, an off-site visit may be scheduled to administer the Oath of Allegiance.

Footnotes

[^ 1] The lists of accommodations in this chapter are not exhaustive. USCIS determines and provides accommodations on a case-by-case basis.

[^ 2] If an applicant qualifies for an exception to the English requirement, the sign language interpreter does not need to sign in English. See Part E, English and Civics Testing and Exceptions, Chapter 2, English and Civics Testing [12 USCIS-PM E.2].

[^ 3] Contact the Registry of Interpreters for the Deaf (RID) at 703-838-0030 (voice), 703-838-0459 (TTY), or use RID's searchable interpreter agency referral database.

[^ 4] See 8 CFR 335.2.

[^ 5] See Part J, Oath of Allegiance [12 USCIS-PM J].

[^ 6] See INA 335(b).

[^ 7] See Part E, English and Civics Testing and Exceptions, Chapter 2, English and Civics Testing [12 USCIS-PM E.2]. See INA 312(b). See 8 CFR 312.1(b) and 8 CFR 312.2(b).

[^ 8] For additional information on how USCIS evaluates each request for a reasonable accommodation, see Volume 1, General Policies and Procedures, Part A, Public Services, Chapter 6, Disability Accommodation Requests, Section C, Requesting Accommodation, Subsection 3, USCIS Review [1 USCIS-PM A.6(C)(3)].

[^ 9] While the inability to speak is considered a disability under the Rehabilitation Act, the inability to speak in the English language alone (while being able to speak in a foreign language) is not considered a disability under the Act. Therefore, no accommodation is required, and USCIS does not provide accommodations solely on the basis of the requestor being unable to speak English. See INA 312. See 8 CFR 312.1. In addition, a request for an interpreter is not approved unless the requestor is otherwise eligible. See 8 CFR 312.4.

[^ 10] Officers may photocopy the current versions of the test into larger print or increase the font electronically.

[^ 11] If an applicant qualifies for an exception to the English requirement, the sign language interpreter does not need to sign in English. See Part E, English and Civics Testing and Exceptions, Chapter 2, English and Civics Testing [12 USCIS-PM E.2].

[^ 12] See Part J, Oath of Allegiance, Chapter 3, Oath of Allegiance Modifications and Waivers [12 USCIS-PM J.3].

Part D - General Naturalization Requirements

Chapter 1 - Purpose and Background

A. Purpose

Naturalization is the conferring of U.S. citizenship after birth by any means whatsoever.[1] There are various ways to become a U.S. citizen through the process of naturalization. This chapter addresses the general naturalization requirements.[2]

The applicant has the burden of establishing by a preponderance of the evidence that he or she meets the requirements for naturalization.

B. General Eligibility Requirements

The following are the general naturalization requirements that an applicant must meet in order to become a U.S. citizen:[3]

General Eligibility Requirements for Naturalization
The applicant must be age 18 or older at the time of filing for naturalization
The applicant must be a lawful permanent resident (LPR) for at least five years before being eligible for naturalization
The applicant must have continuous residence in the United States as an LPR for at least five years immediately preceding the date of filing the application and up to the time of admission to citizenship
The applicant must be physically present in the United States for at least 30 months out of the five years immediately preceding the date of filing the application
The applicant must have lived within the state or USCIS district with jurisdiction over the applicant's place of residence for at least three months prior to the date of filing
The applicant must demonstrate good moral character for five years prior to filing for naturalization, and during the period leading up to the administration of the Oath of Allegiance
The applicant must have an attachment to the principles of the U.S. Constitution and be well disposed to the good order and happiness of the United States during all relevant periods under the law
The applicant must be able to read, write, and speak and understand English and have knowledge and an understanding of U.S. history and government

C. Legal Authorities

- INA 312; 8 CFR 312 – Educational requirements for naturalization
- INA 316; 8 CFR 316 – General requirements for naturalization
- INA 318 – Prerequisite to naturalization, burden of proof

Footnotes

[^ 1] See INA 101(a)(23).

[^ 2] See INA 316. See relevant parts in Volume 12 [12 USCIS-PM] for other naturalization provisions and requirements.

[^ 3] See INA 316.

Chapter 2 - Lawful Permanent Resident Admission for Naturalization

A. Lawful Permanent Resident at Time of Filing and Naturalization

1. Lawful Admission for Permanent Residence

Section 318 of the Immigration and Nationality Act (INA) requires a naturalization applicant to show that they have been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of the INA in effect at the time of admission or adjustment.[1] This requirement applies to the applicant's initial admission as a lawful permanent resident (LPR) or adjustment to LPR status. Officers do not review subsequent reentries in determining whether there was a lawful admission.[2] The applicant generally must make this showing at the time they file the naturalization application. If the LPR status was not lawfully obtained for any reason, regardless of whether there was any fraud or willful

misrepresentation by the applicant, the applicant is ineligible for naturalization even if the applicant was admitted as an LPR and possesses a Permanent Resident Card (PRC) (Form I-551).[3]

In order for the applicant to establish that he or she was lawfully admitted for permanent residence, the applicant must have met all the requirements for admission as an immigrant for adjustment of status.[4] An applicant is not lawfully admitted for permanent residence in accordance with all applicable provisions of the INA if his or her LPR status was obtained by fraud, willful misrepresentation, or if the admission was otherwise not in compliance with the law.[5] Any such applicant is ineligible for naturalization in accordance with INA 318.

2. Conditional Permanent Residents

A conditional permanent resident (CPR) filing for naturalization on the basis of his or her permanent resident status for 5 years (or 3 years for spouses of U.S. citizens) must have met all of the applicable requirements of the conditional residence provisions. CPRs are generally not eligible for naturalization unless the conditions on their permanent resident status have been removed because such CPRs have not been lawfully admitted for permanent residence in accordance with all applicable provisions of the INA.[6] However, there are certain exceptions,[7] and under certain circumstances, an officer may adjudicate a Petition to Remove Conditions on Residence (Form I-751) during a naturalization proceeding.[8]

If the record indicates that the alien spouse was admitted or adjusted as a spouse of a U.S. citizen married less than 2 years at the time of admission (CR-1 or CR-6), but should have been admitted or adjusted as a spouse of a U.S. citizen married more than 2 years at the time of admission (IR-1 or IR-6), the officer may update his or her spouse's class of admission code accordingly. The erroneous classification of the alien spouse as a CR-1 or CR-6 instead of an IR-1 or IR-6 does not render this or her admission or adjustment unlawful. In addition, the applicant would be eligible for naturalization even if a Form I-751 was not filed or approved.

If the record indicates that the alien spouse was admitted or adjusted as a spouse of a U.S. citizen married more than 2 years at the time of admission (IR-1 or IR-6), but should have been admitted or adjusted as a spouse of a U.S. citizen married less than 2 years at the time of admission (CR-1 or CR-6), the officer should request the submission of Form I-751 and adjudicate Form I-751 before adjudicating the Application for Naturalization (Form N-400). The fact that the applicant was admitted or adjusted under the wrong code of admission does not render the adjustment unlawful, and the applicant is still eligible for naturalization, if otherwise qualified, upon the approval of Form I-751.

3. Effective Date of Permanent Residence

A person is generally considered an LPR at the time USCIS approves the applicant's adjustment application or at the time the applicant is admitted into the United States with an immigrant visa.[9] Most applicants applying for adjustment of status become LPRs on the date USCIS approves the application.[10]

For certain classifications, however, the effective date of becoming an LPR may be a date that is earlier than the actual approval of the status (commonly referred to as a "rollback" date). For example:

- An alien admitted under the Cuban Adjustment Act (CAA) is generally an LPR as of the date of his or her last arrival and admission into the United States or 30 months before the filing of the adjustment application, whichever is later.[11]
- A refugee is generally considered an LPR as of the date of entry into the United States.[12]
- An asylee is generally considered an LPR 1 year before the date USCIS approves the adjustment application.[13]
- A parolee granted adjustment of status under the Lautenberg Amendment is considered an LPR as of the date of inspection and parole into the United States.[14]
- A principal applicant granted adjustment of status based on the Liberian Refugee Immigration Fairness (LRIF) provision of the Fiscal Year 2020 National Defense Authorization Act is an LPR as of the date of his or her earliest arrival into the United States or as of November 20, 2014 (if the principal applicant cannot establish residence earlier). An eligible family member granted adjustment of status under LRIF is an LPR as of the date of his or her earliest arrival in the United States or the receipt date of his or her adjustment application (if the eligible family member cannot establish residence earlier).[15]

4. Evidence of LPR Status

USCIS issues a PRC to each alien who has been admitted for lawful permanent residence as evidence of their LPR status. LPRs 18 years of age and over are required to have their PRC in their possession as evidence of their status.[16] The PRC contains the date and the classification under which the alien was accorded LPR status.

If the PRC is expired or the LPR has lost the card, or the card has been stolen, LPRs generally must file an Application to Replace Permanent Resident Card (Form I-90) to replace the PRC.[17] A naturalization applicant who properly files Form N-400 on or after December 12, 2022 receives a Form N-400 receipt notice that, when presented with their PRC, automatically extends the validity of the PRC for 24 months from the "Card Expires" date on the PRC. If the applicant loses the Form N-400 receipt notice extending the validity of the PRC, and the "Card Expires" date on the PRC has passed, then the applicant may seek an Alien Documentation, Identification and Telecommunication (ADIT) stamp or file Form I-90 with fee to obtain evidence of status. In the event that the applicant's Form N-400 is not adjudicated before the 24-month extension of the PRC's validity has expired, then the applicant may request that USCIS provide an ADIT stamp to demonstrate their LPR status by contacting the Contact Center.[18]

A PRC alone is insufficient to establish that the applicant has been lawfully admitted for permanent residence in accordance with all applicable provisions of the INA.

5. U.S. Government Error

An applicant is ineligible for naturalization under INA 318 if his or her LPR status was obtained in error, even in the absence of fraud or willful misrepresentation. Some examples of errors in the process of obtaining LPR status that generally render the applicant ineligible for naturalization include:

- The U.S. Department of State (DOS) incorrectly approved the applicant's immigrant visa application and issued a visa;
- USCIS incorrectly approved the applicant's adjustment application; or
- The applicant was otherwise mistakenly admitted as an LPR.[19]

The applicant is generally ineligible for naturalization under such circumstances, even if he or she did not commit any fraud in obtaining the immigrant visa, admission to the United States, or LPR status.[20]

B. Abandonment of Lawful Permanent Residence

An applicant who has abandoned their LPR status is not eligible for naturalization.[21] To naturalize under most provisions of the immigration laws,[22] an applicant must be lawfully admitted for permanent residence and have maintained LPR status through the naturalization process.[23] USCIS may consider any relevant evidence of abandonment to assess

whether the applicant is eligible for naturalization.

Abandonment of LPR status occurs when the LPR demonstrates his or her intent to no longer reside in the United States as an LPR after departing the United States.[24] In addition, abandonment of LPR status by a parent is imputed to a minor child who is in the parent's custody and control.[25] While LPRs are permitted to travel outside the United States,[26] depending on the length and circumstances of the trip abroad, the trip may lead to a determination that the LPR abandoned his or her LPR status.[27]

If the evidence suggests that an applicant abandoned their LPR status and was subsequently erroneously permitted to enter as a returning LPR, the applicant is ineligible for naturalization. This is because the applicant failed to meet the continuous residence requirement for naturalization.[28]

If the officer determines that the naturalization applicant has failed to meet the burden of establishing that he or she maintained LPR status, DHS places the applicant in removal proceedings by issuing a Notice to Appear (NTA) (Form I-862), where issuance would be in accordance with established guidance.[29] USCIS then denies the naturalization application.[30] An immigration judge (IJ) makes a final determination as to whether the applicant has abandoned his or her LPR status. The applicant does not lose his or her LPR status unless and until the IJ issues an order of removal and the order becomes final.[31]

1. Factors in Determining Abandonment of LPR Status

During the review of a naturalization application and interview, USCIS may determine that the applicant has failed to establish that he or she is an LPR due to abandoning his or her LPR status. The applicant may not be able to establish LPR status even if permitted to return to the United States as an LPR at a port of entry.[32] In order to demonstrate that an applicant did not abandon LPR status, an applicant must establish that he or she did not objectively intend to abandon LPR status.[33]

USCIS reviews multiple factors when assessing whether an applicant objectively intended to abandon his or her LPR status,[34] including:

- Length of absence from the United States;
- Purpose of travel outside the United States;
- Intent to return to the United States as an LPR; and
- Continued ties to the United States.

Length of Absences from the United States

While an extended absence from the United States alone is not conclusive evidence of abandonment of LPR status, the length of an extended absence is an important factor. The longer an LPR spends outside the United States, the more difficult for the LPR to show an intent to return to the United States to live permanently in the United States as an LPR.[35] The LPR's visit outside the United States should terminate within a relatively short period.[36] If unforeseen circumstances cause an unavoidable delay in returning, the trip retains its temporary character, so long as the LPR continued to intend to return as soon as his or her original purpose of the visit was completed. A single visit every year to the United States, for those residing outside of the United States, does not preserve LPR status.[37]

An officer must review extended or frequent absences from the United States to determine whether an applicant has met the burden of establishing that he or she has maintained LPR status. This applies regardless of length of time or if the applicant was permitted to return to the United States as an LPR at the port of entry after the absence.[38]

Purpose of Travel Outside the United States[39]

The applicant's purpose for traveling outside the United States is another factor in determining whether the applicant abandoned his or her LPR status. An LPR should ordinarily "have a definite reason for proceeding abroad temporarily."[40] For example, an applicant may have traveled for a short vacation or may have traveled to visit an ill family member.

Intent to Return to the United States as an LPR[41]

The key factor in determining if an applicant abandoned his or her LPR status is the applicant's intent to reside permanently in the United States. The focus is on the intent (as demonstrated by the applicant's actions and objective circumstances) rather than the length of time spent abroad.[42] The applicant must have intended to return to the United States as a place of employment or business or as an actual home.[43] The applicant must not only possess the intent to return to the United States at the time of his or her departure, but must maintain the intent during the course of the visit outside the United States.[44]

An applicant's activities should be consistent with an intent to return to the United States as soon as it is practicable.[45] If there is an absence of intent coupled with objective circumstances, the applicant may have abandoned his or her status even if the applicant returns to the United States often. For example, one common but mistaken assumption is that a single visit every year to the United States preserves LPR status for those residing outside of the United States. However, even though an LPR only needs a PRC[46] to reenter the United States after an absence of less than 1 year, the PRC alone is not sufficient to indicate the intention to reside permanently in the United States.[47]

In addition, a reentry permit does not automatically preserve LPR status or guarantee reentry into the United States.[48] A reentry permit may demonstrate that the LPR intended to return to the United States. However, failure to obtain a reentry permit, alone, is not evidence that an applicant intended to abandon his or her LPR status. As in any abandonment case, USCIS considers this factor in the totality of the circumstances.

Continued Ties to the United States

An applicant should have multiple connections[49] to the United States that establish an intent to reside permanently in the United States, such as:

- Filing federal and state income tax returns as a resident of the United States;[50]
- Maintaining property and business affiliations in the United States;
- Maintaining a driver's license with a U.S. address of record; and
- Immediate family members residing in the United States who are U.S. citizens, LPRs, or are seeking citizenship or LPR status.

USCIS also reviews whether the applicant maintains connections outside the United States including:

- Immediate family members residing outside of the United States;
- Property and business ties in a foreign country;

- Employment by a foreign employer or foreign government;
- Voting in foreign elections;
- Running for political office in a foreign country; and
- Frequent and extended trips outside of the United States.

An applicant who voluntarily claims "nonresident alien" status to qualify for special exemptions from income tax liability, or fails to file either federal or state income tax returns because he or she considers himself or herself to be a "nonresident alien," raises a rebuttable presumption that the applicant has abandoned his or her LPR status.[51] The applicant may overcome that presumption with acceptable evidence establishing that he or she did not abandon LPR status.

To establish a continued intent to maintain permanent residence, an applicant may provide evidence of the following:

- Family ties, including children attending school and a spouse or other relatives residing lawfully in the United States;
- Real and personal property holdings or rentals in the United States; and
- Current or recent employment or education in the United States.

To assess maintenance of LPR status, USCIS reviews the information provided as part of the naturalization application and other available documentation. If needed, USCIS may issue a Request for Evidence (RFE) for residences, travel, and employment information, and other relevant evidence since the time of the adjustment of status. Failure to timely respond to an RFE will result in a denial of the naturalization application for failure to meet the burden of proof.

2. Preserving Residence

Certain applicants[52] may seek to preserve their residence for naturalization if they leave the United States for 1 year or more to engage in qualifying employment outside the United States.[53] Preservation of residence may permit an applicant to avoid breaking the continuity of his or her residence for purposes of the continuous residence requirement and, in some cases, the physical presence requirement. However, approval of an application to preserve residence does not guarantee that the applicant (or any family members) will not be found, upon returning to the United States, to have lost LPR status through abandonment.

For example, USCIS presumes an applicant who claimed special tax exemptions as a "nonresident alien" has lost LPR status through abandonment.[54] The applicant may overcome that presumption with acceptable evidence establishing that he or she did not abandon his or her LPR status.

3. Record of Abandonment

Some LPRs may choose to record the abandonment of their LPR status by filing a Record of Abandonment of Lawful Permanent Resident Status (Form I-407). If an applicant has a completed Form I-407, and subsequently seeks naturalization, USCIS places the applicant in removal proceedings and denies the naturalization application. However, LPRs who seek to abandon LPR status are not required to record such abandonment by executing Form I-407.[55] Therefore, an applicant may still have abandoned LPR status despite the absence of a Form I-407 in their immigration record.

C. Effect of Change in Law

In general, USCIS still considers an alien who was lawfully admitted for permanent residence according to the applicable laws at the time of their initial admission or adjustment, but who would be ineligible for LPR status today based on a change in law, to have been lawfully admitted for permanent residence for purposes of INA 318. This does not apply if the controlling law specifically states otherwise.

1. Illegal Immigration Reform and Immigrant Responsibility Act

Effective September 30, 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) added new or amended grounds of inadmissibility.[56] If the applicant was admitted as an LPR or adjusted status to that of an LPR before the effective date of a particular provision of IIRIRA, the applicant was not subject to the new or amended inadmissibility grounds in that provision. In general, if the applicant became an LPR before September 30, 1996, the applicant would still be considered lawfully admitted for permanent residence even if he or she would have been found inadmissible under IIRIRA.

Some of the classes of inadmissible aliens and grounds of inadmissibility added or amended by IIRIRA include:

- "Certain aliens previously removed;"[57]
- "Aliens unlawfully present,"[58] including those unlawfully present after previous immigration violations;[59]
- "Aliens present without admission or parole;"[60]
- "Failure to attend removal proceeding;"[61]
- "Falsely claiming U.S. citizenship;"[62] and
- "Student visa abusers."[63]

2. Case Law

New case law may change how the law is applied between the time an applicant is lawfully admitted for permanent residence and the time USCIS adjudicates his or her naturalization application. The interpretation and applicability of new case law may vary. In some cases, new case law may result in an applicant being considered lawfully admitted even if his or her admission would have been considered unlawful at the time of the adjudication (before the new case law). Officers should consult with USCIS counsel regarding the interpretation and application of new case law in a naturalization proceeding.

For example, in 2015, the Supreme Court held that a drug paraphernalia conviction was not a conviction “relating to a controlled substance” unless an element of the conviction could be connected to a federally controlled substance.[64] This decision overturned an earlier Board of Immigration Appeals (BIA) interpretation that held that a drug paraphernalia conviction “relates to” any and all controlled substances with which the drug paraphernalia can be used.[65]

Therefore, if an applicant adjusted status and applied for naturalization before 2015 and had a conviction for possession of drug paraphernalia under the applicable state law at that time, the conviction would likely have qualified as a violation of a law relating to a controlled substance, and rendered the applicant inadmissible at the time of adjustment, as outlined in the earlier BIA interpretation. The applicant in this scenario would therefore have been ineligible for naturalization under INA 318 prior to the Supreme Court decision.[66]

However, if the same applicant applied for naturalization after 2015, his or her conviction would be analyzed under the Supreme Court decision. Under the case law, the conviction would not qualify as a violation of a law relating to a controlled substance unless an element of the conviction could be connected to a federally controlled substance. Therefore, even though the applicant's adjustment would have been considered unlawful before 2015, because of the new case law, the applicant is now likely considered to have been lawfully admitted for permanent residence for the purposes of INA 318.

Temporary Protected Status and Admission or Parole into the United States for Adjustment of Status [Reserved][67]

ALERT: USCIS has updated Volume 7 of the Policy Manual to reflect developments in case law and USCIS policy regarding TPS beneficiaries and their eligibility for adjustment of status under INA 245(a). See Temporary Protected Status and Eligibility for Adjustment of Status under Section 245(a) of the Immigration and Nationality Act, PA-2022-16, issued July 1, 2022.

D. Underlying Basis of Admission

To adjust status to that of an LPR or be admitted as an LPR, an applicant must first be eligible for one of the immigrant visa categories established under the law. During a naturalization proceeding, the officer must verify the underlying immigrant visa petition or other basis for immigrating[73] that formed the basis of the adjustment of status or admission as an immigrant to the United States.[74]

1. Ineligible for Underlying Immigrant Petition

Even after the applicant is admitted for permanent residence on an immigrant visa or USCIS approves the applicant's adjustment application, USCIS may find that the applicant was not lawfully admitted to the United States for permanent residence. This may apply in cases where the underlying petition that formed the basis of the LPR status was approved in error, was incorrect, or was approved unlawfully. Officers must review the underlying family and employment-based petitions or other immigration benefits.

K-1 Fiancé(e) Requirements Not Met

For an applicant to be admitted to the United States on a K-1 fiancé(e) nonimmigrant visa and later adjust his or her status to an LPR, the applicant must have established that:

- He or she was free to marry, and intended to marry, his or her U.S. citizen fiancé(e) within 90 days of admission to the United States as a K nonimmigrant; and
- He or she and his or her U.S. citizen fiancé(e) met each other in person within the 2 years immediately preceding the date of filing Petition for Alien Fiancé(e) (Form I-129F), unless the requirement to meet in person was waived because it:
  - Would have violated long-established customs of the applicant's foreign culture or social practice, and all aspects of traditional arrangements were met in accordance with the custom or practice; or
  - Would have resulted in extreme hardship to the U.S. citizen fiancé(e).[75]

If an applicant entered the United States with a K-1 fiancé(e) nonimmigrant visa after the petition was granted when one of these requirements had not been met, the applicant is not eligible for naturalization in accordance with INA 318.[76]

2. Inadmissible at Time of Admission or Adjustment

An applicant who was admitted as an LPR may have been inadmissible to the United States if he or she fell into any of the classes of inadmissible aliens.[77] As such, the applicant is ineligible to be admitted as an LPR or for adjustment of status.[78] Applicants who are inadmissible to the United States may also be eligible to apply for a waiver of the ground(s) of inadmissibility in certain instances.[79]

If an inadmissible applicant was required to obtain a waiver of inadmissibility and no waiver request was approved, or he or she was inadmissible under a ground for which no waiver was available, the applicant was not lawfully admitted for permanent residence.[80] Grounds for which an applicant may be inadmissible are listed in the following table.

Overview of Inadmissibility Grounds	
INA 212(a)(1)	Health-Related Grounds
INA 212(a)(2)	Criminal and Related Grounds
INA 212(a)(3)	Security and Related Grounds
INA 212(a)(4)	Public Charge
INA 212(a)(5)	Labor Certification and Qualifications for Certain Immigrants
INA 212(a)(6)	Illegal Entrants and Immigration Violators
INA 212(a)(7)	Documentation Requirements
INA 212(a)(8)	Ineligible for Citizenship
INA 212(a)(9)	Aliens Previously Removed
INA 212(a)(10)	Miscellaneous (Including Practicing Polygamists, International Child Abductors, Unlawful Voters, and Tax Evaders)

Officers may encounter some naturalization cases where the applicant was inadmissible at the time of admission as an LPR or adjustment of status and was not granted a waiver of inadmissibility or other relief. Evidence of such inadmissibility may be available at the time of the initial review of eligibility for LPR status or may be discovered after admission or adjustment as an LPR, including during a naturalization proceeding. An LPR admission or adjustment of status that was unlawful when it occurred cannot be cured by an applicant's submission of an Application for Waiver of Grounds of Inadmissibility (Form I-601) or an Application by Refugee for Waiver of Inadmissibility Grounds (Form I-602) during a naturalization proceeding.

Terrorism-Related Inadmissibility Grounds[81]

In general, a naturalization applicant who, before obtaining LPR status, committed an act that would have rendered him or her inadmissible under one or more of the terrorism-related inadmissibility grounds (TRIG) at the time of adjustment or admission as an LPR, may not be considered lawfully admitted for permanent residence for purposes of INA 318.[82] This is the case even if the conduct upon which the inadmissibility is based on occurred before the inadmissibility ground existed.[83]

Some examples of activities pertaining to TRIG that could result in denial of the applicant's naturalization application under INA 318 if occurring before obtaining LPR status may include:

- An applicant who engaged in terrorist activity, including providing material support to a person who committed or plans to commit a terrorist activity, or to a terrorist organization;[84]
- An applicant who is a representative of a terrorist organization or other group that endorses or espouses terrorist activity;[85]
- An applicant who is a member of a terrorist organization at the time of adjustment or admission for LPR status, including a Foreign Terrorist Organization (Tier I) as designated by the Secretary of State or a terrorist organization designated by the Secretary of State and listed on the Terrorist Exclusion List (Tier II),[86] or an undesignated terrorist organization (Tier III);[87]
- Certain spouses and children of aliens who were inadmissible on terrorism-related grounds;[88] and
- An applicant who received military-type training from or on behalf of a terrorist organization.[89]

3. Public Charge Inadmissibility [Reserved]

[Reserved]

4. Fraud and Willful Misrepresentation

An applicant was not lawfully admitted for permanent residence if he or she "obtained [his or her] permanent resident status by fraud, or had otherwise not been entitled to it."[90] Therefore, an applicant was not lawfully admitted for permanent residence for purposes of INA 318 if the applicant:

- Procured or sought to procure a visa or other documentation, admission, or other benefit provided under the INA by fraud or willful misrepresentation of a material fact before his or her adjustment or admission as an LPR; and
- The applicant did not obtain a waiver of that inadmissibility.[91]

Some examples of fraud and willful misrepresentation for which the applicant is not lawfully admitted for permanent residence and is therefore not eligible for naturalization, include, but are not limited to cases where:

- The applicant consciously concealed or made a willful misrepresentation of a material fact regarding a previous immigration record (A-file number) or previous final order of removal before adjusting.[92]
- The applicant presented fraudulent identity documentation, or valid identity documentation obtained by fraud, to a U.S. official in order to procure, or attempt to procure, an immigration benefit before DHS admitted him or her as an LPR.[93]
- The applicant obtained LPR status based on an employment-based immigrant petition that contained material misrepresentations related to his or her employment or qualifications such that the applicant would have been otherwise ineligible for adjustment of status. In many instances, the underlying employment-based immigrant petition is filed by the U.S. employer on behalf of the alien worker. Nonetheless, the applicant makes a willful misrepresentation of a material fact when he or she knows of or authorizes false statements submitted on his or her behalf.[94]
- The applicant applied for adjustment of status or an immigrant visa in the family-sponsored preference category based on being the unmarried son or daughter of a U.S. citizen or LPR (unmarried son or daughter of a U.S. citizen) and misrepresented his or her marital status[95] on an application or during an interview by indicating he or she was single (even though the applicant was married at that time).[96]
- The applicant obtained a divorce solely for immigration purposes.[97]
- The applicant misrepresented material facts to obtain asylum or refugee status.[98]
- The applicant misrepresented material facts in order to conceal any group memberships that would have made him or her ineligible for LPR status.[99]
- The applicant misrepresented material facts, at the time of his or her application for adjustment of status or an immigrant visa, in order to conceal that he or she was inadmissible for engaging or having engaged in terrorist activity.[100]

5. Underlying Marriage[101]

Where an applicant's LPR status was based on a marriage, an officer in a naturalization proceeding may review conduct pertaining to the intent of the parties at the time they married.[102] Evidence discovered during or after the adjudication of the Petition to Remove the Conditions on Residence (Form I-751) may also raise questions about whether the underlying admission or adjustment to permanent residence was proper.

Marriage Entered into in Good Faith

A naturalization applicant was not lawfully admitted for permanent residence where he or she obtained LPR status through a marriage that was not entered into in good faith. The key issue in determining whether a marriage was entered into in good faith is whether the parties intended to establish a life together at inception of the marriage.[103]

If there is an issue as to whether the marriage was entered into in good faith, the applicant must present sufficient evidence to show that the marriage was bona fide in that it was "not a sham or fraudulent from its inception."[104] If the applicant fails to provide sufficient evidence, USCIS should issue a Notice of Intent to Deny (NOID) under INA 318. In notifying the applicant of the intent to deny the naturalization application, the officer must explain the basis for the intent to deny and afford the applicant a meaningful opportunity to respond.[105]

Validity of the Underlying Marriage

In cases where an applicant's LPR status was based on his or her marriage (or his or her parent's marriage) to a U.S. citizen or LPR, an officer in a naturalization proceeding may also review whether the marriage was valid at the time the LPR status was granted.

In general, an applicant would have already established a valid marriage before being granted LPR status. However, there may be instances where additional information is available after the applicant is granted LPR status that may lead to a determination that the applicant's marriage was not valid at the time the LPR status was granted, even when there was no fraud or misrepresentation.[106] For example, this may include evidence that the applicant or the applicant's spouse had a prior marriage that was not terminated before they entered into their current marriage, rendering the current marriage invalid due to bigamy.

Where an officer determines that a naturalization applicant's marriage was invalid, and the applicant's LPR status was based on the marriage, the officer should deny the naturalization application under INA 318.

6. LPR Status Obtained through Cuban Adjustment Act

Cuban Adjustment Act and Lawful Presence in the United States

To be eligible for LPR status under the CAA, an applicant must have accrued at least 1 year of physical presence in the United States.[107] While the CAA does not stipulate when this 1-year physical presence requirement must be met,[108] regulations generally require that an applicant is eligible for the benefit sought at the time of filing the benefit request.[109] Additionally, USCIS guidance specifies that this 1-year physical presence requirement must be met at the time of filing of the adjustment of status application.[110]

Therefore, USCIS denies naturalization applications under INA 318 if, after November 18, 2020, the applicant obtained LPR status under the CAA and the applicant did not accrue 1 year of physical presence in the United States before filing his or her adjustment application.

Cuban Adjustment Act and Proof of Cuban Citizenship for Applicants Born Outside of Cuba to Cuban Parent[111]

An officer may find that a naturalization applicant who was granted LPR status under the CAA and provided a consular certificate documenting birth outside of Cuba to a Cuban parent as proof of Cuban citizenship failed to meet his or her burden of proof in establishing Cuban citizenship. A consular certificate alone is not legally sufficient to demonstrate Cuban citizenship for persons born outside of Cuba to at least one Cuban parent.[112] Therefore, naturalization applicants who became LPRs under the CAA by virtue of birth outside of Cuba to a Cuban parent, and who provided only a consular certificate as proof of Cuban citizenship, may be required to provide additional proof of Cuban citizenship. An officer may issue an RFE to request documentation of Cuban citizenship.

The following are examples of acceptable documents to prove Cuban citizenship:[113]

- An unexpired Cuban passport ("Pasaporte de la Republica Cuba");
- Nationality certificate ("Certificado de Nacionalidad"); and
- Citizenship letter ("Carta de Ciudadania").

USCIS may deny a naturalization application under INA 318 if an applicant who was born to a Cuban parent outside of Cuba and granted LPR status under the CAA was in fact not a Cuban citizen at the time of adjustment to permanent residence.

An applicant for naturalization who was granted LPR status under the Violence Against Women Act (VAWA) amendments to the CAA[114] as a battered or abused spouse or child of a qualifying Cuban principal need only provide sufficient information to enable USCIS to verify the qualifying Cuban principal's Cuban citizenship or nationality.[115] Such information may include the Cuban principal's full name, date of birth, place of birth, parents' names, A-number, Form I-94, Social Security number, or other identifying information. Failure to provide such information may result in denial of the naturalization application under INA 318.

7. Asylee and Refugee Adjustment

In order to adjust to lawful permanent residence status, refugees and asylees must accrue 1 year of physical presence in the United States as a refugee[116] or asylee.[117]

If at the time of filing the adjustment of status application, the applicant had not accrued 1 year of physical presence, but USCIS approved the adjustment of status application, USCIS considers the refugee or asylee lawfully admitted for permanent residence if the admission was otherwise lawful.[118] USCIS does not deny the naturalization application on INA 318 grounds based solely on the early filing. The applicant must still have accrued the 1 year at the time of approval of the adjustment of status of application.

8. Other Factors to Consider

Otherwise Ineligible for Adjustment of Status

If an applicant was ineligible for adjustment of status, the applicant was not lawfully admitted for permanent residence and therefore is ineligible for naturalization.[119] The following are examples of ineligibility for adjustment of status:

- A crewman is ineligible for adjustment of status under INA 245.[120]
- An exchange visitor who did not fulfill the 2-year foreign residence requirement or did not obtain a waiver of the requirement is ineligible for adjustment of status or an immigrant visa.[121]

Disqualifying Material Facts Unknown at Time of Filing for Admission or Adjustment

After an alien files an application for LPR status (either adjustment of status or an immigrant visa) but before he or she is granted adjustment of status or admitted to the United States as an LPR, he or she may experience new or additional circumstances that render him or her ineligible or inadmissible for LPR status. In such situations, the officer may not have considered the new or additional facts in approving the adjustment application or admission to the United States on an immigrant visa. Therefore, for purposes of INA 318, USCIS does not consider a naturalization applicant to be lawfully admitted for permanent residence where facts arising after the date of filing of the application for LPR status show that he or she was inadmissible or otherwise ineligible for LPR status.

Derivative Applicants

Derivatives who do not have their own underlying immigrant petition may only be admitted as an LPR or adjust status under INA 245 based on the principal's adjustment of status. In general, a derivative applicant must have the requisite relationship to the principal both at the time of filing the immigration petition or filing the adjustment application and at the time of final adjudication.[122]

There are certain circumstances in which a derivative may not have obtained lawful permanent residence based on the principal's status and therefore would not be eligible for naturalization, including:

- A derivative was admitted as an immigrant or adjusted to LPR status under INA 245 before the principal was admitted as an immigrant or adjusted to LPR status.[123]
- A derivative adjusted to LPR status after the principal applicant naturalizes. A derivative is only eligible for classification as an accompanying or following-to-join family member of the principal so long as the principal applicant remains an LPR. Once the principal applicant naturalizes, the derivative is no longer eligible to adjust status based on the principal applicant.[124]
- A principal applicant's LPR status was rescinded which establishes that the principal applicant was not lawfully admitted or did not lawfully adjust status. Therefore, if the principal's LPR status was rescinded, at any time, even after the derivative is admitted or adjusts, the derivative would have been ineligible to adjust to LPR status based on the principal.[125]

- A principal applicant was denaturalized[126] because he or she was not lawfully admitted or lawfully adjusted as an LPR. Depending on the circumstances, the principal's denaturalization may be evidence that the dependent's LPR status is not lawful.[127]
- The principal applicant committed fraud in order to obtain the LPR status. For example, this may occur in instances where:
  - A derivative was granted LPR status based on a parent's asylee status that was obtained through fraud or misrepresentation;[128] or
  - A stepchild obtained LPR status based on a parent's marriage to the stepparent that was fraudulently entered into for the purpose of an immigration benefit.[129]

E. Applicants Considered Lawfully Admitted

Under certain circumstances, USCIS may consider an applicant lawfully admitted for permanent residence, despite errors, for INA 318 purposes.

1. Availability of Immigrant Visa at Time of Filing for Adjustment of Status

In order for an applicant to be eligible for adjustment of status under INA 245(a), an immigrant visa must be immediately available to the applicant at the time of filing and at the time of final adjudication.[130] An officer may not approve an application for adjustment of status as a preference immigrant until an immigrant visa number has been allocated by DOS.[131]

If at the time of adjustment an officer did not request the visa number from DOS, or DOS had not yet allocated a visa number, but a visa was available at the time of filing and decision and the officer approved the adjustment of status application, USCIS considers the applicant to have been lawfully admitted for permanent residence, despite the error.[132]

If at the time of adjustment, the officer annotated the wrong class of admission code, but there was still an immigrant visa immediately available to the applicant, and there was no misrepresentation by the applicant, USCIS still considers the applicant to have been lawfully admitted permanent residence. In this case, the officer should correct the class of admission code.

2. INA 245(i) Statutory Sum

To qualify for adjustment of status under INA 245(a), an applicant must prove that he or she has been inspected and admitted or paroled into the United States and he or she is not barred from adjustment of status under INA 245(c). The adjustment bars in INA 245(c) may apply to applicants who either entered the United States in a particular status or manner or committed a particular act or violation of immigration law.[133]

However, an applicant who entered the United States without inspection and admission or parole or is barred from adjusting status by INA 245(c) may qualify for adjustment of status under INA 245(i). To qualify under INA 245(i):

- The applicant must be the beneficiary (or derivative beneficiary) of an immigrant petition or labor certification application filed on or before April 30, 2001, that was approvable when filed;
- If such immigrant petition or labor certification was filed after January 14, 1998, the principal beneficiary must have been physically present in the United States on December 21, 2000; and
- The applicant must pay a statutorily required sum, unless exempt from paying the sum.[134]

Where a naturalization applicant's sole ground of ineligibility is that he or she was not lawfully admitted for permanent residence because the applicant failed to pay the statutory sum prescribed by INA 245(i) at the time of adjustment, USCIS, in its discretion, may allow the applicant to submit the statutory sum with Supplement A to Form I-485, Adjustment of Status under Section 245(i) (Form I-485 Supplement A).

If the statutory sum is paid and all other eligibility requirements are met, USCIS approves the naturalization application. However, USCIS does not accept the payment of the statutory sum at the time of the naturalization proceeding if the naturalization applicant is ineligible to naturalize for any other reason.

F. Removal Proceedings

USCIS may not consider the merits of any application for naturalization for an applicant in removal proceedings,[135] except for certain applications for naturalization based on military service.[136] Furthermore, an applicant subject to an order of deportation or removal is not eligible for naturalization, and the naturalization application is denied, except for certain applications for naturalization based on military service.[137]

Upon resolution of the removal proceeding, the applicant may timely file a Request for a Hearing on a Decision in Naturalization Proceedings Under Section 336 (Form N-336) or file a new naturalization application if otherwise eligible for naturalization.[138]

1. Final Order of Removal

USCIS denies a naturalization application if the applicant is or has been subject to a final order of removal from an IJ,[139] unless:

- The order has been vacated;
- The applicant is eligible for naturalization under INA 329(a) for certain honorable service in the U.S. armed forces, or is currently in the U.S. armed forces and is eligible for naturalization under INA 328(a) based upon honorable service in the U.S. armed forces;[140] or
- The applicant departed the United States and later was lawfully admitted for permanent residence under a different visa from the one under which the applicant was previously admitted and then ordered removed.

2. Pending Removal Proceedings

Except for certain applications for naturalization based on military service,[141] USCIS lacks the authority to grant naturalization to an applicant against whom there is a pending removal proceeding initiated by a warrant of arrest.[142] An NTA is a warrant of arrest for purposes of INA 318,[143] except in the 9th Circuit.[144] Officers should consult with USCIS counsel on any INA 318 cases in the 9th Circuit involving pending removal proceedings.

Effective November 18, 2020, where a removal proceeding is pending against a naturalization applicant, USCIS denies the naturalization application under INA 318 based solely on the existence of pending removal proceedings against the applicant.[145] The officer may not issue a decision based on the merits of the naturalization application.[146]

Therefore, if an NTA is issued and a removal proceeding is pending against a naturalization applicant on or before the date of the decision on the naturalization application, the officer should deny the naturalization application under INA 318,[147] even if the removal proceeding was administratively closed.[148]

3. Rescission

A naturalization applicant who was ineligible for adjustment of status to that of an LPR may have his or her LPR status rescinded or be placed in removal proceedings.[149] Upon the rescission of the adjustment of status, or if an administratively final order of removal[150] is entered against the applicant, the officer must deny the naturalization application under INA 318 and INA 316(a)(1).

4. Deportable Aliens

If an officer finds that an applicant for naturalization is deportable, DHS issues an NTA where issuance would be in accordance with established guidance.[151] After the NTA is filed with an immigration court,[152] the officer should deny the naturalization application based on INA 318.

G. Exceptions to Lawful Permanent Resident Status Requirements

1. Nationals of the United States

The law provides an exception to the LPR requirement for naturalization for nationals, but not citizens, of the United States. Currently, persons who are born in American Samoa or Swains Island, which are outlying possessions of the United States, are considered nationals, but not citizens, of the United States.[153]

A national, but not citizen, of the United States may be naturalized without establishing lawful admission for permanent residence if he or she becomes a resident of any state[154] and complies with all other applicable requirements of the naturalization laws. These nationals are not aliens as defined in the INA and do not possess a PRC.[155]

2. Certain Members of the U.S. Armed Forces

Certain members of the U.S. armed forces with service under specified conditions are exempt from the LPR requirement.[156]

Footnotes

[^ 1] See INA 318 and INA 334(b). See 8 CFR 316.2(a)(2) and 8 CFR 316.2(b). See INA 101(a)(20). See 8 CFR 1.2. See *Berenyi v. Dist. Dir., Immigration & Naturalization Serv.*, 385 U.S. 630, 637 (1967) ("it has been universally accepted that the burden is on the alien applicant to show his eligibility for citizenship in every respect"). For limited exceptions, see Section G, Exceptions to Lawful Permanent Resident Status Requirements [12 USCIS-PM D.2(G)].

[^ 2] See *Azumah v. USCIS*, 107 F.4th 272 (4th Cir. 2024) (the applicant satisfied statutory requirements because the applicant was lawfully admitted as an LPR on initial entry to the United States and retained their LPR status, regardless of the fact that they were not lawfully admitted as a permanent resident when they subsequently reentered the United States). The Fourth Circuit stated that "[b]ased purely on text, then, we see no basis for reading into [8 CFR] 316.2(b) a requirement of 'lawful admission,' separate and apart from Azumah's (undisputed) LPR status," and held that to read 8 CFR 316.2(b) to require a naturalization applicant to establish lawful admission "in accordance with the immigration laws in effect at the time of the applicant's initial entry or any subsequent reentry" would impose an additional requirement for naturalization not found in statute. See *Azumah v. USCIS*, 107 F.4th 272, 278 (4th Cir. 2024).

[^ 3] See INA 318. See *Estrada-Ramos v. Holder*, 611 F.3d 318 (7th Cir. 2010). See *Mejia-Orellana v. Gonzales*, 502 F.3d 13 (1st Cir. 2007). See *De La Rosa v. DHS*, 489 F.3d 551 (2nd Cir. 2007). See *Savoury v. U.S. Attorney General*, 449 F.3d 1307 (11th Cir. 2006). See *Arellano-Garcia v. Gonzales*, 429 F.3d 1183 (8th Cir. 2005). See *Monet v. INS*, 791 F.2d 752 (9th Cir. 1986). See *Matter of Longstaff*, 716 F.2d 1439, 1441 (5th Cir. 1983). See *Matter of Koloamatangi (PDF)*, 23 I&N Dec. 548, 550 (BIA 2003). See *Fedorenko v. U.S.*, 449 U.S. 490, 514-15 (1981) (denaturalizing person who obtained immigrant visa through willful misrepresentation). See *Matter of Mozeb (PDF)*, 15 I&N Dec. 430 (BIA 1975).

[^ 4] See Volume 7, Adjustment of Status [7 USCIS-PM].

[^ 5] This applies even if the applicant did not commit fraud or willful misrepresentation. See INA 318. See *Estrada-Ramos v. Holder*, 611 F.3d 318 (7th Cir. 2010). See *Mejia-Orellana v. Gonzales*, 502 F.3d 13 (1st Cir. 2007). See *De La Rosa v. DHS*, 489 F.3d 551 (2nd Cir. 2007). See *Savoury v. U.S. Attorney General*, 449 F.3d 1307 (11th Cir. 2006). See *Arellano-Garcia v. Gonzales*, 429 F.3d 1183 (8th Cir. 2005). See *Monet v. INS*, 791 F.2d 752 (9th Cir. 1986). See *Matter of Longstaff*, 716 F.2d 1439, 1441 (5th Cir. 1983). See *Matter of Koloamatangi (PDF)*, 23 I&N Dec. 548, 550 (BIA 2003). See *Fedorenko v. U.S.*, 449 U.S. 490, 514-15 (1981) (denaturalizing person who obtained immigrant visa through willful misrepresentation). See *Matter of Mozeb (PDF)*, 15 I&N Dec. 430 (BIA 1975).

[^ 6] See INA 216 and INA 216A. See INA 318.

[^ 7] See Part G, Spouses of U.S. Citizens, Chapter 5, Conditional Permanent Resident Spouses and Naturalization [12 USCIS-PM G.5] for special circumstances under which the applicant may not be required to have an approved Petition to Remove Conditions on Residence (Form I-751) prior to naturalization.

[^ 8] See Part G, Spouses of U.S. Citizens, Chapter 5, Conditional Permanent Resident Spouses and Naturalization [12 USCIS-PM G.5].

[^ 9] See INA 245(b).

[^ 10] In general, a PRC should note the correct date that the LPR status was acquired. For additional information on adjustment of status, see Volume 7, Adjustment of Status [7 USCIS-PM].

[^ 11] See Section 1 of the CAA, Pub. L. 89-732 (PDF), 80 Stat. 1161, 1161 (November 2, 1966). See *Matter of Carrillo (PDF)*, 25 I&N Dec. 99 (BIA 2009).

[^ 12] See INA 209(a)(2). See Volume 7, Adjustment of Status, Part L, Refugee Adjustment, Chapter 5, Adjudication Procedures, Section G, Decision, Subsection 1, Approvals [7 USCIS-PM L.5(G)(1)].

[^ 13] See INA 209(b). See Volume 7, Adjustment of Status, Part M, Asylee Adjustment, Chapter 5, Adjudication Procedures, Section G, Decision, Subsection 1, Approvals [7 USCIS-PM M.5(G)(1)].

[^ 14] See 8 CFR 1245.7(e).

[^ 15] See Section 7611(c)(1)(A)(ii) and Section 7611(e) of the National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116-92 (PDF), 113 Stat. 1198, 2310, 2311 (December 20, 2019). See Volume 7, Adjustment of Status, Part P, Other Adjustment Programs, Chapter 5, Liberian Refugee Immigration Fairness, Section E, Adjudication, Subsection 2, Approvals [7 USCIS-PM P.5(E)(2)].

[^ 16] See INA 264(e).

[^ 17] For more information, see Volume 11, Travel and Identity Documents, Part B, Permanent Resident Cards [11 USCIS-PM B].

[^ 18] For additional information on requesting an ADIT stamp, see Volume 11, Travel and Identity Documents, Part B, Permanent Resident Cards, Chapter 2, Replacement of Permanent Resident Card [11 USCIS-PM B.2].

[^ 19] See INA 318.

[^ 20] See *Turfah v. United States Citizenship and Immigration Services*, 845 F.3d 668 (6th Cir. 2017) (finding alien not lawfully admitted for permanent residence where he gained LPR status due to a mistake by the government).

[^ 21] See INA 318.

[^ 22] Except for INA 329.

[^ 23] See INA 318. See INA 101(a)(20).

[^ 24] Abandonment of LPR status is different from rescission. Rescission is the process USCIS uses to remove LPR status if adjustment of status was improperly granted to an alien. See INA 246. See Volume 7, Adjustment of Status, Part Q, Rescission of Lawful Permanent Residence [7 USCIS-PM Q].

[^ 25] See *Khoshfahm v. Holder*, 655 F.3d 1147 (9th Cir 2011) (approving “the imputation of a parent's abandonment of [LPR] status to the parent's unemancipated child” as “consistent with well-established authority”). See *Matter of Huang (PDF)*, 19 I&N Dec. 749, 750 n.1 (BIA 1988) (“Abandonment of lawful permanent resident status of a parent is imputed to a minor child who is subject to the parent's custody and control.”). See *Matter of Zamora (PDF)*, 17 I&N Dec. 395, 396 (BIA 1980) (“We hold that this voluntary and intended abandonment by the mother is imputed to the applicant, who was an unemancipated minor . . . at the time his mother abandoned her lawful resident status.”).

[^ 26] See INA 101(a)(27)(A).

[^ 27] See Chapter 3, Continuous Residence [12 USCIS-PM D.3]. See INA 316(a). See 8 CFR 316.5(a).

[^ 28] See INA 316(a)(1).

[^ 29] This does not apply in certain cases involving naturalizations based on military service. See INA 329(b)(1) (applicants eligible for military naturalization under INA 329(a)). See Section F, Removal Proceedings [12 USCIS-PM D.2(F)]. One possible basis for the NTA would be that the applicant lacked a valid entry document at the time of entry into the United States. See INA 237(a)(1)(A). See INA 212(a)(7)(A)(i).

[^ 30] See Section F, Removal Proceedings, Subsection 2, Pending Removal Proceedings [12 USCIS-PM D.2(F)(2)]. In removal proceedings, DHS has the burden of establishing by clear and convincing evidence that the applicant has abandoned his or her LPR status. See INA 240(c)(3)(4).

[^ 31] See 8 CFR 1241.1. For more information on the effect of removal proceedings on eligibility for naturalization, see Section F, Removal Proceedings [12 USCIS-PM D.2(F)].

[^ 32] See *Shyiak v. Bureau of Citizenship & Immigration Servs.*, 579 F. Supp 2d 900 (W.D. Mich. 2008).

[^ 33] See *Matter of Kane (PDF)*, 15 I&N Dec. 258 (BIA 1975).

[^ 34] See *Khodagholian v. Ashcroft*, 335 F.3d 1003 (9th Cir. 2003). See *Matter of Huang (PDF)*, 19 I&N Dec. 749 (BIA 1988).

[^ 35] See *Matter of Kane (PDF)*, 15 I&N Dec. 258 (BIA 1975) (alien found to have abandoned her permanent residence in the United States after she routinely spent 11 months of each year living in her native country in which she operated a business and returned to the United States for 1 month a year).

[^ 36] See *Matter of Kane (PDF)*, 15 I&N Dec. 258, 262 (BIA 1975). See *Singh v. Reno*, 113 F.3d 1512 (9th Cir. 1997). See *Ahmed v. Ashcroft*, 286 F.3d 611, 613 (2nd Cir. 2002) (When the visit “relies upon an event with a reasonable possibility of occurring within a short period of time. . .[,] the intention of the visitor must still be to return within a period relatively short, fixed by some early event”) (internal quotations omitted).

[^ 37] See *Singh v. Reno*, 113 F.3d 1512 (9th Cir. 1997). See *Shyiak v. Bureau of Citizenship and Immigration Services*, 579 F. Supp. 2d 900, 907 (W.D. Mich. 2008) (infrequent and short stays in the United States are insufficient as a matter of law to support retention of permanent resident status). See *U.S. v. Yakou*, 428 F.3d 241, 251 (D.C. Cir. 2005). See *Aleem v. Perryman*, 114 F.3d 672 (7th Cir. 1997).

[^ 38] See Chapter 3, Continuous Residence [12 USCIS-PM D.3]. See INA 316(a). See 8 CFR 316.2(a)(3).

[^ 39] See *Matter of Kane (PDF)*, 15 I&N Dec. 258 (BIA 1975).

[^ 40] See *Matter of Kane (PDF)*, 15 I&N Dec. 258, 262 (BIA 1975).

[^ 41] See *Matter of Kane (PDF)*, 15 I&N Dec. 258, 263 (BIA 1975). See *Chavez v. Ramirez*, 792 F2d 932, 937 (9th Cir. 1986).

[^ 42] See *Moin v. Ashcroft*, 335 F.3d 415 (5th Cir. 2003) (An LPR's reentry permit, in and of itself, does not prevent a finding that the alien has abandoned her LPR status and is therefore inadmissible on seeking reentry). See *Hana v. Gonzales*, 400 F.3d 472 (6th Cir. 2005) (while Hana did not possess a family, property or job in the United States, she still had an intent to return to the United States upon the approval of her family member’s immigrant visa petitions, which she had filed when she first obtained LPR status. The Court’s decision was influenced by Hana’s decision to remain in the country abroad with her family to ensure their safety in a country with an extreme regime in addition to taking care of her terminally ill mother-in-law.).

[^ 43] See *Singh v. Reno*, 113 F.3d 1512, 1514 (9th Cir. 1997).

[^ 44] See *Singh v. Reno*, 113 F.3d 1512, 1514-15 (9th Cir. 1997).

[^ 45] See *Katebi v. Ashcroft*, 396 F.3d 463 (1st Cir. 2005).

[^ 46] Also known as Form I-551.

[^ 47] See *Singh v. Reno*, 113 F.3d 1512 (9th Cir. 1997) (returning to the United States every year is not, without more, enough to indicate intent to remain an LPR).

[^ 48] See 8 CFR 223.3(d)(1).

[^ 49] See *Singh v. Reno*, 113 F.3d 1512, 1514-15 (9th Cir. 1997) (The alien's few established connections to the United States, despite over 2 1/2 years of LPR status, and his extended time abroad supported a finding that he abandoned his LPR status).

[^ 50] See 8 CFR 316.5(c)(2).

[^ 51] See 8 CFR 316.5(c)(2).

[^ 52] See Chapter 5, Modifications and Exceptions to Continuous Residence and Physical Presence [12 USCIS-PM D.5], for classes of applicants eligible to preserve residence.

[^ 53] The applicant may also need to apply for a reentry permit to be permitted to enter the United States.

[^ 54] See 8 CFR 316.5(d)(1)(iii).

[^ 55] See *U.S. v. Yakou*, 428 F.3d 241 (D.C. Cir. 2005).

[^ 56] See Pub. L. 104-208 (PDF), 110 Stat. 3009 (September 30, 1996). See Volume 8, Admissibility [8 USCIS-PM].

[^ 57] See INA 212(a)(9)(A).

[^ 58] See INA 212(a)(9)(B). See Volume 8, Admissibility, Part O, Aliens Unlawfully Present [8 USCIS-PM O].

[^ 59] See INA 212(a)(9)(C). See Volume 8, Admissibility, Part P, Aliens Present After Previous Immigration Violation [8 USCIS-PM P].

[^ 60] See INA 212(a)(6)(A).

[^ 61] See INA 212(a)(6)(B).

[^ 62] See INA 212(a)(6)(C)(ii). If an alien made a false claim to U.S. citizenship before IIRIRA's enactment (that is, September 30, 1996), then the officer must analyze whether the alien is inadmissible under the fraud and willful misrepresentation ground of inadmissibility. See Volume 8, Admissibility, Part K, False Claim to U.S. Citizenship, Chapter 1, Purpose and Background, Section B, Background [8 USCIS-PM K.1(B)].

[^ 63] See INA 212(a)(6)(G).

[^ 64] See *Mellouli v. Lynch (PDF)*, 575 U.S. 798 (2015).

[^ 65] See *Matter of Martinez Espinoza (PDF)*, 25 I&N Dec. 118 (BIA 2009). See *Mellouli v. Lynch (PDF)*, 575 U.S. 798 (2015).

[^ 66] See INA 212(a)(2)(A)(i)(II). See *Matter of Martinez Espinoza (PDF)*, 25 I&N Dec. 118 (BIA 2009).

[^ 67] Also reserving footnotes 67-72.

[^ 73] For example, refugee status or LPR status under the CAA.

[^ 74] See INA 201. See INA 203. See Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section A, Verify Underlying Basis to Adjust Status [7 USCIS-PM A.6(A)]. For immigrant visas, see 9 FAM 502, Immigrant Visa Classifications.

[^ 75] See 8 CFR 214.2(k)(2). See Instructions for Petition for Alien Fiancé(e) (Form I-129F).

[^ 76] See *Nesari v. Taylor*, 806 F. Supp. 2d 848 (E.D.Va. 2011) (finding that the applicant was not lawfully admitted for permanent residence because he entered the United States under a K-1 fiancé visa for which he was ineligible due to failure to fulfill the in-person meeting requirement prior to entry, and the applicant did not obtain a waiver of the requirement).

[^ 77] See INA 212. See Volume 8, Admissibility [8 USCIS-PM].

[^ 78] See INA 245(a)(2).

[^ 79] See Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 2, Eligibility Requirements [7 USCIS-PM A.2]. See Volume 9, Waivers [9 USCIS-PM].

[^ 80] In general, immigrant waivers for grounds of inadmissibility are requested by filing one of the following forms: Application for Waiver of Grounds of Inadmissibility (Form I-601), Application for Provisional Unlawful Presence Waiver (Form I-601A), or Application By Refugee For Waiver of Grounds of Excludability (Form I-602). However, in the case of refugee adjustment, there may be little or no documentation of a waiver request or approval, as USCIS may grant a waiver of inadmissibility without requiring the applicant to file a Form I-602. See Volume 7, Adjustment of Status, Part L, Refugee Adjustment, Chapter 3, Admissibility and Waiver Requirements [7 USCIS-PM L.3]. The terrorist-related inadmissibility grounds described in INA 212(a)(3)(B) may only be waived by application of an exercise of the Secretary's discretionary authority under INA 212(d)(3)(B)(i).

[^ 81] An applicant may not have met other requirements for naturalization, such as good moral character. If a naturalization application is deniable on grounds other than those related to TRIG, then the officer should deny the naturalization application on those grounds as well.

[^ 82] An applicant may have received an exemption that covered the terrorism-related inadmissibility ground during the adjudication of the adjustment of status application, or during the adjudication of an earlier application such as asylum or refugee status. If the relevant inadmissibility grounds were covered by the exemption, then the applicant's adjustment would have been in accordance with the law and INA 318 would not bar naturalization.

[^ 83] The relevant provision must have become effective prior to the applicant's adjustment or admission on an immigrant visa. Officers should consult with counsel for questions regarding the effect of the enactment of relevant provisions.

[^ 84] See INA 212(a)(3)(B)(i)(I) and INA 212(a)(3)(B)(iv)(VI).

[^ 85] See INA 212(a)(3)(B)(i)(IV).

[^ 86] See INA 212(a)(3)(B)(i)(V). See INA 212(a)(3)(B)(vi)(I), (II). See DOS's Foreign Terrorist Organizations webpage.

[^ 87] See INA 212(a)(3)(B)(i)(VI). See INA 212(a)(3)(B)(vi)(III). For more information about the categories of terrorist organizations, see the Terrorism-Related Inadmissibility Grounds (TRIG) webpage. Even though INA 212(a)(3)(B)(i)(V)-(VI) addresses present membership in a terrorist organization, officers should review prior activities and involvement when considering if the alien has engaged in terrorist activity.

[^ 88] See INA 212(a)(3)(B)(i)(IX) and INA 212(a)(3)(B)(iii).

[^ 89] See INA 212(a)(3)(B)(i)(VIII).

[^ 90] See *Matter of Koloamatangi*, 23 I&N Dec. 548 (BIA 2003). See *Injeti v. USCIS*, 737 F.3d 311, 316 (4th Cir. 2013) (to satisfy the burden of proving lawful admission for permanent residence, an applicant "must do more than simply show that she was granted LPR status; she must further demonstrate that the grant of status was 'in substantive compliance with the immigration laws'"). See *Walker v. Holder*, 589 F.3d 12, 20 (1st Cir. 2009). See *De La Rosa v. U.S. Dep't of Homeland Sec.*, 489 F.3d 551 (2nd Cir. 2007). See *Savoury v. U.S. Att'y General*, 449 F.3d 1307, 1313 (11th Cir. 2006). See *Arellano–Garcia v. Gonzales*, 429 F.3d 1183 (8th Cir. 2005). See *Matter of Longstaff*, 716 F.2d 1439 (5th Cir. 1983). See *Kyong Ho Shin v. Holder*, 607 F.3d 1213, 1217 (9th Cir. 2010). See INA 212(a)(6)(C)(i). See Volume 8, Admissibility, Part J, Fraud and Willful Misrepresentation, Chapter 3, Adjudicating Inadmissibility [8 USCIS-PM J.3].

[^ 91] For further discussion of fraud and willful misrepresentation, see Volume 8, Admissibility, Part J, Fraud and Willful Misrepresentation, Chapter 2, Overview of Fraud and Willful Misrepresentation [8 USCIS-PM J.2].

[^ 92] See *Koszelnik v. DHS*, 828 F.3d 175 (3rd Cir. 2016). See *Gallimore v. Attorney General of U.S.*, 619 F.3d 216, 224 (3rd Cir. 2010). For information regarding applicability to derivative applicants, see Subsection 8, Other Factors to Consider [12 USCIS-PM D.2(D)(8)].

[^ 93] See *Matter of B- and P-*, 2 I&N Dec. 638, 645-46 (A.G. 1947).

[^ 94] See *Matter of A.J. Valdez*, 27 I&N Dec. 496 (BIA 2018) (noting that the applicant is presumed to know the contents of an application he or she signs).

[^ 95] See 8 CFR 204.2(d). See INA 203(a)(1) and INA 203(a)(2).

[^ 96] See INA 318. An officer reviews the information in the naturalization application regarding marital history and compares that with previous immigration benefit requests.

[^ 97] See *Matter of Aldecoaotalora (PDF)*, 18 I&N Dec. 430 (BIA 1983). Where the beneficiary was divorced for the sole purpose of obtaining immigration benefits and continued to reside with and own property jointly with her former husband in what by all appearances is a marital relationship, such a divorce is considered a sham and is not acceptable for immigration purposes.

[^ 98] See *Lucaj v. Dedvukaj*, 13 F.Supp.3d 753 (E.D.M.I. 2014) (evidence established that her asylum application was implicated in a bribery fraud scheme in which an immigration official received money for favorable consideration of her application, resulting in the alteration of a recommendation that she be placed in removal proceedings).

[^ 99] See INA 212(a)(3)(B)(i). See INA 212(a)(3)(D)(i).

[^ 100] See INA 212(a)(3)(B)(i)(I). See INA 212(a)(3)(B)(iv).

[^ 101] Generally, if USCIS determines that a visa petition beneficiary previously entered into or sought to enter into a marriage for the purpose of evading the immigration laws of the United States, then the petition filed on behalf of the applicant must be denied. See INA 204(c). This applies even if the applicant's current marriage is bona fide. See *Matter of Kahy* (PDF), 19 I&N Dec. 803, 805 (BIA 1998).

[^ 102] See *Bark v. I.N.S.*, 511 F.2d 1200, 1202 (9th Cir. 1975).

[^ 103] See *Matter of Soriano* (PDF), 19 I&N Dec. 764 (BIA 1988). See *Matter of Phillis* (PDF), 15 I&N Dec. 385 (BIA 1975). See *Bark v. I.N.S.*, 511 F.2d 1200, 1202 (9th Cir. 1975). See *Damon v. Ashcroft*, 360 F.3d 1084, 1089 (9th Cir. 2004) ("The sole inquiry in determining whether a marriage was entered into in good faith is whether the parties intended to establish a life together at the time of marriage.").

[^ 104] See *Agyeman v. I.N.S.*, 296 F.3d 871, 883 (9th Cir. 2002) (detailing types of evidence that may prove bona fides of marriage besides spouse's testimony including joint tax returns, shared bank accounts or credit cards, or telephone bills).

[^ 105] See 8 CFR 103.2(b)(16)(i).

[^ 106] For additional information on valid marriages, see Part G, Spouses of U.S. Citizens, Chapter 2, Marriage and Marital Union for Naturalization [12 USCIS-PM G.2].

[^ 107] See CAA, Pub. L. 89-732 (PDF) (November 2, 1966), amended by the Refugee Act of 1980, Pub. L. 89-732 (PDF) (March 17, 1980).

[^ 108] See CAA, Pub. L. 89-732 (PDF) (November 2, 1966), amended by the Refugee Act of 1980, Pub. L. 89-732 (PDF) (March 17, 1980) (an applicant who is "physically present in the United States for at least one year may be adjusted by the Attorney General").

[^ 109] See 8 CFR 103.2(b)(1).

[^ 110] See instructions for Application to Register Permanent Residence or Adjust Status (Form I-485) (Additional Instructions for Applicants Filing under Special Adjustment Programs, Cuban Adjustment Act (CAA) section).

[^ 111] An alien may be granted LPR status under the CAA as a Cuban native or citizen.

[^ 112] See Updated agency interpretation of Cuban citizenship law for purposes of the Cuban Adjustment Act; rescission of *Matter of Vazquez* as an Adopted Decision, PM-602-0154, issued November 21, 2017.

[^ 113] See instructions for Application to Register Permanent Residence or Adjust Status (Form I-485) (Additional Instructions for Applicants Filing under Special Adjustment Programs, Cuban Adjustment Act (CAA) section).

[^ 114] See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386 (PDF) (October 28, 2000). See Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162 (PDF) (January 5, 2006).

[^ 115] A naturalization applicant who obtained LPR status through the VAWA amendments to the CAA must provide “any credible evidence” that the qualifying Cuban principal is a Cuban citizen or national. See INA 204(a)(1)(J) and 8 CFR 204.2(c)(2)(i). In recognition of the “any credible evidence” standard, as a matter of policy, USCIS verifies the qualifying Cuban principal’s status. See 8 CFR 103.2(b)(17)(ii).

[^ 116] See INA 209(a)(1)(B). See Volume 7, Adjustment of Status, Part L, Refugee Adjustment, Chapter 2, Eligibility Requirements, Section B, Physical Presence in the United States for at Least 1 Year [7 USCIS-PM L.2(B)].

[^ 117] See INA 209(b)(2). See Volume 7, Adjustment of Status, Part M, Asylee Adjustment, Chapter 2, Eligibility Requirements, Section A, Physical Presence in the United States for at Least 1 Year [7 USCIS-PM M.2(A)].

[^ 118] USCIS’ practice and policy has varied with regard to whether the 1 year of physical presence was required by the time of filing or by the time of adjudication of the adjustment of status application. See Volume 7, Adjustment of Status, Part L, Refugee Adjustment, Chapter 2, Eligibility Requirements, Section B, Physical Presence in the United States for at Least 1 Year [7 USCIS-PM L.2(B)] and Volume 7, Adjustment of Status, Part M, Asylee Adjustment, Chapter 2, Eligibility Requirements, Section A, Physical Presence in the United States for at Least 1 Year [7 USCIS-PM M.2(A)].

[^ 119] See *Reganit v. Secretary, Dept. of Homeland Sec.*, 814 F.3d 1253 (11th Cir. 2016) (naturalization applicant's adjustment to LPR status must be “in compliance with the substantive requirements of the law”).

[^ 120] See INA 245(c)(1).

[^ 121] See INA 212(e). To be eligible for an immigrant visa or lawful permanent residence, certain J-1 and J-2 nonimmigrant exchange visitors must have resided and been physically present in their country of nationality or country of last foreign residence for an aggregate of at least 2 years after departing the United States. See Application for Waiver of the Foreign Residence Requirement (under Section 212(e) of the Immigration and Nationality Act, as Amended) (Form I-612). See INA 214(l).

[^ 122] See 8 CFR 103.2(b)(1). Certain exceptions may apply to this general rule, such as adjustment of status approved for a surviving relative under INA 204(l), which allows for approval of the dependent’s application even though the principal passed away while the qualifying petition or application was pending and therefore never obtained LPR status. For further information on derivatives, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6].

[^ 123] See INA 203(d). See *Turfah v. United States Citizenship and Immigration Services*, 845 F.3d 668 (6th Cir. 2017) (USCIS properly denied a derivative son’s naturalization application where the derivative son was mistakenly admitted as an LPR before his father, the principal, who was not admitted as an LPR until 1 month after the derivative son). Certain exceptions may apply to this general rule, such as adjustment of status approved for a surviving relative under INA 204(l), which allows for approval of the dependent’s application even though the principal passed away while the qualifying petition or application was pending and therefore never obtained LPR status. For more information on derivatives, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6].

[^ 124] While a derivative would no longer be eligible to adjust status based on the principal applicant if the principal naturalizes (and is no longer an alien), the principal applicant who naturalizes may file a Petition for Alien Relative (Form I-130) for any eligible family member.

[^ 125] See *Matter of Valiyee (PDF)*, 14 I&N Dec. 710 (BIA 1974).

[^ 126] See Part L, Revocation of Naturalization, Chapter 3, Effects of Revocation of Naturalization [12 USCIS-PM L.3].

[^ 127] For more information, see Part L, Revocation of Naturalization, Chapter 3, Effects of Revocation of Naturalization [12 USCIS-PM L.3].

[^ 128] See *Kadirov v. Beers*, 71 F.Supp.3d 519 (E.D.Pa. 2014).

[^ 129] See *Matter of Awwal (PDF)*, 19 I&N Dec. 617, 621 (BIA 1988) (noting that “a marriage which is a sham from the outset cannot form the basis for a step relationship” under the INA). Even if the derivative beneficiary was not involved in the fraud or misrepresentation committed by the principal, the derivative would still be ineligible for naturalization under INA 318 based on inadmissibility on a different ground at the time of adjustment to LPR status. See *Matter of Teng* (PDF), 15 I&N Dec. 516, 519 (BIA 1975) (finding that even though the beneficiary did not participate in the fraud, he or she was nonetheless deportable under INA 237(a)(1)(A) as inadmissible at the time of admission or adjustment).

[^ 130] See INA 245(a). See 8 CFR 245.1(g)(1) and 8 CFR 245.2(a)(2)(i)(A). See Volume 7, Adjustment of Status, Part B, 245(a) Adjustment [7 USCIS-PM B]. For detailed guidance on the availability of immigrant visas, including for aliens who file using the Dates for Filing chart of the DOS Visa Bulletin, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section B, Definition of Properly Filed, Subsection 4, Visa Availability Requirement [7 USCIS-PM A.3(B)(4)] and Chapter 6, Adjudicative Review, Section C, Verify Visa Availability [7 USCIS-PM A.6(C)].

[^ 131] See 8 CFR 245.2(a)(5)(ii). See INA 203(a)-(c) (enumerating immigrant visa categories for which an alien is considered a “preference alien”).

[^ 132] See 8 CFR 245.2(a)(5)(ii), 8 CFR 245.1(g)(1), and 8 CFR 245.2(a)(2)(i)(A).

[^ 133] For more information on adjustment of status under INA 245(a), see Volume 7, Adjustment of Status Policies and Procedures, Part B, 245(a) Adjustment [7 USCIS-PM B].

[^ 134] See INA 245(i). See *Matter of Briones* (PDF), 24 I&N Dec. 355, 360-62 (BIA 2007). The sum required for INA 245(i) has changed over time. IIRIRA increased the sum to $1,000 in 1996. The increased sum applies to applications made on or after April 1, 1997. See Section 376 of IIRIRA, Pub. L. 104-208 (PDF), 110 Stat. 3009, 3009-648 (September 30, 1996). Officers should confirm what sum was required at the time an applicant applied to adjust under INA 245(i).

[^ 135] See 8 CFR 1239.1(a) (removal proceedings commence by the filing of an NTA with the immigration court). See INA 318. See *Klene v. Napolitano*, 697 F.3d 666, 669 (7th Cir. 2012)). See *Rumierz v. Gonzales*, 456 F.3d 31 (1st Cir. 2006). See *Ajlani v. Chertoff*, 545 F.3d 229 (2nd Cir. 2008). See *Zayed v. U.S.*, 368 F.3d 902 (6th Cir. 2004). See *De Lara Bellajaro*

v. Schiltgen, 378 F.3d 1042, 1043 (9th Cir. 2004), as amended. See *Martinez v. Johnson*, 104 F.Supp.3d 835, 843 (W.D. Tex. 2015). See *Ka Lok Lau v. Holder*, 880 F.Supp.2d 276 (D. Mass. 2012). See *Farghaly v. Frazier*, 404 F. Supp. 2d 1125, 1127 (D. Minn. 2005).

[^ 136] See INA 328(b)(2) (applicants currently in the U.S. armed forces and eligible for military naturalization under INA 328(a)). See INA 329(b)(1) (applicants eligible for military naturalization under INA 329(a)). See 8 CFR 329.2(e)(3).

[^ 137] See INA 318. See INA 328(b)(2) (applicants currently in the U.S. armed forces and eligible for military naturalization under INA 328(a)). See INA 329(b)(1) (applicants eligible for military naturalization under INA 329(a)). See Part I, Military Members and their Families, Chapter 2, One Year of Military Service during Peacetime (INA 328) [12 USCIS-PM I.2] and Chapter 3, Military Service during Hostilities (INA 329) [12 USCIS-PM I.3].

[^ 138] See Notice of Appeal or Motion (Form I-290B).

[^ 139] Officers should consult with OCC where an applicant is subject to an order of deportation or removal or was subject to an order of deportation or removal at the time of adjustment of status.

[^ 140] See INA 328(b)(2) (applicants currently in the U.S. armed forces and eligible for military naturalization under INA 328(a)). See INA 329(b)(1) (applicants eligible for military naturalization under INA 329(a)).

[^ 141] See INA 328(b)(2) (applicants currently in the U.S. armed forces and eligible for military naturalization under INA 328(a)). See INA 329(b)(1) (applicants eligible for military naturalization under INA 329(a)).

[^ 142] See INA 318.

[^ 143] See 8 CFR 318.1.

[^ 144] See *Yith v. Nielsen*, 881 F.3d 1155 (9th Cir. 2018) (declining to give effect to 8 CFR 318.1 by holding that an NTA is not a “warrant of arrest”). A Warrant for Arrest of Alien (Form I-200) is issued by U.S. Immigration and Customs Enforcement (ICE) under to 8 CFR 236.1(b). For deportation proceedings that commenced before IIRIRA, the Warrant of Arrest may be Form I-221S, which is part of the Order to Show Cause (Form I-221).

[^ 145] This applies to naturalization applications filed on or after November 18, 2020 (effective date of policy). See INA 318. See *De Lara Bellajaro v. Schiltgen*, 378 F.3d 1042, 1043 (9th Cir. 2004), as amended (agency’s denial of applicant’s naturalization application on the ground that INA 318 precludes the application from being considered while removal proceedings are pending is “unquestionably correct”).

[^ 146] See *Saba-Bakare v. Chertoff*, 507 F.3d 337, 340 (5th Cir. 2007) (denial of application for naturalization on the merits while applicant in removal proceedings is improper).

[^ 147] See *Zayed v. U.S.*, 368 F.3d 902, 907 (6th Cir. 2004) (“Regardless of when removal proceedings are initiated, the Attorney General may not naturalize an alien while such proceedings remain pending.”).

[^ 148] The “temporary pause” of removal proceedings through administrative closure is not equivalent to the termination of removal proceedings. See 8 CFR 245.1(c)(8). Instead, administrative closure of removal proceedings is “a docket management tool that is used to temporarily pause removal proceedings.” See *Matter of W-Y-U-*, 27 I&N Dec. 17, 18 (BIA 2017). Administrative closure of removal proceedings is used to “remove a case from an Immigration Judge's active calendar or from the Board's docket.” See *Matter of Avetisyan (PDF)*, 25 I&N Dec. 688, 692 (BIA 2012).

[^ 149] See INA 246(a). For additional information on rescission of lawful permanent residence see Volume 7, Adjustment of Status, Part Q, Rescission of Lawful Permanent Residence [7 USCIS-PM Q].

[^ 150] An order of removal is generally considered an administratively final order when either a decision by the BIA affirms an order of removal or the period in which the alien is permitted to seek review of such order by the BIA has expired, whichever date is earlier.

[^ 151] For further discussion of when USCIS issues or may issue an NTA in connection with a Form N-400, see Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens, PM-602-0187, issued February 28, 2025. Officers must refer to component-specific operational guidance related to the issuance of NTAs to determine if USCIS may issue the NTA or if the case must be referred to ICE.

[^ 152] See 8 CFR 1239.1(a). This does not apply in certain cases involving naturalizations based on military service. See INA 328(b)(2) (applicants currently in the U.S. armed forces and eligible for military naturalization under INA 328(a)). See INA 329(b)(1) (applicants eligible for military naturalization under INA 329(a)).

[^ 153] See INA 101(a)(29) and INA 308.

[^ 154] See INA 325. See 8 CFR 325.2. Nationals, but not citizens, may satisfy the residence and physical presence requirements through their residence and presence within any of the outlying possessions of the United States.

[^ 155] See INA 101(a)(20).

[^ 156] See INA 329(a) (lawful admission for permanent residence not required for applicants who are otherwise eligible for military naturalization under INA 329 and who were in the United States or certain other specified locations at the time of enlistment, reenlistment, extension of enlistment, or induction). See Part I, Military Members and their Families, Chapter 3, Military Service during Hostilities (INA 329) [12 USCIS-PM I.3].

Chapter 3 - Continuous Residence

A. Continuous Residence Requirement

An applicant for naturalization under the general provision[1] must have resided continuously in the United States after his or her lawful permanent resident (LPR) admission for at least 5 years prior to filing the naturalization application and up to the time of naturalization. An applicant must also establish that he or she has resided in the state or service district having jurisdiction over the application for 3 months prior to filing.[2]

The concept of continuous residence involves the applicant maintaining a permanent dwelling place in the United States over the period of time required by the statute. The residence in question “is the same as that alien’s domicile, or principal actual dwelling place, without regard to the alien’s intent, and the duration of an alien’s residence in a particular location

measured from the moment the alien first establishes residence in that location."[3] Accordingly, the applicant's residence is generally the applicant's actual physical location regardless of his or her intentions to claim it as his or her residence.

Certain classes of applicants may be eligible for a reduced period of continuous residence, for constructive continuous residence while outside the United States, or for an exemption from the continuous residence requirement altogether.[4] These classes of applicants include certain military members and certain spouses of U.S. citizens.[5]

The requirements of "continuous residence" and "physical presence" are interrelated but are different requirements. Each requirement must be satisfied (unless otherwise specified) in order for the applicant to be eligible for naturalization.[6]

B. Maintenance of Continuous Residence for Lawful Permanent Residents

USCIS will consider the entire period from the LPR admission until the present when determining an applicant's compliance with the continuous residence requirement.

An order of removal terminates the applicant's status as an LPR and therefore disrupts the continuity of residence for purposes of naturalization. However, an applicant who has been readmitted as an LPR after a deferred inspection or by an immigration judge in removal proceedings can satisfy the residence and physical presence requirements in the same manner as any other applicant for naturalization.[7]

Other examples that may raise a rebuttable presumption that an applicant has abandoned his or her LPR status include cases where there is evidence that the applicant voluntarily claimed "nonresident alien" status to qualify for special exemptions from income tax liability or fails to file either federal or state income tax returns because he or she considers himself or herself to be a "nonresident alien."[8]

C. Breaks in Continuous Residence

An applicant for naturalization has the burden of establishing that he or she has complied with the continuous residence requirement, if applicable. Generally, there are two ways outlined in the statute in which the continuity of residence can be broken:[9]

- The applicant is absent from the United States for more than 6 months but less than 1 year; or
- The applicant is absent from the United States for 1 year or more.

An officer may also review whether an applicant with multiple absences of less than 6 months each will be able to satisfy the continuous residence requirement. In some of these cases, an applicant may not be able to establish that his or her principal actual dwelling place is in the United States or establish residence within the United States for the statutorily required period of time.[10]

An LPR's lengthy or frequent absences from the U.S. can also result in a denial of naturalization due to abandonment of permanent residence.

An applicant who has an approved Application to Preserve Residence for Naturalization Purposes (Form N-470) maintains his or her continuous residence in the United States.[11]

1. Absence of More than 6 Months (but Less than 1 Year)

An absence of more than 6 months (more than 180 days) but less than 1 year (less than 365 days) during the period for which continuous residence is required (also called "the statutory period") is presumed to break the continuity of such residence.[12] This includes any absence that takes place during the statutory period before the applicant files the naturalization application and any absence between the filing of the application and the applicant's admission to citizenship.[13]

An applicant's intent is not relevant in determining the location of his or her residence. The length of the period of absence from the United States is the defining factor in determining whether the applicant is presumed to have disrupted the continuity of his or her residence.

However, an applicant may overcome the presumption of a break in the continuity of residence by providing evidence to establish that the applicant did not disrupt the continuity of his or her residence. Such evidence may include, but is not limited to, documentation that during the absence:[14]

- The applicant did not terminate his or her employment in the United States or obtain employment while abroad;
- The applicant's immediate family members remained in the United States; and
- The applicant retained full access to or continued to own or lease a home in the United States.

Eligibility After Break in Residence

An applicant who USCIS determines to have broken the continuity of residence must establish a new period of continuous residence in order to become eligible for naturalization.[15] The requisite duration of that period depends on the basis upon which the applicant seeks to naturalize.[16] In general, such an applicant may become eligible and may apply for naturalization at least 6 months before reaching the end of the pertinent statutory period.[17]

Example

An applicant who is subject to a 5-year statutory period for naturalization is absent from the United States for 8 months, returning on August 1, 2018. The applicant has been absent from the United States for more than 6 months (180 days) but less than 1 year (365 days). As such, the applicant must be able to rebut the presumption of a break in the continuity of residence in order to meet the continuous residence requirement for naturalization.

If the applicant is unable to rebut the presumption, he or she must wait until at least 6 months from reaching the 5-year anniversary of the newly established statutory period following the applicant's return to the United States. In this example, the newly established statutory period began on August 1, 2018, when the applicant returned to the United States. Therefore, the earliest the applicant may re-apply for naturalization is February 1, 2023, which is at least 6 months from the 5-year anniversary of the pertinent statutory period.[18]

2. Absence of 1 Year or More

An absence from the United States for a continuous period of 1 year or more (365 days or more) during the period for which continuous residence is required will automatically break the continuity of residence. This applies whether the absence takes place before or after the applicant files the naturalization application.[19]

Unless an applicant has an approved Application to Preserve Residence for Naturalization Purposes (Form N-470), USCIS must deny a naturalization application for failure to meet the continuous residence requirement if the applicant has been continuously absent for a period of 1 year or more during the statutory period. Form N-470 preserves residence for LPRs engaged in qualifying employment abroad with the U.S. government, private sector, or a religious organization.[20]

Eligibility After Break in Residence

An applicant applying for naturalization under INA 316, which requires 5 years of continuous residence, must then wait at least 4 years and 1 day after returning to the United States (whenever 364 days or less of the absence remains within the statutory period), to have the requisite continuous residence to apply for naturalization.[21] The statutory period preceding the filing of the application is calculated from the date of filing.

Once 4 years and 1 day have elapsed from the date of the applicant's return to the United States, the period of absence from the United States that occurred within the past 5 years is now less than 1 year. Since the period of absence is still more than 6 months, an applicant for naturalization in these circumstances must also overcome the presumption of a break in the continuity of residence.[22]

If the same applicant reapplies for naturalization at least 4 years and 6 months after reestablishing residence in the United States, he or she would not be subject to the presumption of a break in residence because the period of absence immediately preceding the application date is now less than 6 months.[23]

Example

An applicant for naturalization under INA 316 departs the United States on January 1, 2010, and returns January 2, 2011.[24] The applicant has been outside the United States for exactly 1 year (365 days) and has therefore broken the continuity of his or her residence in the United States. The applicant must wait until at least January 3, 2015, to apply for naturalization, when the 5-year statutory period[25] immediately preceding the application will date back to January 3, 2010. At that time, although the applicant will have been absent from the United States for less than 1 year during the statutory period, the applicant will still have been absent from the United States for more than 6 months (180 days) during the statutory period and may be eligible for naturalization if he or she successfully rebuts the presumption that he or she has broken the continuity of her residence.

If the applicant cannot overcome the presumption of a break in the continuity of his or her residence, the applicant must wait until at least July 6, 2015, to apply for naturalization, when the 5-year statutory period immediately preceding the application will date back to July 6, 2010. During the 5-year period of July 6, 2010 to July 6, 2015, assuming the applicant did not make any additional trips outside the United States that would cause USCIS to presume a break in continuity of residence, the applicant was only absent from the United States between July 6, 2010 and January 2, 2011, a period that is not more than 6 months. Therefore, no presumption of a break in continuous residence applies.

3. Summary

The following table provides a summary of how an applicant's absence from the United States may impact his or her eligibility to naturalize.

Impact of Absence from the United States During Statutory Period on Naturalization Eligibility

Duration of Absence	Must Applicant Overcome Presumption of a Break in the Continuity of Residence?	Eligible to Naturalize?
6 months or less	No[26]	Yes
More than 6 months but less than 1 year	Yes	Yes
1 year or more (without USCIS approval via N-470 process)	Not eligible to apply	No

The following table illustrates the length of time needed to re-establish eligibility and residence in the United States following an absence of 1 year or more from the United States.

Filing Under Specific Provisions After Break in Continuous Residence

Provision	Absence During Statutory Period	May Apply After…
INA 316 5-year statutory period	More than 1 year	• 4 years and 6 months, or • 4 years and 1 day (but must overcome presumption of break in continuity of residence)[27]
INA 319 3-year statutory period	More than 1 year	• 2 years and 6 months, or • 2 years and 1 day (but must overcome presumption of break in continuity of residence)

D. Preserving Residence for Naturalization (Form N-470)

Certain applicants[28] may seek to preserve their residence for an absence of 1 year or more to engage in qualifying employment abroad.[29] Such applicants must file an Application to Preserve Residence for Naturalization Purposes (Form N-470) in accordance with the form instructions.

In order to qualify, in general, the following criteria must be met:

- The applicant must have been physically present in the United States as an LPR for an uninterrupted period of at least 1 year prior to working abroad.
- The application may be filed either before or after the applicant's employment begins, but before the applicant has been abroad for a continuous period of 1 year.[30]

In addition, the applicant must have been:

- Employed with or under contract with the U.S. government or an American institution of research[31] recognized as such by the Attorney General;

- Employed by an American firm or corporation engaged in the development of U.S. foreign trade and commerce, or a subsidiary thereof if more than 50 percent of its stock is owned by an American firm or corporation;[32]
- Employed by a public international organization of which the United States is a member by a treaty or statute and by which the applicant was not employed until after becoming an LPR;[33] or
- Engaged solely for the purpose of performing the ministerial or priestly functions of a religious denomination having a bona fide organization within the United States, or engaged solely by a religious denomination or interdenominational mission organization having a bona fide organization within the United States as a missionary, brother, nun, or sister.[34]

The applicant's spouse and dependent unmarried sons and daughters are also entitled to such benefits during the period when they were residing abroad as dependent members of the principal applicant's household. The application's approval notice includes the applicant and any dependent family members who were also granted the benefit.

The approval of an application to preserve residence does not relieve an applicant (or any family members) from any applicable required period of physical presence, unless the applicant was employed by, or under contract with, the U.S. government[35] or performing religious duties.[36]

In addition, the approval of an application to preserve residence does not guarantee that the applicant (or any family members) will not be found, upon returning to the United States, to have lost LPR status through abandonment. USCIS may find that an applicant who claimed special tax exemptions as a "nonresident alien" to have lost LPR status through abandonment. The applicant may overcome that presumption with acceptable evidence establishing that he or she did not abandon his or her LPR status.[37]

Approval of an application to preserve residence also does not relieve the LPR of the need to have an appropriate travel document when the LPR seeks to return to the United States.[38] A Permanent Resident Card (PRC) card, generally, is acceptable as a travel document only if the person has been absent for less than 1 year.[39] If an LPR expects to be absent for more than 1 year, the LPR should also apply for a reentry permit. The LPR must actually be in the United States when he or she applies for a reentry permit.[40]

E. Residence in the Commonwealth of the Northern Mariana Islands

As of November 28, 2009, the Commonwealth of the Northern Mariana Islands (CNMI) is defined as a state in the United States for naturalization purposes.[41] Previously, residence in the CNMI only counted as residence in the United States for naturalization purposes for an alien who was an immediate relative of a U.S. citizen residing in the CNMI.

All other aliens, including any non-immediate relative LPRs, were considered to be residing outside of the United States for immigration purposes. Therefore, some LPRs residing in the CNMI, before the Consolidated Natural Resources Act of 2008 (CNRA) was enacted, were considered to have abandoned their lawful permanent resident status if they continuously lived in the CNMI.

Under the current law, USCIS no longer considers lawful permanent residents to have abandoned their LPR status solely by residing in the CNMI. This provision is retroactive and provides for the restoration of permanent resident status. However, the provision did not provide that the residence would count towards the naturalization continuous and physical presence requirements. Therefore, USCIS will only count residence in the CNMI on or after November 28, 2009, as continuous residence within the United States for naturalization purposes.[42]

F. Documentation and Evidence

Mere possession of a PRC for the period of time required for continuous residence does not in itself establish the applicant's continuous residence for naturalization purposes. The applicant must demonstrate actual maintenance of his or her principal dwelling place, without regard to intent, in the United States through testimony and documentation.

For example, a "commuter alien" may have held and used a PRC[43] for 7 years, but would not be eligible for naturalization until he or she had actually taken up permanent residence in the United States and maintained such residence for the required statutory period.

USCIS will review all of the relevant records to determine whether the applicant has met the required period of continuous residence. The applicant's testimony will also be considered to determine whether the applicant met the required period of continuous residence.

Footnotes

[^ 1] See INA 316(a).

[^ 2] See INA 316(a). See Chapter 6, Jurisdiction, Place of Residence, and Early Filing [12 USCIS-PM D.6].

[^ 3] See 8 CFR 316.5(a).

[^ 4] See Chapter 5, Modifications and Exceptions to Continuous Residence and Physical Presence [12 USCIS-PM D.5].

[^ 5] See Part I, Military Members and their Families [12 USCIS-PM I].

[^ 6] See Chapter 4, Physical Presence [12 USCIS-PM D.4].

[^ 7] See 8 CFR 316.5(c)(3) and 8 CFR 316.5(c)(4).

[^ 8] See 8 CFR 316.5(c)(2).

[^ 9] See INA 316(b).

[^ 10] See 8 CFR 316.5(a). See Chapter 3, Continuous Residence, Section A, Continuous Residence Requirement [12 USCIS-PM D.3(A)].

[^ 11] For more information, see Section D, Preserving Residence for Naturalization (Form N-470) [12 USCIS-PM D.3(D)].

[^ 12] See INA 316(a) and INA 316(b). See 8 CFR 316.2(a)(3), 8 CFR 316.2(a)(6), and 8 CFR 316.5(c)(1).

[^ 13] See 8 CFR 316.2(a)(3), 8 CFR 316.2(a)(6), and 8 CFR 316.5(c)(1).

[^ 14] See 8 CFR 316.5(c)(1)(i).

[^ 15] For example, this applies to applicants who were not able to overcome the presumption of the disruption of the continuity of residence after an absence of more than 6 months but less than 1 year during the pertinent statutory period.

[^ 16] For example, the pertinent statutory period under INA 316(a) is 5 years. For certain spouses of U.S. citizens, the statutory period is 3 years under INA 319(a). Under certain spousal provisions, there is no required statutory period residence (or period of physical presence) as provided under INA 319(b). See Part G, Spouses of U.S. Citizens [12 USCIS-PM G].

[^ 17] This is assuming that the applicant did not make any additional trips outside the United States that would cause USCIS to presume a break in continuity of residence after the previous disqualifying absence.

[^ 18] This is assuming that the applicant did not make any additional trips outside the United States that would cause USCIS to presume a break in the continuity of residence.

[^ 19] See INA 316(b).

[^ 20] See Section D, Preserving Residence for Naturalization (Form N-470) [12 USCIS-PM D.3(D)].

[^ 21] See 8 CFR 316.5(c)(1)(ii).

[^ 22] See Subsection 1, Absence of More than 6 Months (but Less than 1 Year) [12 USCIS-PM D.3(C)(1)].

[^ 23] Subject to certain conditions, spouses (and battered spouses and children) of U.S. citizens may apply for citizenship after 3 years of continuous residence. See INA 319. The same conditions apply to these applicants, however, the periods in question are 2 years and 1 day (eligible for naturalization if they can successfully rebut the presumption of a break in residence) and 2 years and 6 months (to avoid any presumption of a break in continuous residence).

[^ 24] For purposes of calculating time spent outside the United States, USCIS does not count the dates of travel among the dates spent outside the United States. Therefore, in this example, January 2, 2010 is the first date counted as outside the United States; January 1, 2011 is the last date counted as outside the United States.

[^ 25] In this example, the applicant is not the spouse (or battered spouse or child) of a U.S. citizen.

[^ 26] An applicant who has not been absent from the United States for any single period of greater than 6 months during the statutory period is neither considered nor presumed to have broken the continuity of his or her residence. However, there are circumstances in which an applicant who has multiple absences of less than 6 months each during the statutory period may nevertheless have broken the continuity of his or her residence even though the presumption does not apply.

[^ 27] See 8 CFR 316.5(c)(1)(ii). The applicant would still have an absence of over 6 months that occurred during the statutory period and therefore would still have a presumption of a break in continuous residence. See INA 316(b). See 8 CFR 316.2(a)(6) and 8 CFR 316.5(c)(1).

[^ 28] See Chapter 5, Modifications and Exceptions to Continuous Residence and Physical Presence [12 USCIS-PM D.5], for classes of applicants eligible to preserve residence.

[^ 29] The applicant may also need to apply for a reentry permit to be permitted to enter the United States.

[^ 30] See 8 CFR 316.5(d). For more information on filing timeframes, see Volume 1, General Policies and Procedures, Part B, Submission of Benefit Requests, Chapter 6, Submitting Requests, Section D, Filing Periods Ending on Weekends or Federal Holidays [1 USCIS-PM B.6(D)].

[^ 31] See 8 CFR 316.20. See uscis.gov/AIR for lists of recognized organizations.

[^ 32] See *Matter of Chawathe (PDF)*, 25 I&N Dec. 369 (AAO 2010).

[^ 33] See INA 316(b). See 8 CFR 316.20.

[^ 34] See INA 317. In these cases, the applicant may file Form N-470 before, during, or after an absence from the United States for qualifying religious duties, even if the absence lasted for more than 1 year. Additionally, while the applicant must still establish 1 year of uninterrupted physical presence in the United States, he or she may comply with this requirement at any time before filing the naturalization application. The applicant need not comply with this physical presence requirement before filing Form N-470. See Chapter 5, Modifications and Exceptions to Continuous Residence and Physical Presence, Section A, Qualifying Employment Abroad, Subsection 4, Person Performing Religious Duties [12 USCIS-PM D.5(A)(4)].

[^ 35] See INA 316(c). See Chapter 5, Modifications and Exceptions to Continuous Residence and Physical Presence [12 USCIS-PM D.5].

[^ 36] As described in INA 317. While persons performing religious duties as described in INA 317 must establish 1 year of uninterrupted physical presence in the United States before filing the naturalization application, they do not need to have met this requirement before starting their religious duties outside the United States, unlike other naturalization applicants filing Form N-470 who must meet this requirement before working outside of the United States.

[^ 37] See *Matter of Huang (PDF)*, 19 I&N Dec. 749 (BIA 1988). In removal proceedings, the Department of Homeland Security bears the burden of proving abandonment by clear and convincing evidence. But if the probative evidence is sufficient to meet that standard of proof, approval of the application to preserve residence, by itself, would not preclude a finding of abandonment.

[^ 38] See INA 212(a)(7)(A).

[^ 39] See 8 CFR 211.1(a)(2).

[^ 40] See 8 CFR 223.2(b)(1).

[^ 41] See INA 101(a)(36) and INA 101(a)(38). See 48 U.S.C. 1806(a) and 48 U.S.C. 1806(f). See Section 705(b) of the Consolidated Natural Resources Act of 2008 (CNRA), Pub. L. 110-229 (PDF), 122 Stat. 754, 867 (May 8, 2008) (48 U.S.C. 1806 note).

[^ 42] See Section 705(c) of the CNRA, Pub. L. 110-229 (PDF), 122 Stat. 754, 867 (May 8, 2008) (48 U.S.C. 1806 note). See *Eche v. Holder*, 694 F.3d 1026 (9th Cir. 2012).

[^ 43] See 8 CFR 211.5.

Chapter 4 - Physical Presence

A. Physical Presence Requirement

An applicant for naturalization is generally required to have been physically present in the United States for at least half the time for which his or her continuous residence is required. Applicants for naturalization under INA 316(a) are required to demonstrate physical presence in the United States for at least 30 months (at least 913 days) before filing the application.[1]

Physical presence refers to the number of days the applicant must physically be present in the United States during the statutory period up to the date of filing for naturalization. The continuous residence[2] and physical presence requirements are interrelated but each must be satisfied for naturalization.

USCIS will count the day that an applicant departs from the United States and the day he or she returns as days of physical presence within the United States for naturalization purposes.[3]

B. Documentation and Evidence

Mere possession of a Permanent Resident Card (PRC) for the period of time required for physical presence does not in itself establish the applicant's physical presence for naturalization purposes. The applicant must demonstrate actual physical presence in the United States through documentation. USCIS will review all of the relevant records to assist with the determination of whether the applicant has met the required period of physical presence. The applicant's testimony will also be considered in determining whether the applicant met the required period of physical presence.

Footnotes

[^ 1] See INA 316(a). See 8 CFR 316.2.

[^ 2] See Chapter 3, Continuous Residence [12 USCIS-PM D.3].

[^ 3] USCIS will only count residence in the Commonwealth of the Northern Mariana Islands on or after November 28, 2009, as time counted for physical presence within the United States for naturalization purposes.

Chapter 5 - Modifications and Exceptions to Continuous Residence and Physical Presence

Certain classes of applicants may be eligible for a reduced period of continuous residence and physical presence. Certain applicants may also be eligible to count time residing abroad as residence and physical presence in the United States for naturalization purposes.

Other applicants may be exempt from the residence or physical presence requirement, or both. Although not required in all cases, applicants are generally required to have been "physically present and residing within the United States for an uninterrupted period of at least one year" at some time after becoming a lawful permanent resident (LPR) and before filing to qualify for an exemption.

A. Qualifying Employment Abroad

The table below serves as a quick reference guide on certain continuous residence and physical presence provisions for persons residing abroad under qualifying employment. The paragraphs that follow the table provide further guidance on each class of applicant.

Continuous Residence and Physical Presence for Qualifying Employment Abroad

Employer or Vocation	Provision	Continuous Residence	Physical Presence
U.S. government or contractor	INA 316(b) INA 316(c)	Preserves residence through N-470 process	Exempt through N-470 process
American institution of research	INA 316(b) INA 316(c)	Preserves residence through N-470 process	Must meet regular statutory requirement
American firm	INA 316(b) INA 316(c)	Preserves residence through N-470 process	Must meet regular statutory requirement
Media organizations	INA 319(c)	Exempt	
Interpreter, translator, or security-related position (executive or manager)	Sec. 1059(e) of Pub. L. 109-163	Entire period abroad may count as continuous residence and physical presence in United States if engaged in qualifying employment for any portion of period abroad	
Religious duties	INA 317	Time residing abroad while performing religious duties may count as residence and physical presence in United States through N-470 process	

1. Employee of U.S. Government or Specified Entities

LPRs who have been continuously physically present in the United States for at least one year before filing an application to preserve residence and who obtain approval of the application from USCIS for employment by or contract with the U.S. government abroad will not break the continuity of their residence during such time abroad.[1] Such persons are exempt from the physical presence requirement.[2] Persons employed by or under contract with the Central Intelligence Agency can accrue the required year of continuous physical presence at any time prior to applying for naturalization and not just before filing the application to preserve residence.[3]

LPRs who have been continuously physically present in the United States for at least one year before filing an application to preserve residence and who obtain approval of the application from USCIS for employment abroad by an American institution of research recognized as such by the Attorney General (now DHS Secretary) or by an American firm[4]

engaged in development of U.S. foreign trade and commerce or its subsidiary, or a public international organization, will not break the continuity of their residence during such time abroad. Such applicants are subject to the physical presence requirement.[5]

Only applicants who are employed by or under contract with the U.S. government may be exempt from the physical presence requirements. All other applicants who are eligible to preserve their residence remain subject to the physical presence requirement.

The applicant's spouse and dependent unmarried sons and daughters, included in the application, are entitled to the same benefits for the period during which they were residing abroad with the applicant.[6]

2. Employee of Certain Media Organizations Abroad

An applicant for naturalization employed by a U.S. incorporated nonprofit communications media organization that disseminates information significantly promoting United States interests abroad, that is so recognized by the Secretary of Homeland Security, is exempt from the continuous residence and physical presence requirements if:

- The applicant files the application for naturalization while still employed, or within six months of termination of employment;
- The applicant has been continuously employed with the organization for at least five years after becoming an LPR;
- The applicant is within the United States at the time of naturalization; and
- The applicant declares a good faith intention to take up residence within the United States immediately upon termination of employment.[7]

3. Employed as an Interpreter, Translator, or Security-Related Position (Executive or Manager)[8]

Time Abroad as Continuous Residence and Physical Presence in the United States

An applicant's time employed abroad by, or under contract with, the Chief of Mission (Department of State) or by the U.S. armed forces as an interpreter, translator, or in a security-related position in an executive or managerial capacity[9] does not break any period for which continuous residence or physical presence in the United States is required for naturalization. The period abroad under such employment is treated as a period of residence and physical presence in the United States for naturalization purposes.

This benefit commonly referred to as the "section 1059(e)" provision only applies to the continuous residence and physical presence naturalization requirements. Applicants must still meet all other requirements for naturalization. The applicant has the responsibility of providing all documentation to establish eligibility.[10]

Qualifying Employment Abroad

In order to count time abroad as continuous residence and physical presence in the United States for purposes of naturalization under the "section 1059(e)" provision, the applicant must meet all of the following requirements during such time abroad:

- The applicant must be:
  - Employed by the Chief of Mission or the U.S. armed forces;
  - Under contract with the Chief of Mission or the U.S. armed forces; or
  - Employed by a firm or corporation under contract with the Chief of Mission or the U.S. armed forces;
- The applicant must be employed as:
  - An interpreter;
  - Translator; or
  - In a security-related position in an executive or managerial capacity; and
- The applicant must have spent at least a portion of the time abroad working directly with the Chief of Mission or the U.S. armed forces.

Security-Related Position Must be in an Executive or Managerial Capacity[11]

An applicant who was in a security-related position must have been in an executive or managerial capacity under such employment to qualify for the section 1059(e) benefits. USCIS uses the same definitions and general considerations that apply to other employment-based scenarios in the immigration context when determining whether an applicant worked in an executive or managerial capacity.

In general, an executive or managerial capacity requires a high level of authority and a broad range of job responsibilities. Managers and executives plan, organize, direct, and control an organization's major functions and work through other employees to achieve the organization's goals. The duties of the security-related position must primarily be of an executive or managerial nature, and a majority of the executive's or manager's time must be spent on duties relating to policy or operational management. This does not preclude the executive or manager from regularly applying his or her professional expertise to functions that are not executive or managerial in nature.

To be employed in an "executive capacity" means an assignment within an organization in which the employee primarily:

- Directs the management of the organization or a major component or function of the organization;
- Establishes the goals and policies of the organization, component, or function;
- Exercises wide latitude in discretionary decision-making; and
- Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.[12]

To be employed in a "managerial capacity" means an assignment within an organization in which the employee primarily:

- Manages the organization, or a department, subdivision, function, or component of the organization;
- Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.[13]

USCIS does not deem an applicant to be an executive or manager simply because he or she has such a title in an organization or because the applicant periodically directs the organization as the owner or sole managerial employee. The focus is on the applicant's primary duties. In this regard, there must be sufficient staff, such as contract employees or others,

to perform the day-to-day operations of the organization in order to enable the applicant to be primarily employed in an executive or managerial function.[14]

USCIS does not consider a person to be acting in a managerial or executive capacity merely on the basis of the number of employees that the person supervises. USCIS takes into account the reasonable needs of the organization with regard to the overall purpose and stage of development of the organization in cases where staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity.[15]

Applicable Period of Absence

Section 1059(e) benefits are available for an absence from the United States when an applicant is employed in a qualifying position and has worked directly with the Chief of Mission or the U.S. armed forces for any period of time during that absence. However, if the applicant spent part of that time abroad in employment other than the specified qualifying employment, then the applicant does not receive credit for that part of the time.

Other employment abroad, or employment as an interpreter, translator, or in a security-related position (as described above) by an entity other than the Chief of Mission or the U.S. armed forces, or under contract with them, does not provide a benefit to the applicant. Such an applicant would still be required to meet the continuous residence and physical presence requirements unless the applicant qualified for the preservation of his or her residence (through the N-470 process).[16]

4. Person Performing Religious Duties

Qualifying Religious Duties

An LPR who travels outside of the United States temporarily may treat such time outside of the United States as continuous residence and physical presence in the United States for naturalization purposes in cases where the LPR was outside of the United States for the sole purpose of:

- Performing the ministerial or priestly functions of a religious denomination with a bona fide organization within the United States; or
- Serving as a missionary,[17] brother, nun, or sister who was engaged solely by a religious denomination or interdenominational mission having a bona fide organization within the United States.

Applicants must have been physically present and residing within the United States for an uninterrupted period of at least 1 year before filing the naturalization application in order to qualify for naturalization.[18] While the applicant must establish 1 year of uninterrupted physical presence, he or she may comply with this requirement at any time before filing the naturalization application, after becoming an LPR.[19]

Application to Preserve Residence

The LPR must file an Application to Preserve Residence for Naturalization Purposes (Form N-470) in order for USCIS to consider whether the LPR qualifies to preserve continuous residence and physical presence while outside of the United States.

The Form N-470 may be filed before, during, or after an absence from the United States for qualifying religious duties, even if the absence lasted for more than 1 year. The applicant need not comply with the 1-year physical presence requirement mentioned above before filing Form N-470. However, the N-470 must be approved before USCIS can approve the naturalization application.[20]

B. Qualifying Military Service

Applicants with certain types of military service may be eligible for a modification or exception to the continuous residence and physical presence requirements for naturalization.

See Part I, Military Members and their Families,[21] for modifications and exceptions for applicants with certain types of military service, to include:

- One Year of Military Service – INA 328;
- Service during Hostilities – INA 329;
- Service in WWII Certain Natives of Philippines – Section 405 of IMMACT90; and
- Members who Enlisted under Lodge Act – Act of June 30, 1950, 64 Stat. 316.

C. Spouse, Child, or Parent of Certain U.S. Citizens

The spouse, child, or parent of certain U.S. citizens may be eligible for a modification or exception to the continuous residence and physical presence requirements for naturalization.

See Part G, Spouses of U.S. Citizens,[22] for modifications and exceptions for spouses of certain U.S. citizens, to include:

- Spouse of U.S. Citizen for 3 Years – INA 319(a);
- Spouse of Military Member Serving Abroad – INA 319(e);
- Surviving Spouse of U.S. Citizen – INA 319(d); and
- Surviving Spouse Person Conducting U.S. Intelligence.[23]

See Part H, Children of U.S. Citizens,[24] for modifications and exceptions to the continuous residence and physical presence requirements for children of certain U.S. citizens.

- Child of U.S. Government Employee (Abroad) – INA 320;
- Surviving Child of U.S. Citizen – INA 319(d); and
- Surviving Child of Person Conducting U.S. Intelligence.[25]

These parts will also include information on modifications and exceptions to the continuous residence and physical presence requirements for surviving parents of certain U.S. citizens.

D. Other Special Classes of Applicants

The table below serves as a quick reference guide to certain continuous residence and physical presence provisions for special classes of applicants. The paragraphs that follow the table provide further guidance on each class of applicant.

Continuous Residence and Physical Presence for Special Classes of Applicants

Applicant	Provision	Continuous Residence	Physical Presence
Citizens who lost citizenship through foreign military service	INA 327	Exempt	
Nationals, but not citizens	INA 325	Time residing in outlying possession may count as residence and physical presence in the United States	
Service on certain U.S. vessels	INA 330	Time in service on certain U.S. vessels may count as residence and physical presence in the United States	
Service contributing to national security	INA 316(f)	Exempt	

1. Citizens who Lost U.S. Citizenship through Foreign Military Service[26]

Former citizens who lost citizenship through service during the Second World War in foreign armed forces not then at war with the United States can regain citizenship. The applicant must be admitted as an LPR. However, the applicant is exempt from the continuous residence and physical requirements for naturalization.[27]

2. Nationals, but not Citizens, of the United States

The time a national, but not citizen, of the United States spends within any of the outlying possessions of the United States counts as continuous residence and physical presence in the United States.[28]

3. Service on Certain U.S. Vessels

Any time an LPR has spent in qualifying honorable service on board a vessel operated by the United States or on board a vessel whose home port is in the United States will be considered residence and physical presence within the United States.[29] The qualifying service must take place within five years immediately preceding the date the applicant files for naturalization.

4. Service Contributing to National Security

The Director of Central Intelligence, the Attorney General, and the Director of USCIS may designate annually up to five persons who have “made an extraordinary contribution to the national security of the United States or to the conduct of United States intelligence activities.” Such persons are exempted from the continuous residence and physical presence requirements.[30]

Footnotes

[^ 1] Any Peace Corps personal service contractor (PSC) who entered into a contract with the Peace Corps on or after November 21, 2011 is a U.S. government employee under the Immigration and Nationality Act (INA). See the Kate Puzey Peace Corps Volunteer Protection Act of 2011 (Puzey Act), Pub. L. 112-57 (PDF) (November 21, 2011), 22 U.S.C. 2509(a)(5), amending Section 10(a)(5) of the Peace Corps Act, Pub. L. 87-293 (PDF) (September 22, 1961), 22 U.S.C. 3901. Prior to enactment of the Puzey Act, PSCs were not considered U.S. government employees.

[^ 2] See INA 316(b) and INA 316(c).

[^ 3] See INA 316(c).

[^ 4] USCIS has adopted the AAO decision in *Matter of Chawathe (PDF)*, 25 I&N Dec. 369 (AAO 2010). The decision states that under INA 316(b), a publicly held corporation may be deemed an “American firm or corporation” if the applicant establishes that the corporation is both incorporated and trades its stock exclusively on U.S. Stock Exchange markets. If the applicant is unable to meet this qualification, then he or she must meet the requirements under *Matter of Warrach (PDF)*, 17 I&N Dec. 285, 286-287 (Reg. Comm. 1979). USCIS then determines the nationality of the corporation by reviewing whether more than 50 percent is owned by U.S. citizens. The applicant must establish this by a preponderance of the evidence.

[^ 5] See INA 316(b) and INA 316(c). See 8 CFR 316.20. See uscis.gov/AIR for a list of recognized organizations.

[^ 6] See INA 316(b)(2). See 8 CFR 316.5(d)(1)(ii).

[^ 7] See INA 319(c). See 8 CFR 319.4.

[^ 8] See Section 1059(e) of the National Defense Authorization Act of 2006, Pub. L. 109-163 (PDF) [8 U.S.C. 1101 Note] (January 6, 2006), as amended. The subsection ‘(e)’ provision relating to naturalization was added to Section 1059 on June 15, 2007. The amendments state that certain persons do not break the continuity of their residence in the United States for naturalization purposes during time abroad if employed abroad by, or under contract with, the Chief of Mission (Department of State) or by the U.S. armed forces as an interpreter or translator in Iraq or Afghanistan. See Pub. L. 110-36 (PDF) (June 15, 2007). On December 28, 2012, Section 1059(e) was further amended by adding certain security-related positions (in an executive or managerial capacity), in addition to interpreters and translators, as types of qualifying employment. The amendments also removed the geographical limitation of qualifying employment within Iraq or Afghanistan. See Pub. L. 112-227 (PDF) (December 28, 2012).

[^ 9] See INA 101(a)(44)(A) and INA 101(a)(44)(B) for statutory definitions of the terms “managerial capacity” and “executive capacity.” See 8 CFR 204.5(j)(2), 8 CFR 214.2(l)(1)(ii)(B), and 8 CFR 214.2(l)(1)(ii)(C). See Part F, Employment-Based Classifications, Chapter 4, Multinational Executive or Manager [6 USCIS-PM F.4] for further guidance on managerial and executive capacity and the evaluation of such positions.

[^ 10] Pub. L. 110-36 (PDF) added Section 1059(e) to the National Defense Authorization Act for Fiscal Year 2006, which added the interpreter and translator provisions.

[^ 11] See INA 101(a)(44)(A) and INA 101(a)(44)(B) for statutory definitions of the terms “managerial capacity” and “executive capacity.” See 8 CFR 204.5(j)(2), 8 CFR 214.2(l)(1)(ii)(B), and 8 CFR 214.2(l)(1)(ii)(C). See Part F, Employment-Based Classifications, Chapter 4, Multinational Executive or Manager [6 USCIS-PM F.4] for further guidance on managerial and executive capacity and the evaluation of such positions. See Foreign Affairs Manual (FAM), 9 FAM 402.12, Intracompany Transferees.

[^ 12] See INA 101(a)(44)(B). See 8 CFR 204.5(j)(2). See 8 CFR 214.2(l)(1)(ii)(C).

[^ 13] See INA 101(a)(44)(A). See 8 CFR 204.5(j)(2). See 8 CFR 214.2(l)(1)(ii)(B).

[^ 14] See INA 101(a)(44)(A) and INA 101(a)(44)(B) for statutory definitions of the terms “managerial capacity” and “executive capacity.” See 8 CFR 204.5(j)(2), 8 CFR 214.2(l)(1)(ii)(B), and 8 CFR 214.2(l)(1)(ii)(C). See Part F, Employment-Based Classifications, Chapter 4, Multinational Executive or Manager [6 USCIS-PM F.4] for further guidance on managerial and executive capacity and the evaluation of such positions. See 9 FAM 402.12, Intracompany Transferees.

[^ 15] See INA 101(a)(44)(C).

[^ 16] See INA 316(b) and INA 316(c). Certain applicants who meet the requirements of INA 316(b) to preserve residence may also qualify for benefits under INA 316(c) dealing with physical presence. See Section A, Qualifying Employment Abroad [12 USCIS-PM D.5(A)].

[^ 17] See INA 317.

[^ 18] See INA 317.

[^ 19] Persons performing religious duties as described in INA 317 do not need to have met this 1-year physical presence requirement before starting their religious duties outside the United States, unlike other naturalization applicants filing Form N-470 who must meet this requirement before working outside the United States. For more information on the N-470, see Chapter 3, Continuous Residence, Section D, Preserving Residence for Naturalization (Form N-470) [12 USCIS-PM D.3(D)].

[^ 20] See 8 CFR 316.5(d)(2). For more information about Form N-470, see Chapter 3, Continuous Residence, Section D, Preserving Residence for Naturalization (Form N-470) [12 USCIS-PM D.3(D)].

[^ 21] See 12 USCIS-PM I.

[^ 22] See 12 USCIS-PM G.

[^ 23] See Section 305 of the Intelligence Authorization Act of 1997, Pub. L. 104-293 (PDF), 110 Stat. 3461, 3465 (October 11, 1996).

[^ 24] See 12 USCIS-PM H.

[^ 25] See Section 305 of the Intelligence Authorization Act of 1997, Pub. L. 104-293 (PDF), 110 Stat. 3461, 3465 (October 11, 1996).

[^ 26] See INA 327.

[^ 27] See 8 CFR 327.1(f).

[^ 28] See INA 325. See 8 CFR 325.2. Unless otherwise provided under INA 301, the following persons are nationals, but not citizens of the United States at birth: (1) a person born in an outlying possession of the United States on or after the date of formal acquisition of such possession; (2) a person born outside the United States and its outlying possessions of parents both of whom are nationals, but not citizens, of the United States, and have had a residence in the United States, or one of its outlying possessions prior to the birth of such person; (3) a person of unknown parentage found in an outlying possession of the United States while under the age of five years, until shown, prior to his attaining the age of twenty- one years, not to have been born in such outlying possession; and (4) a person born outside the United States and its outlying possessions of parents one of whom is an alien, and the other a national, but not citizen, of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than seven years in any continuous period of ten years: during which the national parent was not outside the United States or its outlying possessions for a continuous period of more than one year, and at least five years of which were after attaining the age of fourteen years. See INA 101(a)(22) and INA 308.

[^ 29] See INA 330. See 8 CFR 330.1.

[^ 30] See INA 316(f).

Chapter 6 - Jurisdiction, Place of Residence, and Early Filing

A. Three-Month Residency Requirement (in State or Service District)

In general, an applicant for naturalization must file his or her application for naturalization with the state or service district that has jurisdiction over his or her place of residence. The applicant must have resided in that location for at least three months prior to filing.

The term “state” includes the District of Columbia, Puerto Rico, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands (CNMI).[1] The term “service district” is defined as the geographical area over which a USCIS office has jurisdiction.[2]

The service district that has jurisdiction over an applicant’s application may or may not be located within the state where the applicant resides. In addition, some service districts may have jurisdiction over more than one state and most states contain more than one USCIS office.

In cases where an applicant changes or plans to change his or her residence after filing the naturalization application, the applicant is required to report the change of address to USCIS so that the applicant’s A-file (with application) can be transferred to the appropriate office having jurisdiction over the applicant’s new place of residence.

B. Place of Residence

The applicant’s “residence” refers to the applicant’s principal, actual dwelling place in fact, without regard to intent.[3] The duration of an applicant’s residence in a particular location is measured from the moment the applicant first establishes residence in that location.[4]

C. Place of Residence in Certain Cases

There are special considerations regarding the place of residence for the following applicants:[5]

1. Military Member

Special provisions exist for applicants who are serving or have served in the U.S. armed forces but who do not qualify for naturalization on the basis of the military service for one year.[6]

- The service member's place of residence may be the state or service district where he or she is physically present for at least three months immediately prior to filing (or the examination if filed early);
- The service member's place of residence may be the location of the residence of his or her spouse or minor child, or both; or
- The service member's place of residence may be his or her home of record as declared to the U.S. armed forces at the time of enlistment and as currently reflected in the service member's military personnel file.

2. Spouse of Military Member (Residing Abroad)

The spouse of a U.S. armed forces member may be eligible to count the time he or she is residing (or has resided) abroad with the service member as continuous residence and physical presence in any state or district of the United States.[7] Such a spouse may consider his or her place of residence abroad as a place of residence in any state or district in the United States.

3. Students

An applicant who is attending an educational institution in a state or service district other than the applicant's home residence may apply for naturalization where that institution is located, or in the state of the applicant's home residence if the applicant is financially dependent upon his or her parents at the time of filing and during the naturalization process.[8]

4. Commuter

A commuter must have taken up permanent residence (principal dwelling place) in the United States for the required statutory period and must meet the residency requirements to be eligible for naturalization.[9]

5. Residence in Multiple States

If an applicant claims residence in more than one state, the residence for purposes of naturalization will be determined by the location from which the applicant's annual federal income tax returns have been and are being filed.[10]

6. Residence During Absences of Less than One Year

An applicant's residence during any absence abroad of less than one year will continue to be the state or service district where the applicant resided before departure. If the applicant returns to the same residence, he or she will have complied with the three-month jurisdictional residence requirement when at least three months have elapsed, including any part of the absence, from when the applicant first established that residence.[11]

If the applicant establishes residence in a different state or service district from where he or she last resided, the applicant must reside three months at that new residence before applying in order to meet the three-month jurisdictional residence requirement.[12]

7. Nationals, but not Citizens, of the United States

A national, but not citizen, may naturalize if he or she becomes a resident of any state and is otherwise qualified.[13] Nationals, but not citizens, will satisfy the continuous residence and physical presence requirements while residing in an outlying possession. Such applicants must reside for three months prior to filing in a state or service district to be eligible for naturalization.

D. 90-Day Early Filing Provision (INA 334)

An applicant filing under the general naturalization provision may file his or her application up to 90 days before he or she would first meet the required 5-year period of continuous residence as an LPR.[14] Although an applicant may file early according to the 90 day early filing provision, the applicant is not eligible for naturalization until he or she has reached the required five-year period of continuous residence as a lawful permanent resident (LPR).

USCIS calculates the early filing period by counting back 90 days from the day before the applicant would have first satisfied the continuous residence requirement for naturalization. For example, if the applicant would satisfy the five-year continuous residence requirement for the first time on June 10, 2010 USCIS will begin to calculate the 90-day early filing period from June 9, 2010. In such a case, the earliest that the applicant is allowed to file would be March 12, 2010 (90 calendar days earlier).

In cases where an applicant has filed early and the required three month period of residence in a state or service district falls within the required five-year period of continuous residence, jurisdiction for filing will be based on the three-month period immediately preceding the examination on the application.[15]

E. Expediting Applications from Certain Supplemental Security Income (SSI) Beneficiaries

USCIS will expedite naturalization applications filed by applicants:

- Who are within one year or less of having their Supplemental Security Income (SSI) benefits terminated by the Social Security Administration (SSA); and
- Whose naturalization application has been pending for four months or more from the date of receipt by USCIS.

Although USCIS will prioritize processing of these applications, each applicant is still required to meet all eligibility requirements for naturalization at the time of filing. Applicants must inform USCIS of the approaching termination of benefits by InfoPass appointment or by United States postal mail or other courier service by providing:

- A cover letter or cover sheet to explain that SSI benefits will be terminated within one year or less and that their naturalization application has been pending for four months or more from the date of receipt by USCIS; and
- A copy of the applicant's most recent SSA letter indicating the termination of their SSI benefits. (The USCIS A-number must be written at the top right of the SSA letter).

Footnotes

[^ 1] See INA 101(a)(36). As of November 28, 2009, the CNMI is part of the definition of United States. See Consolidated Natural Resources Act of 2008, Pub. L. 110-229 (PDF) (May 8, 2008). See Chapter 3, Continuous Residence, Section E, Residence in the Commonwealth of the Northern Mariana Islands [12 USCIS-PM D.3(E)].

[^ 2] See 8 CFR 316.1.

[^ 3] See INA 101(a)(33). This is the same as the applicant's actual domicile.

[^ 4] See 8 CFR 316.5(a).

[^ 5] See 8 CFR 316.5(b).

[^ 6] See INA 328. See Part I, Military Members and their Families, Chapter 2, One Year of Military Service during Peacetime (INA 328) [12 USCIS-PM I.2].

[^ 7] See INA 319(e). See Part I, Military Members and their Families, Chapter 9, Spouses, Children, and Surviving Family Benefits, Section B, Spouses of Military Members [12 USCIS-PM I.9(B)]. See Part G, Spouses of U.S. Citizens, Chapter 3, Spouses of U.S. Citizens Residing in the United States [12 USCIS-PM G.3].

[^ 8] See 8 CFR 316.5(b)(2).

[^ 9] See 8 CFR 211.5. See 8 CFR 316.5(b)(3).

[^ 10] See 8 CFR 316.5(b)(4).

[^ 11] See 8 CFR 316.5(b)(5).

[^ 12] See 8 CFR 316.2(a)(5).

[^ 13] See INA 325. See Chapter 5, Modifications and Exceptions to Continuous Residence and Physical Presence [12 USCIS-PM D.5].

[^ 14] See INA 334(a). See 8 CFR 334.2(b).

[^ 15] See 8 CFR 316.2(a)(5).

Chapter 7 - Attachment to the Constitution

A. Attachment to the Constitution

An applicant for naturalization must show that he or she has been and continues to be a person attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States during the statutorily prescribed period.[1] "Attachment" is a stronger term than "well disposed" and implies a depth of conviction, which would lead to active support of the Constitution.[2]

Attachment includes both an understanding and a mental attitude including willingness to be attached to the principles of the Constitution. An applicant who is hostile to the basic form of government of the United States, or who does not believe in the principles of the Constitution, is not eligible for naturalization.[3]

To be admitted to citizenship, naturalization applicants must take the Oath of Allegiance in a public ceremony. At that time, an applicant declares his or her attachment to the United States and its Constitution.[4] To be admitted to citizenship:

- The applicant must understand that he or she is taking the Oath freely without any mental reservation or purpose of evasion;
- The applicant must understand that he or she is sincerely and absolutely renouncing all foreign allegiance;
- The applicant must understand that he or she is giving true faith and allegiance to the United States, its Constitution and laws; and
- The applicant must understand that he or she is discharging all duties and obligations of citizenship including military and civil service when required by the law.

The applicant's true faith and allegiance to the United States includes supporting and defending the principles of the Constitution by demonstrating an acceptance of the democratic, representational process established by the U.S. Constitution, and the willingness to obey the laws which result from that process.[5]

B. Selective Service Registration

1. Males Required to Register

In general, males must register with Selective Service within 30 days of their 18th birthday but not after reaching 26 years of age. The U.S. government suspended the registration in April of 1975 and resumed it in 1980. An applicant who refused to or knowingly and willfully failed to register for Selective Service negates his disposition to the good order and happiness of the United States, attachment to the principles of the Constitution, good moral character, and willingness to bear arms on behalf of the United States.[6]

Applicants may register for Selective Service at their local post office, return a Selective Service registration card received by mail, or online at the Selective Service System website.[7] Confirmation of registration may be obtained by calling (847) 688-6888 or online at sss.gov. The officer may also accept other persuasive evidence presented by an applicant as proof of registration.

USCIS assists with the registration process by transmitting the appropriate data to the Selective Service System (SSS) for male applicants between the ages of 18 and 26 who apply for adjustment of status. After registering the eligible male, Selective Service will send an acknowledgement to the applicant that can be used as his official proof of Selective Service registration.

2. Failure to Register for Selective Service

USCIS will deny a naturalization application when the applicant refuses to register with Selective Service or has knowingly and willfully failed to register during the statutory period.[8] The officer may request for the applicant to submit a status information letter and registration acknowledgement card before concluding that he failed to register.

The status information letter will indicate whether a requirement to register existed. The applicant must show by a preponderance of the evidence that his failure to register was not a knowing or willful act.[9] Failure on the part of USCIS or SSS to complete the process on behalf of the applicant, however, will not constitute a willful failure to register on the part of the applicant.

The denial notice in cases where willful failure to register is established may also show that in addition to failing to register, the applicant is not well disposed to the good order and happiness of the United States. This determination depends on the applicant's age at the time of filing the application and up until the time of the oath:

Applicants Under 26 Years of Age

The applicant is generally ineligible.

Applicants Between 26 and 31 Years of Age

The applicant may be ineligible for naturalization. USCIS will allow the applicant an opportunity to show that he did not knowingly or willfully fail to register, or that he was not required to do so.

Applicants Over 31 Years of Age

The applicant is eligible. This is the case even if the applicant knowingly and willfully failed to register because the applicant's failure to register would be outside of the statutory period.

3. Males Not Required to Register

The following classes of males are not required to register for Selective Service:

- Males over the age of 26;
- Males who did not live in the United States between the ages of 18 and 26 years;
- Males who lived in the United States between the ages of 18 and 26 years but who maintained lawful nonimmigrant status for the entire period; and
- Males born after March 29, 1957 and before December 31, 1959.[10]

C. Draft Evaders

In general, the law prohibits draft evaders and deserters from the U.S. armed forces during wartime from naturalizing for lack of attachment to the Constitution and favorable disposition to the good order of the United States.[11]

A conviction by a court martial or a court of competent jurisdiction for a military desertion or a departure from the United States to avoid a military draft will preclude naturalization.[12] USCIS may obtain such information from the applicant's testimony during the naturalization examination (interview), security checks, and from the Request for Certification of Military or Naval Service (Form N-426).[13]

An applicant who admits to desertion during wartime, but who has not been convicted of desertion by court martial or court of competent jurisdiction may still be eligible for naturalization.[14] An applicant's military record may list him or her as a deserter but without a final conviction.

D. Membership in Certain Organizations

The officer will review an applicant's record and testimony during the interview on the naturalization application to determine whether he or she was ever a member of or in any way associated (either directly or indirectly) with:

- The Communist Party;
- Any other totalitarian party; or
- A terrorist organization.

Current and previous membership in these organizations may indicate a lack of attachment to the Constitution and an indication that the applicant is not well disposed to the good order and happiness of the United States.[15] Membership in these organizations may also raise issues of lawful admission, good moral character,[16] or may even render the applicant removable.[17]

The burden rests on the applicant to prove that he or she has an attachment to the Constitution and that he or she is well disposed to the good order and happiness of the United States, among the other naturalization requirements. An applicant who refuses to testify or provide documentation relating to membership in such organizations has not met the burden of proof. USCIS may still deny the naturalization application under such grounds in cases where such an applicant was not removed at the end of removal proceedings.[18]

1. Communist Party Affiliation

An applicant cannot naturalize if any of the following are true within 10 years immediately preceding his or her filing for naturalization and up until the time of the Oath of Allegiance:

- The applicant is or has been a member of or affiliated with the Communist Party or any other totalitarian party;
- The applicant is or has advocated communism or the establishment in the United States of a totalitarian dictatorship;
- The applicant is or has been a member of or affiliated with an organization that advocates communism or the establishment in the United States of a totalitarian dictatorship, either through its own utterance or through any written or printed matter published by such organization;
- The applicant is or has been a subversive, or a member of, or affiliated with, a subversive organization;
- The applicant is knowingly publishing or has published any subversive written or printed matter, or written or printed matter advocating communism;
- The applicant is knowingly circulating or has circulated, or knowingly possesses or has possessed for the purpose of circulating, subversive written or printed matter, or written or printed matter advocating communism; or

- The applicant is or has been a member of, or affiliated with, any organization that publishes or circulates, or that possesses for the purpose of publishing or circulating, any subversive written or printed matter, or any written or printed matter advocating communism.

2. Exemptions to Communist Party Affiliation

The burden is on the applicant to establish eligibility for an exemption. An applicant may be eligible for naturalization if he or she establishes that:

- The applicant's membership or affiliation was involuntary;
- The applicant's membership or affiliation was without awareness of the nature or the aims of the organization, and was discontinued when the applicant became aware of the nature or aims of the organization;
- The applicant's membership or affiliation was terminated prior to his or her attaining the age of 16;
- The applicant's membership or affiliation was terminated more than 10 years prior to the filing for naturalization;
- The applicant's membership or affiliation was by operation of law; or
- The applicant's membership or affiliation was necessary for purposes of obtaining employment, food rations, or other essentials of living.[19]

Even if participating without awareness of the nature or the aims of the organization, the applicant's participation must have been minimal in nature. The applicant must also demonstrate that membership in the covered organization was necessary to obtain the essentials of living like food, shelter, clothing, employment, and an education, which were routinely available to the rest of the population.

For purposes of this exemption, higher education qualifies as an essential of living only if the applicant can establish the existence of special circumstances which convert the need for higher education into a need as basic as the need for food or employment, and that he or she participated only to the minimal extent necessary to receive the essentials of living.

However, unless the applicant can show special circumstances that establish a need for higher education as basic as the need for food or employment, membership to obtain a college education is not excusable for obtaining an essential of living.[20]

3. Nazi Party Affiliation

Applicants who were affiliated with the Nazi government of Germany or any government occupied by or allied with the Nazi government of Germany, either directly or indirectly, are ineligible for admission into the United States and permanently barred from naturalization.[21] The applicant is responsible for providing any evidence or documentation to support a claim that he or she is not ineligible for naturalization based on involvement in the Nazi Party.

4. Persecution and Genocide

An applicant who has engaged in persecution or genocide is permanently barred from naturalization because he or she is precluded from establishing good moral character.[22] Additionally, an applicant who engaged in persecution or genocide prior to admission as a lawful permanent resident (LPR) would have been inadmissible. Such an applicant would not have lawfully acquired LPR status in accordance with all applicable provisions and would be ineligible for naturalization.[23] Such persons may also be deportable.[24]

5. Membership or Affiliation with Terrorist Organizations

Information concerning an applicant's membership in a terrorist organization implicates national security issues. Such information is important in determining the applicant's eligibility in terms of the good moral character and attachment requirements.

Footnotes

[^ 1] See INA 316(a). See 8 CFR 316.11.

[^ 2] See *In re Shanin*, 278 F. 739 (D.C. Mass. 1922).

[^ 3] See *Allan v. United States*, 115 F.2d 804 (9th Cir. 1940).

[^ 4] See INA 337. See 8 CFR 337.1. See Part J, Oath of Allegiance [12 USCIS-PM J].

[^ 5] The oath requirements may be modified for religious objections or waived for applicants with an inability to comprehend the oath. Prior to November 6, 2000, certain disabled applicants were precluded from naturalization because they could not personally express intent or voluntary assent to the oath requirement. However, subsequent legislation authorized USCIS to waive the oath requirements for anyone who has a medical condition constituting physical or developmental disability or mental impairment that makes him or her unable to understand or communicate an understanding of the meaning of the oath. An applicant for whom USCIS granted an oath waiver is considered to have met the requirement of attachment to the principles of the Constitution of the United States. See Pub. L. 106-448 (PDF) (November 6, 2000). See Part J, Oath of Allegiance, Chapter 3, Oath of Allegiance Modifications and Waivers [12 USCIS-PM J.3].

[^ 6] See INA 316(a) and INA 337(a)(5)(A). See the Selective Training and Service Act of 1940, Pub. L. 76-783 (September 16, 1940).

[^ 7] See sss.gov.

[^ 8] Failure to register is not a permanent bar to naturalization.

[^ 9] See 50 U.S.C. 3811.

[^ 10] See Section 1-101 of Proclamation 4771 of July 2, 1980 (PDF), 94 Stat. 3775. See 50 U.S.C. 3806. See Section 3(a) of the Selective Training and Service Act of 1940, Pub. L. 76-783, 54 Stat. 885, 885 (September 16, 1940). See 50 U.S.C. 3802(a).

[^ 11] See INA 316(a)(3).

[^ 12] See INA 314.

[^ 13] See Part I, Military Members and their Families [12 USCIS-PM I].

[^ 14] See *State v. Symonds*, 57 Me. 148 (1869). See *Holt v. Holt*, 59 Me. 464 (1871). See *McCafferty v. Guyer*, 59 Pa. 109 (1868).

[^ 15] See INA 313 and INA 316. See 8 CFR 316.

[^ 16] See Part F, Good Moral Character [12 USCIS-PM F].

[^ 17] See INA 237(a)(4).

[^ 18] See INA 313. See the Legal Decisions and Opinions of the Office of Immigration Litigation Case Summaries - No. 93-380, *Price v. U.S. Immigration and Naturalization Service*, seeking review of *Price v. U.S. Immigration and Naturalization Service*, 962 F.2d 836 (9th Cir. 1992).

[^ 19] See INA 313(d).

[^ 20] See *Langhammer v. Hamilton*, 194 F. Supp. 854, 857 (1961).

[^ 21] See INA 212(a)(3)(E).

[^ 22] See INA 101(a)(42), INA 101(f), and INA 208(b)(2)(A)(i). See Part F, Good Moral Character, Chapter 4, Permanent Bars to Good Moral Character (GMC), Section C, Persecution, Genocide, Torture, or Severe Violations of Religious Freedom [12 USCIS-PM F.4(C)].

[^ 23] See INA 318. See Chapter 2, LPR Admission for Naturalization [12 USCIS-PM D.2].

[^ 24] See INA 212(a)(3)(E).

Chapter 8 - Educational Requirements

In general, applicants for naturalization must demonstrate an understanding of the English language, including an ability to read, write, and speak words in ordinary usage. Applicants must also demonstrate a knowledge and understanding of the fundamentals of the history and principles and form of government of the United States (civics). These are the English and civics requirements for naturalization.

An applicant may be eligible for an exception to the English requirements if he or she is a certain age and has been an LPR for a certain period of time. In addition, an applicant who has a physical or developmental disability or mental impairment may be eligible for a medical exception of both the English and civics requirements.[1]

Footnote

[^ 1] See INA 312 and 8 CFR 312. See Part E, English and Civics Testing and Exceptions [12 USCIS-PM E].

Chapter 9 - Good Moral Character

One of the requirements for naturalization is good moral character (GMC). An applicant for naturalization must show that he or she has been, and continues to be, a person of good moral character. In general, the applicant must show GMC during the five-year period immediately preceding his or her application for naturalization and up to the time of the Oath of Allegiance. Conduct prior to the five-year period may also impact whether the applicant meets the requirement.[1]

Footnote

[^ 1] See Part F, Good Moral Character [12 USCIS-PM F].

Part E - English and Civics Testing and Exceptions

Chapter 1 - Purpose and Background

A. Purpose

United States citizenship confers rights, privileges, and responsibilities that are vital to the security and safety of the United States, unification around a common American identity and common welfare of the American people. In order to become a United States citizen through naturalization, an alien must be willing and able to accept all of the responsibilities of being a United States citizen in return for gaining certain rights and privileges.

Some rights of U.S. citizenship include the right to vote and the right to hold public office. The responsibilities of U.S. citizenship include serving on federal juries and most state juries, supporting and defending the United States and the U.S. Constitution, swearing loyalty to the United States and renouncing allegiance to any other country, and serving in the military or performing civilian service when called upon by the government.[1]

In recognition that U.S. citizens must be willing and able to carry out these rights and responsibilities, Congress, among other things, required that aliens applying for naturalization demonstrate basic English proficiency and knowledge and understanding of the fundamentals of the history, the principles, and the form of government of the United States (civics).[2]

Demonstration of English and civics knowledge is essential to showing an alien's commitment to fulfilling the rights and responsibilities of citizenship and to actively assimilate into American society. Understanding the rights and responsibilities of citizenship, engaging with the government, and fully contributing to the democratic process all rely on a basic understanding of the English language and American government and civics. Further, knowledge of English and U.S. government and civics enables naturalized citizens to more fully engage with local and federal government agencies and be active and responsible members of their local communities, furthering the success of our democracy.

In general, an alien must demonstrate an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in order to naturalize.[3] An alien who is applying for naturalization must also demonstrate a knowledge and understanding of the fundamentals of the history and principles and form of government of the United

States (civics).[4]

B. Background

Prior to 1906, naturalization procedures varied widely at the local level and an alien was not required to understand English, history, civics, or the principles of the U.S. Constitution to naturalize. Because there were no explicit educational requirements for naturalization, if the court determined the alien was a “thoroughly law-abiding and industrious man, of good moral character,” the alien became a U.S. citizen.[5]

With the Basic Naturalization Act of 1906, Congress created the Federal Naturalization Service, which was tasked with overseeing and implementing the constitutionally mandated uniform law of naturalization. However, the Basic Naturalization Act did not contain an explicit educational requirement.[6]

As far back as 1908, the former Immigration Service and the Courts determined that a person could not establish the naturalization requirement of showing an attachment to the Constitution unless he or she had some understanding of its provisions.[7]

In the 1930s, the Immigration and Naturalization Service (INS) under INS Commissioner D.W. MacCormack, made reforming naturalization testing a major initiative under his tenure. Commissioner MacCormack issued instructions described as definite and uniform procedure for examining aliens for citizenship and stressed that the examinations were meant to demonstrate the attachment to the principles of the Constitution rather than memorization of facts, and that the examination be uniform, fair, and devoid of “trick questions.”[8]

In 1940, Congress made amendments to include an English language requirement for naturalization and certain exemptions based on age and residence, as well as a provision for questioning aliens who were applying for naturalization on their understanding of the principles of the Constitution.[9] The Nationality Act of 1940 also expanded the agency’s authority to test naturalization candidates’ knowledge of the Constitution and U.S. government.[10]

The Internal Security Act of 1950 put into place what can be considered the modern educational requirements for naturalization, by amending the Nationality Act of 1940 to make knowledge of U.S. history and civics an explicit requirement for naturalization.[11] These amendments were carried forward essentially without change into the Immigration and Nationality Act (INA) when it was enacted in 1952. INS policy in 1950 maintained the civics test as primarily an oral quiz, with the degree of questioning determined by the alien’s education, background, and interactions with the examiner.[12]

The Immigration Reform and Control Act of 1986 (IRCA) mandated that persons legalized under INA 245A meet basic citizenship skills.[13] Aliens who qualified under IRCA could choose to demonstrate their understanding of U.S. history and government by taking a course prescribed in IRCA. For all other aliens, including those who qualified under IRCA who chose not to take a prescribed course, INS developed the “100 questions,” a list of civics questions based on content from the Federal Textbooks on Citizenship.[14] In 1994, Congress enacted legislation providing an exception to the naturalization educational requirements for aliens who cannot meet the requirements because of a medical disability.[15] Congress also amended the exceptions to the English requirement based on age and residence that are current today.[16]

In 1997, the U.S. Commission on Immigration Reform (the Commission) recommended that the former Immigration and Naturalization Service (INS)[17] standardize the naturalization testing process.[18] The Commission recommended that the naturalization test be revised to better determine if aliens have a meaningful knowledge of U.S. history and government and can communicate in English.

Also in 1997, the U.S. Department of Justice (DOJ) began to reengineer the naturalization process. For naturalization testing, DOJ determined that the former INS should develop a uniform approach to testing, including standard and meaningful test content, standardized testing instruments and protocols, standard scoring, and standard levels of passing. The former INS began to redesign the testing process with the goal of developing a new process that would be uniform, fair, and meaningful.[19]

On December 26, 2000, the former INS issued “Policy Memorandum No. 73: Standardization of Procedures for Testing Naturalization Applicants on English and Civics,” which announced plans to redesign the test and to provide interim guidance and procedures for testing aliens on English literacy and civics knowledge until the naturalization test was redesigned.

In 2003, USCIS began redesigning the naturalization test, and on October 1, 2008, USCIS implemented a redesigned English and civics test. With this redesigned test, USCIS ensured that all aliens had the same testing experience and an equal opportunity to demonstrate their understanding of English and civics.

On November 13, 2020, USCIS announced, as part of a decennial test review, a redesigned naturalization civics test (2020 Naturalization Civics Test) to ensure that it remained an instrument that comprehensively and more meaningfully assessed an alien’s knowledge of American history, government, and civics. Specifically, the revised 2020 Naturalization Civics Test improved USCIS’ ability to assess aliens’ knowledge and understanding of U.S. history and civics as required by the INA. The new test questions were piloted in July and August of 2020. USCIS implemented the redesigned civics test on December 1, 2020; however, shortly after implementation, USCIS reverted to the 2008 test version. On September 18, 2025, USCIS announced that it would resume administering the 2020 Naturalization Civics Test, with certain modifications [the 2025 Naturalization Civics Test], to aliens who filed applications for naturalization on or after October 20, 2025.

C. Legal Authorities

- INA 103; 8 CFR 103 – Powers and duties of the Secretary, the Under Secretary, and the Attorney General
- INA 312; 8 CFR 312 – Educational requirements for naturalization
- INA 316; 8 CFR 316 – General requirements for naturalization
- INA 332; 8 CFR 332 – Naturalization administration

Footnotes

[^ 1] See The Citizen’s Almanac (Form M-76 (PDF, 8.53 MB)).

[^ 2] See INA 312. See 8 CFR Part 312.

[^ 3] See INA 312. See 8 CFR 312.

[^ 4] See INA 312. See 8 CFR 312.

[^ 5] See *In re Rodriguez*, 81 F. 337 (W.D. Tex. 1897). Note that naturalization was under the exclusive jurisdiction of the federal courts until the Immigration Act of 1990.

[^ 6] See *Report to the President of the Commission on Naturalization appointed by executive order March 1, 1905, House of Representatives,* 59th Congress 1st Sess. (1905). (Several of the recommended laws drafted by the 1905 Presidential Commission on Naturalization, whose work the Basic Naturalization Act was based upon, proposed that the law include English literacy and educational requirements. None of these proposals made it into the final Act.)

[^ 7] See *In re Meakins*, 164 F. 334 (E.D. Wash. 1908). See *In re Vasicek*, 271 F. 326 (E.D. Mo. 1921).

[^ 8] See *Citizenship Program of the Immigration and Naturalization Service* (1936).

[^ 9] See the Nationality Act of 1940, Pub. L. 76-853 (PDF), 54 Stat. 1137 (October 14, 1940).

[^ 10] See the Nationality Act of 1940, Pub. L. 76-853 (PDF), 54 Stat. 1137, 1151 (October 14, 1940). (Under the Act,"[s]uch examination shall be limited to inquiry concerning the applicant's … understanding of and attachment to the fundamental principles of the Constitution of the United States, and other qualifications to become a naturalized citizen as required by law, and shall be uniform throughout the United States.").

[^ 11] See Internal Security Act of 1950, Pub. L. 81-831 (PDF), 64 Stat. 987 (September 23, 1950).

[^ 12] See INS Nationality Manual, Section 835.82, updated April 1, 1950.

[^ 13] See Pub. L. 99-603 (PDF), 100 Stat. 3359, 3396 (November 6, 1986). The INS Standardized Citizenship Testing Program was conducted by five non-government companies on behalf of the INS. That program was established in 1991 and ended on August 30, 1998. See 63 FR 25080 (May 6, 1998).

[^ 14] See United States, Bureau of Naturalization, *Federal Textbook on Citizenship*, (1918). (First published in 1918 by the Bureau of Naturalization, it was designed to assist immigrants prepare for naturalization examinations and was distributed to public schools offering citizenship classes).

[^ 15] See INA 312(b)(1). See Section 108 of the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416 (PDF), 108 Stat. 4305, 4309 (October 25, 1994) (adding INA 312(b)).

[^ 16] See the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416 (PDF) (October 25, 1994).

[^ 17] On March 1, 2003, the functions of INS were transferred from the U.S. Department of Justice (DOJ) to the Department of Homeland Security (DHS), pursuant to the Homeland Security Act of 2002, Pub. L. 107–296 (PDF) (November 25, 2002). INS' adjudication functions involving naturalization and citizenship were transferred to USCIS.

[^ 18] See H.R. 57-602, p. 15 (1997).

[^ 19] See Department of Justice News Release, DOJ and INS Begin Redesign of Citizenship Program Coopers and Lybrand Selected to Lead Effort, issued March 20, 1997.

Chapter 2 - English and Civics Testing

A. Educational Requirements

An officer administers a naturalization test to determine whether an alien meets the English and civics requirements.[1] The naturalization test consists of two components:

- English language proficiency, which is determined by the alien's ability to read, write, speak and understand English; and
- Knowledge of U.S. history and government, which is determined by a civics test.

An alien has two opportunities to pass the English and civics tests: the initial examination and the re-examination interview. USCIS denies the naturalization application if the alien fails to pass any portion of the tests after two attempts. In cases where an alien requests a USCIS hearing on the denial, officers must administer any failed portion of the tests.[2]

Unless excused by USCIS, the alien's failure to appear at the re-examination for testing or to take the tests at an examination or hearing counts as a failed attempt to pass the test.

B. Exceptions

An alien may qualify for an exception from the English requirement, civics requirement, or both requirements. The table below serves as a quick reference guide on the exceptions to the English and civics requirements for naturalization.

Exceptions to English and Civics Requirements for Naturalization

Exceptions [INA 312(b)]	English Educational Requirements: Read, write, speak, and understand	Civics Educational Requirements: Knowledge of U.S. history and government
Age 50 or older and resided in the United States as a lawful permanent resident (LPR) for at least 20 years at time of filing	Exempt	Still required. Aliens may take civics test in their language of choice using an interpreter.
Age 55 or older and resided in the United States as an LPR for at least 15 years at time of filing	Exempt	
Age 65 or older and resided in the United States as an LPR for at least 20 years at time of filing	Exempt	Still required but officers administer specially designated test forms. Aliens may take the civics test in their language of choice using an interpreter.
Medical Disability Exception (Form N-648)	May be exempt from English, civics, or both	

1. Age and Residency Exceptions to English

An alien is exempt from the English language requirement but is still required to meet the civics requirement if:

- The alien is age 50 or older at the time of filing for naturalization and has lived as an LPR in the United States for at least 20 years; or
- The alien is age 55 or older at the time of filing for naturalization and has lived as an LPR in the United States for at least 15 years.

The alien may take the civics test in his or her language of choice with the use of an interpreter.

2. Special Consideration for Civics Test

An alien receives special consideration in the civics test if, at the time of filing the application, the alien is 65 years of age or older and has been living in the United States for periods totaling at least 20 years subsequent to a lawful admission for permanent residence.[3] An alien who qualifies for special consideration is administered specific test forms.

3. Medical Disability Exception to English and Civics

An alien who cannot meet the English and civics requirements because of a medical disability may be exempt from the English requirement, the civics requirement, or both requirements.

C. Meeting Requirements under IRCA 1986

The Immigration Reform and Control Act of 1986 (IRCA) mandated that persons legalized under INA 245A meet a basic citizenship skills requirement in order to be eligible for adjustment to LPR status. An alien was permitted to demonstrate basic citizenship skills by:

- Passing the English and civics tests administered by legacy Immigration and Naturalization Service (INS); or
- Passing standardized English and civics tests administered by organizations then authorized by the INS.[4]

At the time of the naturalization re-examination, the officer only retests the alien on any portion of the test that the applicant did not satisfy under IRCA. In all cases, the alien must demonstrate the ability to speak English at the time of the naturalization examination, unless the alien meets one of the age and time as resident exemptions of English or qualifies for a medical waiver.[5]

D. English Portion of the Test

An alien applying for naturalization must only demonstrate an ability to read, write, speak, and understand words in ordinary usage.[6] Ordinary usage means comprehensible and pertinent communication through simple vocabulary and grammar, which may include noticeable errors in pronouncing, constructing, spelling, and understanding completely certain words, phrases, and sentences.

An alien may ask for words to be repeated or rephrased and may make some errors in pronunciation, spelling, and grammar and still meet the English requirement for naturalization. An officer should repeat and rephrase questions until the officer is satisfied that the alien either fully understands the question or is unable to understand English.[7]

1. Speaking Test

An officer determines an alien’s ability to speak and understand English based on the alien's ability to respond to questions normally asked in the course of the naturalization examination. The officer’s questions relate to eligibility and include questions provided in the naturalization application.[8] The officer should repeat and rephrase questions during the naturalization examination until the officer is satisfied that the alien either understands the questions or does not understand English.

An alien who does not qualify for a waiver of the English requirement must be able to communicate in English about his or her application and eligibility for naturalization. An alien does not need to understand every word or phrase on the application.

Passing the Speaking Test

If the alien generally understands and responds meaningfully to questions relevant to his or her naturalization eligibility, then he or she has sufficiently demonstrated the ability to speak English.

Failing the Speaking Test

An alien fails the speaking test when he or she does not understand sufficient English to be placed under oath or to answer the eligibility questions on his or her naturalization application. The officer must still administer all other parts of the naturalization test, including the portions on reading, writing, and civics.

An officer cannot offer or accept a withdrawal of a naturalization application from an alien who does not speak English unless the alien has an interpreter present who is able to clearly understand the consequences of withdrawing the application.[9]

2. Reading Test

To sufficiently demonstrate the ability to read in English, aliens must read one sentence out of three sentences. The reading test is administered by the officer using standardized reading test forms. Once the alien reads one of the three sentences correctly, the officer stops the reading test.

Passing the Reading Test

An alien passes the reading test if the alien reads one of the three sentences without extended pauses in a manner that the alien is able to convey the meaning of the sentence and the officer is able to understand the sentence. In general, the alien must read all content words but may omit short words or make pronunciation or intonation errors that do not interfere with the meaning.

Failing the Reading Test

An alien fails the reading test if he or she does not successfully read at least one of the three sentences. An alien fails to read a sentence successfully when he or she:

- Omits a content word or substitutes another word for a content word;
- Pauses for extended periods of time while reading the sentence; or
- Makes pronunciation or intonation errors to the extent that the alien is not able to convey the meaning of the sentence and the officer is not able to understand the sentence.

3. Writing Test

To sufficiently demonstrate the ability to write in English, the alien must write one sentence out of three sentences in a manner that the officer understands. The officer dictates the sentence to the alien using standardized writing test forms. An alien must not abbreviate any of the words. Once the alien writes one of the three sentences in a manner that the officer understands, the officer stops the writing test.

An alien does not fail the writing test because of spelling, capitalization, or punctuation errors, unless the errors interfere with the meaning of the sentence and the officer is unable to understand the sentence.

Passing the Writing Test

The alien passes the writing test if the alien is able to convey the meaning of one of the three sentences to the officer. The alien's writing sample may have the following:

- Some grammatical, spelling, or capitalization errors;
- Omitted short words that do not interfere with meaning; or
- Numbers spelled out or written as digits.

Failing the Writing Test

An alien fails the writing test if he or she makes errors to a degree that the alien does not convey the meaning of the sentence and the officer is not able to understand the sentence.

An alien fails the writing test if he or she writes the following:

- A different sentence or words;
- An abbreviation for a dictated word;[10]
- Nothing or only one or two isolated words; or
- A sentence that is completely illegible.

E. Civics Portion of the Test

1. Civics Test

Aliens applying for naturalization must demonstrate a knowledge and understanding of the fundamentals of the history, the principles, and the form of government of the United States (civics).[11] USCIS is committed to administering a test that is an instrument of civic learning and fosters civic assimilation as part of the test preparation process.

Depending on the date an application for naturalization is filed, an alien applying for naturalization may be required to take either the 2008 Naturalization Civics Test or the 2025 Naturalization Civics Test. The percentage of questions required to pass either version of the civics test remains at 60 percent.

Additionally, USCIS updates responses to certain questions on a rolling basis for accuracy. For example, USCIS will update responses because of federal or state elections, certain judicial appointments, or due to statutory changes or updates. When civics test questions are updated, so is the public-facing bank of questions and study materials, if applicable.[12]

2008 Naturalization Civics Test

Aliens who filed a naturalization application before October 20, 2025, must take the 2008 Naturalization Civics Test.

To sufficiently demonstrate knowledge of civics, the applicant must answer correctly at least six out of 10 questions (also called test items) from the standardized civics test form administered by an officer.

The 2008 Naturalization Civics Test contains a bank of 100 questions from which a USCIS system randomly selects the test questions, and an officer administers the test orally.[13] The standardized civics test contains 10 questions. The officer stops the test once the alien correctly answers the minimum number of six questions required to pass the test, or answers five questions incorrectly.

Passing the Civics Test

An applicant passes the civics test if he or she provides a correct answer or provides an alternative phrasing of the correct answer for six of the 10 questions.

Failing the Civics Test

An applicant fails the civics test if he or she provides an incorrect answer or fails to respond to five out of the 10 questions from the standardized test form.

2025 Naturalization Civics Test

Aliens who file a naturalization application on or after October 20, 2025, must take the 2025 Naturalization Civics Test.

To sufficiently demonstrate knowledge of civics, an alien applying for naturalization must pass a civics test by answering at least 12 of 20 questions correctly.

The 2025 Naturalization Civics Test contains a bank of 128 questions from which a USCIS system randomly selects the test questions, and an officer administers the test orally.[14] The standardized civics test contains 20 questions. The officer stops the test once the alien correctly answers the minimum of 12 questions required to pass the test, or answers nine questions incorrectly. Stopping the test after the requisite number of questions is answered either correctly or incorrectly is a departure from the 2020 Naturalization Civics Test. In other respects, the 2025 Naturalization Civics Test remains the same.

Passing the Civics Test

An alien passes the civics test if he or she provides a correct answer or provides an alternative phrasing of the correct answer for at least 12 out of the 20 questions.

Failing the Civics Test

An alien fails the civics test if he or she provides an incorrect answer or fails to respond to nine out of the 20 questions.

2. Special Consideration

An officer gives special consideration to an alien who is 65 years of age or older and who has been living in the United States for periods totaling at least 20 years subsequent to a lawful admission for permanent residence.[15] The age and time requirements must be met at the time of filing the naturalization application.

The bank of civics test questions for aliens given special consideration contains 20 specially designated civics questions to study. The civics test for aliens given special consideration contains 10 questions.

- Aliens who filed a naturalization application before October 20, 2025, are given a 10-question test from the 20 specially designated questions on the 2008 Naturalization Civics Test.
- Aliens who file a naturalization application on or after October 20, 2025, are given a 10-question test from the 20 specially designated questions on the 2025 Naturalization Civics Test.

An alien who meets the criteria for special consideration passes the civics test if he or she provides a correct answer or provides an alternative phrasing of the correct answer for at least six of 10 civics test questions from the specially designated list of 20 questions.

3. Due Consideration

An officer should exercise “due consideration” on a case-by-case basis in choosing subject matters, phrasing questions, and evaluating responses when administering the civics test. The officer’s decision to exercise due consideration should be based on a review of the alien's:

- Age;
- Background;
- Level of education;
- Length of residence in the United States;
- Opportunities available and efforts made to acquire the requisite knowledge; and
- Any other relevant factors relating to the alien’s knowledge and understanding.[16]

F. Failure to Meet the English or Civics Requirements

If an alien fails any portion of the English test, the civics test, or all tests during the initial naturalization examination, USCIS reschedules the alien to appear for a second examination between 60 and 90 days after the initial examination.[17]

In cases where the alien appears for a re-examination, the reexamining officer must not administer the same English or civics test forms administered during the initial examination. The officer must only retest the alien in those areas that the alien previously failed. For example, if the alien passed the English speaking, reading, and civics portions but failed the writing portion during the initial examination, the officer must only administer the English writing test during the re-examination.[18]

If an alien fails any portion of the naturalization test a second time, the officer must deny the application based upon the alien’s failure to meet the educational requirements for naturalization. The officer also must address any other areas of ineligibility in the denial notice. An alien who refuses to be tested or to respond to individual questions on the reading, writing, or civics test, or fails to respond to eligibility questions because he or she did not understand the questions as asked or rephrased, fails to meet to the educational requirements. An officer should treat an alien’s refusal to be tested or to respond to test questions as a failure of the test.[19]

G. Documenting Test Results

All officers administering the English and civics tests are required to record the test results in the alien’s A-file. Officers are required to complete and provide to each alien at the end of the naturalization examination the results of the examination and testing, unless the officer serves the applicant with a denial notice at that time.[20] The results of the examination include the results of the English and civics tests.

Footnotes

[^ 1] USCIS coordinates with external stakeholders to provide instruction and training materials related to the citizenship educational requirements. USCIS provides these educational materials and a list of all naturalization civics test items to aliens for study through the USCIS Citizenship Resource Center site.

[^ 2] Only one opportunity to pass the failed portion of the tests is provided at the hearing. See Part B, Naturalization Examination, Chapter 6, USCIS Hearing and Judicial Review, Section B, Review of Timely Filed Hearing Request [12 USCIS-PM B.6(B)].

[^ 3] See INA 312(b)(3).

[^ 4] See Pub. L. 99-603 (PDF), 100 Stat. 3359, 3396 (November 6, 1986). The INS Standardized Citizenship Testing Program was conducted by five non-government companies on behalf of the INS. That program was established in 1991 and ended on August 30, 1998. See 63 FR 25080 (May 6, 1998).

[^ 5] See INA 245A(b)(1)(D)(iii). See 8 CFR 312.3.

[^ 6] See INA 312. See 8 CFR 312.

[^ 7] See 8 CFR 335.2(c).

[^ 8] See 8 CFR 312.1(c)(1).

[^ 9] See Part B, Naturalization Examination, Chapter 4, Results of the Naturalization Examination, Section D, Administrative Closure, Lack of Prosecution, Withdrawal, and Applications Not Held in Abeyance [12 USCIS-PM B.4(D)].

[^ 10] An abbreviation for a dictated word may be accepted if the officer has approved the abbreviation.

[^ 11] See 8 CFR 312.2.

[^ 12] See the Check for Test Updates webpage.

[^ 13] See 8 CFR 312.2(c)(1).

[^ 14] See 8 CFR 312.2(c)(1).

[^ 15] See INA 312(b)(3).

[^ 16] See 8 CFR 312.2(c)(2).

[^ 17] See 8 CFR 335.3(b) (re-examination no earlier than 60 days from initial examination). See 8 CFR 312.5(a) (re-examination no later than 90 days from initial examination).

[^ 18] See 8 CFR 312.5.

[^ 19] See 8 CFR 312.5(b).

[^ 20] Officers must use Naturalization Interview Results (Form N-652).

Chapter 3 - Medical Disability Exception (Form N-648)

A. Purpose

U.S. law provides an exception for aliens who are unable to meet the required proficiency in English or the knowledge and understanding of the fundamentals of the history, and of the principles and form of government, of the United States ("civics") for naturalization because of a physical disability, developmental disability, or mental impairment.[1]

This medical disability exception to the English and civics requirements for naturalization ensures that aliens with legitimate and demonstrated physical or mental disabilities or impairments are not excluded from the naturalization process.

B. Background

In 1994, Congress enacted legislation providing an exception to the English and civics requirements for aliens filing for naturalization who cannot meet the requirements[2] because of a physical or developmental disability or mental impairment.[3]

The English and civics requirements do not apply to aliens filing for naturalization who are unable to comply due to a "medically determinable" physical or developmental disability or mental impairment[4] that has lasted, or is expected to last, at least 12 months. The regulations define medically determinable as an impairment that results from abnormalities which can be shown by medically acceptable clinical or laboratory diagnostic techniques.[5]

The alien must demonstrate that he or she has a disability or impairment that affects functioning such that the alien is unable to meet the English and civics requirements for naturalization, even with reasonable accommodations.

A licensed medical professional[6] must complete a Medical Certification for Disability Exceptions (Form N-648) and certify, under penalty of perjury, that the alien's disability or impairment prevents the alien from meeting the English requirement, the civics requirement, or both requirements.

C. Submission of Form N-648

1. Form N-648 Submitted Concurrently with Form N-400

An alien seeking an exception to the English or civics requirements or both must submit an initial Form N-648 as an attachment to the Application for Naturalization (Form N-400).[7] However, USCIS may accept an initial Form N-648 submitted after filing Form N-400, or the submission of multiple Forms N-648, in limited circumstances as set forth below. Aliens should use the form edition of the Form N-648 listed on the form webpage.

2. Late Submissions

A late submission occurs when an alien submits Form N-648 for the first time after filing Form N-400 (including at the interview). However, USCIS may accept late submissions of Form N-648 if the alien demonstrates extenuating circumstances. Aliens may provide supporting evidence and explain the extenuating circumstances that prevented the timely submission of Form N-648 in writing (submitted before or during the interview) or verbally at the interview.

For example, if an alien develops a disability or impairment after filing Form N-400 and provides evidence to support this claim, this change in his or her medical condition would ordinarily constitute extenuating circumstances that justify submitting Form N-648 late. Similarly, if an alien had a medical condition before filing, but it subsequently worsened and the alien is then unable to meet the educational requirement, the alien may be able to establish extenuating circumstances for the late submission. If there are other reasons for submitting Form N-648 late, USCIS evaluates these situations individually to determine whether to accept the late submission.[8]

Officers should evaluate each form submitted late individually, considering both verbal statements and any supporting documentation. If the explanation to support the late submission is vague, incomplete, or if there is evidence suggesting that disability or impairment existed before filing Form N-400, officers may question[9] the validity of the medical certification.

Submission of updated or additional Forms N-648 in response to a request from USCIS will not be considered a late submission.

When an alien has already submitted one Form N-648 with his or her Form N-400 but presents a new or updated Form N-648 at the interview, this is considered a multiple submission rather than a late submission.

3. Multiple Submissions

Only one initial Form N-648 should be submitted with the naturalization application. If the alien submits more than one Form N-648 at any stage of the naturalization process—whether during the initial interview, re-examination, or while the application is still pending—the officer may question the validity of the submissions.[10] The officer should ask the alien to explain why multiple forms were submitted and carefully examine any discrepancies between them.

When two different Form N-648 submissions come from separate medical professionals, this may raise concerns about the credibility of the medical certification, if there are significant inconsistencies in medical assessments or diagnoses. For example, discrepancies regarding the nature or origin of the disability or impairment or its impact on the alien's ability to meet

English or civics requirements may call the validity of the medical certification into question.

If significant discrepancies or inconsistencies exist, the officer may determine that Form N-648 is insufficient. However, before making this determination, the officer must give the alien an opportunity to explain the discrepancies.[11]

Submission by the alien of a second Form N-648 at re-exam by the same medical professional, or a different medical professional when USCIS has directed the alien to submit a Form N-648 from a different medical professional, to address the insufficiencies USCIS identified in the initial N-648 will not be considered submitting multiple Forms N-648. However, the officer at re-exam should carefully examine the new Form N-648 to ensure that it addresses all insufficiencies and is consistent with the prior Form N-648.

If legitimate concerns about the validity of the medical certification still exist, USCIS may find the Form N-648 insufficient[12] and require the alien to submit a Form N-648 from a different medical professional.[13]

D. Distinction Between Medical Disability Exception and Accommodation

Requesting an exception to the English or civics requirements or both is different from requesting an accommodation for the naturalization test or interview.[14] An accommodation simply modifies the manner in which an applicant meets the educational requirements; it does not exempt the applicant from the English or civics requirements. Form N-648 is not used to request an accommodation.

Reasonable accommodations may include, but are not limited to, sign language interpreters, extended time for completing the English and civics requirements, and completing the English and civics requirements and naturalization interview at an off-site location. A disability exception, which can only be requested by submitting Form N-648, requires an applicant to show that the applicant's physical or developmental disability or mental impairment prevents the applicant from complying with the English or civics requirements or both, even with reasonable accommodations. The impact of a particular physical or developmental disability or mental impairment may vary between applicants.

It may be possible for USCIS to accommodate one applicant who is affected by a particular physical or developmental disability or mental impairment, while another applicant affected by the same disability or impairment may be eligible for a disability exception.[15] For example, an applicant who has a traumatic brain injury may require the accommodation of more time to complete the writing portion of the English test, while an applicant with the same diagnosis may not be able to write a simple sentence in English even with an accommodation, and needs to submit a Form N-648.

An applicant may request both a medical disability exception and a reasonable accommodation where both are needed. For example, if an applicant is deaf and uses a sign language interpreter and is also unable to meet the English and civics requirements due to a physical or developmental disability or mental impairment, the applicant may submit a Form N-648 and also request that USCIS provide a sign language interpreter for the naturalization interview.[16]

E. Authorized Medical Professionals

USCIS only authorizes the following licensed medical professionals to certify the disability exception form:

- Medical doctors;
- Doctors of osteopathy; and
- Clinical psychologists.[17]

These medical professionals must be licensed to practice in any state of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands of the United States, or the Commonwealth of the Northern Mariana Islands.

F. Scope of Medical Examination

In order for USCIS to consider a Form N-648 sufficient, the medical professional must, at a minimum:

- Conduct an examination of the alien;
- Identify and describe each disability or impairment that affects the alien's ability to meet the English or civics requirements on Form N-648;
- Explain how each disability or impairment prevents the alien from learning or demonstrating knowledge of English, civics, or both;
- Attest that the disability or impairment has lasted or is expected to last at least 12 months; and
- Attest that the cause of the disability or impairment is not related to the illegal use of drugs.

The medical professional should complete the Form N-648 using common terminology that a person without medical training can understand. While staff associated with the medical professional may assist in completing the form, the medical professional alone is responsible for providing the necessary information, answering the questions, and verifying and attesting to the accuracy of the form's content. If information is missing from the Form N-648, the officer should review any extra documents provided by the medical professional to determine if the information completes the Form N-648. If the missing information is not present on the additional documentation, the officer must reject the Form N-648 as insufficient.

The medical professional certifying the form may choose to provide additional information as attachments to the Form N-648 to support the claim of disability. Any supporting documentation should be relevant, probative, and credible to establish that the medical disability or impairment prevents the alien from completing the English and civics requirements.

Telehealth Examination

USCIS may accept a Form N-648 certified by an authorized medical professional who completed the alien's medical examination through a telehealth examination.[18] The medical professional must be licensed. In conducting telehealth examinations, medical professionals must adhere to the respective state telehealth laws and requirements, otherwise USCIS may request a new Form N-648. After a telehealth examination, the alien should ensure all signatures are present and then submit the Form N-648 to USCIS.

G. Review of Medical Certification

1. General Review Guidelines

The officer must carefully review the form for sufficiency[19] to determine whether the alien is eligible for the exception. The tables below provide general guidelines on what steps the officer should and should not take when reviewing the Form N-648. The alien has the burden of proof by the "preponderance of the evidence" standard.[20] The form must be reviewed based on the totality of evidence in the record to assess eligibility.

If USCIS identifies deficiencies in a Form N-648, the alien must submit a new Form N-648.

When reviewing the form, the officer must:
• Determine whether the form has been completed, certified, and signed by all appropriate parties.
• Ensure that the Form N-648 relates to the alien and that there are no significant discrepancies between the form and other available information, including biographic data, testimony during the interview, or information contained in the alien's A-file or record.
• Determine whether the alien has met his or her burden to establish eligibility for the exception by a preponderance of the evidence. This determination includes ensuring that the medical professional's explanation is both sufficiently detailed as well as specific to the alien and to the alien's stated disability or impairment (rather than a generic, "one size fits all" explanation).
When reviewing the form, the officer should not:
• Attempt to determine the validity of the medical diagnosis or second guess why this diagnosis precludes the alien from complying with the English requirement, civics requirement, or both requirements.
• Request to see an alien's medical or prescription records solely to question whether there was a proper basis for the medical professional's diagnosis unless evidence exists that creates significant discrepancies that those records can help resolve. The officer may ask follow-up questions to resolve any outstanding issues.
• Require that an alien undergo specific medical, clinical, or laboratory diagnostic techniques, tests, or methods.
• Conclude that the alien has failed to meet the burden of proof solely because the alien did not previously disclose the alleged medical condition in other immigration-related medical examinations or documents. It is appropriate, however, to consider this as a factor when determining the sufficiency of the Form N-648. The officer should always carefully examine the evidence of record and ask follow-up questions to resolve any outstanding issues.
• Refer an alien to another medical professional solely because the alien sought care from a professional who shares the same language, culture, ethnicity, or nationality.

2. Connection Between Medical Disability and Educational Requirements

When reviewing the request for the medical disability exception, the officer must determine whether the medical professional has sufficiently explained with enough supporting details that the alien has a disability or impairment. The medical professional must also explain how the disability or impairment prevents the alien from being able to demonstrate that he or she meets the English requirement, civics requirement, or both (also known as "nexus").[21] The explanation should be sufficiently detailed and tailored to the individual alien's diagnosed disabilities or impairments.

After review of the record, the officer may only grant an exception from the English or civics requirements if the alien has demonstrated by a preponderance of the evidence that the physical or developmental disability or mental impairment results in functioning so impaired as to render the alien unable to:

- Demonstrate an understanding of the English language, including reading, writing, and speaking words in ordinary usage in the English language;
- Demonstrate a knowledge and understanding of the fundamentals of history and of the principles and form of government of the United States; or
- Both.

3. Use of Interpreters

Certification on Form N-648 and Presence of Interpreter at Medical Examination

A medical professional may use an interpreter during a medical examination. The interpreter must sign the interpreter section of Form N-648. Interpreters who provide services for telehealth medical examinations are not required to complete the interpreter certification on Form N-648. Instead, it is the responsibility of the medical professional to complete the interpreter certification on the form.

When it's not clear if an interpreter was present during the medical examination, the officer must confirm with the alien whether an interpreter assisted during the medical examination that was conducted to complete Form N-648. For example, the officer may ask the alien how they communicated during the medical examination.

If necessary, the officer may ask the interpreter about the interpretation services he or she provided during the medical examination in connection with the alien's Form N-648.[22] Officers may not ask interpreters about the medical condition of the alien. Before questioning the interpreter, the officer must place the interpreter under oath.

If the interpreter who assisted during the medical examination is also serving as the interpreter for the naturalization interview, and is to be questioned as a witness, the interpreter must be disqualified from interpreting for that alien at the naturalization interview unless there is a valid exception for good cause.[23] If no good cause exception applies, the officer reschedules the interview, as needed, to allow the alien time to find a new interpreter.

Interpreter at Interview

If at the interview the officer needs to ask the alien questions about Form N-648 or explain why it is insufficient, the officer must do so in the alien's preferred language, with the use of an interpreter,[24] and while the alien is under oath. If the office has a language service available and the alien agrees, the officer may use the language service when the interpreter provided by the alien is disqualified. In the agency's discretion, as in all cases, the officer may disqualify an interpreter provided by the alien or a telephonic language service interpreter for cause and reschedule the interview.[25] If the officer disqualifies the alien's interpreter and no additional questioning about the Form N-648 is needed to determine its sufficiency, the officer should reject the N-648.

4. Credible Reasons to Doubt the Validity of Form N-648

One of the reasons that USCIS might consider a Form N-648 insufficient is if there are credible reasons to doubt its validity. Such reasons may include, but are not limited to, discrepancies (for example, the medical certification directly conflicts with other evidence), misrepresentation, or fraud. However, USCIS generally presumes that the medical professional's diagnosis is valid, unless credible evidence suggests otherwise. The presumption that the medical professional has correctly diagnosed the alien's medical condition is not a presumption that the alien has met his or her burden of establishing eligibility for the waiver.

If an officer identifies inconsistencies or discrepancies in the Form N-648 during the naturalization interview, the alien must be given an opportunity to address the inconsistencies. If discrepancies are not resolved during the interview, the officer may issue a Request for Evidence (RFE). When issuing an RFE, the officer should only request the information necessary to determine the sufficiency of the Form N-648. In some cases, USCIS may require:

- A new Form N-648;
- Medical records to verify the diagnosis; or
- Evidence confirming that the medical professional actually examined and diagnosed the alien.

Such requests are warranted when there are credible reasons to doubt the validity of the Form N-648 particularly if documentary evidence clearly contradicts the medical diagnosis or claimed disability or impairment.

Examples of Credible Reasons to Doubt Validity

The following are examples of situations that may raise credible doubts about the validity of Form N-648, which should guide officers in determining the sufficiency of the form:[26]

- Lack of Examination or Proper Certification
  - The alien was not examined by the authorized medical professional.
  - The form was certified by someone other than the authorized medical professional.
  - The alien paid for Form N-648 without undergoing a proper medical examination or receiving a diagnosis from an authorized medical professional.
- Fraud or Misconduct by the Medical Professional
  - The certifying medical professional has been or is currently under investigation for immigration fraud, healthcare fraud (such as Medicaid or Medicare fraud), or other fraudulent activities by USCIS Fraud Detection and National Security (FDNS) Directorate, U.S. Immigration and Customs Enforcement, or another federal, state, or local agency.
  - The medical professional has been disciplined by a state medical board for unethical or fraudulent practices.
- Contradictory Information in Alien's Existing Records
  - Previously submitted Forms N-648 in prior applications or existing medical records in the A-file containing information that directly contradicts the diagnosis or claims made in the submitted Form N-648.
  - Other official documentation contained in the record that directly contradicts the diagnosis or claims made in the submitted Form N-648.
  - The previous petitions and applications such as Form I-693, with medical records that show no history or evidence of the medical condition now claimed in Form N-648.
- Inconsistencies in the Alien's Interview
  - The alien's statements during the naturalization interview directly contradict the medical condition or disability described in Form N-648.
- Fraudulent Involvement of Interpreters
  - The interpreter used during the medical examination, the naturalization interview, or both, is known or suspected by FDNS or another state or federal agency to be involved in any immigration fraud, especially fraud related to Form N-648.
- Multiple Inconsistent Forms N-648
  - The alien submits multiple Forms N-648 with conflicting diagnoses or inconsistent information.
- Other Articulable Grounds
  - Any other credible reasons supported by the record that call into question the validity of the form.

Handling Suspected Fraud or Misrepresentation

If any one or more of the above indicators are present, and USCIS suspects or determines that an alien, interpreter, or medical professional has committed fraud or made material misrepresentations in connection with Form N-648, the officer will find the Form N-648 insufficient and refer the case to FDNS for further investigation consistent with appropriate policies and procedures.

5. Requesting Supplemental Form N-648

USCIS may ask an alien to submit a new Form N-648 from a different medical professional when there are doubts about whether the medical professional actually examined and diagnosed the alien, or when the medical certification directly conflicts with other evidence in the record, raising credible concerns about its validity.[27]

The officer issues an RFE to the alien, clearly explaining all specific reasons for questioning the validity or completeness of the original form. The RFE should include details such as:

- Any inconsistencies observed during the interview that raised credible doubts,
- The alien's responses to interview questions that conflicted with the medical certification, and
- Any relevant sworn statements submitted during the interview that contradict the medical certification.

H. Sufficiency of Form N-648

The Form N-648 must be certified by the certifying medical professional no more than 180 days before the alien files the naturalization application. Once this requirement is satisfied, the Form N-648 remains valid for the entire naturalization process connected to that particular Form N-400.

An officer must find the Form N-648 insufficient if the form lacks any of the required information detailed below.

1. Sufficient Form N-648

A request for a medical disability exception is sufficient if it contains the following information:

- Clinical diagnosis of the alien's disabilities or impairments that render the alien unable to meet the English and civics requirements;[28]

- Indication whether any disability or impairment has lasted, or is expected to last, at least 12 months;
- Statement that the physical or developmental disability or mental impairment is not the result of the illegal use of drugs;
- Description of the clinical or laboratory diagnostic methods used to diagnose each disability or impairment;
- Date that the medical professional last examined the alien for the disability or impairment;
- A sufficient explanation of how the alien's disability or impairment prevents the alien from meeting the English requirement, the civics requirement, or both requirements (the "nexus"); and
- Form N-648 must be properly completed, certified, and signed by all appropriate parties.

The table below provides the general procedures for cases where an alien qualifies for a medical disability exception. The procedures apply to any phase of the naturalization examination, including the initial examination, re-examination, or hearing on a denial.

General Procedures Upon Determination the Form N-648 is Sufficient

If the officer determines an alien's Form N-648 is sufficient at the naturalization examination or hearing and	USCIS action
• The medical professional indicated on the form that the alien is unable to comply with the English speaking requirement.	• USCIS proceeds with the interview and civics test in the alien's preferred language with the use of an interpreter, if applicable.
• The medical professional indicated on the form that the alien is unable to comply with any or part of the English and civics requirements.	• USCIS waives the indicated requirement(s).
• The medical professional indicated on the form that the alien is unable to understand or communicate an understanding of the Oath of Allegiance.	• USCIS follows the process established for legal guardians, surrogates, or designated representatives.[29]

USCIS then determines whether the alien meets all other naturalization eligibility requirements.

2. Insufficient Form N-648

A request for a medical disability exception is insufficient if the Form N-648 omits any required information, contains material inconsistencies or discrepancies, or presents fraud indicators that preclude a finding of eligibility under the preponderance of the evidence standard.[30]

The table below provides the general procedures USCIS follows when the Form N-648 is found to be insufficient. The procedures apply to any phase of the naturalization examination, including the initial examination, re-examination, or hearing on a denial.[31]

General Procedures Upon Determination the Form N-648 is Insufficient

If the Form N-648 is insufficient at the naturalization examination or hearing:
• When an interpreter is available, the officer must explain the deficiencies to the alien in his or her preferred language. If an interpreter is unavailable or was disqualified by USCIS, the officer will then explain in detail why the form is insufficient in writing in the form of an RFE or written decision as applicable.
• USCIS proceeds with the interviewing and testing as if no Form N-648 was submitted.
• USCIS must provide the alien with an opportunity to complete all portions of the English and civics requirements.
• An alien has two opportunities to pass the English and civics tests before the application for naturalization is adjudicated: once during the initial examination and then again during a re-examination, which is scheduled if the requirements are not passed at the initial examination.
• If an alien refuses to attempt taking the tests, this is treated as a failed attempt. If the alien declines to proceed, the officer must document the refusal and explain the consequences to the alien in their preferred language, using an interpreter if necessary.
• Failure to appear for re-examination or hearing on a denial without good cause, or to complete the English or civics requirements for any reason, results in a denial of the application.

I. Interview, Re-Examination, and Hearing after an Insufficient Form N-648

1. Initial Interview

Passing the English and Civics Requirements

If an alien's Form N-648 is found to be insufficient, but the alien subsequently meets the English and civics requirements[32] in the same examination:

- The officer must provide the applicant the opportunity to proceed with the rest of the naturalization interview to determine if the applicant meets the other applicable eligibility requirements.
- The officer should not determine that the applicant engaged in fraud or lacks good moral character for the sole reason that the applicant met the educational requirements after submitting an insufficient Form N-648.

- The officer may question the applicant further, however, on the reasons for submitting the form, and any other relevant factors, if necessary.[33]

Failing the English and Civics Requirements

If an applicant's Form N-648 is found to be insufficient, and the applicant fails to meet the English or civics requirements:

- The officer must notify the applicant of the Form N-648 deficiencies in writing by issuing an RFE that specifically addresses the issues with the Form N-648.
- The officer should schedule the applicant to appear for a re-examination for a second opportunity to meet the English or civics requirements or both, between 60 and 90 days after the initial examination. If the applicant requests that the re-examination be rescheduled to a date that is more than 90 days after the initial examination, the applicant must agree in writing to waive the requirement under INA 336 that USCIS must adjudicate the application within 120 days from the initial interview before the applicant may apply to U.S. district court for review of a pending application for naturalization, and instead permit USCIS to adjudicate the application within 120 days from the re-examination before seeking review.[34]

2. Re-Examination

If new information is received in support of a Form N-648 that USCIS found insufficient at the initial interview, the officer must review the new evidence at the re-examination. In addition, the officer conducting the re-examination should review the original Form N-648 and accompanying evidence for consistency with the new information.

If an applicant submits a Form N-648 for the first time at the re-examination interview, the officer should review the form to determine if it is sufficient.[35] If the applicant has established eligibility for the disability exception, the officer should continue the naturalization interview and examination, exempting the applicant from the English or civics requirements, or both, as indicated on the Form N-648. If the medical professional indicated on the form that the applicant is unable to comply with the English speaking requirement, the applicant may use an interpreter during the interview and examination.

If an RFE related to an insufficient Form N-648 was issued at the initial interview and the interviewing officer determines that the evidence submitted in response to the RFE is insufficient:

- The officer must explain the reasons for the insufficiency in the applicant's preferred language verbally during the interview, using an interpreter, if needed. The RFE also needs to have an explanation of the insufficiency;
- The officer must proceed with the re-examination as if the applicant had not submitted a Form N-648;
- The officer must administer any portion of the English and civics tests that the applicant previously failed;
- The officer must not issue another RFE related to any insufficient Form N-648 to provide the applicant another opportunity to submit a Form N-648 or to take the English and civics tests for a third time;
- If the applicant fails any portion of the test or declines to take the test, the officer must deny the naturalization application based on the applicant's failure to meet the English or civics requirements or both; and
- In the notice to deny the application for naturalization, the officer must provide an explanation for finding the Form N-648 insufficient.

3. Hearing on Denial

An applicant whose naturalization application was denied may file a Request for a Hearing on a Decision in Naturalization Proceedings Under Section 336 (Form N-336) within 30 calendar days of receiving the adverse decision.[36]

USCIS may conduct a full de novo hearing on a denied naturalization application, including a full review of any previously submitted Form N-648 as well as other information contained in the record.[37] An applicant may submit additional documentation at the hearing, including a new or initial Form N-648 and relevant medical diagnostic reports, records, or statements. At the hearing, an applicant will only be allowed to submit one Form N-648 and only allowed to attempt to satisfy the educational requirements once.

In addition, the officer also should follow the same procedures in the hearing as provided in this chapter when making a determination that a Form N-648 filed for the first time at the hearing is sufficient or insufficient.

Footnotes

[^ 1] See INA 312(b).

[^ 2] The term "English and civics requirements" refers to demonstrating English language proficiency, which is determined by an ability to read, write, speak, and understand English, as well as knowledge of U.S. history and government, which is determined by a civics test. See Chapter 2, English and Civics Testing, Section A, Educational Requirements [12 USCIS-PM E.2(A)].

[^ 3] See INA 312(b)(1). See Section 108 of the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416 (PDF), 108 Stat. 4305, 4309 (October 25, 1994) (adding INA 312(b)).

[^ 4] From now on, the phrase "physical or developmental disability or mental impairment" will be referred as "disability or impairment" for simplicity.

[^ 5] See INA 312(b). See 8 CFR 312.1(b)(3) and 8 CFR 312.2(b).

[^ 6] See Section E, Authorized Medical Professionals [12 USCIS-PM E.3(E)].

[^ 7] See 8 CFR 312.2(b)(2). Aliens filing a naturalization application online should upload a scanned copy of the Medical Certification for Disability Exceptions (Form N-648) using their USCIS online account.

[^ 8] In such cases, the officer should consult with a supervisor for guidance.

[^ 9] For more information about credible doubt, see Section G, Review of Medical Certification, Subsection 4, Credible Reasons to Doubt the Validity of Form N-648 [12 USCIS-PM E.3(G)(4)].

[^ 10] Forms from different medical professionals describing different medical conditions may not pose a credibility issue.

[^ 11] For more information about credible doubt, see Section G, Review of Medical Certification, Subsection 4, Credible Reasons to Doubt the Validity of Form N-648 [12 USCIS-PM E.3(G)(4)].

[^ 12] For more information on what happens when a Form N-648 is found insufficient, see Section H, Sufficiency of Form N-648, Subsection 2, Insufficient Form N-648 [12 USCIS-PM E.3(H)(2)].

[^ 13] For more information on a request for additional disability determination, see Section G, Review of Medical Certification, Subsection 5, Requesting Supplemental Form N-648 [12 USCIS-PM E.3(G)(5)].

[^ 14] See Part C, Accommodations [12 USCIS-PM C].

[^ 15] See the Disability Accommodations for the Public webpage to request an accommodation.

[^ 16] See Part C, Accommodations, Chapter 3, Types of Accommodations [12 USCIS-PM C.3].

[^ 17] See 8 CFR 312.2(b)(2).

[^ 18] See the Why use telehealth? webpage from the U.S. Department of Health and Human Services.

[^ 19] See Section H, Sufficiency of Form N-648 [12 USCIS-PM E.3(H)].

[^ 20] For more information about the preponderance of the evidence standard, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 4, Burden and Standards of Proof [1 USCIS-PM E.4].

[^ 21] See 8 CFR 312.2(b)(2) ("These medical professionals shall be experienced in diagnosing those with physical or mental medically determinable impairments and shall be able to attest to the origin, nature, and extent of the medical condition as it relates to the disability exceptions.").

[^ 22] If not present at the naturalization interview, the N-648 interpreter may be questioned via issuance of Form G-56 (Call-In Letter) or an FDNS site visit. As a last resort, USCIS may issue a subpoena to the interpreter for this purpose. Officers should consult with Office of the Chief Counsel before issuing a subpoena.

[^ 23] In the officer's discretion, a good cause exception may be granted that would allow the witness to interpret. See The Role and Use of Interpreters in Domestic Field Office Interviews (PDF, 497.54 KB), PM-602-0125.1, issued January 17, 2017. See Part B, Naturalization Examination, Chapter 3, Naturalization Interview, Section A, Roles and Responsibilities, Subsection 3, Interpreters [12 USCIS B.3(A)(3)].

[^ 24] The interpreter must be under oath. See Part B, Naturalization Examination, Chapter 3, Naturalization Interview, Section A, Roles and Responsibilities, Subsection 3, Interpreters [12 USCIS B.3(A)(3)].

[^ 25] See The Role and Use of Interpreters in Domestic Field Office Interviews (PDF, 497.54 KB), PM-602-0125.1, issued January 17, 2017, and Part B, Naturalization Examination, Chapter 3, Naturalization Interview, Section A, Roles and Responsibilities, Subsection 3, Interpreters [12 USCIS B.3(A)(3)].

[^ 26] The list includes examples to guide officers when reviewing Form N-648 for sufficiency but is not comprehensive.

[^ 27] See 8 CFR 312.2(b)(2).

[^ 28] The officer may not find the Form N-648 insufficient solely because the Diagnostic Statistical Manual or International Classification of Diseases medical codes are missing in the form if the medical professional has provided a sufficient description of the clinical diagnosis for all the physical or developmental disabilities or mental impairments.

[^ 29] See Part J, Oath of Allegiance, Chapter 3, Oath of Allegiance Modifications and Waivers, Section C, Waiver of the Oath [12 USCIS-PM J.3(C)].

[^ 30] Before determining that a Form N-648 is insufficient due to missing information, officers should review all sections to confirm that the information needed does not appear in a different section of the form.

[^ 31] See Part B, Naturalization Examination, Chapter 3, Naturalization Interview, Section D, Subsequent Re-examination [12 USCIS-PM B.3(D)]. See Part B, Naturalization Examination, Chapter 6, USCIS Hearing and Judicial Review [12 USCIS-PM B.6]. See Request for a Hearing on a Decision in Naturalization Proceedings Under Section 336 (Form N-336).

[^ 32] See INA 312.

[^ 33] The officer may question the applicant about a Form N-648 with the use of an interpreter.

[^ 34] See 8 CFR 312.5(b).

[^ 35] For more information see Section G, Review of Medical Certification, Subsection 4, Credible Reasons to Doubt the Validity of Form N-648 [12 USCIS-PM E.3(G)(4)].

[^ 36] See Part B, Naturalization Examination, Chapter 6, USCIS Hearing and Judicial Review [12 USCIS-PM B.6].

[^ 37] See 8 CFR 336.2.

Part F - Good Moral Character

Chapter 1 - Purpose and Background

A. Purpose

One of the general requirements for naturalization is good moral character (GMC). GMC means character which measures up to the standards of average citizens of the community in which the alien resides.[1] The purpose of demonstrating GMC for naturalization is to ensure that the alien is suitable to become a U.S. citizen, reflecting the values and standards expected of a U.S. citizen.

In general, an alien must show that he or she has been and continues to be a person of GMC during the statutory period prior to filing and up to the time of the Oath of Allegiance.[2]

The applicable naturalization provision under which the alien files determines the period during which the alien must demonstrate GMC.[3] The alien's conduct outside the GMC period may also impact whether he or she meets the GMC requirement.[4]

While USCIS determines whether an alien has met the GMC requirement on a case-by-case basis, certain types of criminal conduct automatically preclude aliens from establishing GMC and may make the alien subject to removal proceedings.[5] An alien may also be found to lack GMC for other types of criminal conduct (or unlawful acts).

An officer's assessment of whether an alien meets the GMC requirement includes an officer's review of:

- The alien's record;
- Statements provided in the naturalization application; and
- Oral testimony provided during the interview.

There may be cases that are affected by specific jurisdictional case law. The officer should rely on local USCIS counsel in cases where there is a question about whether a particular offense rises to the level of precluding an alien from establishing GMC. In addition, the offenses and conduct which affect the GMC determination may also render an alien removable.

B. Background

The Naturalization Act of 1790 first introduced the long-standing GMC requirement for naturalization requiring an alien applying for naturalization to demonstrate "good character."[6] Subsequent enactments[7] incorporated "good moral character" and it remains a requirement for naturalization to this day.[8]

Prior to 1940, the statute read "behaved as a man of good moral character."[9] Since 1940, the statute has stated "has been and still is a person of good moral character."[10] Until 1952, the statute provided no guidance on character determination. Rather, where the statute did not bar a finding of good moral character, the standard was judicially defined on a case-by-case basis.[11] If the court determined the alien was a "thoroughly law-abiding and industrious man, of good moral character," and was otherwise eligible the alien became a U.S. citizen.[12]

In 1952, Congress revamped the immigration and naturalization laws, passing the comprehensive Immigration and Nationality Act of 1952 (INA), also known as the McCarran-Walter Act.[13] It provided the first definition for good moral character in the citizenship context.[14] While the INA does not specifically define what "good moral character is," Congress did explicitly state what it is not. INA 101(f) lists certain conduct that precludes a person from demonstrating good moral character.[15]

The amendment also included a catch-all provision, stating that an alien may lack good moral character even if he or she does not fit into any of the eight enumerated classes.[16] Judicial precedent holds that good moral character under the immigration laws requires adherence to the standards of average citizens in the community.[17]

Thus, any conduct or act that offends the accepted moral character standards of the community[18] in which the alien applying for naturalization resides should be considered without regard to whether the alien has been arrested or convicted of an offense.

In general, an alien applying for naturalization must establish GMC throughout the requisite periods of continuous residence in the United States.[19] In prescribing specific periods during which GMC must be established, Congress generally intended to make provision for the reformation and eventual naturalization of persons who were guilty of certain past misconduct. The good moral character standard has proliferated throughout the INA and is now a prerequisite to eligibility for numerous immigration benefits.[20]

C. Legal Authorities

- INA 101(f) – Good moral character definition
- INA 316; 8 CFR 316 – General naturalization requirements
- INA 316(e); 8 CFR 316.10 – Good moral character requirement
- INA 318 – Prerequisite to naturalization, burden of proof
- INA 237(a) – Deportable Aliens

Footnotes

[^ 1] See INA 101(f). See 8 CFR 316.10(a)(2). See *In re Mogus*, 73 F.Supp. 150, 152 (W.D. Pa. 1947) ("'Good moral character' which an alien seeking naturalization must prove results from acts and conduct of an individual, and is of such a character as measures up to the standards of average citizens of the community in which the alien resides.").

[^ 2] See INA 316(a). See 8 CFR 316.10(a)(1).

[^ 3] See Chapter 2, Adjudicative Factors, Section A, Applicable Statutory Period [12 USCIS-PM F.2(A)].

[^ 4] See INA 316(e). See 8 CFR 316.10(a)(2).

[^ 5] See INA 101(f).

[^ 6] See Section 1 of the Naturalization Act of 1790, ch. 3, 1 Stat. 103 (PDF), 103–04 (March 26, 1790) (repealed 1795) (requiring that any alien applying for naturalization "mak[e] proof to the satisfaction of [a] court, that he is a person of good character").

[^ 7] See Section 1 of the Naturalization Act of 1795, ch. 20, 1 Stat. 414 (PDF), 566 (January 29, 1795) (repealed 1802) (The word "moral" was added in 1795). See the Naturalization Act of 1802, 2 Stat. 153 (PDF) (1802).

[^ 8] See INA 316(a).

[^ 9] See Basic Naturalization Act of 1906, ch. 3592, 34 Stat. 596 (PDF), 597 (June 29, 1906).

[^ 10] See Nationality Act of 1940, Pub. L. 76-853 (PDF), 54 Stat. 1138, 1142 (October 14, 1940) (repealed 1952).

[^ 11] *In re Spenser*, 22 F. Cas. 921 (C.C.D. Or. 1878) (first reported case to discuss good moral character - "The standard may vary from one generation to another, and probably the average man of the country is as high as it can be set.”).

[^ 12] See *In re Rodriguez*, 81 F. 337 (W.D. Tex. 1897). Note that naturalization was under the exclusive jurisdiction of the federal courts until the Immigration Act of 1990.

[^ 13] See Immigration and Nationality Act of 1952, also referred to as the McCarran-Walter Act, Pub. L. 82–414 (PDF), (June 27, 1952).

[^ 14] See *Sugarman v. Dougall*, 413 U.S. 634, 660 (1973) (citing H.R. Rep.1365, 82d Cong.2d Sess., 78, 80 (1952), good moral character was intended by Congress to mean a broad attachment to the principles of the Constitution of the United States, and disposition to the good order and happiness of the United States).

[^ 15] See INA 101(f). See Revision of Grounds for Deportation; Conforming Regulations, 58 FR 49901, 49905-09 (PDF) (Sept. 24, 1993) (The definition governing the “good moral character” criterion, set forth at 8 U.S.C. 1101(f), has intentionally been left open-ended.).

[^ 16] See INA 101(f).

[^ 17] See *United States v. Francioso*, 164 F.2d. 163, 163 (2d. Cir. 1947). See *Petition of De Leo*, 75 F.Supp. 896, 900 (W.D. Pa. 1948) (good moral character “results from acts and conduct of an individual and is of such a character as measures up to the standards of average citizens of the community in which the alien resides”). See Black’s Law Dictionary (12th ed. 2024) (defining good moral character as a “pattern of behavior that is consistent with the community's current ethical standards and that shows an absence of deceit or morally reprehensible conduct). See *Matter of Sanchez-Linn* (PDF), 20 I&N Dec. 362 (BIA 1991) (quoting *Matter of B-*, 1 I&N Dec. 611 (BIA 1943) “we have long held that good moral character does not mean moral excellence and that it is not destroyed by a single lapse. Rather do we think it is a concept of a person's natural worth derived from the sum total of all his actions in the community.”).

[^ 18] See *In re Mogus*, 73 F.Supp. 150 (W.D. Pa. 1947) (moral standard of average citizen). See 8 CFR 316.10(a)(2) (The Service shall evaluate claims of good moral character … taking into account … the standards of the average citizen in the community of residence.).

[^ 19] See *Berenyi v. District Director*, 385 U.S. 630, 637 (1967). See 8 CFR. 316.10(a)(1) and 8 CFR 316.2(b) (the alien must demonstrate he or she is a person of good moral character by a preponderance of the evidence.).

[^ 20] See *Matter of Castillo-Perez*, 27 I&N Dec. 664 (A.G. 2019). For example, see INA 240B(b)(1)(B) (voluntary departure) and INA 245(l)(1)(B) (adjustment of status for trafficking victims).

Chapter 2 - Adjudicative Factors

A. Applicable Statutory Period

The applicable period during which an applicant must show that he or she has been a person of good moral character (GMC) depends on the corresponding naturalization provision.[1] In general, the statutory period for GMC for an applicant filing under the general naturalization provision starts 5 years prior to the date of filing.[2]

The statutory period starts 3 years prior to the date of filing for certain spouses of U.S. citizens.[3] The period during which certain service members or veterans must show GMC starts 1 or 5 years from the date of filing depending on the military provision.[4]

In all cases, the applicant must also show that he or she continues to be a person of GMC until the time of his or her naturalization.[5]

B. Conduct Outside of the Statutory Period

USCIS is not limited to reviewing the applicant's conduct only during the applicable GMC period. An applicant’s conduct prior to the GMC period may affect the applicant’s ability to establish GMC if the applicant’s present conduct does not reflect a reformation of character or the earlier conduct is relevant to the applicant’s present moral character.[6]

In general, an officer must consider the totality of the circumstances and weigh all factors, favorable and unfavorable, when considering reformation of character in conjunction with GMC within the relevant period.[7] The following factors may be relevant in assessing an applicant’s current moral character and reformation of character:

- Family ties and background;
- Absence or presence of other criminal history;
- Education;
- Employment history;
- Other law-abiding behavior (for example, meeting financial obligations, paying taxes);
- Community involvement;
- Credibility of the applicant;
- Compliance with probation; and
- Length of time in United States.

C. Definition of Conviction

1. Statutory Definition of Conviction for Immigration Purposes

Most of the criminal offenses that preclude a finding of GMC require a conviction for the disqualifying offense or arrest. A “conviction” for immigration purposes means a formal judgment of guilt entered by the court. A conviction for immigration purposes also exists in cases where the adjudication of guilt is withheld if the following conditions are met:

- A judge or jury has found the person guilty or the person entered a plea of guilty or nolo contendere[8] or has admitted sufficient facts to warrant a finding of guilt; and

- The judge has ordered some form of punishment, penalty, or imposed a restraint on the person's liberty.[9]

It is not always clear if the outcome of the arrest resulted in a conviction. Various states have provisions for diminishing the effects of a conviction. In some states, adjudication may be deferred upon a finding or confession of guilt. Some states have a pretrial diversion program whereby the case is removed from the normal criminal proceedings. This way the person may enter into a counseling or treatment program and potentially avoid criminal prosecution.

If the accused is directed to attend a pre-trial diversion or intervention program, where no admission or finding of guilt is required, the order may not count as a conviction for immigration purposes.[10]

2. Juvenile Convictions

In general, a guilty verdict, ruling, or judgment in a juvenile court does not constitute a conviction for immigration purposes.[11] A conviction for a person who is under 18 years of age and who was charged as an adult constitutes a conviction for immigration purposes.

3. Court Martial Convictions

A general "court martial" is defined as a criminal proceeding under the governing laws of the U.S. armed forces. A judgment of guilt by a court martial has the same force and effect as a conviction by a criminal court.[12] However, disciplinary actions in lieu of a court martial are not convictions for immigration purposes.

4. Deferrals of Adjudication

In cases where adjudication is deferred, the original finding or confession of guilt and imposition of punishment is sufficient to establish a conviction for immigration purposes because both conditions establishing a conviction are met. If the court does not impose some form of punishment, then it is not considered a conviction even with a finding or confession of guilt. A decision or ruling of nolle prosequi[13] does not meet the definition of conviction.

5. Vacated Judgments

If a judgment is vacated for cause due to Constitutional defects, statutory defects, or pre-conviction errors affecting guilt, it is not considered a conviction for immigration purposes. The judgment is considered a conviction for immigration purposes if it was dismissed for any other reason, such as completion of a rehabilitative period (rather than on its merits) or to avoid adverse immigration consequences.[14]

A conviction vacated where a criminal court failed to advise a defendant of the immigration consequences of a plea, which resulted from a defect in the underlying criminal proceeding, is not a conviction for immigration purposes.[15]

6. Foreign Convictions

USCIS considers a foreign conviction to be a "conviction" in the immigration context if the conviction was the result of an offense deemed to be criminal by United States standards.[16] In addition, federal United States standards on sentencing govern the determination of whether the offense is a felony or a misdemeanor regardless of the punishment imposed by the foreign jurisdiction.[17] The officer may consult with local USCIS counsel in cases involving foreign convictions.

7. Pardons

An applicant who has received a full and unconditional executive pardon[18] prior to the start of the statutory period may establish GMC if the applicant shows that he or she has been reformed and rehabilitated prior to the statutory period.[19] If the applicant received a pardon during the statutory period, the applicant may establish GMC if he or she shows evidence of extenuating or exonerating circumstances that would establish his or her GMC.[20]

Foreign pardons do not eliminate a conviction for immigration purposes.[21]

8. Expunged Records

Expunged Records and the Underlying Conviction

A record of conviction that has been expunged does not remove the underlying conviction.[22] For example, an expunged record of conviction for a controlled substance violation[23] or any crime involving moral turpitude (CIMT) does not relieve the applicant from the conviction in the immigration context.[24] In addition, foreign expungements are still considered convictions for immigration purposes.[25]

The Board of Immigration Appeals (BIA) has held that a state court action to "expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute" has no effect on removing the underlying conviction for immigration purposes.[26]

The officer may require the applicant to submit evidence of a conviction regardless of whether the record of the conviction has been expunged. It remains the applicant's responsibility to obtain his or her records regardless of whether they have been expunged or sealed by the court. USCIS may file a motion with the court to obtain a copy of the record in states where the applicant is unable to obtain the record.

9. Change in Sentence

"Term of imprisonment or a sentence"[27] generally refers to a person's original criminal sentence, without regard to post-sentencing alterations.[28] Therefore, state-court orders that modify, clarify, or otherwise alter a criminal person's original sentence will only be relevant for immigration purposes if they are based on a procedural or substantive defect in the underlying criminal proceeding.[29]

D. Effect of Probation

An officer may not approve a naturalization application while the applicant is on probation, parole, or under a suspended sentence.[30] However, an applicant who has satisfactorily completed probation, parole, or a suspended sentence during the relevant statutory period is not automatically precluded from establishing GMC. The fact that an applicant was on probation, parole, or under a suspended sentence during the statutory period, however, may affect the overall GMC determination.

E. Admission of Certain Criminal Acts

An applicant may be unable to establish GMC if he or she admits committing certain offenses even if the applicant has never been formally charged, indicted, arrested or convicted.[31] This applies to offenses involving "moral turpitude" or any violation of, or a conspiracy or attempt to violate, any law or regulation relating to a controlled substance.[32] When determining whether an applicant committed a particular offense, the officer must review the relevant statute in the jurisdiction where it is alleged to have been committed.

The officer must provide the applicant with a full explanation of the purpose of the questioning stemming from the applicant's declaration that he or she committed an offense. In order for the applicant's declaration to be considered an "admission," it must meet the long held requirements for a valid "admission" of an offense:[33]

- The officer must provide the applicant the text of the specific law from the jurisdiction where the offense was committed;
- The officer must provide an explanation of the offense and its essential elements in "ordinary" language; and
- The applicant must voluntarily admit to having committed the particular elements of the offense under oath.[34]

The officer must ensure that the applicant is under oath when taking the sworn statement to record the admission. The sworn statement must cover the requirements for a valid admission, to include the specifics of the act or acts that may prevent the applicant from establishing GMC. The officer may consult with his or her supervisor to ensure that sufficient written testimony has been received from the applicant prior to making a decision on the application.

F. "Purely Political Offense" Exception

There is an exception to certain conditional bars to GMC in cases where the offense was a "purely political offense" that resulted in conviction, or in conviction and imprisonment, outside of the United States.[35] Purely political offenses are generally offenses that "resulted in convictions obviously based on fabricated charges or predicated upon repressive measures against racial, religious or political minorities."[36]

The "purely political offense" exception applies to the following conditional bars to GMC:[37]

- Conviction for one or more crimes involving moral turpitude (CIMTs);[38]
- Conviction of two or more offenses with a combined sentence of 5 years or more;[39] and
- Incarceration for a total period of 180 days or more.[40]

These conditional bars to GMC do not apply if the underlying conviction was for a "purely political offense" abroad. The officer should rely on local USCIS counsel in cases where there is a question about whether a particular offense should be considered a "purely political offense."

G. Extenuating Circumstances

Certain conditional bars to GMC should not adversely affect the GMC determination if the applicant shows extenuating circumstances.[41] The extenuating circumstance must precede or be contemporaneous with the commission of the offense. USCIS does not consider any conduct or equity (including evidence of reformation or rehabilitation) subsequent to the commission of the offense as an extenuating circumstance.

The "extenuating circumstances" provision applies to the following conditional bars to GMC:[42]

- Failure to support dependents;[43]
- Adultery;[44] and
- Unlawful acts.[45]

These conditional bars to GMC do not apply if the applicant shows extenuating circumstances. The officer should provide the applicant with an opportunity during the interview to provide evidence and testimony of extenuating circumstances in relevant cases.

H. Removability and GMC

Certain permanent and conditional bars to GMC may also render the applicant amenable to removal proceedings.[46] This depends on various factors specific to each case. Not all applicants who are found to lack GMC are removable. An applicant may be found to lack GMC and have his or her naturalization application denied under those grounds without DHS issuing a Notice to Appear.[47]

Footnotes

[^ 1] See the relevant Volume 12 [12 USCIS-PM] part for the specific statutory period pertaining to each naturalization provision.

[^ 2] See Part D, General Naturalization Requirements, Chapter 1, Purpose and Background, Section B, General Eligibility Requirements [12 USCIS-PM D.1(B)]. See INA 316(a). See 8 CFR 316.2(a)(7).

[^ 3] See Part G, Spouses of U.S. Citizens, Chapter 1, Purpose and Background, Section C, Table of General Provisions [12 USCIS-PM G.1(C)]. See INA 319(a) and 8 CFR 319.1(a)(7).

[^ 4] See Part I, Military Members and their Families, Chapter 9, Spouses, Children, and Surviving Family Benefits, Section B, Spouses of Military Members [12 USCIS-PM I.9(B)]. See INA 328(c) and INA 329. See 8 CFR 328.2(d) and 8 CFR 329.2(d).

[^ 5] See 8 CFR 316.10(a)(1).

[^ 6] See INA 316(e). See 8 CFR 316.10(a)(2).

[^ 7] See *Ralich v. United States*, 185 F.2d 784 (1950) (provided false testimony within the statutory period and operated a house of prostitution prior to the statutory period). See *Marcantonio v. United States*, 185 F.2d 934 (1950) (applicant had rehabilitated his character after multiple arrests before statutory period).

[^ 8] The term “nolo contendere” is Latin for “I do not wish to contest.”

[^ 9] See INA 101(a)(48)(A).

[^ 10] See *Matter of Grullon (PDF)*, 20 I&N Dec. 12 (BIA 1989).

[^ 11] See *Matter of Devison-Charles (PDF)*, 22 I&N Dec. 1362 (BIA 2000).

[^ 12] See *Matter of Rivera-Valencia (PDF)*, 24 I&N Dec. 484 (BIA 2008).

[^ 13] The term “nolle prosequi” is Latin for “we shall no longer prosecute.”

[^ 14] See *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006).

[^ 15] See *Matter of Adamiak (PDF)*, 23 I&N Dec. 878 (BIA 2006). See *Alim v. Gonzales*, 446 F.3d 1239 (11th Cir 2006).

[^ 16] See *Matter of Squires (PDF)*, 17 I&N Dec. 561 (BIA 1980). See *Matter of McNaughton (PDF)*, 16 I&N Dec. 569 (BIA 1978).

[^ 17] See *Lennon v. INS*, 527 F.2d 187 (2nd Cir. 1975).

[^ 18] Executive pardons are given by the President or a governor of the United States.

[^ 19] See 8 CFR 316.10(c)(2)(i).

[^ 20] See 8 CFR 316.10(c)(2)(ii).

[^ 21] See *Marino v. INS*, 537 F.2d 686 (2nd Cir. 1976). See *Mullen-Cofee v. INS*, 976 F.2d 1375 (11th Cir. 1992). See *Matter of B-*, 7 I&N Dec. 166 (BIA 1956) (referring to amnesty).

[^ 22] See *Matter of Marroquin (PDF)*, 23 I&N Dec. 705 (A.G. 2005).

[^ 23] For cases arising in the Ninth Circuit involving state law convictions for simple possession of a controlled substance, please consult local counsel as the date of the conviction may affect whether possible treatment under the Federal First Offender Act renders the conviction invalid for immigration purposes. See *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir 2011).

[^ 24] See 8 CFR 316.10(c)(3)(i) and 8 CFR 316.10(c)(3)(ii).

[^ 25] See *Danso v. Gonzales*, 489 F.3d 709 (5th Cir. 2007). See *Elkins v. Comfort*, 392 F.3d 1159 (10th Cir. 2004).

[^ 26] See *In re Roldan-Santoyo (PDF)*, 22 I&N Dec. 512 (BIA 1999).

[^ 27] See INA 101(a)(48)(B).

[^ 28] See *Matter of Thomas and Thompson*, 27 I&N Dec. 674 (A.G. 2019) (“the phrase ‘term of imprisonment or a sentence’ in paragraph (B) [of INA 101(a)(48)] is best read to concern an alien’s *original* criminal sentence, without regard to post-sentencing alterations that, like a suspension, merely alleviate the impact of that sentence.”).

[^ 29] See *Matter of Thomas and Thompson*, 27 I&N Dec. 674, 682 (A.G. 2019) (holding that the tests set forth in *Matter of Cota-Vargas (PDF)*, 23 I&N Dec. 849 (BIA 2005), *Matter of Song (PDF)*, 23 I&N Dec. 173 (BIA 2001), and *Matter of Estrada*, 26 I&N Dec. 749 (BIA 2016), will no longer govern the effect of state-court orders that modify, clarify, or otherwise alter a criminal's sentence.) For questions on procedural or substantive defects, officers should consult the Office of the Chief Counsel (OCC).

[^ 30] See 8 CFR 316.10(c)(1).

[^ 31] See 8 CFR 316.10(b)(2)(iv).

[^ 32] See Chapter 5, Conditional Bars for Acts in Statutory Period [12 USCIS-PM F.5]. See 8 CFR 316.10(b)(2)(i) (offenses involving “moral turpitude”). See 8 CFR 316.10(b)(2)(iii) (violation of controlled substance law).

[^ 33] See *Matter of K-*, 7 I&N Dec. 594 (BIA 1957).

[^ 34] See *Matter of J-*, 2 I&N Dec. 285 (BIA 1945).

[^ 35] See *In re O'Cealleagh (PDF)*, 23 I&N Dec. 976 (BIA 2006) (finding that a CIMT offense must be completely or totally political for “purely political offense” exception to apply).

[^ 36] See 22 CFR 40.21(a)(6).

[^ 37] See Chapter 5, Conditional Bars for Acts in Statutory Period [12 USCIS-PM F.5], for further guidance on each bar to GMC.

[^ 38] See Chapter 5, Conditional Bars for Acts in Statutory Period, Section A, One or More Crimes Involving Moral Turpitude [12 USCIS-PM F.5(A)].

[^ 39] See Chapter 5, Conditional Bars for Acts in Statutory Period, Section B, Aggregate Sentence of 5 Years or More [12 USCIS-PM F.5(B)].

[^ 40] See Chapter 5, Conditional Bars for Acts in Statutory Period, Section D, Imprisonment for 180 Days or More [12 USCIS-PM F.5(D)].

[^ 41] See 8 CFR 316.10(b)(3).

[^ 42] See Chapter 5, Conditional Bars for Acts in Statutory Period [12 USCIS-PM F.5], for further guidance on extenuating circumstances.

[^ 43] See Chapter 5, Conditional Bars for Acts in Statutory Period, Section K, Certain Acts in Statutory Period, Subsection 2, Failure to Support Dependents [12 USCIS-PM F.5(K)(2)].

[^ 44] See Chapter 5, Conditional Bars for Acts in Statutory Period, Section K, Certain Acts in Statutory Period, Subsection 3, Adultery [12 USCIS-PM F.5(K)(3)].

[^ 45] See Chapter 5, Conditional Bars for Acts in Statutory Period, Section L, Unlawful Acts [12 USCIS-PM F.5(L)].

[^ 46] See INA 237 ("general classes of deportable aliens").

[^ 47] See INA 318. See Part D, General Naturalization Requirements, Chapter 2, Lawful Permanent Resident Admission for Naturalization, Section F, Removal Proceedings [12 USCIS-PM D.2(F)].

Chapter 3 - Evidence and the Record

A. Applicant Testimony

Issues relevant to the good moral character (GMC) requirement may arise at any time during the naturalization interview. The officer's questions during the interview should elicit a complete record of any criminal, unlawful, or questionable activity in which the applicant has ever engaged regardless of whether that information eventually proves to be material to the GMC determination.

The officer should take into consideration the education level of the applicant and his or her knowledge of the English language. The officer may rephrase questions and supplement the inquiry with additional questions to better ensure that the applicant understands the proceedings.[1]

The officer must take a sworn statement from an applicant when the applicant admits committing an offense for which the applicant has never been formally charged, indicted, arrested or convicted.[2]

B. Court Dispositions

In general, an officer has the authority to request the applicant to provide a court disposition for any criminal offense committed in the United States or abroad to properly determine whether the applicant meets the GMC requirement. USCIS requires applicants to provide court dispositions certified by the pertinent jurisdiction for any offense committed during the statutory period. In addition, USCIS may request any additional evidence that may affect a determination regarding the applicant's GMC. The burden is on the applicant to show that an offense does not prevent him or her from establishing GMC.

An applicant is required to provide a certified court disposition for any arrest involving the following offenses and circumstances, regardless of whether the arrest resulted in a conviction:

- Arrest for criminal act committed during the statutory period;
- Arrest that occurred on or after November 29, 1990, that may be an aggravated felony;[3]
- Arrest for murder;
- Arrest for any offense that would render the applicant removable;
- Arrest for offenses outside the statutory period, if when combined with other offenses inside the statutory period, the offense would preclude the applicant from establishing GMC; and
- Arrest for crime where the applicant would still be on probation at the time of adjudication of the naturalization application or may have been incarcerated for 180 days during the statutory period.

These procedures are not intended to limit the discretion of any officer in requesting documentation that the officer needs to properly assess an applicant's GMC.

In cases where a court disposition or police record is not available, the applicant must provide original or certified confirmation that the record is not available from the applicable law enforcement agency or court.

C. Failure to Respond to Request for Evidence

In cases where the initial naturalization examination has already been conducted, the officer should adjudicate the naturalization application on the merits where the applicant fails to respond to a request for additional evidence.[4]The officer should not deny the application for lack of prosecution after the initial naturalization examination.[5]

Footnotes

[^ 1] See Part E, English and Civics Testing and Exceptions, Chapter 2, English and Civics Testing [12 USCIS-PM E.2], for guidance on rephrasing questions.

[^ 2] See 8 CFR 316.10(b)(2)(iv). See Chapter 2, Adjudicative Factors, Section E, Admission of Certain Criminal Acts [12 USCIS-PM F.2(E)].

[^ 3] See INA 101(a)(43). See Chapter 4, Permanent Bars to Good Moral Character (GMC), Section B, Aggravated Felony [12 USCIS-PM F.4(B)].

[^ 4] See Part B, Naturalization Examination, Chapter 4, Results of the Naturalization Examination [12 USCIS-PM B.4], for guidance on decisions on the application, to include cases where the applicant fails to respond.

[^ 5] See INA 335(e). See 8 CFR 335.7.

Chapter 4 - Permanent Bars to Good Moral Character

A. Murder

An applicant who has been convicted of murder at any time is permanently barred from establishing good moral character (GMC)for naturalization.[1]

B. Aggravated Felony

In 1996, Congress expanded the definition and type of offense considered an “aggravated felony” in the immigration context.[2] An applicant who has been convicted of an “aggravated felony” on or after November 29, 1990, is permanently barred from establishing GMC for naturalization.[3]

While an applicant who has been convicted of an aggravated felony prior to November 29, 1990, is not permanently barred from naturalization, the officer should consider the seriousness of the underlying offense (aggravated felony) along with the applicant's present moral character in determining whether the applicant meets the GMC requirement. If the applicant's actions during the statutory period do not reflect a reform of his or her character, then the applicant may not be able to establish GMC.[4]

Some offenses require a minimum term of imprisonment of one year to qualify as an aggravated felony in the immigration context. The term of imprisonment is the period of confinement ordered by the court regardless of whether the court suspended the sentence.[5] For example, an offense involving theft or a crime of violence is considered an aggravated felony if the term of imprisonment ordered by the court is one year or more, even if the court suspended the entire sentence.[6]

The table below serves as a quick reference guide listing aggravated felonies in the immigration context. The officer should review the specific statutory language for further information.

“Aggravated Felonies” in the Immigration Context

Aggravated Felony	Citation
Murder, Rape, or Sexual Abuse of a Minor	INA 101(a)(43)(A)
Illicit Trafficking in Controlled Substance	INA 101(a)(43)(B)
Illicit Trafficking in Firearms or Destructive Devices	INA 101(a)(43)(C)
Money Laundering Offenses (over $10,000)	INA 101(a)(43)(D)
Explosive Materials and Firearms Offenses	INA 101(a)(43)(E)(i)–(iii)
Crime of Violence (imprisonment term of at least 1 yr)	INA 101(a)(43)(F)
Theft Offense (imprisonment term of at least 1 yr)	INA 101(a)(43)(G)
Demand for or Receipt of Ransom	INA 101(a)(43)(H)
Child Pornography Offense	INA 101(a)(43)(I)
Racketeering, Gambling (imprisonment term of at least 1 yr)	INA 101(a)(43)(J)
Prostitution Offenses (managing, transporting, trafficking)	INA 101(a)(43)(K)(i)–(iii)
Gathering or Transmitting Classified Information	INA 101(a)(43)(L)(i)–(iii)
Fraud or Deceit Offenses or Tax Evasion (over $10,000)	INA 101(a)(43)(M)(i), (ii)
Alien Smuggling	INA 101(a)(43)(N)
Illegal Entry or Reentry by Removed Aggravated Felon	INA 101(a)(43)(O)
Passport, Document Fraud (imprisonment term of at least 1 yr)	INA 101(a)(43)(P)
Failure to Appear Sentence (offense punishable by at least 5 yrs)	INA 101(a)(43)(Q)
Bribery, Counterfeiting, Forgery, or Trafficking in Vehicles	INA 101(a)(43)(R)
Obstruction of Justice, Perjury, Bribery of Witness	INA 101(a)(43)(S)
Failure to Appear to Court (offense punishable by at least 2 yrs)	INA 101(a)(43)(T)

Aggravated Felony	Citation
Attempt or Conspiracy to Commit an Aggravated Felony	INA 101(a)(43)(U)

C. Persecution, Genocide, Torture, or Severe Violations of Religious Freedom

The applicant is responsible for providing any evidence or documentation to support a claim that he or she is not ineligible for naturalization based on involvement in any of the activities addressed in this section.

1. Nazi Persecutions

An applicant who ordered, incited, assisted, or otherwise participated in the persecution of any person or persons in association with the Nazi Government of Germany or any government in an area occupied by or allied with the Nazi Government of Germany is permanently barred from establishing GMC for naturalization.[7]

2. Genocide

An applicant who has ordered, incited, assisted, or otherwise participated in genocide, at any time is permanently barred from establishing GMC for naturalization.[8] The criminal offense of "genocide" includes any of the following acts committed in time of peace or time of war with the specific intent to destroy in whole or in substantial part a national, ethnic, racial, or religious group as such:

- Killing members of that group;
- Causing serious bodily injury to members of that group;
- Causing the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;
- Subjecting the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;
- Imposing measures intended to prevent births within the group; or
- Transferring by force children of the group to another group.[9]

3. Torture or Extrajudicial Killings

An applicant who has committed, ordered, incited, assisted, or otherwise participated in the commission of any act of torture or under color of law of any foreign nation any extrajudicial killing is permanently barred from establishing GMC for naturalization.[10]

"Torture" is defined as an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his or her custody or physical control.[11]

An "extrajudicial killing" is defined as a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees, which are recognized as indispensable by civilized peoples.[12]

4. Particularly Severe Violations of Religious Freedom

An applicant who was responsible for, or directly carried out, particularly severe violations of religious freedom while serving as a foreign government official at any time is not able to establish GMC.[13] "Particularly severe violations of religious freedom" are defined as systematic, ongoing, egregious violations of religious freedom, including violations such as:

- Torture or cruel, inhuman, or degrading treatment or punishment;
- Prolonged detention without charges;
- Causing the disappearance of persons by the abduction or clandestine detention of those persons; or
- Other flagrant denial of the right to life, liberty, or the security of persons.[14]

Footnotes

[^ 1] See 8 CFR 316.10(b)(1)(i).

[^ 2] See INA 101(a)(43). See the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208 (PDF) , 110 Stat. 3009-546 (September 30, 1996).

[^ 3] See 8 CFR 316.10(b)(1)(ii).

[^ 4] See 8 CFR 316.10(a)(2).

[^ 5] See INA 101(a)(43)(B) . See *Matter of S-S- (PDF)*, 21 I&N Dec. 900 (BIA 1997).

[^ 6] See INA 101(a)(43)(F) and INA 101(a)(43)(G).

[^ 7] See INA 101(f)(9) and INA 212(a)(3)(E).

[^ 8] See INA 101(f)(9) and INA 212(a)(3)(E). See 18 U.S.C. 2340 and 18 U.S.C. 1091(a).

[^ 9] See 18 U.S.C. 1091. See Article II of the United Nations *Convention on the Prevention and Punishment of the Crime of Genocide* (78 U.N.T.S. 278 [Dec. 9, 1948]).

[^ 10] See INA 101(f)(9) and INA 212(a)(3)(E).

[^ 11] See 18 U.S.C. 2340.

[^ 12] See 28 U.S.C. 1350 (Note). See Section 3(a) of the Torture Victim Protection Act of 1991.

[^ 13] See INA 101(f)(9) and INA 212(a)(2)(G).

[^ 14] See 22 U.S.C. 6402.

Chapter 5 - Conditional Bars for Acts in Statutory Period

In addition to the permanent bars to good moral character (GMC), the Immigration and Nationality Act (INA) and corresponding regulations include bars to GMC that are not permanent in nature and the alien may be able to later naturalize if able to establish good moral character. USCIS refers to these bars as “conditional bars.” These bars are triggered by specific acts, offenses, activities, circumstances, or convictions within the statutory period for naturalization, including the period prior to filing and up to the time of the Oath of Allegiance.[1] An offense that does not fall within a permanent or conditional bar to GMC may nonetheless affect an alien’s ability to establish GMC.[2]

With regard to bars to GMC requiring a conviction, the officer reviews the relevant federal or state law or regulation of the United States, or law or regulation of any foreign country to determine whether the alien can establish GMC.

The table below serves as a quick reference guide on the general conditional bars to establishing GMC for acts occurring during the statutory period. The sections and paragraphs that follow the table provide further guidance on each bar and offense.

Conditional Bars to GMC for Acts Committed in Statutory Period

Offense	Citation	Description
One or More Crimes Involving Moral Turpitude (CIMTs)	• INA 101(f)(3) • 8 CFR 316.10(b)(2)(i), (iv)	Conviction or admission of one or more CIMTs (other than political offense), except for one petty offense
Aggregate Sentence of 5 Years or More	• INA 101(f)(3) • 8 CFR 316.10(b)(2)(ii), (iv)	Conviction of two or more offenses with combined sentence of 5 years or more (other than political offense)
Controlled Substance Violation	• INA 101(f)(3) • 8 CFR 316.10(b)(2)(iii), (iv)	Violation of any law on controlled substances, except for simple possession of 30g or less of marijuana
Incarceration for 180 Days	• INA 101(f)(7) • 8 CFR 316.10(b)(2)(v)	Incarceration for a total period of 180 days or more, except political offense and ensuing confinement abroad
False Testimony under Oath	• INA 101(f)(6) • 8 CFR 316.10(b)(2)(vi)	False testimony for the purpose of obtaining any immigration benefit
Prostitution Offenses	• INA 101(f)(3) • 8 CFR 316.10(b)(2)(vii)	Engaged in prostitution, attempted or procured to import prostitution, or received proceeds from prostitution
Smuggling of a Person	• INA 101(f)(3) • 8 CFR 316.10(b)(2)(viii)	Involved in smuggling of a person to enter or try to enter the United States in violation of law
Polygamy	• INA 101(f)(3) • 8 CFR 316.10(b)(2)(ix)	Practiced or is practicing polygamy (the custom of having more than one spouse at the same time)
Gambling Offenses	• INA 101(f)(4)–(5) • 8 CFR 316.10(b)(2)(x)–(xi)	Two or more gambling offenses or derives income principally from illegal gambling activities
Habitual Drunkard	• INA 101(f)(1) • 8 CFR 316.10(b)(2)(xii)	Is or was a habitual drunkard
Two or More Convictions for Driving Under the Influence (DUI)	• INA 101(f)	Two or more convictions for driving under the influence during the statutory period
Failure to Support Dependents	• INA 101(f) • 8 CFR 316.10(b)(3)(i)	Willful failure or refusal to support dependents, unless extenuating circumstances are established
Adultery	• INA 101(f) • 8 CFR 316.10(b)(3)(ii)	Extramarital affair tending to destroy existing marriage, unless extenuating circumstances are established

Offense	Citation	Description
Unlawful Acts	• INA 101(f) • 8 CFR 316.10(b)(3)(iii)	Unlawful acts that adversely reflect upon GMC, unless extenuating circumstances are established

A. One or More Crimes Involving Moral Turpitude

1. Crime Involving Moral Turpitude

"Crime involving moral turpitude" (CIMT) is a term used in the immigration context that has no statutory definition. Extensive case law, however, has provided sufficient guidance on whether an offense rises to the level of a CIMT. The courts have held that moral turpitude "refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general."[3]

Whether an offense is a CIMT is largely based on whether the offense involves willful conduct that is morally reprehensible and intrinsically wrong, the essence of which is a reckless, evil or malicious intent. The Attorney General has decreed that a finding of "moral turpitude" requires that the perpetrator committed a reprehensible act with some form of guilty knowledge.[4]

The officer should consider the nature of the offense in determining whether it is a CIMT.[5] In many cases, the CIMT determination depends on whether the relevant state statute includes one of the elements that involves moral turpitude. For example, an offense or crime may be a CIMT in one state, but a similarly named crime in another state may not be a CIMT because of differences in the definition of the crime or offense. The officer may rely on local USCIS counsel in cases where there is a question about whether a particular offense is a CIMT.

The table below serves as a quick reference guide on the general categories of CIMTs and their respective elements or determining factors. The paragraphs that follow the table provide further guidance on each category.

General Categories of Crimes Involving Moral Turpitude (CIMTs)

CIMT Category	Elements of Crime
Crimes Against a Person	Criminal intent or recklessness, or is defined as morally reprehensible by state (may include statutory rape)
Crimes Against Property	Involving fraud against the government or an individual (may include theft, forgery, robbery)
Sexual and Family Crimes	No one set of principles or elements; see further explanation below (may include spousal or child abuse)
Crimes Against Authority of the Government	Presence of fraud is the main determining factor (may include offering a bribe, counterfeiting)

Crimes Against a Person

Crimes against a person involve moral turpitude when the offense contains criminal intent or recklessness or when the crime is defined as morally reprehensible by state statute. Criminal intent or recklessness may be inferred from the presence of unjustified violence or the use of a dangerous weapon. For example, aggravated battery is usually, if not always, a CIMT. Simple assault and battery is not usually considered a CIMT.

Crimes Against Property

Moral turpitude attaches to any crime against property which involves fraud, whether it entails fraud against the government or against an individual. Certain crimes against property may require guilty knowledge or intent to permanently take property. Petty theft, grand theft, forgery, and robbery are CIMTs in some states.

Sexual and Family Crimes

It is difficult to discern a distinguishing set of principles that the courts apply to determine whether a particular offense involving sexual and family crimes is a CIMT. In some cases, the presence or absence of violence seems to be an important factor. The presence or absence of criminal intent may also be a determining factor. The CIMT determination depends upon state statutes and the controlling case law and must be considered on a case-by-case basis.

Offenses such as spousal or child abuse may rise to the level of a CIMT, while an offense involving a domestic simple assault generally does not. An offense relating to indecent exposure or abandonment of a minor child may or may not rise to the level of a CIMT. In general, if the person knew or should have known that the victim was a minor, any intentional sexual contact with a child involves moral turpitude.[6]

Crimes Against the Authority of the Government

The presence of fraud primarily determines the presence of moral turpitude in crimes against the authority of the government. Offering a bribe to a government official and offenses relating to counterfeiting are generally CIMTs. Offenses relating to possession of counterfeit securities without intent and contempt of court, however, are not generally CIMTs.

2. Committing One or More CIMTs in Statutory Period

An alien who is convicted of or admits to committing one or more CIMTs during the statutory period cannot establish GMC for naturalization.[7] If the alien has only been convicted of (or admits to) one CIMT, the CIMT must have been committed within the statutory period as well. In cases of multiple CIMTs, only the commission and conviction (or admission) of one CIMT needs to be within the statutory period.

Petty Offense Exception

An alien who has committed only one CIMT that is a considered a "petty offense," such as petty theft, may be eligible for an exception if all of the following conditions are met:

- The "petty offense" is the only CIMT the alien has ever committed;
- The sentence imposed for the offense was 6 months or less; and
- The maximum possible sentence for the offense does not exceed one year.[8]

The petty offense exception does not apply to an alien who has been convicted of or who admits to committing more than one CIMT even if only one of the CIMTs was committed during the statutory period. An alien who has committed more than one petty offense of which only one is a CIMT may be eligible for the petty offense exception.[9]

Purely Political Offense Exception

This bar to GMC does not apply to a conviction for a CIMT occurring outside of the United States for a purely political offense committed abroad.[10]

B. Aggregate Sentence of 5 Years or More

An alien may not establish GMC if he or she has been convicted of two or more offenses during the statutory period for which the combined, imposed sentence was 5 years or more.[11] The underlying offenses must have been committed within the statutory period.

Purely Political Offense Exception

The GMC bar for having two or more convictions does not apply if the convictions and resulting sentence or imprisonment of 5 years or more occurred outside of the United States for purely political offenses committed abroad.[12]

C. Controlled Substance Violation

1. Controlled Substance Violations

An alien cannot establish good moral character (GMC) if he or she has violated any controlled substance-related federal or state law or regulation of the United States or law or regulation of any foreign country during the statutory period.[13] This includes conspiring to violate or aiding and abetting another person to violate such laws or regulations.

This conditional bar to establishing GMC applies to a conviction for such an offense or an admission to such an offense, or an admission to committing acts that constitute the essential elements of a violation of any controlled substance law.[14] Furthermore, a conviction or admission that the alien has been a trafficker in a controlled substance, or benefited financially from a spouse or parent's trafficking is also a conditional bar.[15]

Controlled substance is defined in the Controlled Substances Act (CSA) as a "drug or other substance, or immediate precursor" that is included in the schedule or attachments in the CSA.[16] The substance underlying the alien's state law conviction or admission must be listed in the CSA.[17] Possession of controlled substance related paraphernalia may also constitute an offense "relating to a controlled substance" and may preclude the alien from establishing GMC.[18]

2. Conditional GMC Bar Applies Regardless of State Law Decriminalizing Marijuana

A number of states and the District of Columbia (D.C.) have enacted laws permitting "medical"[19] or "recreational"[20] use of marijuana.[21] Marijuana, however, remains classified as a "Schedule I" controlled substance under the federal CSA.[22] Schedule I substances have no accepted medical use pursuant to the CSA.[23] Classification of marijuana as a Schedule I controlled substance under federal law means that certain conduct involving marijuana, which is in violation of the CSA, continues to constitute a conditional bar to GMC for naturalization eligibility, even where such activity is not a criminal offense under state law.[24]

Such an offense under federal law may include, but is not limited to, possession, manufacture or production, or distribution or dispensing of marijuana.[25] For example, possession of marijuana for recreational or medical purposes or employment in the marijuana industry may constitute conduct that violates federal controlled substance laws. Depending on the specific facts of the case, these activities, whether established by a conviction or an admission by the alien, may preclude a finding of GMC for the alien during the statutory period. An admission must meet the long held requirements for a valid "admission" of an offense.[26] Note that even if an alien does not have a conviction or make a valid admission to a marijuana-related offense, he or she may be unable to meet the burden of proof to show that he or she has not committed such an offense.

3. Exception for Single Offense of Simple Possession[27]

The conditional bar to GMC for a controlled substance violation does not apply if the violation was for a single offense of simple possession of 30 grams or less of marijuana.[28] This exception is also applicable to paraphernalia offenses involving controlled substances as long as the paraphernalia offense is "related to" simple possession of 30 grams or less of marijuana.[29]

D. Imprisonment for 180 Days or More

An alien cannot establish GMC if he or she is or was imprisoned for an aggregate period of 180 days or more during the statutory period based on a conviction.[30] This bar to GMC does not apply if the conviction resulted only in a sentence to a period of probation with no sentence of incarceration for 180 days or more. This bar applies regardless of the reason for the conviction. For example, this bar still applies if the term of imprisonment results from a violation of probation rather than from the original sentence.[31]

The commission of the offense resulting in conviction and confinement does not need to have occurred during the statutory period for this bar to apply. Only the confinement needs to be within the statutory period for the alien to be precluded from establishing GMC.

Purely Political Offense Exception

This bar to GMC does not apply to a conviction and resulting confinement of 180 days or more occurring outside of the United States for a purely political offense committed abroad.[32]

E. False Testimony

1. False Testimony in Statutory Period

An alien who gives false testimony to obtain any immigration benefit during the statutory period cannot establish GMC.[33] False testimony occurs when the alien deliberately intends to deceive the U.S. Government while under oath in order to obtain an immigration benefit. This holds true regardless of whether the information provided in the false testimony would have impacted the alien's eligibility. The statute does not require that the benefit be obtained, only that the false testimony is given in an attempt to obtain the benefit.[34]

While the most common occurrence of false testimony is failure to disclose a criminal or other adverse record, false testimony can occur in other areas. False testimony may include, but is not limited to, facts about lawful admission, absences, residence, marital status or infidelity, employment, organizational membership, or tax filing information.

2. Three Elements of False Testimony

There are three elements of false testimony established by the Supreme Court that must exist for a naturalization application to be denied on false testimony grounds:[35]

Oral Statements

The "testimony" must be oral. False statements in a written application and falsified documents, whether or not under oath, do not constitute "testimony."[36] However, false information provided orally under oath to an officer in a question-and-answer statement relating to a written application is "testimony."[37] The oral statement must also be an affirmative misrepresentation. The Supreme Court makes it clear that there is no "false testimony" if facts are merely concealed, to include incomplete but otherwise truthful answers.

Oath

The oral statement must be made under oath in order to constitute false testimony.[38] Oral statements to officers that are not under oath do not constitute false testimony.

Subjective Intent to Obtain an Immigration Benefit

The alien must be providing the false testimony in order to obtain an immigration benefit. False testimony for any other reason does not preclude the alien from establishing GMC.

F. Prostitution

An alien may not establish GMC if he or she has engaged in prostitution, procured or attempted to procure or to import prostitutes or persons for the purpose of prostitution, or received proceeds from prostitution during the statutory period.[39] The Board of Immigration Appeals (BIA) has held that to "engage in" prostitution, one must have engaged in a regular pattern of behavior or conduct.[40] The BIA has also determined that a single act of soliciting prostitution on one's own behalf is not the same as procurement.[41]

G. Smuggling of a Person

An alien is prohibited from establishing GMC if he or she is or was involved in the smuggling of a person or persons by encouraging, inducing, assisting, abetting or aiding any alien to enter or try to enter the United States in violation of law during the statutory period.[42]

Family Reunification Exception

This bar to GMC does not apply in certain cases where the alien was involved in the smuggling of his or her spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law before May 5, 1988.[43]

H. Polygamy

An alien who has practiced or is practicing polygamy during the statutory period is precluded from establishing GMC.[44] Polygamy is the custom of having more than one spouse at the same time.[45] The officer should review documents in the file and any documents the alien brings to the interview for information about the alien's marital history, to include any visa petitions or applications, marriage and divorce certificates, and birth certificates of children.

I. Gambling

An alien who has been convicted of committing two or more gambling offenses or who derives his or her income principally from illegal gambling activities during the statutory period is precluded from establishing GMC.[46] The gambling offenses must have been committed within the statutory period.

J. Habitual Drunkard

An alien who is or was a habitual drunkard during the statutory period is precluded from establishing GMC.[47] Certain documents may reveal habitual drunkenness, to include divorce decrees, employment records, and arrest records. In addition, termination of employment, unexplained periods of unemployment, and arrests or multiple convictions for public intoxication or driving under the influence may be indicators that the alien is or was a habitual drunkard.

K. Certain Acts in Statutory Period

Although the INA provides a list of specific bars to good moral character,[48] the INA also allows a finding that "for other reasons" a person lacks good moral character, even if none of the specific statutory bars applies.[49] The following sections provide examples of acts that may lead to a finding that an alien lacks GMC "for other reasons."[50]

1. Driving Under the Influence

The term "driving under the influence" (DUI) includes all state and federal impaired-driving offenses, including "driving while intoxicated," "operating under the influence," and other offenses that make it unlawful for a person to operate a motor vehicle while impaired. This term does not include lesser included offenses, such as negligent driving, that do not require proof of impairment.

Evidence of two or more DUI convictions during the statutory period establishes a rebuttable presumption that an alien lacks GMC.[51] The rebuttable presumption may be overcome[52] if the alien is able to provide "substantial relevant and credible contrary evidence" that he or she "had good moral character even during the period within which he [or she] committed the DUI offenses," and that the "convictions were an aberration."[53] An alien's efforts to reform or rehabilitate himself or herself after multiple DUI convictions do not in and of themselves demonstrate GMC during the period that includes the convictions.

2. Failure to Support Dependents

An alien who willfully failed or refused to support his or her dependents during the statutory period cannot establish GMC unless the alien establishes extenuating circumstances.[54] The GMC determination for failure to support dependents includes consideration of whether the alien has complied with his or her child support obligations abroad in cases where it is

relevant.[55]

Even if there is no court-ordered child support, the courts have concluded that parents have a moral and legal obligation to provide support for their minor children, and a willful failure to provide such support demonstrates that the individual lacks GMC.[56]

An alien who fails to support dependents may lack GMC if he or she:

- Deserts a minor child;[57]
- Fails to pay any support;[58] or
- Obviously pays an insufficient amount.[59]

If the alien has not complied with court-ordered child support and is in arrears, the alien must identify the length of time of non-payment and the circumstances for the non-payment. An officer should review all court records regarding child support, and non-payment if applicable, in order to determine whether the alien established GMC.[60]

Extenuating Circumstances

If the alien shows extenuating circumstances, a failure to support dependents should not adversely affect the GMC determination.[61]

The officer should consider the following circumstances:

- An alien's unemployment and financial inability to pay the child support;[62]
- Cause of the unemployment and financial inability to support dependents;
- Evidence of a good-faith effort to reasonably provide for the support of the child;[63]
- Whether the nonpayment was due to an honest but mistaken belief that the duty to support a minor child had terminated;[64] and
- Whether the nonpayment was due to a miscalculation of the court-ordered arrears.[65]

3. Adultery

An alien who has an extramarital affair during the statutory period that tended to destroy an existing marriage is precluded from establishing GMC.[66]

Extenuating Circumstances

If the alien shows extenuating circumstances, an offense of adultery should not adversely affect the GMC determination.[67] Extenuating circumstances may include instances where the alien divorced his or her spouse but later the divorce was deemed invalid or the alien and the spouse mutually separated and they were unable to obtain a divorce.[68]

L. Unlawful Acts

1. Unlawful Acts Provision

An alien who has committed, was convicted of, or was imprisoned for an unlawful act during the statutory period may be found to lack GMC if the act adversely reflects on his or her moral character, unless the alien can demonstrate extenuating circumstances.[69] An act is unlawful if it violates a criminal or civil law of the jurisdiction where it was committed. The provision addressing “unlawful acts” does not require the alien to have been charged with or convicted of the offense.[70] The fact that none of the statutorily enumerated bars to GMC applies does not preclude a finding under this provision that the alien lacks the GMC required for naturalization.[71]

2. Case-by-Case Analysis

USCIS officers determine on a case-by-case basis whether an unlawful act committed during the statutory period is one that adversely reflects on moral character.[72] The officer may make a finding that an alien did not have GMC due to the commission of an unlawful act evidenced through admission, conviction, or other relevant, reliable evidence in the record.[73] The case-by-case analysis must address whether:

- The act is unlawful (meaning the act violates a criminal or civil law in the jurisdiction where committed);
- The act was committed or the person was convicted of or imprisoned for the act during the statutory period;
- The act adversely reflects on the person’s moral character; and
- There is evidence of any extenuating circumstances.[74]

In addition, in cases under the jurisdiction of the Ninth Circuit, the officer’s analysis must also consider any counterbalancing factors that bear on the alien’s moral character.[75]

The following steps provide officers with further guidance on making GMC determinations based on the unlawful acts provision.

Step 1 – Determine Whether the Alien Committed, Was Convicted of, or Was Imprisoned for an Unlawful Act during the Statutory Period

The officer should determine if the alien committed, was convicted of, or was imprisoned for any unlawful acts during the statutory period. To determine if an act qualifies as an unlawful act, the officer should identify the applicable law, then look to whether the act violated the relevant law regardless of whether criminal or civil proceedings were initiated or concluded during the statutory period.[76]

Officers should only conclude that a person committed the acts in question based on a conviction record, an admission to the elements of the criminal or civil offense, or other relevant, reliable evidence in the record showing commission of the unlawful act.[77]

Step 2 – Determine Whether the Unlawful Act Adversely Reflects on GMC

The officer should evaluate whether the unlawful act adversely reflects on the moral character of the alien. Unlawful acts that reflect adversely on moral character are not limited to conduct that would be classified as a CIMT.[78] In general, an act that is classified as a CIMT[79] would be an unlawful act that adversely reflects on the alien’s moral character.[80] An

officer should also consider whether the act is against the standards of an average member of the community. For example, mere technical or regulatory violations may not be against the standards of an average member of the community.[81]

Step 3 – Review for Extenuating Circumstances

The officer should review whether the alien has shown extenuating circumstances which render the crime less reprehensible than it otherwise would be or the actor less culpable than he or she otherwise would be.[82] Extenuating circumstances must pertain to the unlawful act and must precede or be contemporaneous with the commission of the unlawful act.[83] It is the alien's burden to show extenuating circumstances that mitigate the effect of the unlawful act on the alien's moral character.[84]

If the alien meets his or her burden of proof to demonstrate extenuating circumstances, the officer may find that commission of the unlawful act[85] does not preclude the alien from establishing GMC.[86] An officer may not, however, consider conduct or equities (including evidence of reformation or rehabilitation) subsequent to the commission of the unlawful act as an extenuating circumstance. Consequences after the fact and future hardship(s) are not extenuating circumstances.[87]

3. Examples of Unlawful Acts

There is no comprehensive list of unlawful acts in the INA or regulations. Examples of unlawful acts recognized by case law as barring GMC include, but are not limited to the following:

- Bail jumping;[88]
- Bank fraud;[89]
- Conspiracy to distribute a controlled substance;[90]
- Failure to file or pay taxes (discussed below);
- Falsification of records;[91]
- False claim to U.S. citizenship;[92]
- Forgery-uttering;[93]
- Insurance fraud;[94]
- Obstruction of justice;[95]
- Sexual assault;[96]
- Social Security fraud;[97]
- Unlawful harassment;[98]
- Unlawfully registering to vote (discussed below);
- Unlawful voting (discussed below); and
- Violating a U.S. embargo.[99]

Despite these examples, officers must still perform the case-by-case analysis described above, including whether the act adversely reflects on one's moral character and the existence of any extenuating circumstances, in every case.[100]

Failure to File Tax Returns or Pay Taxes in Accordance with Tax Authority

An alien who fails to file tax returns, if required to do so, or fully pay his or her tax liability, as required under the relevant tax laws, may be precluded from establishing GMC. If there are inconsistencies[101] between the record and the alien's tax returns, the alien may be precluded from establishing GMC due to the commission of an unlawful act.[102] Once the failure to file tax returns or pay taxes and the relevant law has been identified, the officer must assess on a case-by-case basis whether the alien is ineligible for naturalization under the unlawful acts provision.

If the officer determines that the unlawful conduct violates the standards of an average member of the community, the alien will not be able to establish GMC. However, recognizing the complexities of filing taxes, there may be instances where the officer may determine that the alien's conduct regarding his or her tax return or tax payment did not violate the standards of an average member of the community, or that the alien established extenuating circumstances. In such cases, the alien may establish GMC by showing that he or she has corrected all inconsistencies or errors.

An example of when an alien may not be prevented from establishing GMC despite filing taxes incorrectly could be where the alien is divorced and mistakenly claimed a child as a dependent on his or her tax return for a tax year that the former spouse was entitled to claim the child as a dependent based on the terms of the divorce.

Examples of corrections of such inconsistencies or errors might include a letter from the tax authority indicating that:

- The alien has filed the appropriate forms and returns; and
- The alien has paid the required taxes, or has made arrangements for payment and is doing so in accordance with the pertinent tax authority.

M. False Claim to U.S. Citizenship, Unlawful Voter Registration, and Unlawful Voting

1. Background

It is unlawful for aliens to vote in federal elections or in most state elections.[103] Under 18 U.S.C. 611, it is unlawful for an alien to vote in a federal election unless the election was held partly for some other purpose, aliens were authorized to vote for such other purpose under a state or local law and voting for the other purpose was conducted independently of voting for a candidate for federal office.

National Voter Registration Act of 1993 (NVRA) and Unlawful Voter Registration

The NVRA[104] directs states[105] to provide eligible voters with the opportunity to register to vote at the same time they apply for a driver's license or ID card[106] at the state's motor vehicle authority.[107]

Consequently, the voter registration application has been incorporated into many states' motor vehicle authority applications for a new or renewed driver's license or state ID card.[108] The NVRA also requires states to provide citizens with an opportunity to register to vote when applying to other designated state and local offices, including those that provide public

assistance and services to persons with disabilities.[109]

The portion of the driver's license, ID card, or other benefit application that permits a person to register to vote generally includes a question asking whether the person is a U.S. citizen and instructions or warnings that indicate a person should not register to vote if he or she is not a U.S. citizen.

Further, the registration form may note that if the person answered "no" to the citizenship question, he or she should not complete the form, as the person is not eligible to register to vote.[110] Because of these safeguards, ineligible voters are generally not registered to vote, unless they confirm that they are eligible to vote by claiming to be a U.S. citizen.

Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)

Before the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[111] false claims to U.S. citizenship were considered under broader grounds of fraud and willful misrepresentation, when made to obtain an immigration benefit. IIRIRA added INA sections 237(a)(3)(D) and 237(a)(6), making deportable aliens who falsely claim to be U.S. citizens or who vote in violation of the law.[112] Congress also enacted parallel federal criminal provisions to deal specifically with unlawful voting including fraudulent registration.

18 U.S.C. 611 makes it a federal crime for aliens to vote in federal elections. An alien convicted of violating this provision may be fined, imprisoned for up to 1 year, or both. 18 U.S.C. 1015(e) criminalizes an alien who knowingly makes a false statement or claims to be a U.S. citizen with the intent to obtain any federal or state benefit or service. 18 U.S.C. 1015(f) criminalizes an alien who knowingly makes a false claim to U.S. citizenship in order to register to vote in any federal, state, or local election.

Child Citizenship Act of 2000 (CCA)

The Child Citizenship Act of 2000 (CCA)[113] added an exception to the criminal prosecutions under 18 U.S.C. 611(c) and the last clause of 18 U.S.C. 1015(f), for lawful permanent residents who resided in the United States prior to age 16, have U.S. citizen parents, and who reasonably believed that he or she was a citizen of the United States at the time of making the false claim.[114]

Board of Immigration Appeals (BIA) Caselaw

On May 7, 2015, the Board of Immigration Appeals (BIA) held in *Matter of Fitzpatrick* that an alien is deportable under INA 237(a)(6)(A) regardless of whether the alien knew he or she was committing an unlawful act by voting in violation of 18 U.S.C. 611.[115] On June 28, 2019, the BIA further clarified in *Matter of Zhang* that an alien's false claim to U.S. citizenship can result in deportability under INA 237(a)(3)(D)(i), even if it was not made knowingly.[116]

2. Deportability

Under certain sections of the INA, an alien is deportable for unlawful voting or falsely claiming to be a U.S. citizen.[117] Therefore, USCIS may issue a Notice to Appear (NTA) to an alien who:

- Falsely represents or has represented himself or herself to be a citizen of the United States for any purpose or benefit under the INA or any Federal or State law,[118] unless he or she meets the limited exception in INA 237(a)(3)(D)(ii);[119]
- Falsely claims to be a U.S. citizen when registering to vote,[120] unless he or she meets the limited exception in INA 237(a)(3)(D)(ii);[121] or
- Votes in violation of any federal, state, or local constitutional provision, statute, ordinance, or regulation,[122] unless he or she meets the limited exception in INA 237(a)(6)(B).[123]

A conviction is not required to issue an NTA under any of these grounds.

An alien may be removable based on a false claim to U.S. citizenship that the alien made in an oral interview, in a written or online application, or by submitting evidence. It is irrelevant whether or not the alien made the claim under oath. USCIS may also obtain information about a false claim to U.S. citizenship, voter registration or voting through record review, evidence the alien submits, documents obtained through other agencies, or other means.

An alien may also be removable based on a false claim to U.S. citizenship even if the alien made the claim without knowledge or intent.[124] The alien can make the claim to any federal, state, or local official, or even to a private person, such as an employer.[125] An alien who makes a false claim to U.S. citizenship in a driver's license or state benefit application, where unconnected to voter registration, may have violated 18 U.S.C. 1015(e) or an applicable state law.[126]

USCIS may consider an alien to have falsely claimed to be a U.S. citizen if the alien affirmatively indicates that he or she is a U.S. citizen. If the alien registered to vote, the alien has the burden to prove that the registration form did not contain a question about whether the alien is a U.S. citizen or that the alien did not indicate, in response to such a question, that he or she is a U.S. citizen.

USCIS considers an alien to have falsely claimed to be a U.S. citizen in violation of 18 U.S.C. 1015(f), and to be removable under INA 237(a)(3)(D)(i), in cases where the alien answered "yes" to a question asking whether he or she is a U.S. citizen in order to register to vote. This may apply even if the alien's registration to vote was done simultaneously with the process of a driver's license or identification (ID) card application, or an application for other state benefits.

Denial of Naturalization Application

After an NTA is filed with the immigration court, USCIS generally denies the naturalization application under INA 318 based on the existence of pending removal proceedings against the alien,[127] except for certain applications for naturalization based on military service.[128] Furthermore, an alien subject to an order of deportation or removal is not eligible for naturalization, and the naturalization application is denied, except for certain applications for naturalization based on military service.[129]

3. Unlawful Acts

Further, an alien commits an unlawful act, and therefore may lack good moral character,[130] if he or she knowingly makes any false statement or claim that he or she is or has been a U.S. citizen or national of the United States, with the intent to obtain on behalf of himself or herself, or any other person, any federal or state benefit or service, or to engage unlawfully in employment in the United States.[131] An alien also commits an unlawful act if he or she makes a false statement or claim that he or she is a U.S. citizen in order to register to vote in any federal, state, or local election.[132] Additionally, an alien commits an unlawful act if he or she unlawfully votes in a federal election.[133]

Voting in a local election is not an unlawful act for good moral character purposes if the alien is eligible to vote under the relevant law. For good moral character in the unlawful acts context, where the alien answered "yes" to a question asking whether he or she is a U.S. citizen in order to register to vote or otherwise made a false claim to U.S. citizenship, the offense

must be committed knowingly.[134] The offense under 18 U.S.C. 1015(f) may also be considered to be a crime involving moral turpitude (CIMT) for which the alien lacks GMC if committed within the statutory period.[135] An alien may also be unable to establish GMC under INA 101(f)(3) and INA 212(a)(2)(B) (multiple crimes) and INA 101(f)(7) (confined 180 days or more).

4. Documentation and Evidence

If USCIS believes that an alien has falsely claimed U.S. citizenship, unlawfully registered to vote, or unlawfully voted in a U.S. election, where appropriate, the officer may take a sworn statement regarding the alien's false claim to U.S. citizenship, unlawful registration to vote, or unlawful voting.[136] If an officer requires evidence to determine whether the alien in fact made false claims of U.S. citizenship, voted in a U.S. election, or both, the officer may issue a Request for Evidence (RFE). Such evidence may include:

- The voter registration card;
- Applicable voter registration form or application (in some cases this is part of the application for a driver's license or state ID), if available; and
- Voting record from the relevant board of elections or other authority.

In addition, when assessing unlawful acts, if an alien wishes to demonstrate that once he or she realized that claiming U.S. citizenship was unlawful, they took immediate corrective steps to remediate the violation or violations, such as by notifying state officials, an alien may include supporting evidence, such as:

- Request to be removed from the voter list (if applicable); and
- Proof of removal from the voter list (if applicable).

When there is evidence of one of the above-mentioned unlawful acts, as with all unlawful acts, the officer must make an assessment regarding whether the act reflects adversely on moral character and must consider any extenuating circumstances. This is in addition to the below exception for false claims to U.S. citizenship and unlawful registration or voting.[137]

5. Exception for False Claims to U.S. Citizenship and Unlawful Registration or Voting

In 2000, Congress added an exception for deportability and GMC determinations for false claims to U.S. citizenship, unlawful registration to vote, and unlawful voting.[138] An alien who was convicted under 18 U.S.C. 611(c) or 18 U.S.C 1015(f), and the conviction became final on or after October 30, 2000, is removable and not eligible for an exception under the CCA.[139] Otherwise, an alien qualifies for an exception if all of the following conditions are met:

- The alien's natural or adoptive parents (both parents) are or were U.S. citizens at the time of the violation;[140]
- The alien permanently resided in the United States before reaching the age of 16 years; and
- The alien reasonably believed at the time of the violation that he or she was a U.S. citizen.

Evidence of the alien's parent's U.S. citizenship is required in order to assess eligibility for the exception. To assess whether the alien reasonably believed that he or she was a U.S. citizen at the time of the violation, the officer must consider the totality of the circumstances in the case. This includes weighing such factors as the length of time the alien resided in the United States and the age when the alien became a lawful permanent resident (LPR).

If the alien has established his or her burden of proof for meeting the exception, then he or she is not deportable, and the offense would not be considered an unlawful act. The alien may be eligible for naturalization if other requirements are met. Otherwise, USCIS generally issues an NTA and denies the naturalization application.[141]

Footnotes

[^ 1] See INA 316(a). See 8 CFR 316.10.

[^ 2] See INA 101(f). See Chapter 1, Purpose and Background [12 USCIS-PM F.1].

[^ 3] See *Medina v. United States*, 259 F.3d 220, 227 (4th Cir. 2001), quoting *Matter of Danesh (PDF)*, 19 I&N Dec. 669, 670 (BIA 1988). See *Matter of Perez-Contreras (PDF)*, 20 I&N Dec. 615, 618 (BIA 1992). See *Matter of Flores (PDF)*, 17 I&N Dec. 225 (BIA 1980) (and cases cited therein).

[^ 4] See *Matter of Silva-Trevino (PDF)*, 24 I&N Dec. 687, 688, 706 (A.G. 2008).

[^ 5] See *Matter of Esfandiary (PDF)*, 16 I&N Dec. 659 (BIA 1979).

[^ 6] See *Matter of Silva-Trevino (PDF)*, 24 I&N Dec. 687 (A.G. 2008).

[^ 7] See INA 101(f)(3). See 8 CFR 316.10(b)(2)(i).

[^ 8] See INA 212(a)(2)(A)(ii)(II).

[^ 9] See *Matter of Garcia-Hernandez (PDF)*, 23 I&N Dec. 590, 594-95 (BIA 2003).

[^ 10] See Chapter 2, Adjudicative Factors, Section F, "Purely Political Offense" Exception [12 USCIS-PM F.2(F)].

[^ 11] See 8 CFR 316.10(b)(2)(ii).

[^ 12] See Chapter 2, Adjudicative Factors, Section F, "Purely Political Offense" Exception [12 USCIS-PM F.2(F)].

[^ 13] See 21 U.S.C. 802 for federal definition of "controlled substance." For good moral character provisions, see INA 101(f)(3), INA 212(a)(2)(A)(i)(II), and INA 212(a)(2)(C). Also, see 8 CFR 316.10(b)(2)(iii) and (iv). Note that the conditional bar to GMC for a controlled substance violation does not apply if the violation was for a single offense of simple possession of 30 grams or less of marijuana. See Subsection 3, Exception for Single Offense of Simple Possession [12 USCIS-PM F.5(C)(3)].

[^ 14] An admission must comply with the requirements outlined in *Matter of K (PDF)*, 7 I&N Dec 594 (BIA 1957) (establishing requirements for a valid "admission" of an offense); See Chapter 2, Adjudicative Factors, Section E, Admission of Certain Criminal Acts [12 USCIS-PM F.2(E)].

[^ 15] See INA 101(f)(3) and INA 212(a)(2)(C).

[^ 16] See 21 U.S.C. 802(6). The term “controlled substance” does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

[^ 17] See 21 U.S.C. 802(6). See also *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1078 (9th Cir. 2007); *Matter of Hernandez-Ponce (PDF)*, 19 I&N Dec. 613, 616 (BIA 1988); *Matter of Mena (PDF)*, 17 I&N Dec. 38, 39 (BIA 1979); *Matter of Paulus (PDF)*, 11 I&N Dec. 274, 275-76 (BIA 1965).

[^ 18] The paraphernalia offense must be connected to a drug defined in 21 U.S.C. 802. See *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015). Conviction for, or an admission to the essential elements of a trafficking offense may be considered a Crime Involving Moral Turpitude, which may trigger a bar to a finding of GMC. See INA 101(f)(3). See 8 CFR 316.10(b)(2)(i). See Section A, One or More Crimes Involving Moral Turpitude [12 USCIS-PM F.5(A)].

[^ 19] See, for example, Cal. Health & Safety Code section 11362.5; Colo. Rev. Stat. 44-11-101, *et. seq.*; Haw. Rev. Stat. sections 329-121 to 329-128; Me. Rev. Stat. Ann., Tit. 22, 2383-B(5); Nev. Rev. Stat. sections 453A.010-453A.810; Ore. Rev. Stat. sections 475.300-475.346.

[^ 20] See, for example, Washington Initiative 502 at section 20, amending RCW 69.50.4013 and 2003 c 53 s 334; Colorado Amendment 64, Amending Colo. Const. Art. XVIII 16(3), Colo Rev. State. Sections 44-12-101, *et. seq.* These laws are commonly known as permitting certain “recreational use” of marijuana and may include conduct such as use, possession, purchase, transport, and consumption. See, for example, Washington Initiative 502 at section 20, amending RCW 69.50.4013 and 2003 c 53 s 334; Colorado Amendment 64, Amending Colo. Const. Art. XVIII 16(3).

[^ 21] “Marihuana” is defined by the Controlled Substances Act (21 U.S.C. 802(16)):

> (A) Subject to subparagraph (B), the term “marihuana” means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.
>
> (B) The term “marihuana” does not include –
>
>> (i) hemp, as defined in section 297A of the Agricultural Marketing Act of 1946; or
>>
>> (ii) the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

[^ 22] See 21 U.S.C. 812(c).

[^ 23] See 21 U.S.C. 812(b)(1)(B).

[^ 24] See 21 U.S.C. 812(b)(1)(B). See 21 U.S.C. 844(a).

[^ 25] See 21 U.S.C. 841(a) (“unlawful for any person knowingly or intentionally…to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.”). See 21 U.S.C. 844 (simple possession). See 21 U.S.C. 802(15) (defining manufacture) and 8 U.S.C. 802(22) (defining production).

[^ 26] See Chapter 2, Adjudicative Factors, Section E, Admission of Certain Criminal Acts [12 USCIS-PM F.2(E)]. See *Matter of K- (PDF)*, 7 I&N Dec. 594 (BIA 1957) (establishing requirements for a valid “admission” of an offense).

[^ 27] The BIA defined “offense” in INA 212(h) as “refer[ring] to the specific unlawful acts that made the alien inadmissible, rather than to any generic crime.” *Matter of Martinez Espinoza* (PDF), 25 I&N Dec. 118, 124 (2009). Multiple offenses that are parts of a single act and are committed simultaneously may be considered a “single offense.” *Matter of Davey (PDF)*, 26 I&N Dec. 37 (BIA 2012).

[^ 28] See INA 101(f)(3). See 8 CFR 316.10(b)(2)(iii). As explained in subsection 2, the decriminalization of certain activities involving marijuana in certain states and the District of Columbia (D.C.) does not affect the applicability of the controlled substances violation conditional bar to establishing GMC.

[^ 29] See *Matter of Martinez Espinoza* (PDF), 25 I&N Dec. 118 (BIA 2009), abrogated on other grounds by *Mellouli v. Lynch*, 135 S.Ct. 1980 (U.S. 2015).

[^ 30] See INA 101(f)(7). See 8 CFR 316.10(b)(2)(v).

[^ 31] See *Matter of Piroglu (PDF)*, 17 I&N Dec. 578 (BIA 1980).

[^ 32] See Chapter 2, Adjudicative Factors, Section F, “Purely Political Offense” Exception [12 USCIS-PM F.2(F)].

[^ 33] See INA 101(f)(6). See 8 CFR 316.10(b)(2)(vi).

[^ 34] See *Matter of R-S-J-* (PDF), 22 I&N Dec. 863 (BIA 1999).

[^ 35] See *Kungys v. United States*, 485 U.S. 759, 780-81 (1988).

[^ 36] See *Matter of L-D-E* (PDF), 8 I&N Dec. 399 (BIA 1959).

[^ 37] See *Matter of Ngan* (PDF), 10 I&N Dec. 725 (BIA 1964). See *Matter of G-L-T-* (PDF), 8 I&N Dec. 403 (BIA 1959).

[^ 38] See *Matter of G-,* 6 I&N Dec. 208 (BIA 1954).

[^ 39] See INA 101(f)(3) and INA 212(a)(2)(D)(i) and INA 212(a)(2)(D)(ii). See 8 CFR 316.10(b)(2)(vii).

[^ 40] See *Matter of T*, 6 I&N Dec. 474 (BIA 1955).

[^ 41] See *Matter of Gonzalez-Zoquiapan* (PDF), 24 I&N Dec. 549 (BIA 2008).

[^ 42] See INA 101(f)(3) and INA 212(a)(6)(E). See 8 CFR 316.10(b)(2)(viii).

[^ 43] See INA 212(a)(6)(E)(ii). See Section 301 of the Immigration Act of 1990 (IMMACT90), Pub. L. 101-649 (PDF), 104 Stat. 4978, 5029 (November 29, 1990).

[^ 44] See INA 101(f)(3) and INA 212(a)(10)(A). See 8 CFR 316.10(b)(2)(ix).

[^ 45] Polygamy is not the same as bigamy. Bigamy is the crime of marrying a person while being legally married to someone else. An alien who has committed bigamy may be susceptible to a denial under the “unlawful acts” provision.

[^ 46] See INA 101(f)(5). See 8 CFR 316.10(b)(2)(x) and 8 CFR 316.10(b)(2)(xi).

[^ 47] See INA 101(f)(1). See 8 CFR 316.10(b)(2)(xii).

[^ 48] See INA 101(f).

[^ 49] See INA 101(f).

[^ 50] For information on “unlawful acts” under 8 CFR 316.10(c)(iii), see Section L, Unlawful Acts [12 USCIS-PM F.5(L)]. As is the case for finding a person lacks GMC “for other reasons,” the statutory authority for the conditional bar to GMC for “unlawful acts” is the last paragraph of INA 101(f).

[^ 51] See INA 101(f). See *Matter of Castillo-Perez*, 27 I&N Dec. 664 (A.G. 2019).

[^ 52] For specific questions on whether the alien may overcome the presumption, officers should consult the Office of the Chief Counsel.

[^ 53] See *Matter of Castillo-Perez*, 27 I&N Dec. 664, 671 (A.G. 2019).

[^ 54] See 8 CFR 316.10(b)(3)(i). See Hague Convention on the International Recovery of Child Support.

[^ 55] See Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.

[^ 56] See *Brukiewicz v. Savoretti*, 211 F.2d 541 (5th Cir. 1954). See *Petition of Perdiak*, 162 F.Supp. 76 (S.D. Cal. 1958). See *Petition of Dobric*, 189F.Supp. 638 (D. Minn. 1960). See *In re Malaszenko*, 204 F.Supp. 744 (D.N.J. 1962) (and cases cited). See *Petition of Dobric*, 189 F.Supp. 638 (D. Minn. 1960). See *In re Huymaier*, 345 F.Supp. 339 (E.D. Pa. 1972). See *In re Valad*, 465 F.Supp. 120 (E.D. Va. 1979).

[^ 57] See *United States. v. Harrison*, 180 F.2d 981 (9th Cir. 1950).

[^ 58] See *In re Malaszenko*, 204 F.Supp. 744 (D. N.J. 1962). See *In re Mogus*, 73 F.Supp. 150 (W.D. Pa. 1947).

[^ 59] See *In re Halas*, 274 F.Supp. 604 (E.D. Pa. 1967). See *Petition of Dobric*, 189 F.Supp. 638 (D. Minn. 1960).

[^ 60] See 8 CFR 316.10(b)(3)(i).

[^ 61] See Chapter 2, Adjudicative Factors, Section G, Extenuating Circumstances [12 USCIS-PM F.2(G)].

[^ 62] See *In re Huymaier*, 345 F.Supp. 339 (E.D. Pa. 1972).

[^ 63] See *Petition of Perdiak*, 162 F.Supp. 76 (S.D. Cal. 1958).

[^ 64] See *In re Valad*, 465 F.Supp. 120 (E.D. Va. 1979).

[^ 65] See *Etape v. Napolitano*, 664 F.Supp.2d 498, 517 (D. Md. 2009).

[^ 66] See 8 CFR 316.10(b)(3)(ii).

[^ 67] See Chapter 2, Adjudicative Factors, Section G, Extenuating Circumstances [12 USCIS-PM F.2(G)].

[^ 68] See *In re Petition of Schroers*, 336 F.Supp. 1348 (S.D.N.Y. 1971). See *In re Petition of Russo*, 259 F.Supp. 230 (S.D.N.Y. 1966). See *Dickhoff v. Shaughnessy*, 142 F.Supp. 535 (S.D.N.Y. 1956).

[^ 69] See INA 101(f). See 8 CFR 316.10(b)(3)(iii). For cases arising in the Ninth Circuit, in addition to extenuating circumstances, USCIS must also consider and weigh all factors relevant to the determination of GMC, which include education, family background, employment history, financial status, and lack of criminal record. See *Hussein v. Barrett*, 820 F.3d 1083 (9th Cir. 2016).

[^ 70] See *United States v. Jean-Baptiste*, 395 F.3d 1190 (11th Cir. 2005) (finding that even where a conviction for a crime occurs after naturalization, the alien lacked the good moral character for naturalization when the crime was committed during the statutory period). Likewise, if the unlawful act is committed outside the statutory period, but the alien is convicted or imprisoned for the unlawful act during the statutory period, he or she will be barred from establishing good moral character.

[^ 71] See INA 101(f). See 8 CFR 316.10(b)(3)(iii), 8 CFR 316.10(b)(1), and 8 CFR 316.10(b)(2) (other relevant GMC regulations). See *United States v. Jean-Baptiste*, 395 F.3d 1190 (11th Cir. 2005).

[^ 72] See INA 101(f) and INA 316(a)(3). See 8 CFR 316.10(b)(3)(iii).

[^ 73] An admission must comply with the requirements outlined in *Matter of K (PDF)*, 7 I&N Dec 594 (BIA 1957) (establishing requirements for a valid “admission” of an offense). See Chapter 2, Adjudicative Factors, Section C, Definition of Conviction [12 USCIS-PM F.2(C)] and Section E, Admission of Certain Criminal Acts [12 USCIS-PM F.2(E)]. See INA 101(f). See 8 CFR 316.10(b)(3)(iii). Other significant evidence, for example, includes but is not limited to a fine, civil judgment, guilty plea which was later withdrawn after completion of rehabilitation program, voting records, or unexplained discrepancies on tax filings.

[^ 74] See, generally, *United States v. Jean-Baptiste*, 395 F.3d 1190, 1195 (11th Cir. 2005).

[^ 75] See *Hussein v. Barrett*, 820 F.3d 1083 (9th Cir. 2016).

[^ 76] See *Etape v. Napolitano*, 664 F. Supp.2d 498, 507 (D. Md. 2009). See *Meyersiek v. USCIS*, 445 F. Supp.2d 202, 205–06 (D.R.I. 2006) (“Although the words ‘unlawful acts’ are not further defined, the Court interprets them to mean bad acts that would rise to the level of criminality, regardless of whether a criminal prosecution was actually initiated.”). See *United*

States v. Jean-Baptiste, 395 F.3d 1190, 1193 (11th Cir. 2005).

[^ 77] See 8 CFR 316.10(b)(3)(iii). See Chapter 2, Adjudicative Factors, Section E, Admission of Certain Criminal Acts [12 USCIS-PM F.2(E)]. Other relevant, reliable evidence, for example, includes but is not limited to a fine, civil judgment, guilty plea which was later withdrawn after completion of rehabilitation program, voting records, or unexplained discrepancies on tax filings.

[^ 78] See *Khamooshpour v. Holder*, 781 F.Supp.2d 888, 896 (D. Ariz 2011). See *Agarwal v. Napolitano*, 663 F.Supp.2d 528, 542 (W.D. Tex 2009).

[^ 79] See Section A, One or More Crimes Involving Moral Turpitude, Subsection 1, Crime Involving Moral Turpitude [12 USCIS-PM F.5(A)(1)].

[^ 80] See *United States v. Teng Jiao Zhou*, 815 F.3d 639 (9th Cir. 2016) (finding that first degree robbery under California Penal Code, Section 211 was a CIMT and therefore an unlawful act that adversely reflected on one's moral character).

[^ 81] See 8 CFR 316.10(a)(2). See *Abdi v. U.S. Citizenship and Immigration Services*, 923 F.Supp.2d 1160, 1166 (D. Minn. 2013).

[^ 82] See 8 CFR 316.10(b)(3)(iii). See INA 101(f). See Chapter 2, Adjudicative Factors, Section G, Extenuating Circumstances [12 USCIS-PM F.2(G)]. See *United States v. Suarez*, 664 F.3d 655, 662 (7th Cir. 2011). See *United States. v. Lekarczyk*, 354 F.Supp.2d 883 (W.D. Wis. 2005).

[^ 83] See *United States v. Jean-Baptiste*, 395 F.3d 1190, 1195 (11th Cir. 2005) (citing *Rico v. INS*, 262 F.Supp.2d 6 (E.D.N.Y. 2003).

[^ 84] See *United States v. Lekarczyk*, 354 F.Supp.2d 883 (W.D. Wis. 2005).

[^ 85] See 8 CFR 316.10(b)(3)(iii).

[^ 86] See INA 101(f). See 8 CFR 316.10(b)(3)(iii). See Chapter 2, Adjudicative Factors, Section G, Extenuating Circumstances [12 USCIS-PM F.2(G)]. For cases under the jurisdiction of the Ninth Circuit Court of Appeals, however, the officer must also consider and weigh the alien's evidence relevant to moral character beyond that which precedes or is contemporaneous with and applies directly to the unlawful act. See *Hussein v. Barrett*, 820 F.3d 1083, 1089-90 (9th Cir. 2016) (finding that the officer must consider all of the alien's evidence on factors relevant to the GMC determination to determine if the catch-all provision in the statute precludes the alien from establishing GMC). In the Ninth Circuit, positive additional factors counterbalance an unlawful act committed in the statutory period if the factors are sufficient to overcome the weight of the negative act.

[^ 87] See *United States v. Jean-Baptiste*, 395 F.3d 1190, 1195 (11th Cir. 2005).

[^ 88] See *United States v. Lekarczyk*, 354 F.Supp.2d 883, 887 (W.D. Wis 2005).

[^ 89] See *United States v. Lekarczyk*, 354 F.Supp.2d 883, 887 (W.D. Wis 2005).

[^ 90] See *United States v. Jean-Baptiste*, 395 F.3d 1190 (11th Cir. 2005).

[^ 91] See *Etape v. Napolitano*, 664 F.Supp.2d 498 (D. Md. 2009).

[^ 92] See, for example, 18 U.S.C. 1001.

[^ 93] See *United States v. Lekarczyk*, 354 F.Supp.2d 883, 887 (W.D. Wis 2005).

[^ 94] See *United States v. Salama*, 891 F.Supp.2d 1132, 1140-41 (E.D. Cal. 2012).

[^ 95] See *Etape v. Napolitano*, 664 F.Supp.2d 498 (D. Md. 2009).

[^ 96] See *United States v. Okeke*, 671 F.Supp.2d 744 (D. Md. 2009).

[^ 97] See *Etape v. Napolitano*, 664 F.Supp.2d 498 (D. Md. 2009).

[^ 98] See *Sabbaghi v. Napolitano*, 2009 WL 4927901 (W.D. Wash. 2009) (unpublished).

[^ 99] See *Khamooshpour v. Holder*, 781 F.Supp.2d 888, 896-97 (D. Ariz 2011).

[^ 100] See Subsection 2, Case-by-Case Analysis [12 USCIS-PM F.5(L)(2)]. See *Hussein v. Barrett*, 820 F.3d 1083 (9th Cir. 2016).

[^ 101] Examples of material facts include marital status, number of dependents, and income.

[^ 102] Examples of such unlawful acts include attempt to defraud the IRS by avoiding taxes in violation of 26 U.S.C. 7201 or 26 U.S.C. 6663 or filing a false document under penalties of perjury in violation of 26 U.S.C. 7206(1). See *Carty v. Ashcroft*, 395 F.3d 1081 (9th Cir. 2005) (state failure to pay taxes; evasion is same as fraud). See *Wittgenstein v. INS*, 124 F.3d 1244 (10th Cir. 1997) (state crime). See *Matter of M- (PDF)*, 8 I&N Dec. 535 (BIA 1960) (conspiracy to defraud the U.S. government by avoiding taxes is a CIMT). See *Matter of E- (PDF)*, 9 I&N Dec. 421 (BIA 1961).

[^ 103] See 18 U.S.C. 611.

[^ 104] See Pub. L. 103-31 (PDF), 107 Stat. 77 (May 20, 1993) (codified at 52 U.S.C. 20501-20511). For more information about the NVRA, see the U.S. Department of Justice (DOJ)'s About the National Voter Registration Act webpage.

[^ 105] The NVRA applies to 44 States. Certain states (Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming) and territories (Puerto Rico, Guam, Virgin Islands, American Samoa) are exempt from the NVRA. For more information, see DOJ's About the National Voter Registration Act webpage.

[^ 106] See 52 U.S.C. 20504 (Section 5 of the NVRA).

[^ 107] This includes departments of motor vehicles or equivalent state agencies. Because of the requirement for motor vehicle authorities to participate in voter registration, the NVRA is often referred to as the "Motor Voter" law.

[^ 108] See, for example, California's Driver License Renewal (PDF) and New York's Application for Permit, Driver License or Non-driver ID Card (PDF).

[^ 109] See 52 U.S.C. 20506 (Section 7 of the NVRA). See, for example, New York's Apply for SNAP webpage.

[^ 110] See, for example, New Jersey's Voter Registration Application (PDF) and Colorado's Driver License or ID Card Renewal by Mail and Voter Registration (PDF) form.

[^ 111] See Section 347 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208 (PDF), 110 Stat. 3009-546, 3009-637 (September 30, 1996).

[^ 112] See IIRIRA, Pub. L. 104-208 (PDF), 110 Stat. 3009, 3009-637 (September 30, 1996).

[^ 113] See Section 201(b) of the Child Citizenship Act (CCA) of 2000, Pub. L. 106-395 (PDF), 114 Stat 1631 (October 30, 2000).

[^ 114] These criminal provision exceptions only apply to convictions that became final on or after October 30, 2000. See section 201(d)(3) of Pub. L. 106–395 (PDF).

[^ 115] See *Matter of Fitzpatrick*, 26 I&N Dec. 559 (BIA 2015).

[^ 116] See *Matter of Zhang*, 27 I&N Dec 569 (BIA 2019). See INA 237(a)(3)(D).

[^ 117] See INA 237(a)(6)(A) and INA 237(a)(3)(D)(i).

[^ 118] See INA 237(a)(3)(D)(i).

[^ 119] See INA 237(a)(3)(D)(ii). See Subsection 5, Exception for False Claims to U.S. Citizenship and Unlawful Registration or Voting [12 USCIS-PM F.5(M)(5)].

[^ 120] See INA 237(a)(3)(D)(i).

[^ 121] See INA 237(a)(3)(D)(i) and INA 237(a)(3)(D)(ii).

[^ 122] See INA 237(a)(6)(A).

[^ 123] See INA 237(a)(6) and INA 237(a)(6)(B).

[^ 124] In *Matter of Zhang*, 27 I&N Dec. 569 (BIA 2019), the Board of Immigration Appeals (BIA) noted that unlike INA 212(a)(6)(C)(i), the plain language of INA 237(a)(3)(D)(i) does not require an intent to falsely represent citizenship to trigger this ground of removability. The BIA in *Zhang* reasoned that "the absence of a 'knowing' or 'willful' requirement for false claims to citizenship in sections 212(a)(6)(C)(ii)(I) and 237(a)(3)(D)(i) indicates that there was no congressional intent to include one."

[^ 125] For example, the alien could make a false claim to U.S. citizenship to comply with the employment verification requirements under INA 274A or for tax credit purposes.

[^ 126] The offense would not be under 18 U.S.C. 1015(f) which involves registering to vote.

[^ 127] See 8 CFR 1239.1(a) (removal proceedings commence by the filing of an NTA with the immigration court). See INA 318. See *Klene v. Napolitano*, 697 F.3d 666, 669 (7th Cir. 2012). See *Rumierz v. Gonzales*, 456 F.3d 31 (1st Cir. 2006). See *Ajlani v. Chertoff*, 545 F.3d 229 (2nd Cir. 2008). See *Zayed v. U.S.*, 368 F.3d 902 (6th Cir. 2004). See *De Lara Bellajaro v. Schiltgen*, 378 F.3d 1042, 1043 (9th Cir. 2004), as amended. See *Martinez v. Johnson*, 104 F.Supp.3d 835, 843 (W.D. Tex. 2015). See *Ka Lok Lau v. Holder*, 880 F.Supp.2d 276 (D. Mass. 2012). See *Farghaly v. Frazier*, 404 F. Supp. 2d 1125, 1127 (D. Minn. 2005). But see *Yith v. Nielsen*, 881 F.3d 1155 (9th Cir. 2018) (declining to give effect to 8 CFR 318.1 by holding that an NTA is not a "warrant of arrest"). In *Yith,* the Ninth Circuit concluded a "warrant of arrest" is separate from an NTA; therefore, in the Ninth Circuit, USCIS can adjudicate a naturalization application for an alien who is in proceedings if there is no separate warrant of arrest. Officers should consult with USCIS counsel on any cases in the Ninth Circuit involving pending removal proceedings.

[^ 128] See INA 328(b)(2) (aliens currently in the U.S. armed forces and eligible for military naturalization under INA 328(a)). See INA 329(b)(1) (aliens eligible for military naturalization under INA 329(a)). See 8 CFR 329.2(e)(3). See Part D, General Naturalization Requirements, Chapter 2, Lawful Permanent Resident Admission for Naturalization, Section F, Removal Proceedings [12 USCIS-PM D.2(F)].

[^ 129] See INA 318. See INA 328(b)(2) (aliens currently in the U.S. armed forces and eligible for military naturalization under INA 328(a)). See INA 329(b)(1) (aliens eligible for military naturalization under INA 329(a)). See Part I, Military Members and their Families, Chapter 2, One Year of Military Service during Peacetime (INA 328) [12 USCIS-PM I.2] and Chapter 3, Military Service during Hostilities (INA 329) [12 USCIS-PM I.3].

[^ 130] See 8 CFR 316.10(b)(3)(iii).

[^ 131] See 18 U.S.C. 1015(e).

[^ 132]See 18 U.S.C. 1015(f).

[^ 133] See 18 U.S.C. 611(a). Note that it is not unlawful for an alien to vote in an election held in part for the purpose of electing candidates to federal office if the election is held partly for some other purpose, aliens are authorized to vote for such other purpose under state or local law, and voting for such other purpose is conducted independently of voting for a candidate for federal office.

[^ 134] In contrast to a false claim to U.S. citizenship under the unlawful acts analysis, where the false claim must be "knowing," an alien may be inadmissible or deportable based on a false claim to U.S. citizenship even if the alien mistakenly believed he was a U.S. citizen. See *Matter of Zhang*, 27 I&N Dec. 569 (BIA 2019). For more information, see Volume 8, Admissibility, Part K, False Claim to U.S. Citizenship [8 USCIS-PM K].

[^ 135] See 18 U.S.C. 1015(e) and 18 U.S.C. 1015(f). See INA 101(f)(3) (one or more CIMTs), as discussed in Section A, One or More Crimes Involving Moral Turpitude [12 USCIS-PM F.5(A)].

[^ 136] An additional sworn statement may be unnecessary where the alien has admitted to falsely claiming U.S. citizenship, or to unlawfully voting, or both in his or her responses in the Application for Naturalization (Form N-400), given that Form N-400 is signed by the alien certifying under penalty of perjury that the information therein is true and correct. See *Matter of A.J Valdez and Z. Valdez*, 27 I&N Dec. 496, 499 (BIA 2018) (explaining that courts have held that a "signature on a form establishes a strong presumption that the signer knows its contents and has assented to them, absent evidence of fraud or other wrongful acts by another person."). However, if the alien did not provide an explanation, or USCIS learned of the false claim through other means, a sworn statement may be appropriate to determine the circumstances under which the false claim, unlawful voter registration, or voting occurred, including whether an exception to finding a lack of good moral character applies.

[^ 137] See 8 CFR 316.10(b)(3)(iii). See *United States v. Suarez*, 664 F.3d 655, 662 (7th Cir. 2011). See *United States v. Lekarczyk*, 354 F.Supp.2d 883 (W.D. Wis. 2005). See INA 101(f). See Chapter 2, Adjudicative Factors, Section G, Extenuating Circumstances [12 USCIS-PM F.2(G)].

[^ 138] See INA 101(f). See INA 237(a)(3)(D)(ii) and INA 237(a)(6)(B). These provisions were added by the Child Citizenship Act of 2000 (CCA), but they apply to all applications filed on or after September 30, 1996. See Section 201(a)(2) of the CCA, Pub. L. 106-395 (PDF), 114 Stat. 1631, 1636 (October 30, 2000).

[^ 139] See Section 201(d)(3) of the CCA, Pub. L. 106-395 (PDF) (Oct. 30, 2000).

[^ 140] As a matter of policy, USCIS has determined that the alien's parents had to be U.S. citizens at the time of the false claim to U.S. citizenship, unlawful registration, or unlawful voting in order to meet the first prong of this exception.

[^ 141] Special consideration must be given to aliens in the Ninth Circuit and individuals applying for naturalization based on military service. In *Yith,* the Ninth Circuit concluded a 'warrant of arrest' is separate from an NTA; therefore, in the Ninth Circuit, USCIS can adjudicate a naturalization application for an alien who is in proceedings if there is no separate warrant of arrest. See *Yith v. Nielsen*, 881 F.3d 1155 (9th Cir. 2018). Officers should consult with USCIS counsel on any cases in the Ninth Circuit involving pending removal proceedings. For current or former members of the military, see INA 328(b)(2) (aliens currently in the U.S. armed forces and eligible for military naturalization under INA 328(a)). See INA 329(b)(1) (aliens eligible for military naturalization under INA 329(a)). See 8 CFR 329.2(e)(3).

Part G - Spouses of U.S. Citizens

Chapter 1 - Purpose and Background

A. Purpose

Spouses of United States citizens may be eligible for naturalization on the basis of their marriage under special provisions of the Immigration and Nationality Act (INA), to include overseas processing. In general, spouses of U.S. citizens are required to meet the general naturalization requirements.[1] The special provisions, however, provide modifications to those requirements.

The spouse of a U.S. citizen may naturalize through various provisions:

- The spouse of a U.S. citizen may naturalize under the general naturalization provisions for applicants who have resided in the United States for at least five years after becoming a lawful permanent resident (LPR).[2]
- The spouse of a U.S. citizen may naturalize after residing in the United States for three years after becoming an LPR, rather than five years as generally required.[3]
- The spouse of a U.S. citizen employed abroad who is working for the U.S. Government (including the armed forces) or other qualified entity may naturalize in the United States without any required period of residence or physical presence in the United States after becoming an LPR.[4]
- The spouse of a U.S. citizen who is serving abroad in the U.S. armed forces may naturalize abroad while residing with his or her spouse, and time spent abroad under these circumstances is considered residence and physical presence in the United States for purposes of the general five-year or three-year provision for spouses.[5]
- The surviving spouse of a U.S. citizen who dies during a period of honorable service in an active-duty status in the U.S. armed forces or was granted citizenship posthumously may naturalize in the United States without any required period of residence or physical presence after becoming an LPR.[6]

In addition, spouses, former spouses, or intended spouses of U.S. citizens may naturalize if they obtained LPR status on the basis of having been battered or subjected to extreme cruelty by their citizen spouse.[7]

B. Background

The current naturalization provisions for spouses of U.S. citizens reflect legislation dating back to 1922. Congress considered it inefficient and undesirable to require the spouse of a U.S. citizen to wait five years before naturalization.[8] Congress made further amendments in 1934, to include a required period of three years of residence. In 1940, Congress incorporated provisions into the Nationality Act of 1940 that were substantially similar to those of the 1922 and 1934 acts. Today's statutes reflect Congress' long-standing aim to facilitate the naturalization process for spouses of U.S. citizens to provide spouses with the protections afforded by U.S. citizenship.

C. Table of General Provisions

The table below serves as a quick reference guide to the pertinent naturalization authorities for spouses of U.S. citizens. The chapters that follow the table provide further guidance.

General Provisions for Applicants filing as Spouses of U.S. Citizens

Provision	Marriage and Marital Union	Continuous Residence	Physical Presence	Eligibility for Overseas Processing
Spouses of U.S. Citizens Residing in United States INA 319(a)	Married and living in marital union for at least 3 years prior to filing	3 years after becoming an LPR	18 months during period of residence	Not applicable, except for spouses of military members who may complete entire process from abroad – INA 319(e)

Provision	Marriage and Marital Union	Continuous Residence	Physical Presence	Eligibility for Overseas Processing
Spouses of U.S. Citizens Employed Abroad INA 319(b)	Married prior to filing	Must be LPR at filing; no specified period required		Not applicable; all must be in U.S. for interview and Oath
Spouses of Deceased Service Members INA 319(d)	Must have been married and living in marital union at time of death	Must be LPR at filing; no specified period required		Not applicable; all must be in U.S. for interview and Oath

D. Legal Authorities

- INA 316; 8 CFR 316 – General requirements for naturalization
- INA 319; 8 CFR 319 – Spouses of U.S. citizens
- INA 319(e); 8 CFR 316.5(b)(6) and 8 CFR 316.6 – Residence, physical presence, and overseas naturalization for certain spouses of military personnel
- 8 U.S.C. 1443a – Overseas naturalization for service members and their family

Footnotes

[^ 1] See INA 316. See 8 CFR 316. See Part D, General Naturalization Requirements [12 USCIS-PM D].

[^ 2] See INA 316(a). See Part D, General Naturalization Requirements [12 USCIS-PM D].

[^ 3] See INA 319(a). See Chapter 3, Spouses of U.S. Citizens Residing in the United States [12 USCIS-PM G.3].

[^ 4] See INA 319(b). See Chapter 4, Spouses of U.S. Citizens Employed Abroad [12 USCIS-PM G.4].

[^ 5] See INA 316(a), INA 319(a), and INA 319(e). See 8 U.S.C. 1443a. See Part I, Military Members and their Families [12 USCIS-PM I].

[^ 6] See INA 319(d). See Part I, Military Members and their Families, Chapter 9, Spouses, Children, and Surviving Family Benefits, Section B, Spouses of Military Members [12 USCIS-PM I.9(B)].

[^ 7] See INA 319(a). See Chapter 3, Spouses of U.S. Citizens Residing in the United States [12 USCIS-PM G.3].

[^ 8] See H.R. REP. 67-1110, 2d Sess., p. 2. See Immigration Act of September 22, 1922.

Chapter 2 - Marriage and Marital Union for Naturalization

A. Validity of Marriage

1. Validity of Marriages in the United States or Abroad

Validity of Marriage for Immigration Purposes

The applicant must establish validity of his or her marriage. In general, the legal validity of a marriage is determined by the law of the place where the marriage was celebrated ("place-of-celebration rule"). Under this rule, a marriage is valid for immigration purposes in cases where the marriage is valid under the law of the jurisdiction in which it is performed.[1]

In all cases, the burden is on the applicant to establish that he or she has a valid marriage with his or her U.S. citizen spouse for the required period of time.[2] In most cases, a marriage certificate is prima facie evidence that the marriage was properly and legally performed.

USCIS does not recognize the following relationships as marriages, even if valid in the place of celebration:

- Polygamous marriages;[3]
- Certain marriages that violate the strong public policy of the state of residence of the couple;[4]
- Civil unions, domestic partnerships, or other such relationships not recognized as marriages in the place of celebration;[5]
- Relationships where one party is not present during the marriage ceremony (proxy marriages) unless the marriage has been consummated;[6] or
- Relationships entered into for purposes of evading immigration laws of the United States.[7]

Validity of Marriage Between Two Persons of the Same Sex

In June 2013, the Supreme Court held that section 3 of the Defense of Marriage Act (DOMA), which had limited the terms “marriage” and “spouse” to opposite-sex marriages for purposes of all federal laws, was unconstitutional.[8] In accordance with the Supreme Court decision, USCIS determines the validity of a same-sex marriage by the place-of-celebration rule, just as USCIS applies this rule to determine the validity of an opposite-sex marriage.[9]

Therefore, in cases of marriage between persons of the same sex, officers will review the laws of the jurisdiction in which the marriage took place to determine if the jurisdiction recognizes same-sex marriages and the marriage otherwise is legally valid.

Since the place-of-celebration rule governs same-sex marriages in exactly the same way that it governs opposite-sex marriages, unless the marriage is polygamous or otherwise falls within an exception to the place-of-celebration rule as discussed above, the legal validity of a same-sex marriage is determined exclusively by the law of the jurisdiction where the marriage was celebrated.

If the same-sex couple now resides in a jurisdiction different from the one in which they celebrated their marriage, and that jurisdiction does not recognize same-sex marriages, the officer will look to the law of the state where the marriage was celebrated in order to determine the validity of the marriage. The domicile state’s laws and policies on same-sex marriages will not affect whether USCIS will recognize a marriage as valid.

2. Validity of Foreign Divorces and Subsequent Remarriages

The validity of a divorce abroad depends on the interpretation of the divorce laws of the foreign country that granted the divorce and the reciprocity laws in the state of the United States where the applicant remarried.[10] If the divorce is not final under the foreign law, remarriage to a U.S. citizen is not valid for immigration purposes.[11]

An officer should ensure that the court issuing the divorce had jurisdiction to do so.[12] Foreign divorce laws may allow for a final decree even when the applicants are not residing in the country. Some states, however, do not recognize these foreign divorces and do not provide reciprocity. The applicant and his or her former spouse’s place of domicile at the time of the divorce is important in determining whether the court had jurisdiction.

3. Evidence

The burden is on the applicant to establish that he or she is in a valid marriage with his or her U.S. citizen spouse for the required period of time.[13] A spouse of a U.S. citizen must submit with the naturalization application an official civil record to establish that the marriage is legal and valid. If an official civil record cannot be produced, secondary evidence may be accepted on a case-by-case basis. An officer has the right to request an original record if there is doubt as to the authenticity of the record.[14]

B. Common Law Marriage

The concept of common law marriage presupposes an honest good-faith intention on the part of two persons, free to marry, to live together as husband and wife from the inception of the relationship. Some states recognize common law marriages and consider the parties to be married.[15] In order for a common law marriage to be valid for immigration purposes:

- The parties must live in that jurisdiction; and
- The parties must meet the qualifications for common law marriage for that jurisdiction.

Other states may recognize a common law marriage contracted in another state even if the recognizing state does not accept common law marriage as a means for its own residents to contract marriage.

USCIS recognizes common law marriages for purposes of naturalization if the marriage was valid and recognized by the state in which the marriage was established.[16] This applies even if the naturalization application is filed in a jurisdiction that does not recognize or has never recognized the principle of common law marriage.

The officer should review the laws of the relevant jurisdiction on common law marriages to determine whether the applicant and spouse should be considered to be married for purposes of naturalization and when the marriage commenced.

C. U.S. Citizenship from Time of Filing until Oath

In order to take advantage of the special naturalization provisions for spouses of U.S. citizens, the applicant’s spouse must be and remain a U.S. citizen from the time of filing until the time the applicant takes the Oath of Allegiance. An applicant is ineligible for naturalization under these provisions if his or her spouse is not a U.S. citizen or loses U.S. citizenship status by denaturalization or expatriation prior to the applicant taking the Oath of Allegiance.[17]

D. Marital Union and Living in Marital Union

1. Married and Living in Marital Union

In general, all naturalization applicants filing on the basis of marriage to a U.S. citizen must continue to be the spouse of a U.S. citizen from the time of filing the naturalization application until the applicant takes the Oath of Allegiance. In addition, some spousal naturalization provisions require that the applicant “live in marital union” with his or her citizen spouse for at least 3 years immediately preceding the date of filing the naturalization application.[18] USCIS considers an applicant to “live in marital union” with his or her citizen spouse if the applicant and the citizen actually reside together.

An applicant does not meet the married and “living in marital union” requirements if:

- The applicant is not residing with his or her U.S. citizen spouse at the time of filing or during the time in which the applicant is required to be living in marital union with the U.S. citizen spouse; or
- The marital relationship is terminated at any time prior to taking the Oath of Allegiance.

If the applicant ceases to reside with his or her U.S. citizen spouse between the time of filing and the time at which the applicant takes the Oath of Allegiance, the officer should consider whether the applicant met the living in marital union requirement at the time of filing.

There are limited circumstances where an applicant may be able to establish that he or she is living in marital union with his or her citizen spouse even though the applicant does not actually reside with the citizen spouse.[19]

In all cases where it is applicable, the burden is on the applicant to establish that he or she has lived in marital union with his or her U.S. citizen spouse for the required period of time.[20]

2. Loss of Marital Union due to Death, Divorce, or Expatriation

Death of U.S. Citizen Spouse

An applicant is ineligible to naturalize as the spouse of a U.S. citizen if the U.S. citizen dies any time prior to the applicant taking the Oath of Allegiance.[21] However, if the applicant is the surviving spouse of a U.S. citizen who died during a period of honorable service in an active-duty status in the U.S. armed forces, the applicant may be eligible for naturalization based on his or her marriage under a special provision.[22]

Divorce or Annulment

A person's marital status may be terminated by a judicial divorce or by an annulment. A divorce or annulment breaks the marital relationship. The applicant is no longer the spouse of a U.S. citizen if the marriage is terminated by a divorce or annulment. Accordingly, such an applicant is ineligible to naturalize as the spouse of a U.S. citizen if the divorce or annulment occurs before or after the naturalization application is filed.[23]

The result of annulment is to declare a marriage null and void from its inception. An annulment is usually retroactive, meaning that the marriage is considered to be invalid from the beginning. A court's jurisdiction to grant an annulment is set forth in the various divorce statutes and generally requires residence or domicile of the parties in that jurisdiction. When a marriage has been annulled, it is documented by a court order or decree.

In contrast, the effect of a judicial divorce is to terminate the status as of the date on which the court entered the final decree of divorce. When a marriage is terminated by divorce, the termination is entered by the court with jurisdiction and is documented by a copy of the final divorce decree. USCIS determines the validity of a divorce by examining whether the state or country which granted the divorce properly assumed jurisdiction over the divorce proceeding.[24] USCIS also determines whether the parties followed the proper legal formalities required by the state or country in which the divorce was obtained to determine if the divorce is legally binding.[25] In all cases, the divorce must be final.

An applicant's ineligibility for naturalization as the spouse of a U.S. citizen due to the death of the citizen spouse or to divorce is not cured by the subsequent marriage to another U.S. citizen.

Expatriation of U.S. Citizen Spouse

An applicant is ineligible to naturalize as the spouse of a U.S. citizen if the U.S. citizen has expatriated any time prior to the applicant taking the Oath of Allegiance for naturalization.[26]

3. Failure to be Living in Marital Union due to Separation

Legal Separation

A legal separation is a formal process by which the rights of a married couple are altered by a judicial decree but without eliminating the marital relationship.[27] In most cases, after a legal separation, the applicant will no longer be actually residing with his or her U.S. citizen spouse, and therefore will not be living in marital union with the U.S. citizen spouse.

However, if the applicant and the U.S. citizen spouse continue to reside in the same household, the marital relationship has been altered to such an extent by the legal separation that they will not be considered to be living together in marital union.

Accordingly, an applicant is not living in marital union with a U.S. citizen spouse during any period of time in which the spouses are legally separated.[28] An applicant who is legally separated from his or her spouse during the time period in which he or she must be living in marital union is ineligible to naturalize as the spouse of a U.S. citizen.

Informal Separation

In many instances, spouses will separate without obtaining a judicial order altering the marital relationship or formalizing the separation. An applicant who is no longer actually residing with his or her U.S. citizen spouse following an informal separation is not living in marital union with the U.S. citizen spouse.

However, if the U.S. citizen spouse and the applicant continue to reside in the same household, an officer must determine on a case-by-case basis whether an informal separation before the filing of the naturalization application renders an applicant ineligible for naturalization as the spouse of a U.S. citizen.[29] Under these circumstances, an applicant is not living in marital union with a U.S. citizen spouse during any period of time in which the spouses are informally separated if such separation suggests the possibility of marital disunity.

Factors to consider in making this determination may include:

- The length of separation;
- Whether the applicant and his or her spouse continue to support each other and their children (if any) during the separation;
- Whether the spouses intend to separate permanently; and
- Whether either spouse becomes involved in a relationship with others during the separation.[30]

Involuntary Separation

Under very limited circumstances and where there is no indication of marital disunity, an applicant may be able to establish that he or she is living in marital union with his or her U.S. citizen spouse even though the applicant does not actually reside with citizen spouse. An applicant is not made ineligible for naturalization for not living in marital union if the separation is due to circumstances beyond his or her control, such as:[31]

- Service in the U.S. armed forces; or
- Required travel or relocation for employment.

USCIS does not consider incarceration during the time of required living in marital union to be an involuntary separation.

Footnotes

[^ 1] See, for example, *Matter of Lovo-Lara*, 23 I&N Dec. 746 (BIA 2005); *Matter of Da Silva*, 15 I&N Dec. 778 (BIA 1976); *Matter of H-*, 9 I&N Dec 640 (BIA 1962).

[^ 2] See 8 CFR 319.1(b)(1).

[^ 3] See *Matter of H-*, 9 I&N Dec. 640 (BIA 1962). Polygamous marriages are not recognized as a matter of federal public policy. However, note that battered spouses who had a bigamous marriage may still be eligible for naturalization. See INA 204(a)(1)(A)(iii)(II) and INA 319(a).

[^ 4] This is a narrow exception that under BIA case law generally has been limited to situations, such as certain incestuous marriages, where the marriage violates the criminal law of the state of residence. See *Matter of Da Silva*, 15 I&N Dec 778 (BIA 1976); *Matter of Zappia*, 12 I&N Dec. 439 (BIA 1967); *Matter of Hirabayashi*, 10 I&N Dec 722 (BIA 1964); *Matter of M*, 3 I&N Dec. 465 (BIA 1948). Note that as discussed below, if the state of residence has a public policy refusing to recognize same-sex marriage, this will not result in a same-sex marriage being considered invalid for immigration purposes if it is valid in the place of celebration.

[^ 5] If the relationship is treated as a marriage, however, such as a “common law marriage,” it will be recognized.

[^ 6] See INA 101(a)(35).

[^ 7] See *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Phillis*, 15 I&N Dec. 385 (BIA 1975; *Matter of M-*, 8 I&N Dec. 217 (BIA 1958).

[^ 8] See *United States v. Windsor*, 133 S. Ct. 2675 (2013). See 1 U.S.C. 7 (section 3 of DOMA). See the Defense of Marriage Act (DOMA), Pub.L. 104-199 (PDF), 110 Stat. 2419 (September 21, 1996).

[^ 9] Prior to the Supreme Court decision, *United States v. Windsor*, USCIS did not recognize relationships between two persons of the same sex as marriages or intended marriages in accordance with section 3 of DOMA.

[^ 10] See *Matter of Luna*, 18 I&N Dec. 385 (BIA 1983). See *Matter of Ma*, 15 I&N Dec. 70 (BIA 1974).

[^ 11] See *Matter of Ma*, 15 I&N Dec. 70, 71 (BIA 1974). See *Matter of Miraldo*, 14 I&N Dec. 704 (BIA 1974).

[^ 12] For example, law requires both parties to be domiciled in the country at the time of divorce, but that was not the case. See *Matter of Hosseinian*, 19 I& N Dec. 453 (BIA 1987). See *Matter of Weaver*, 16 I&N Dec. 730 (BIA 1979). See *Matter of Luna*, 18 I&N Dec. 385 (BIA 1983).

[^ 13] See 8 CFR 319.1(b)(1).

[^ 14] See 8 CFR 103.2(b). See 8 CFR 319.1 and 8 CFR 319.2.

[^ 15] For purposes of determining whether a common law marriage exists, see statutes and case law for the appropriate jurisdiction.

[^ 16] The date a common law marriage commences is determined by laws of the relevant jurisdiction.

[^ 17] See 8 CFR 319.1(b)(2)(i) and 8 CFR 319.2(c).

[^ 18] See INA 319(a). See 8 CFR 319.1(a)(3) and 8 CFR 319.1(b).

[^ 19] See 8 CFR 319.1(b)(2)(ii)(C) and guidance below on “Involuntary Separation” under the paragraph “Failure to be Living in Marital Union due to Separation.” See Volume 12, Citizenship and Naturalization, Part G, Spouses of U.S. Citizens, Chapter 2, Marriage and Marital Union for Naturalization, Section 3, Failure to be Living In Marital Union due to Separation [12 USCIS-PM G.2(D)(3)].

[^ 20] See 8 CFR 319.1(b)(1).

[^ 21] See 8 CFR 319.1(b)(2)(i). See 8 CFR 319.2(c).

[^ 22] See INA 319(d). See Part I, Military Members and their Families, Chapter 9, Spouses, Children, and Surviving Family Benefits, Section D, Naturalization for Surviving Spouse, Child, or Parent of Service Member (INA 319(d)) [12 USCIS-PM I.9(D)].

[^ 23] See 8 CFR 319.1(b)(2)(i) and 8 CFR 319.2(c).

[^ 24] See *Matter of Hussein*, 15 I&N Dec. 736 (BIA 1976).

[^ 25] See *Matter of Luna*, 18 I&N Dec. 385 (BIA 1983).

[^ 26] See 8 CFR 319.1(b)(2)(i). See 8 CFR 319.2(c). See INA 337.

[^ 27] See for example, *Nehme v. INS*, 252 F.3d 415, 422-27 (5th Cir. 2001) (Discussing legal separation for purposes of derivation of citizenship).

[^ 28] See 8 CFR 319.1(b)(2)(ii)(A).

[^ 29] See 8 CFR 319.1(b)(2)(ii)(B).

[^ 30] See *U.S. v. Moses*, 94 F. 3d 182 (5th Cir. 1996).

[^ 31] See 8 CFR 319.1(b)(2)(ii)(C).

Chapter 3 - Spouses of U.S. Citizens Residing in the United States

A. General Eligibility for Spouses Residing in the United States

The spouse of a U.S. citizen who resides in the United States may be eligible for naturalization on the basis of his or her marriage.[1] The spouse must have continuously resided in the United States after becoming a lawful permanent resident (LPR) for at least 3 years immediately preceding the date of filing the naturalization application and must have lived in marital union with his or her citizen spouse for at least those 3 years.

The spouse must establish that he or she meets the following criteria in order to qualify:

- Age 18 or older at the time of filing.

- LPR at the time of filing the naturalization application.
- Continue to be the spouse of the U.S. citizen up until the time the applicant takes the Oath of Allegiance.
- Living in marital union with the citizen spouse for at least 3 years preceding the time of filing the naturalization application (the citizen spouse must have been a U.S. citizen for those 3 years).
- Continuous residence in the United States as an LPR for at least 3 years immediately preceding the date of filing the application and up to the time of naturalization.
- Physically present in the United States for at least 18 months (548 days) out of the 3 years immediately preceding the date of filing the application.
- Living within the state or USCIS district with jurisdiction over the applicant's place of residence for at least 3 months prior to the date of filing.
- Demonstrate an understanding of the English language, including an ability to read, write, and speak words in ordinary usage.
- Demonstrate a knowledge and understanding of the fundamentals of the history and principles and form of government of the United States (civics).
- Demonstrate good moral character for at least 3 years prior to filing the application until the time of naturalization.
- Attachment to the principles of the U.S. Constitution and well-disposed to the good order and happiness of the United States during all relevant periods under the law.

The spouse of a U.S. citizen residing in the United States may also naturalize under the general naturalization provisions for applicants who have been LPRs for at least 5 years.[2] In addition, in some instances the spouse of a member of the U.S. armed forces applying pursuant to INA 319(a) or INA 316(a) may be eligible for any naturalization proceeding abroad, to include interviews, filings, oaths, ceremonies, or other proceedings relating to naturalization.[3]

B. Living in Marital Union for Spouses Residing in the United States

The spouse of a U.S. citizen residing in the United States must have been living in marital union with his or her citizen spouse for at least 3 years immediately preceding the time of filing the naturalization application. This provision requires that the spouse live in marital union with the citizen spouse during the entire period of 3 years before filing.[4]

However, the statute does not require living in marital union for the period between the date of filing the application and the date of naturalization (date applicant takes the Oath of Allegiance). The corresponding regulation conflicts with the statute in stating that the spouse must have been living in marital union with his or her citizen spouse for at least 3 years at the time of the examination on the application, and not at the time of filing.

USCIS follows the language of the statute in requiring living in marital union only up until the time of filing.[5] Accordingly, only the existence of a legally valid marriage is required from the date of filing the application until the time of the applicant's naturalization.[6]

A person who was a spouse subjected to battery or extreme cruelty by their citizen spouse is exempt from the marital union requirement.[7]

C. 3 Years of Continuous Residence

The spouse of a U.S. citizen residing in the United States must have continuously resided in the United States as an LPR for at least 3 years immediately preceding the date of the filing the application and up to the time of the Oath of Allegiance. Continuous residence involves the applicant maintaining a permanent dwelling place in the United States for the required period of time. The residence is the applicant's actual dwelling place regardless of his or her intentions to claim it as his or her residence.[8]

D. 18 Months of Physical Presence

The spouse must have been physically present in the United States for at least 18 months (548 days) out of the 3 years immediately preceding the date of filing the application.[9] Physical presence refers to the number of days the applicant must physically be present in the United States during the statutory period up to the date of filing for naturalization.[10]

E. 90-Day Early Filing Provision (INA 334)

The spouse of a U.S. citizen filing for naturalization on the basis of his or her marriage may file the naturalization application up to 90 days before the date he or she would first meet the required 3-year period of continuous residence.[11] Although an applicant may file early and may be interviewed during that period, the applicant is not eligible for naturalization until he or she has satisfied the required 3-year period of residence. All other requirements for naturalization must be met at the time of filing.

USCIS calculates the early filing period by counting back 90 days from the day before the applicant would have first satisfied the continuous residence requirement for naturalization. For example, if the day the applicant would satisfy the 3-year continuous residence requirement for the first time is on June 10, 2010, USCIS will begin to calculate the 90-day early filing period from June 9, 2010.

In cases where an applicant has filed early and the required 3-month period of residence in a state or service district falls within the required 3-year period of continuous residence, jurisdiction is based on the 3-month period immediately preceding the examination on the application (interview).[12]

F. Eligibility for Persons Subjected to Battery or Extreme Cruelty

1. General Eligibility for Persons Subjected to Battery or Extreme Cruelty

On October 28, 2000, Congress expanded the provision regarding naturalization based on marriage to a U.S. citizen for persons who reside in the United States. The amendments added that any person who obtained LPR status as the spouse, former spouse, or intended spouse[13] of a U.S. citizen who subjected him or her to battery or extreme cruelty may naturalize under this provision.[14]

Specifically, the person must have obtained LPR status based on:

- An approved Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) as the self-petitioning spouse of an abusive U.S. citizen;
- An approved Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) as the self-petitioning spouse of an abusive LPR, if the abusive spouse naturalizes after the petition has been approved;[15] or
- Special rule cancellation of removal for battered spouses and children in cases where the applicant was the spouse, or intended spouse of a U.S. citizen, who subjected him or her to battery or extreme cruelty.[16]

A person is also eligible for naturalization under the spousal naturalization provisions if he or she had the conditions on his or her residence removed based on:

- An approved battery or extreme cruelty waiver of the joint filing requirement for Petition to Remove Conditions on Residence (Form I-751), for a conditional permanent resident, if the marriage was entered into in good faith and the spouse was subjected to battery or extreme cruelty by the petitioning citizen or LPR spouse.[17]

2. Exception to Marital Union and U.S. Citizenship Requirements for Spouses

A person subjected to battery or extreme cruelty by his or her U.S. citizen spouse is exempt from the following naturalization requirements:[18]

- Married to the U.S. citizen spouse at the time of filing the naturalization application;
- Living in marital union with the citizen spouse for at least 3 years at the time of filing the naturalization application; and
- Applicant's spouse has U.S. citizenship from the time of filing until the time the applicant takes the Oath of Allegiance.[19]

The spouse must meet all other eligibility requirements for naturalization.[20]

G. Application and Evidence

1. Application for Naturalization (Form N-400)

To apply for naturalization, the applicant must submit an Application for Naturalization (Form N-400) in accordance with the form instructions and with the required fee.[21] The applicant should check the appropriate eligibility option on the naturalization application to indicate that he or she is applying on the basis of marriage to a U.S. citizen.

2. Evidence of Spouse's United States Citizenship

Under this provision, the burden is on the applicant to establish that he or she is married and living in marital union with a U.S. citizen.[22] A spouse of a U.S. citizen must submit with the application evidence to establish the U.S. citizenship of his or her spouse.[23]

Evidence of U.S. citizenship may include:

- Certificate of birth in the United States;
- Department of State Consular Report of Birth Abroad (FS-240);
- Certificate of Citizenship;
- Certificate of Naturalization; and
- Valid and unexpired United States Passport.

If an official civil record cannot be produced, secondary evidence may be accepted on a case-by-case basis. An officer has the right to request an original record if there is doubt as to the authenticity of the record.[24]

Footnotes

[^ 1] See INA 319(a). See 8 CFR 319.1.

[^ 2] See INA 316(a). See Part D, General Naturalization Requirements [12 USCIS-PM D].

[^ 3] See Part I, Military Members and their Families, Chapter 9, Spouses, Children, and Surviving Family Benefits [12 USCIS-PM I.9].

[^ 4] There are limited circumstances where an applicant may be able to establish that he or she is living in marital union with the citizen spouse even though the applicant does not actually reside with the citizen spouse. See Chapter 2, Marriage and Marital Union for Naturalization, Section D, Marital Union and Living in Marital Union [12 USCIS-PM G.2(D)].

[^ 5] See 8 CFR 319.1(a)(3). See *Ali v. Smith*, 39 F. Supp. 2d 1254. (W.D. Wash. 1999).

[^ 6] See INA 319(a). See *In re Petition of Olan*, 257 F. Supp. 884 (1966). See *Petition of Yao Quinn Lee*, 480 F.2d 673 (C.A. 2, 1973). See Chapter 2, Marriage and Marital Union for Naturalization [12 USCIS-PM G.2].

[^ 7] See INA 319(a). See Section F, Eligibility for Persons Subjected to Battery or Extreme Cruelty [12 USCIS-PM G.3(F)].

[^ 8] See Part D, General Naturalization Requirements, Chapter 3, Continuous Residence [12 USCIS-PM D.3]. See 8 CFR 316.5(a).

[^ 9] See 8 CFR 319.1(a)(2) and 8 CFR 319.1(a)(4). See Part D, General Naturalization Requirements, Chapter 5, Modifications and Exceptions to Continuous Residence and Physical Presence [12 USCIS-PM D.5].

[^ 10] See 8 CFR 319.1(a)(2) and 8 CFR 319.1(a)(4). See Part D, General Naturalization Requirements, Chapter 4, Physical Presence [12 USCIS-PM D.4].

[^ 11] See INA 334(a). See 8 CFR 334.2(b).

[^ 12] See 8 CFR 316.2(a)(5).

[^ 13] See INA 101(a)(50) (definition of intended spouse).

[^ 14] See INA 319(a). See the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386 (PDF) (October 28, 2000). See Part H, Children of U.S. Citizens, Chapter 6, Special Provisions for the Naturalization of Children [12 USCIS-PM H.6].

[^ 15] See INA 204(a)(1)(B)(ii).

[^ 16] See INA 240A(b)(2)(A)(i)(I) or INA 240A(b)(2)(A)(i)(III).

[^ 17] See INA 216(c)(4)(C).

[^ 18] See INA 319(a).

[^ 19] See INA 319(a) and 8 CFR 319.1(b). See INA 204(a)(1)(A)(iii)(II)(aa)(CC)(bbb).

[^ 20] See INA 319(a). See 8 CFR 319.1.

[^ 21] See 8 CFR 319.11(a). See Fee Schedule (Form G-1055).

[^ 22] See Chapter 2, Marriage and Marital Union for Naturalization [12 USCIS-PM G.2].

[^ 23] See INA 319(a). See 8 CFR 319.1(a).

[^ 24] See 8 CFR 103.2(b)(5). See 8 CFR 319.1 and 8 CFR 319.2.

Chapter 4 - Spouses of U.S. Citizens Employed Abroad

A. General Eligibility for Spouses of U.S. Citizens Employed Abroad

The spouse of a U.S. citizen who is “regularly stationed abroad” in qualifying employment may be eligible for naturalization on the basis of their marriage.[1] Spouses otherwise eligible under this provision are exempt from the continuous residence and physical presence requirements for naturalization.[2]

The spouse must establish that he or she meets the following criteria in order to qualify:

- Age 18 or older at the time of filing.
- LPR at the time of filing the naturalization application.
- Continue to be the spouse of the U.S. citizen up until the time the applicant takes the Oath of Allegiance.
- Married to a U.S. citizen spouse regularly stationed abroad in qualifying employment for at least one year.
- Has a good faith intent to reside abroad with the U.S. citizen spouse upon naturalization and to reside in the United States immediately upon the citizen spouse’s termination of employment abroad.
- Establish that he or she will depart to join the citizen spouse within 30 to 45 days after the date of naturalization.[3]
- Understanding of basic English, including the ability to read, write, and speak.
- Knowledge of basic U.S. history and government.
- Demonstrate good moral character for at least three years prior to filing the application until the time of naturalization.[4]
- Attachment to the principles of the U.S. Constitution and well-disposed to the good order and happiness of the U.S. during all relevant periods under the law.

The period for showing good moral character (GMC) for spouses employed abroad is not specifically stated in the corresponding statute and regulation.[5] USCIS follows the statutory three-year GMC period preceding filing (until naturalization) specified for spouses of U.S. citizens residing in the United States.[6]

In general, the spouse is required to be present in the United States after admission as an LPR for his or her naturalization examination and for taking the Oath of Allegiance for naturalization.[7]

A spouse of a member of the U.S. military applying under this provision may also qualify for naturalization under INA 316(a) or INA 319(a), which could permit him or her to be eligible for overseas processing of the naturalization application, to include interviews, filings, oaths, ceremonies, or other proceedings relating to naturalization.[8]

B. Marital Union for Spouses Employed Abroad

The spouse of a U.S. citizen employed abroad is not required to have lived in marital union with his or her citizen spouse.[9] The spouse only needs to show that he or she is in a legally valid marriage with a U.S. citizen from the date of filing the application until the time of the Oath of Allegiance.[10] Such spouses who are not living in marital union still have to show intent to reside abroad with the U.S. citizen spouse abroad and take up residence in the United States upon termination of the qualifying employment abroad.[11]

C. Qualifying Employment Abroad

Qualifying employment abroad means to be under employment contract or orders and to assume the duties of employment in any of following entities or positions:[12]

- Government of the United States (including the U.S. armed forces);
- American institution of research recognized as such by the Attorney General;[13]
- American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, or a subsidiary thereof;
- Public international organization in which the United States participates by treaty or statute;[14]
- Authorized to perform the ministerial or priestly functions of a religious denomination having a bona fide organization within the United States; or
- Engaged solely as a missionary by a religious denomination or by an interdenominational mission organization having a bona fide organization within the United States.

D. Calculating Period “Regularly Stationed Abroad”

A person applying for naturalization based on marriage to a U.S. citizen employed abroad must establish that his or her citizen spouse is regularly stationed abroad. A citizen spouse is regularly stationed abroad if he or she engages in qualifying employment abroad for at least one year.[15] Both the statute and its corresponding regulation are silent on when to begin calculating the specified period regularly stationed abroad.[16]

As a matter of policy, USCIS calculates the period of qualifying employment abroad from the time the applicant spouse properly files for naturalization.[17] However, this policy does not alter the requirement that the applicant must intend to reside abroad with the U.S. citizen spouse after naturalization.[18]

Accordingly, the spouse of the U.S. citizen employed abroad may naturalize if his or her U.S. citizen’s qualifying employment abroad is scheduled to last for at least one year at the time of filing, even if less than one year of such employment remains at the time of the naturalization interview or Oath of Allegiance provided that the spouse remains employed abroad at the time of naturalization.

The burden is on the applicant to establish that his or her U.S. citizen’s qualifying employment abroad is scheduled to last for at least one year from the time of filing.

E. Exception to Continuous Residence and Physical Presence Requirements

Spouses of U.S. citizens who are regularly stationed abroad under qualifying employment may be eligible to file for naturalization immediately after obtaining LPR status in the United States. Such spouses are not required to have any prior period of residence or specified period of physical presence within the United States in order to qualify for naturalization.[19]

F. In the United States for Examination and Oath of Allegiance

A spouse of a U.S. citizen who is regularly stationed abroad under qualifying employment is required to be in the United States pursuant to an admission as an LPR for the naturalization examination and the Oath of Allegiance for naturalization.[20]

G. Application and Evidence

Application for Naturalization (Form N-400)

To apply for naturalization, the spouse of a U.S. citizen employed abroad must submit an Application for Naturalization (Form N-400) in accordance with the form instructions and with the required fee.[21] The applicant should check the “other” eligibility option on the naturalization application and indicate that he or she is applying pursuant to INA 319(b) on the basis of marriage to a U.S. citizen who is or will be regularly stationed abroad.

Evidence of Spouse’s United States Citizenship

Under this provision, the burden is on the applicant to establish that he or she is married to a U.S. citizen.[22] A spouse of a U.S. citizen must submit with the application evidence to establish the U.S. citizenship of his or her spouse.[23]

Evidence of U.S. citizenship may include:

- Certificate of birth in the United States;
- Department of State Consular Report of Birth Abroad (FS-240);
- Certificate of Citizenship;
- Certificate of Naturalization; and
- Valid and unexpired United States Passport.

If an official civil record cannot be produced, secondary evidence may be accepted on a case-by-case basis. An officer has the right to request an original record if there is doubt as to the authenticity of the record.[24]

Evidence of Citizen Spouse’s Employment Abroad

Along with his or her naturalization application, the applicant must submit evidence demonstrating the spouse’s qualifying employment abroad.[25]

Such evidence may include:

- The name of the employer and either the nature of the employer’s business or the ministerial, religious, or missionary activity in which the employer is engaged;
- Whether the employing entity is owned in whole or in part by United States interests;
- Whether the employing entity is engaged in whole or in part in the development of the foreign trade and commerce of the United States;
- The nature of the activity in which the citizen spouse is engaged; and
- The anticipated period of employment abroad.

Evidence of Applicant’s Intent to Reside Abroad with Citizen Spouse and Return to the United States Upon Termination of Qualifying Employment

Along with his or her naturalization application, an applicant for naturalization under INA 319(b) must submit a statement describing his or her intent to reside abroad with the citizen spouse and his or her intent to take up residence within the United States immediately upon the termination of such employment abroad of the citizen spouse.[26]

Footnotes

[^ 1] See INA 319(b). See 8 CFR 319.2. See Section C, Qualifying Employment Abroad [12 USCIS-PM G.4(C)].

[^ 2] See INA 319(b). See 8 CFR 319.2(a)(6).

[^ 3] See 8 CFR 319.2(b).

[^ 4] See INA 319(a). See 8 CFR 319.1(a)(7) and 8 CFR 319.2(a)(5).

[^ 5] See INA 319(b). See 8 CFR 319.2(a)(5).

[^ 6] See INA 319(a). See 8 CFR 319.1(a)(7).

[^ 7] See INA 319(b). See 8 CFR 319.2.

[^ 8] See Part I, Military Members and their Families, Chapter 9, Spouses, Children, and Surviving Family Benefits, Section B, Spouses of Military Members [12 USCIS-PM I.9(B)]. See INA 319(e). See 8 U.S.C. 1443a.

[^ 9] See INA 319(b). See 8 CFR 319.1(b)(1). See Chapter 2, Marriage and Marital Union for Naturalization [12 USCIS-PM G.2].

[^ 10] See Chapter 2, Marriage and Marital Union for Naturalization, Section A, Validity of Marriage [12 USCIS-PM G.2(A)].

[^ 11] See 8 CFR 319.2(a)(4).

[^ 12] See INA 319(b)(1)(B).

[^ 13] See 8 CFR 316.20(a). See uscis.gov/AIR lists of recognized organizations.

[^ 14] See 8 CFR 319.5 and 8 CFR 316.20(b).

[^ 15] See INA 319(b)(1)(B) and INA 319(b)(1)(C). See 8 CFR 319.2(a)(1). See Section G, Application and Evidence [12 USCIS-PM G.4(G)].

[^ 16] See INA 319(b)(1)(B) and INA 319(b)(1)(C). See 8 CFR 319.2(a)(1).

[^ 17] This policy is effective as of January 22, 2013, effective date of first publication of the USCIS Policy Manual and will not be applied retroactively.

[^ 18] See 8 CFR 319.2(a)(4).

[^ 19] See INA 319(b)(3). See 8 CFR 319.2(a)(6). See Part D, General Naturalization Requirements, Chapter 5, Modifications and Exceptions to Continuous Residence and Physical Presence [12 USCIS-PM D.5].

[^ 20] See INA 319(b). See 8 CFR 319.2. Spouses of members of the U.S. armed forces may be eligible for overseas processing. See Part I, Military Members and their Families, Chapter 9, Spouses, Children, and Surviving Family Benefits, Section B, Spouses of Military Members [12 USCIS-PM I.9(B)].

[^ 21] See 8 CFR 319.11(a). See Fee Schedule (Form G-1055).

[^ 22] See Chapter 2, Marriage and Marital Union for Naturalization [12 USCIS-PM G.2].

[^ 23] See INA 319(b). See 8 CFR 319.2(a).

[^ 24] See 8 CFR 103.2(b)(5). See 8 CFR 319.1 and 8 CFR 319.2.

[^ 25] See INA 319(b). See 8 CFR 319.11(a).

[^ 26] See 8 CFR 319.2(a)(4).

Chapter 5 - Conditional Permanent Resident Spouses and Naturalization

A. General Requirements for Conditional Permanent Residents

Since 1986, certain spouses of U.S. citizens have been admitted to the United States as lawful permanent residents on a conditional basis for a period of 2 years.[1] In general, a conditional permanent resident (CPR) must jointly file with his or her petitioning spouse a Petition to Remove Conditions on Residence (Form I-751) with USCIS during the 90-day period immediately preceding the second anniversary of his or her admission as a CPR in order to remove the conditions.[2] An approval of a petition to remove conditions demonstrates the bona fides of the marital relationship.

In order for USCIS to approve the petition to remove conditions, the CPR must establish that:

- The marriage upon which the CPR admitted to the United States was valid;
- The marriage has not been terminated; and
- The marriage was not entered into for purposes of evading the immigration laws of the United States.[3]

In general, USCIS requires that an applicant for naturalization must have an approved petition to remove conditions before an officer adjudicates the naturalization application. However, certain CPRs may be eligible for naturalization without filing a petition or having the conditions removed if applying for naturalization on the basis of:

- Marriage to a U.S. citizen employed abroad; or
- Qualifying military service.[4]

B. Spouses who Must Have an Approved Petition Prior to Naturalization

In all cases, a CPR applying for naturalization on the basis of marriage must have an approved petition prior to naturalization if the CPR:

- Has a pending petition to remove conditions at the time of filing the Application for Naturalization; or
- Reaches the 90-day period to file the petition to remove conditions prior to taking the Oath of Allegiance.[5]

1. Spouses who Reach Petition Filing Period Prior to Naturalization

In most cases, the 90-day period for filing the petition to remove conditions will have passed prior to an applicant becoming eligible to apply for naturalization. However, in some cases involving applicants whose citizen spouse is employed abroad and in cases in which a late filing of the petition to remove conditions is permitted, the 90-day filing period will start after filing for naturalization.

Under these circumstances, the applicant must file the petition to remove conditions and the petition must be adjudicated prior to or concurrently with the naturalization application.

2. Spouses with Pending Petitions and Naturalization Applications

An application for naturalization may not be approved if there is a pending petition for removal of conditions. If an applicant's petition to remove conditions is pending at the time of filing or is filed prior to the interview, USCIS will adjudicate the petition to remove conditions prior to or concurrently with the adjudication of the naturalization application.[6]

3. Failure to File or Denial of the Petition to Remove Conditions

The CPR status of an applicant is terminated and he or she must be placed into removal proceedings if:

- The applicant fails to file the petition to remove conditions; or

- If the petition to remove conditions is filed, but the petition is denied.[7]

C. Spouses Eligible to Naturalize without Filing Petition to Remove Conditions

1. Conditional Residents Filing on the Basis of Qualifying Military Service

Applicants for naturalization who qualify on the basis of honorable military service in periods of hostilities may be naturalized whether or not they have been lawfully admitted for permanent residence.[8] For this reason, such applicants are not required to comply with all of the requirements for admission to the United States, including the requirements for removal of conditions.

Accordingly, CPRs who are filing on the basis of such qualifying military service are not required to file a petition to remove conditions and may be naturalized without the removal of conditions from their permanent resident status.

2. Conditional Residents Filing as the Spouse of a U.S. Citizen Employed Abroad

A spouse of a U.S. citizen employed abroad based on authorized employment is not required to have any specific period of residence or physical presence in order to naturalize.[9] Consequently, a CPR spouse is not required to file the petition to remove conditions if the spouse files his or her naturalization application before he or she reaches the 90-day filing period to remove the conditions on residence.[10]

A CPR spouse of a U.S. citizen employed abroad may naturalize without filing a petition to remove conditions if:

- The CPR spouse has been a CPR for less than 1 year and 9 months; and
- The CPR spouse does not reach the 90-day filing period for the petition to remove conditions prior to the final adjudication of his or her naturalization application or the time of the Oath of Allegiance.[11]

Even though the CPR spouse is not required to file the petition to remove conditions, he or she must satisfy the substantive requirements for removal of the conditions.[12] Therefore, the CPR spouse must establish that:

- The marriage was entered into in accordance with the laws of the place where the marriage occurred;
- The marriage has not been judicially annulled or terminated;
- The marriage was not entered into for the purpose of procuring his or her admission as an immigrant; and
- No fee or other consideration was given (other than attorney's fees) for filing the immigrant or fiancé(e) visa petition that forms the basis for admission to the United States.[13]

An officer must not approve a CPR spouse's naturalization application unless the spouse meets these requirements.[14]

D. Conditional Permanent Residents Admitted as Investors

If a CPR spouse is admitted as an investor, or the spouse or child of an investor,[15] USCIS will make a determination on the CPR's petition to remove conditions before approving the CPR's naturalization application.

Footnotes

[^ 1] See INA 216. See Immigration Marriage Fraud Amendments of 1986, Pub. L. 99-639 (PDF) (November 10, 1986). The time period spent as a CPR counts toward the satisfaction of the continuous residence and physical presence requirements for naturalization. See INA 216(e).

[^ 2] See INA 216(c), INA 216(d), and INA 216(e). See H.R. REP. 99-906, 1986 U.S.C.C.A.N. 5978.

[^ 3] See INA 216(d)(1).

[^ 4] See Section C, Spouses Eligible to Naturalize without Filing Petition to Remove Conditions [12 USCIS-PM G.5(C)].

[^ 5] See INA 216(d)(2).

[^ 6] An officer should conduct the naturalization examination even if the petition to remove conditions is not in the CPR spouse's A-file. The officer should follow internal procedures to request the petition. The officer must not approve the CPR spouse's naturalization application until the officer has reviewed and approved the petition to remove conditions.

[^ 7] See INA 216(c)(2) and INA 216(c)(3).

[^ 8] See INA 329. See Part I, Military Members and their Families, Chapter 3, Military Service during Hostilities (INA 329), Section G, Conditional Permanent Residence and Naturalization during Hostilities [12 USCIS-PM I.3(G)].

[^ 9] See INA 319(b). See 8 CFR 319.2.

[^ 10] See INA 216(d)(2). Additionally, any conditional permanent resident who is otherwise eligible for naturalization under INA 329 (based on military service), and who is not required to be an LPR as provided for in INA 329, is exempt from all of the requirements of INA 216. See Part I, Military Members and their Families, Chapter 3, Military Service during Hostilities (INA 329) [12 USCIS-PM I.3].

[^ 11] If the CPR spouse reaches the 90-day filing period prior to taking the Oath of Allegiance, the applicant must file the petition to remove conditions and it must be adjudicated prior to the taking of the Oath of Allegiance. See INA 319(b).

[^ 12] See INA 319(b) and INA 318. An applicant must satisfy all naturalization requirements, including establishing he or she has been lawfully admitted for permanent residence in accordance with all applicable provisions of the INA.

[^ 13] See INA 216. See 8 CFR 216.4(c).

[^ 14] See INA 319(b) and INA 318. An applicant must satisfy all naturalization requirements, including establishing he or she has been lawfully admitted for permanent residence in accordance with all applicable provisions.

[^ 15] See INA 216A (EB-5 investors).

Part H - Children of U.S. Citizens

Chapter 1 - Purpose and Background

A. Purpose

United States laws allow for children to acquire U.S. citizenship other than through birth in the United States.[1] Persons who were born outside of the United States to a U.S. citizen parent or parents may acquire or derive U.S. citizenship at birth. Persons, including adopted children,[2] may also acquire citizenship after birth, but before the age of 18, through their U.S. citizen parents.

Previously, acquisition of citizenship generally related to those persons who became U.S. citizens at the time of birth, and derivation of citizenship to those who became U.S. citizens after birth due to the naturalization of a parent.

In general, current nationality laws only refer to acquisition of citizenship for persons who automatically become U.S. citizens either at the time of birth or after. In general, a person must meet the applicable definition of child at the time he or she acquires citizenship and must be under 18 years of age.

B. Background

The law in effect at the time of birth determines whether someone born outside the United States to a U.S. citizen parent or parents is a U.S. citizen at birth. In general, these laws require a combination of at least one parent being a U.S. citizen when the child was born and having lived in the United States for a period of time. In addition, children born abroad may become U.S. citizens after birth. Citizenship laws have changed extensively over time with two major changes coming into effect in 1978 and 2001.

Before the Act of October 10, 1978, U.S. citizens who had acquired citizenship through birth abroad to one citizen parent had to meet certain physical presence requirements to retain citizenship.[3] This legislation removed all retention requirements.

Before the Child Citizenship Act of 2000 (CCA),[4] effective February 27, 2001, the Immigration and Nationality Act (INA) had two provisions for derivation of citizenship, former INA 320 and former INA 321.[5] The CCA removed INA 321 and revised INA 320 making it the only statutory provision for children under 18 years of age in the United States to automatically acquire citizenship after birth.[6] The CCA also amended INA 322 to provide for applications for naturalization on behalf of foreign-born children who did not automatically acquire citizenship and who reside outside the United States with a U.S. citizen parent.[7]

C. Table of General Provisions

Children born outside the United States may acquire U.S. citizenship in multiple ways. The table below serves as a quick reference guide to the acquisition of citizenship provisions.[8] The chapters that follow the table provide further guidance.

General Provisions for Acquisition of Citizenship for Children Born Abroad

INA Section	Status of Parents	Residence or Physical Presence Requirements	Child is a U.S. Citizen
301(c) (Born in wedlock)	Both parents are U.S. citizens at the time of child's birth	At least one U.S. citizen parent has resided in the United States or its outlying possessions before child's birth	At birth
301(d)	One parent is a U.S. citizen; other parent is a U.S. national (but not citizen) of the United States	U.S. citizen parent was physically present in the United States or its outlying possessions for one year before child's birth	At birth
301(f)	Unknown parentage	Child is found in the United States while under 5 years of age	At birth
301(g)	One parent is a U.S. citizen; other parent is an alien	U.S. citizen parent was physically present in United States or its outlying possessions for at least 5 years (2 after age 14) before child's birth	At birth
301(h)	Mother is a U.S. citizen and father is an alien	U.S. citizen mother resided in the United States before child's birth	At birth (only applies to birth before 1934)
309(a) (Born out of wedlock)	Father is a U.S. citizen and mother is an alien at the time of child's birth	Requirements depend on applicable provision: INA 301(e) or INA 301(g)	At birth
309(c) (Born out of wedlock	Mother is a U.S. citizen and father is an alien at the time of child's birth	U.S. citizen mother continuously physically present in the United	At birth

INA Section	Status of Parents	Residence or Physical Presence Requirements	Child is a U.S. Citizen
after December 23, 1952, and before June 12, 2017)[9]		States or its outlying possessions for 1 year before the child's birth	
309(c) (Born out of wedlock on or after June 12, 2017)	Mother is a U.S. citizen and father is an alien at the time of child's birth	U.S. citizen mother physically present in the United States or its outlying possessions for at least 5 years (2 after age 14) before the child's birth[10]	At birth
320	At least one parent is a U.S. citizen (through birth or naturalization)	Child resides in the United States[11] as a lawful permanent resident	On the date all conditions are met before the child reaches the age of 18
321 Repealed by CCA on February 27, 2001	Both parents naturalize, or in certain cases, one parent naturalizes	Child resides in the United States as a lawful permanent resident[12]	On the date all conditions are met before the child reaches the age of 18
322	At least one parent is a U.S. citizen (through birth or naturalization)	Child resides outside of the United States and child's parent (or grandparent) was physically present in the United States or its outlying possessions for at least 5 years (2 after age 14)	At time oath is administered

D. Legal Authorities

- INA 101(c) – Definition of child for citizenship and naturalization
- INA 301 – Nationals and citizens of the United States at birth
- INA 309 – Children born out of wedlock
- INA 320; 8 CFR 320 – Children residing permanently in the United States
- INA 322; 8 CFR 322 – Children residing outside the United States

Footnotes

[^ 1] See INA 301, INA 309, INA 320, and INA 322.

[^ 2] For guidance on citizenship for adopted children, see Volume 5, Adoptions, Part F, Citizenship for Adopted Children [5 USCIS-PM F].

[^ 3] See Pub. L. 95-432 (PDF), 92 Stat. 1046 (October 10, 1978).

[^ 4] See Section 101 of the Child Citizenship Act (CCA) of 2000, Pub. L. 106-395 (PDF), 114 Stat 1631 (October 30, 2000). The amendments made under the CCA became effective on February 27, 2001.

[^ 5] These two provisions remain applicable to someone who already turned 18 years old before the CCA took effect on February 27, 2001, as the CCA is not retroactive. See *Matter of Rodriguez-Tejedor* (PDF), 23 I&N Dec. 153 (BIA 2001).

[^ 6] See Chapter 4, Automatic Acquisition of Citizenship after Birth (INA 320) [12 USCIS-PM H.4].

[^ 7] See Chapter 5, Child Residing Outside the United States (INA 322) [12 USCIS-PM H.5].

[^ 8] Except for INA 321, the references in the table are to the current statutory requirements for citizenship. Previous versions of the law may apply.

[^ 9] For births before December 23, 1952, see Appendix: Nationality Chart 2 - Children Born Outside the United States Out of Wedlock [12 USCIS-PM H.3, Appendices Tab].

[^ 10] See *Sessions v. Morales-Santana* (PDF), 582 U.S. 47 (2017). See Chapter 3, U.S. Citizens at Birth (INA 301 and 309), Section C, Child Born Out of Wedlock [12 USCIS-PM H.3(C)].

[^ 11] For residence requirements of children of armed forces members or U.S. government employees or for children of the spouses of armed forces members or U.S. government employees, see Chapter 4, Automatic Acquisition of Citizenship after Birth (INA 320), Section C, Children of Armed Forces Members or U.S. Government Employees (or their Spouses) [12 USCIS-PM H.4(C)].

[^ 12] For cases in the Second Circuit or the Ninth Circuit, see Appendix: Nationality Chart 3 - Derivative Citizenship of Children [12 USCIS-PM H.3, Appendices Tab].

Chapter 2 - Definition of Child and Residence for Citizenship and Naturalization

A. Definition of Child

The definition of "child" for citizenship and naturalization differs from the definition used for other parts of the Immigration and Nationality Act (INA).[1] The INA provides two different definitions of "child."

- One definition of child applies to approval of visa petitions, issuance of visas, and similar issues.[2]
- The other definition of child applies to citizenship and naturalization.[3]

One significant difference between the two definitions of child is that a stepchild is not included in the definition relating to citizenship and naturalization. Although a stepchild may be the stepparent's "child" for purposes of visa issuance, the stepchild is not the stepparent's "child" for purposes of citizenship and naturalization. A stepchild is not eligible for citizenship or naturalization through the U.S. citizen stepparent unless the stepparent adopts the stepchild and the adoption meets certain requirements.[4]

Below are definitions of child that apply to citizenship and naturalization.[5] The applicable definition depends in part on whether a child is claiming citizenship through the mother or father. A child generally must be under the age of 18[6] and unmarried to acquire citizenship after birth.

Definition of Child of a U.S. Citizen Mother

To be considered a child of a U.S. citizen mother, the child must be:

- The genetic child of a U.S. citizen mother who is recognized as the legal parent;[7]
- The adopted (including an orphan or Hague Convention adoptee) child of a U.S. citizen mother;[8]
- The child of a non-genetic gestational U.S. citizen mother (woman who carried and gave birth to the child) who is recognized by the relevant jurisdiction as the child's legal parent;[9] or
- The child of a U.S. citizen mother who is married to the child's genetic or gestational parent at the time of the child's birth (even if no genetic or gestational relationship exists with the U.S. citizen mother) if both parents are recognized by the relevant jurisdiction as the child's legal parents.

Definition of Child of a U.S. Citizen Father

To be considered a child of a U.S. citizen father, the child must be:

- The legitimated[10] child of a U.S. citizen father who is recognized as the legal parent;[11]
- The adopted (including an orphan or Hague Convention adoptee) child of a U.S. citizen father;[12]
- The child of a U.S. citizen father who is married to the child's genetic or gestational parent at the time of the child's birth (even if no genetic or gestational relationship exists with the U.S. citizen father) if both parents are recognized by the relevant jurisdiction as the child's legal parents; or
- If the child was born out of wedlock and claiming U.S. citizenship at birth, then the evidence must demonstrate that the requirements under INA 309 are met.[13]

For citizenship purposes, a person is considered a "parent," "mother," or "father," where their child satisfies one of the definitions of child provided above.

The term "genetic child" refers to a child who shares genetic material with the parent, and "gestational parent" is the woman who carries and gives birth to the child. A genetic parent, as well as a non-genetic gestational parent who is recognized by the relevant jurisdiction as the child's legal parent, is included within the phrase "natural" parent as referenced in the INA.[14]

In general, absent other evidence to the contrary, USCIS considers a child's birth certificate as recorded by a proper authority as primary and sufficient evidence to determine a child's genetic or gestational relationship to the parent (or parents). The parental relationship may also be established under the paternity laws of the child or the father's residence, or if this evidence is not available, it could be established by DNA testing. USCIS cannot require DNA test results to verify the claimed biological relationship but may suggest that the applicant voluntarily submit DNA test results.

In addition to meeting the definition of a child (as described above), the child must also meet the particular requirements of the specific citizenship or naturalization provision, which may include references to birth in wedlock or out of wedlock, and which may require that certain conditions be met by 18 years of age.[15]

B. Legitimated Child

Legitimation means "placing a child born out of wedlock in the same legal position as a child born in wedlock."[16] Legitimation is a legal concept that generally refers to father-child relationships.

Generally, unless otherwise specified by the specific provision, if the father or child had various residences or domiciles before the child reached 16, 18, or 21 years of age (depending on the applicable provision), then the laws of the various places of residence or domicile must be analyzed to determine whether the requirements for legitimation have been met.[17] If the requirement for a child to be legitimated before a certain age is more generous in a particular citizenship statute than the requirement of legitimation before age 16 in the definition of child, USCIS allows legitimation until the age requirement in the applicable citizenship statute.[18]

Depending on the applicable provision, the law of the child's residence or domicile, or the law of the father's residence or domicile, or both, may be the relevant law to determine whether a child has been legitimated.[19]

A child is considered the legitimated child of his or her parent if:

- The child is legitimated in the United States or abroad under the law of either the child's residence or domicile, or the law of the child's father's residence or domicile, depending on the applicable provision;[20]
- The child is legitimated before he or she reaches 16 years of age (except for certain cases where the child may be legitimated before reaching 18 or 21 years of age);[21] and
- The child is in the legal custody of the legitimating parent or parents at the time of the legitimation.[22]

A non-genetic gestational mother may legitimate her child. While legitimation has been historically applied to father-child relationships, the gestational mother of a child conceived through Assisted Reproductive Technology (ART) may be required to take action after the birth of the child to formalize the legal relationship. Whether such action is required depends on the law of the relevant jurisdiction.

Post-birth formalization of the legal relationship between a gestational mother and her child should be viewed as relating back to the time of birth. This is because the relevant jurisdiction's recognition of the legal relationship between a non-genetic gestational mother and her child is based on the circumstances of the child's birth, including that she carried and bore the child of whom she is the legal parent. This rule applies unless it is otherwise specified in the law of the relevant jurisdiction.[23]

An officer reviews the specific facts of a case when determining whether a child has been legitimated accordingly and to determine the appropriate citizenship provision.

C. Adopted Child

An adopted child is a child who has met the requirements applicable for adopted children[24] and has been adopted through a full, final, and complete adoption.[25]

D. Assisted Reproductive Technology

1. Background

Assisted Reproductive Technology (ART) refers to fertility treatments where either the egg or sperm, or both, is handled outside the body. ART includes intrauterine insemination (IUI) and in vitro fertilization (IVF), among other reproductive technology procedures.[26] In these procedures, the parent or parents may use a combination of their own genetic material or donated genetic material (donated egg, sperm, or both) in order to conceive a child.[27] ART allows a gestational parent to bear a child to whom the parent does not have a genetic relationship through the use of a donor egg. As such, a gestational parent could have a biological relationship to the child (by carrying and giving birth to the child) but not a genetic relationship.

Children Born Outside the United States Through ART

A parent who is the gestational and legal parent of a child under the law of the relevant jurisdiction at the time of the child's birth may transmit U.S. citizenship to the child if all other requirements are met.[28]

In addition, a non-genetic, non-gestational legal parent of a child born through ART may transmit U.S. citizenship to the child if the parent is married to the child's genetic or gestational parent at the time of the child's birth and both parents are recognized by the relevant jurisdiction as the child's legal parents.[29]

2. Child Born Outside the United States through Assisted Reproductive Technology to Legal Gestational Parent

A child born through ART may acquire U.S. citizenship from the non-genetic gestational parent at the time of birth, or after birth, depending on the applicable citizenship or naturalization provision, if:

- The child's gestational parent is recognized by the relevant jurisdiction as the child's legal parent at the time of the child's birth; and
- The child meets all other applicable requirements under the relevant citizenship or naturalization provision.

The relevant jurisdiction must recognize the gestational parent-child relationship as the legal parental relationship. Whether a parent is recognized as the legal parent is generally assessed under the jurisdiction of the child's birth at the time of birth. In some jurisdictions, the non-genetic gestational parent is recognized as the legal parent without having to take any additional affirmative steps after birth. In other jurisdictions, a non-genetic gestational mother may be required to take certain action after the child's birth to establish the legal relationship.

Post-birth formalization of the legal relationship between a non-genetic gestational parent and the child should be viewed as relating back to the time of birth. This is because the relevant jurisdiction's recognition of the legal relationship between a non-genetic gestational parent and the child is based on the circumstances of the child's conception and birth, including that the gestational parent carried and bore the child and the gestational parent is recognized as that child's legal parent. This rule applies unless it is otherwise specified in the law of the relevant jurisdiction, such as in an applicable court order.

The law of the relevant jurisdiction governs whether the non-genetic gestational parent is the legal parent for purposes of U.S. immigration law. Importantly, a non-genetic gestational parent who is not the legally recognized parent may not transmit U.S. citizenship to the child. USCIS follows any applicable court judgment of the relevant jurisdiction if parentage is disputed. In addition, USCIS does not adjudicate cases involving children whose legal parentage remains in dispute unless there has been a final determination by a proper authority. Therefore, USCIS may deny a case in which the legal parentage is in dispute, and the applicant may then file a motion to reopen[30] upon resolution by the proper authority.

E. Definitions of U.S. Residence and Physical Presence

The term residence is defined in the INA as the person's "principal actual dwelling place in fact, without regard to intent."[31] A person is not required to live in a particular place for a specific period of time in order for that place to be considered their "residence." However, the longer a person stays in a particular place, the more likely it is that they will establish that place as their residence.

By contrast, physical presence refers to the actual time a person is in the United States, regardless of whether that person has or had a residence in the United States.[32] U.S. citizen parents may count any time spent in the United States or its outlying possessions before the child's birth to meet the physical presence requirement, regardless of their citizenship status at the time they were present in the United States.[33] Even if the citizen parent was physically present in the United States without a lawful status or in any immigration status before the birth of the child, USCIS recognizes that period for purposes of the physical presence requirement.

Although some provisions related to naturalization and citizenship require specific time periods of physical presence, residence, or both,[34] in contrast, there is no specific time period of residence required for purposes of acquiring citizenship where a child is born in wedlock outside the United States to two U.S. citizen parents.[35]

For example, a person who spent time travelling in the United States for a year living in different hotel rooms in different cities or towns every week and who did not own or rent any property or have another principal dwelling place in the United States, would likely be able to establish 1 year of physical presence. However, without additional evidence of a principal actual dwelling place in the United States, that person could not establish residence in the United States. The table below provides a few examples on how travel would affect the physical presence and the residence requirements. However, the examples are not dispositive and individual cases will be determined based on the individual merits and evidence presented.

Examples Illustrating Physical Presence and Residence in the United States

Scenarios	Physical Presence	Residence
U.S. citizen parent owns a home and works in a foreign country. Parent travels to the United States and: • Stays 2 weeks with a cousin in New York, • Stays 2 weeks in New York with his or her parents, and • Travels to Florida on vacation for 2 weeks.	6 weeks	No U.S. residence (Residence is outside the United States)
Parent is a U.S. citizen born in a foreign country, who never lived in or visited the United States. His child moved to the United States as an adult and claimed U.S. citizenship.	No physical presence[36]	No U.S. residence
As a child, U.S. citizen parent came to the United States for 3 consecutive summers to attend a 2-month long camp. The parent lived and went to school in a foreign country for the rest of the year.	6 months	No U.S. residence (Residence is outside the United States)
U.S. citizen parent worked in the United States for 9 months in a year for 8 years out of a 9-year period. (Parent returned to Mexico to spend the remaining 3 months of each year with family, who never visited the United States.)	9 months in a year for 8 years	U.S. residence established[37]

1. Special Considerations

Various circumstances may affect whether USCIS considers a person to be residing in or physically present in the United States, and therefore whether U.S. citizens may transmit citizenship to their children.

U.S. Citizens who were Born, But Did Not Reside, in the United States

A U.S. citizen may have automatically acquired U.S. citizenship based on birth in the United States,[38] but never actually resided in the United States. This U.S. citizen will not have established residence in the United States, and may be unable to transmit U.S. citizenship to his or her own children.

For example, if the U.S. citizen, still having never resided in the United States, subsequently marries another U.S. citizen who never resided in the United States, and they give birth to a child outside the United States, the child will not acquire citizenship at birth under INA 301(c) because neither U.S. citizen parent can show the requisite residence in the United States. However, if the U.S. citizen parent had returned to the United States after his or her birth and established residence before giving birth to the child outside the United States, then he or she may be able to meet the residence requirement based on that period of residence and transmit U.S. citizenship to his or her children.

Children of Armed Forces Members or U.S. Government Employees (or their Spouses)

Certain children of U.S. armed forces members or U.S. government employees (or their spouses) who are residing outside the United States are exempt from the requirement to be residing in the United States for purposes of acquiring citizenship under INA 320.[39]

Commuters and Temporary Visits to the United States

Residence is more than a temporary presence or a visit to the United States. Therefore, temporary presences and visits are insufficient to establish residence for the purposes of transmitting citizenship. For example, someone who resides along the border in Mexico or Canada, but works each day in the United States, cannot use his or her workplace to establish a residence.

Vacations or brief stays in the United States do not qualify as residence in the United States. However, attendance at school, college, or university in the United States for an extended period of time may be considered as residence in the United States depending upon the totality of the circumstances.[40]

Owning or Renting Property

A person does not need to own or rent property in the United States in order to establish residence. In addition, owning or renting property outside of the United States does not automatically establish lack of residence in the United States. Owning and renting property in the United States may help to establish residence in the United States if the person also establishes that he or she actually lived in that property, for example. A person who owns property but never lived in the property would not be able to establish residence based on owning that property.

Physical Presence in U.S. Territorial Waters

A parent's physical presence in U.S. territorial waters[41] is determined based on the ports of departure and arrival and the nature of the voyage.[42] Officers determine the location of the ports of departure and arrival first, for the purpose of counting physical presence at a U.S. port. Officers then add any additional days for the portion of the voyage where there is evidence that the ship was in U.S. territorial waters, which includes U.S. coastal travel.

Officers use the following formula to calculate total physical presence in territorial waters:

Physical presence at a U.S. Port + physical presence during voyage =

Physical presence in territorial waters

The following tables show how USCIS calculates physical presence at a U.S. port and during a voyage.

Ports of Departure and Arrival	Physical Presence at a U.S. Port
From United States to United States	1 day if the duration of the voyage is 1 day; 2 days for voyages of more than 2 days
From United States to Foreign	1 day
From Foreign to United States	1 day

Ports of Departure and Arrival	Physical Presence at a U.S. Port
From Foreign to Foreign	0 days

Type of Voyage	Physical Presence During Voyage
Coastal (within U.S. territorial waters on a single coast)	Number of days of voyage (not including days physically present at a U.S. port, as determined above)
Coastwise (from a U.S. port to a U.S. port, but through foreign or international waters)	0 days (unless there is evidence that the ship was in U.S. territorial waters for additional days beyond days physically present at a U.S. port)
Foreign or International (to or from a U.S. port, but operated in foreign or international waters)	0 days (unless there is evidence that the ship was in U.S. territorial waters for additional days beyond days physically present at a U.S. port)
Intercoastal (between a U.S. port on the Atlantic Ocean and a U.S. port on the Pacific Ocean)	0 days (unless there is evidence that the ship was in U.S. territorial waters for additional days beyond days physically present at a U.S. port)
Other (for example, fishing voyages, voyages in the Great Lakes, or time spent in reduced operating status (time spent aboard ship while at a U.S. port))	• For fishing voyages and Great Lakes, number of days of voyage (not including days physically present at a U.S. port, as determined above) for those days operating in U.S. territorial waters. • For reduced operating status, all additional days spent at a U.S. port beyond the days physically present at a U.S. port calculated above.

2. Evidence

A U.S. citizen who was born in the United States generally meets the residence requirement as long as he or she can present evidence to demonstrate that his or her mother was not merely transiting through or visiting the United States at the time of his or her birth.[43] For example, a long form birth certificate is sufficient evidence if it shows a U.S. address listed as the mother's residence at the time of the U.S. citizen's birth.

If a U.S. citizen's birth certificate indicates that his or her mother's address was outside of the United States at the time of the birth, USCIS may find that the U.S. citizen does not meet the residence requirement unless the U.S. citizen can prove U.S. residence.

Documents that can help demonstrate residence include, but are not limited to, the following:

- U.S. marriage certificate indicating the address of the bride and groom;
- Property rental leases, property tax records, and payment receipts;
- Deeds;
- Utility bills;
- Automobile registrations;
- Professional licenses;
- Employment records or information;
- Income tax records and income records, including W-2 salary forms;
- School transcripts;
- Military records; and
- Vaccination and medical records.

Footnotes

[^ 1] See INA 101(b) and INA 101(c).

[^ 2] See INA 101(b).

[^ 3] See INA 101(c).

[^ 4] See *Matter of Guzman-Gomez* (PDF), 24 I&N Dec. 824 (BIA 2009) (the terms "child" and "parent" defined at INA 101(c) do not encompass stepchildren and stepparents; a person born outside the United States cannot derive U.S. citizenship under INA 320(a) by virtue of their relationship to a nonadoptive stepparent). See *Acevedo v. Lynch* (PDF), 798 F.3d 1167 (9th Cir. 2015). See Section C, Adopted Child [12 USCIS-PM H.2(C)].

[^ 5] Applicants who already filed an Application for Certificate of Citizenship (Form N-600) and were denied, but become eligible following a change in USCIS policy, may file a Notice of Appeal or Motion (Form I-290B) to request reopening of the prior USCIS denial of their Form N-600.

[^ 6] USCIS considers a child to be under the age of 18 years even if the last condition for acquisition of citizenship falls on the day of the child's 18th birthday. See *Matter of L-M- and C-Y-C-,* 4 I&N Dec. 617 (BIA 1952).

[^ 7] The relevant jurisdiction must recognize the parent-child relationship as the legal parental relationship. Whether a parent is recognized as the legal parent is generally assessed under the law of the jurisdiction where the child was born, as it existed at the time of birth. An egg donor generally would not be able to transmit citizenship because the donor typically relinquishes parental rights as part of the donation process and generally would not be considered a parent of a child under the applicable law.

[^ 8] The child must satisfy the requirements applicable to adopted children under INA 101(b)(1)(E), INA 101(b)(1)(F), or INA 101(b)(1)(G).

[^ 9] The law of the relevant jurisdiction governs whether the non-genetic parent is the legal parent for purposes of U.S. immigration law. A non-genetic U.S. citizen parent, who is not a legally recognized parent of the child, may not transmit U.S. citizenship to the child. USCIS follows any applicable court judgment of the relevant jurisdiction if parentage is disputed. In addition, USCIS does not adjudicate cases involving children whose legal parentage remains in dispute unless there has been a determination by a proper authority.

[^ 10] Depending on the applicable provision, the relevant law to determine whether a child has been legitimated may be the law of the child's residence or domicile, or the law of the father's residence or domicile, or both. See INA 101(c). A person's "residence" is the person's place of general abode, that is, the principal, actual dwelling place without regard to intent.

See INA 101(a)(33). A person's "domicile" refers to a "person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere." See Black's Law Dictionary (11th ed. 2019). In most cases, a person's residence is the same as a person's domicile.

[^ 11] The relevant jurisdiction must recognize the parent-child relationship as the legal parental relationship. Whether a parent is recognized as the legal parent is generally assessed under the law of the jurisdiction where the child was born, as it existed at the time of birth. A sperm donor generally would not be able to transmit citizenship because the donor typically relinquishes parental rights as part of the donation process and generally would not be considered a parent of a child under the applicable law.

[^ 12] The child must satisfy the requirements applicable to adopted children under INA 101(b)(1)(E), INA 101(b)(1)(F), or INA 101(b)(1)(G).

[^ 13] See Chapter 3, U.S. Citizens at Birth (INA 301 and 309), Section C, Child Born out of Wedlock [12 USCIS PM H.3(C)].

[^ 14] See INA 101(b) and INA 101(c). A "natural" parent may be a genetic or a gestational parent (who carries and gives birth to the child) who is recognized by the relevant jurisdiction as the child's legal parent.

[^ 15] See Chapter 3, U.S. Citizens at Birth (INA 301 and INA 309) [12 USCIS-PM H.3]; Chapter 4, Automatic Acquisition of Citizenship after Birth (INA 320) [12 USCIS-PM H.4]; and Chapter 5, Child Residing Outside the United States (INA 322) [12 USCIS-PM H.5].

[^ 16] See *Matter of Moraga (PDF)*, 23 I&N Dec. 195, 197 (BIA 2001).

[^ 17] Importantly, certain citizenship provisions limit the place of legitimation to the child's residence. See INA 309(a)(4)(A). In such cases, only the law of the place of residence is analyzed to determine whether the requirements for legitimation have been met.

[^ 18] For example, the INA 320 requirements must be met before age 18, while the definition of child at INA 101(c) requires legitimation before age 16. In this case, USCIS would consider a child who was legitimated at age 17 to be eligible for citizenship under INA 320.

[^ 19] See INA 101(c)(1). However, for purposes of INA 309(a), the child must be legitimated under the laws of the child's residence or domicile.

[^ 20] See INA 101(a)(33), which defines the term "residence" as the "place of general abode." The place of general abode of a person means his or her "principal, actual dwelling place in fact, without regard to intent."

[^ 21] For example, the current version of INA 309 allows for legitimation until the age of 18, while INA 101(c) requires legitimation by the age of 16.

[^ 22] See INA 101(c)(1). See also *Matter of Rivers (PDF)*, 17 I&N Dec. 419, 422 (BIA 1980) (presuming a legitimated child to be in the legal custody of the legitimating parent).

[^ 23] See Section D, Assisted Reproductive Technology [12 USCIS-PM H.2(D)].

[^ 24] The child must meet the requirements for family-based adoption at INA 101(b)(1)(E), orphans at INA 101(b)(1)((F), or Hague Convention adoptees at INA 101(b)(1)(G). See Volume 5, Adoptions, Part E, Family-Based Adoption Petitions [5 USCIS-PM E]. See Volume 5, Adoptions, Part C, Child Eligibility Determinations (Orphan) [5 USCIS-PM C]. See Volume 5, Adoptions, Part D, Child Eligibility Determinations (Hague) [5 USCIS-PM D].

[^ 25] See 8 CFR 320.1. See 8 CFR 322.1. See Volume 5, Adoptions, Part F, Citizenship for Adopted Children, Chapter 2, Definitions [5 USCIS-PM F.2].

[^ 26] See Fertility Clinic Success Rate and Certification Act of 1992 (FCSRCA), Pub. L. 102-493 (PDF), 106 Stat. 3146 (October 24, 1992).

[^ 27] In addition, a couple may use a gestational carrier (also called a gestational surrogate). A gestational surrogate is a person who gestates, or carries, an embryo that was formed from the egg of another person on behalf of the intended parent (or parents). The gestational carrier then gives birth to the child. The gestational carrier usually has a contractual obligation to return the infant to the intended legal parents. For additional information on ART, see the Centers for Disease Control (CDC) website.

[^ 28] Before USCIS implemented the gestational mother policy on October 28, 2014, a genetic relationship with a U.S. citizen parent was required in order for a child born outside the United States to acquire U.S. citizenship through that parent.

[^ 29] Children who meet the qualifications under this policy may acquire citizenship. If a Form N-600, Application for Certificate of Citizenship, or N-600K, Application for Citizenship and Issuance of Certificate Under Section 322, has been previously denied but the child now meets these requirements, the applicant may file a motion to reopen or reconsider the denied decision on a Notice of Appeal or Motion (Form I-290B). See 8 CFR 103.5. In order to naturalize under INA 322, a child must be under age 18.

[^ 30] If a Form N-600 or N-600K has been previously denied but the child now meets these requirements, the applicant may file a motion to reopen or reconsider the denied decision on a Notice of Appeal or Motion (Form I-290B). See 8 CFR 103.5.

[^ 31] See INA 101(a)(33). See *Savorgnan v. U.S.*, 338 U.S. 491, 506 (1950).

[^ 32] Examples of documentary evidence showing physical presence include academic transcripts, military records, official vaccination or other medical records, employment records, and lease agreements.

[^ 33] See *Matter of M*, 7 I&N Dec. 643 (BIA 1958) (holding that the parent's physical presence as a student, before he naturalized and became a U.S. citizen, counted towards the required period of residence in the United States, before the child's birth).

[^ 34] See INA 301 and INA 309. For more information on physical presence, see Part D, General Naturalization Requirements, Chapter 4, Physical Presence [12 USCIS-PM D.4].

[^ 35] See INA 301(c).

[^ 36] See *Madar v. USCIS*, 918 F.3d 120 (3rd Cir. 2019). In that case, the appellant argued that he was "constructively resident" in the United States because his U.S. citizen father lived during the relevant time in what was then Communist Czechoslovakia and was not free to leave the country. The court rejected that claim noting that physical presence requirements can be constructively satisfied only in extraordinary circumstances, such as, for example, when a U.S. government error causes citizenship to lapse, preventing the foreign-born parent from complying with the physical presence requirements.

[^ 37] See *Alcarez-Garcia v. Ashcroft*, 293 F.3rd 1155 (9th Cir. 2002).

[^ 38] See U.S. Const. amend XIV. See INA 301(a).

[^ 39] See Chapter 4, Section C, Children of Armed Forces Members or Government Employees (or their Spouses) [12 USCIS PM H.4(C)]. See INA 320(c) (added by the Citizenship for Children of Military Members and Civil Servants Act, Pub. L. 116-133 (PDF) (March 26, 2020)).

[^ 40] See *Matter of M--*, 7 I&N Dec. 643 (BIA 1958) (continuous stay in the United States as a college student for almost 3 years held to have residence in the United States for purposes of Section 201(g) of the Nationality Act of 1940, Pub. L. 76-853, 54 Stat. 1137, 1139 (October 14, 1940)).

[^ 41] Territorial waters or territorial sea means the waters, 12 nautical miles wide, adjacent to the coast of the United States and seaward of the territorial sea baseline. See 33 CFR 2.22. See 46 U.S.C. 70054(2). See Territorial Sea of the United States, 54 FR 777, 103 Stat. 2981 (PDF) (Dec. 27, 1988).

[^ 42] This information is generally documented on a U.S. Coast Guard Certificate of Discharge to Merchant Mariner or some other documentation of the voyage such as a ship's logs.

[^ 43] For more information on how the rules may vary depending on whether the U.S. citizen is the mother or father of a child seeking to acquire citizenship, see Chapter 3, U.S. Citizens at Birth (INA 301 and 309), Section A, General Requirements for Acquisition of Citizenship at Birth [12 USCIS-PM H.3(A)] through Section C, Child Born Out of Wedlock [12 USCIS-PM H.3(C)].

Chapter 3 - U.S. Citizens at Birth (INA 301 and 309)

A. General Requirements for Acquisition of Citizenship at Birth

A person born in the United States who is subject to the jurisdiction of the United States is a U.S. citizen at birth, to include a child born to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe.[1]

In general, a person born outside of the United States may acquire citizenship at birth if all of the following requirements are met at the time of the person's birth:

- The person is a child[2] of a U.S. citizen parent(s);
- The U.S. citizen parent meets certain residence or physical presence requirements in the United States or an outlying possession before the person's birth in accordance with the applicable provision;[3] and
- The person meets all other applicable requirements under either INA 301 or INA 309.

Until the Act of October 10, 1978, persons who had acquired U.S. citizenship through birth outside of the United States to one U.S. citizen parent had to meet certain physical presence requirements to retain their citizenship. This legislation eliminated retention requirements for persons who were born after October 10, 1952. There may be cases where a person who was born before that date, and therefore subject to the retention requirements, may have failed to retain citizenship.[4]

An officer should determine whether a person acquired citizenship at birth by referring to the applicable statutory provisions and conditions that existed at the time of the person's birth. These provisions have been modified extensively over the years.[5] In some cases, an officer may need to determine whether an applicant's parent or grandparent acquired citizenship before the officer can determine whether the applicant acquired citizenship. Officers may request additional evidence needed to establish the U.S. citizenship of the applicant's parent or grandparent. The following sections provide the current law.

B. Child Born in Wedlock

USCIS must determine whether a child is born in wedlock[6] or out of wedlock at the time of birth in order to determine which citizenship provision is applicable.[7]

USCIS considers a child to be born in wedlock when the legal parents are married to one another at the time of the child's birth and at least one of the legal parents has a genetic or gestational relationship to the child.

USCIS views post-birth formalization of the legal relationship between a parent and a child as establishing the relationship from the time of the child's birth. This is because the relevant jurisdiction's recognition of the legal relationship between the parent and child is based on the circumstances of the child's conception and birth, including, for example, the existence of a valid surrogacy contract memorializing all parties' understanding of parental rights pre-conception. This rule applies unless otherwise specified in the law of the relevant jurisdiction or in the applicable court order.

A child born outside the United States acquires U.S. citizenship at birth under INA 301 if at the time of the child's birth:

- The person is a child[8] of a U.S. citizen parent(s);
- The child's legal parents are married to each other and at least one legal parent is the genetic or gestational parent of that child at the time of the child's birth; and
- The parent meets the residence or physical presence requirements under the applicable law and the child meets all other applicable requirements under INA 301.

The tables below provide examples of different relationships and whether USCIS considers the child to be born in or out of wedlock at the time of birth in each scenario.

In-Wedlock Determinations Sample Scenarios: Legal Genetic and Gestational Mother

Marriage Between[9] …	… and	In or Out of Wedlock?
Legal genetic and gestational mother	Legal genetic father	In wedlock
Legal genetic and gestational mother	Non-genetic legal mother or father	In wedlock
Legal genetic and gestational mother	Non-legal mother or father	Out of wedlock

In-Wedlock Determinations Sample Scenarios: Legal Genetic and Non-Gestational Mother[10]

Marriage Between[11] …	… and	In or Out of Wedlock?
Legal genetic and non-gestational mother	Legal genetic father	In wedlock
Legal genetic and non-gestational mother	Non-genetic legal mother or father	In wedlock
Legal genetic and non-gestational mother	Legal gestational mother	In wedlock
Legal genetic and non-gestational mother	Non-genetic and non-legal mother or father	Out of wedlock

In-Wedlock Determinations Sample Scenarios: Legal Gestational Mother

Marriage Between[12] …	… and	In or Out of Wedlock?
Legal gestational mother	Legal genetic mother or father	In wedlock
Legal gestational mother	Non-genetic legal mother or father	In wedlock
Legal gestational mother	Non-genetic and non-legal mother or father	Out of wedlock

In-Wedlock Determinations Sample Scenarios: Legal Genetic Father[13]

Marriage Between[14] …	… and	In or Out of Wedlock?
Legal genetic father	Legal genetic mother or legal gestational mother (or both)	In wedlock
Legal genetic father	Non-genetic, non-gestational legal mother or father	In wedlock
Legal genetic father	Non-genetic, non-gestational, and non-legal mother or father	Out of wedlock

In-Wedlock Determinations: Cases Involving Gestational Carriers[15]

Marriage Between[16]…	… and	In or Out of Wedlock?
Legal genetic mother or father	Legal genetic mother or father	In wedlock
Legal genetic mother or father	Legal non-genetic mother or father	In wedlock
Legal non-genetic mother or father	Legal non-genetic mother or father	Out of wedlock[17]

Parent's Residence and Physical Presence Requirements

Depending on the law applicable at the time, the U.S. citizen parent(s) also have residency or physical presence requirements in the United States to transmit citizenship to a child.[18] The following table provides the current requirements under INA 301 based on the parents' citizenship.

Residence and Physical Presence Requirements for Parents Before the Child's Birth

Parents' Citizenship Status	Residence or Physical Presence Requirement
Child of Two U.S. Citizen Parents	At least one parent had resided in the United States or one of its outlying possessions.
Child of a U.S. Citizen Parent and a U.S. national (but not citizen) of the United States	The U.S. citizen parent was physically present in the United States or one of its outlying possessions for a continuous period of at least 1 year.
Child of a U.S. Citizen Parent and Alien Parent	The U.S. citizen parent was physically present in the United States for at least 5 years, including at least 2 years after 14 years of age.[19]

C. Child Born Out of Wedlock

1. Child of U.S. Citizen Father

General Requirements for Fathers of Children Born Out of Wedlock

The general requirements for acquisition of citizenship at birth[20] for a child born in wedlock also apply to a child born out of wedlock[21] outside of the United States (or one of its outlying possessions) who claims citizenship through a U.S. citizen father. Specifically, the provisions apply in cases where:

- A blood relationship between the child and the father is established by clear and convincing evidence;
- The child's father was a U.S. citizen at the time of the child's birth;
- The child's father (unless deceased) has agreed in writing to provide financial support for the child until the child reaches 18 years of age; and
- One of the following criteria is met before the child reaches 18 years of age:
  - The child is legitimated under the law of his or her residence or domicile;
  - The father acknowledges in writing and under oath the paternity of the child; or
  - The paternity of the child is established by adjudication of a competent court.

In addition, the residence or physical presence requirements contained in the relevant paragraph of INA 301 continue to apply to children born out of wedlock, who are claiming citizenship through their fathers.

Written Agreement to Provide Financial Support

In order for a child born out of wedlock outside of the United States (or one of its outlying possessions) to acquire U.S. citizenship through his or her father, Congress included a requirement that the father agree in writing to provide financial support for the child until the child reaches the age of 18.[22] Congress included the language to prevent children from becoming public charges.[23] USCIS interprets the phrase in the statute "has agreed in writing to provide financial support"[24] to mean that there must be documentary evidence that supports a finding that the father accepted the legal obligation to support the child until the age of 18.

The written agreement of financial support may be dated at any time before the child's 18th birthday. If the child is under the age of 18 at the time of filing an Application for Certificate of Citizenship, the father may provide the written agreement of financial support either concurrently with the filing of the application or prior to the adjudication of the application. USCIS may request the written agreement of financial support at the time of issuance of a Request for Evidence or at the time of an interview (unless the interview is waived).

Alternatively, if the applicant is already over the age of 18, he or she may meet the requirement if one or more documents support a finding that the father accepted his legal obligation to support the child. In such cases, the evidence must have existed (and have been finalized) prior to the child's 18th birthday and must have met any applicable foreign law or U.S. law governing the child's or father's residence to establish acceptance of financial responsibility.[25]

In all cases, the applicant has the burden of proving the father has met any applicable requirements under the law to make an agreement to provide financial support. A written agreement of financial support is not required if the father died before the child's 18th birthday.[26]

Written Agreement Requirements

In order for a document to qualify as a written agreement of financial support under INA 309(a)(3), the document:

- Must be in writing and acknowledged by the father;[27]
- Must indicate the father's agreement to provide financial support for the child;[28] and
- Must be dated before the child's 18th birthday.

In addition, USCIS considers whether the agreement was voluntary.

Other Acceptable Documentation

A written agreement of financial support may come in different forms and documents. USCIS may consider other similar documentation in which the father accepts financial responsibility of the child until the age of 18. Some examples of documents USCIS may consider include:

- A previously submitted Affidavit of Support (Form I-134) or Affidavit of Support Under Section 213A of the INA (Form I-864);
- Military Defense Enrollment Eligibility Reporting System (DEERS) enrollment;
- Written voluntary acknowledgement of a child in a jurisdiction where there is a legal requirement that the father provide financial support;[29]
- Documentation establishing paternity by a court or administrative agency with jurisdiction over the child's personal status, if accompanied by evidence from the record of proceeding establishing the father initiated the paternity proceeding and the jurisdiction legally requires the father to provide financial support; or
- A petition by the father seeking child custody or visitation with the court of jurisdiction with an agreement to provide financial support and the jurisdiction legally requires the father to provide financial support.

2. Child of U.S. Citizen Mother

The rules that determine whether a child born out of wedlock outside of the United States derives citizenship at birth from the U.S. citizen mother vary depending on when the child was born.

Child Born On or After December 23, 1952 and Before June 12, 2017

A child born between December 23, 1952 and June 12, 2017 who is born out of wedlock outside of the United States and its outlying possessions acquires citizenship at birth if:

- The person is a child[30] of a U.S. citizen parent(s);
- The child's mother was a U.S. citizen at the time of the child's birth; and
- The child's U.S. citizen mother was physically present in the United States or one of its outlying possessions for 1 continuous year before the child's birth.[31]

Child Born On or After June 12, 2017

A child born on or after June 12, 2017, who is born out of wedlock outside of the United States or one of its outlying possessions acquires citizenship at birth if:

- The person is a child[32] of a U.S. citizen parent(s);
- The child's mother was a U.S. citizen at the time of the child's birth; and
- The child's U.S. citizen mother was physically present in the United States or one of its outlying possessions for at least 5 years before the child's birth (at least 2 years of which were after age 14).[33]

Effect of Sessions v. Morales-Santana Decision

Prior to the U.S. Supreme Court's decision in *Sessions v. Morales-Santana*,[34] the physical presence requirements for children born out of wedlock were different for a child acquiring citizenship through a U.S. citizen mother than for those acquiring through a U.S. citizen father. An unwed U.S. citizen mother could transmit citizenship to her child if the mother was physically present in the United States for 1 continuous year prior to the child's birth.[35] An unwed U.S. citizen father, by contrast, was held to the longer physical presence requirement of 5 years (at least 2 years of which were after age 14) in the United States or one of its outlying possessions.[36]

On June 12, 2017, the U.S. Supreme Court held, in *Sessions v. Morales-Santana*, that the different physical presence requirements for an unwed U.S. citizen father and an unwed U.S. citizen mother violated the U.S. Constitution's Equal Protection Clause.[37] The U.S. Supreme Court indicated that the 5 years of physical presence (at least 2 years of which were after age 14)[38] requirement should apply prospectively to all cases involving a child born out of wedlock outside the United States to one U.S. citizen parent and one alien parent, regardless of the sex of the parent.[39]

The U.S. Supreme Court decision effectively eliminated, prospectively, the 1 year continuous physical presence requirement that previously applied to unwed U.S. citizen mothers, and replaced it with the higher physical presence requirement that previously applied to unwed U.S. citizen fathers.[40] After *Sessions v. Morales-Santana*, the 1-year continuous physical presence requirement[41] remains in effect only for those children born prior to June 12, 2017 outside of the United States to unwed U.S. citizen mothers.

3. Child of Two U.S. Citizen Parents

For children born out of wedlock to two U.S. citizen parents, USCIS determines whether the child acquired citizenship from either parent individually. Once the child acquired from one of the parents, the child is a U.S. citizen, and the officer need not determine whether the child also acquired from the other U.S. citizen parent. Whether a child born out of wedlock outside the United States acquires citizenship at birth from two U.S. citizen parents depends on when the child was born.

Child Born Out of Wedlock On or After November 14, 1986[42]

A child born out of wedlock on or after November 14, 1986, is a U.S. citizen at birth, if:

- The person is the child[43] of two U.S. citizen parents;
- Both of the child's parents were U.S. citizens at the time of the child's birth; and

- Either the U.S. citizen father meets the requirements to transmit citizenship under INA 309[44] or the U.S. citizen mother was physically present in the United States or one of its outlying possessions for a continuous[45] period of 1 year before the child's birth.[46]

4. Summary of Physical Presence Requirements for Parents of Children Born Out of Wedlock

The following table outlines the physical presence requirements under INA 309 based on the parents' citizenship.

Physical Presence Requirements for U.S. Citizen Parents Before the Child's Birth

Parents' Citizenship Status	Period Child was Born	Physical Presence Requirement
U.S. Citizen Father and Alien Parent	On or after December 24, 1952, and before November 14, 1986	The U.S. citizen father was physically present in the United States or its outlying possessions (OLP) for at least 10 years before the child's birth, including at least 5 years after the age of 14.
	On or after November 14, 1986	The U.S. citizen father was physically present in the United States or OLP for at least 5 years before the child's birth, including at least 2 years after the age of 14.
U.S. Citizen Mother and Alien Parent	On or after December 24, 1952, and before June 12, 2017	The child's U.S. citizen mother was physically present in the United States or OLP for 1 continuous year before the child's birth.
	On or after June 12, 2017	The child's U.S. citizen mother was physically present in the United States or OLP for at least 5 years before the child's birth, including at least 2 years after age 14.
Two U.S. Citizen Parents	On or after November 14, 1986, and before June 12, 2017	• The child's U.S. citizen mother was physically present in the United States or OLP for 1 continuous year before the child's birth; or • The child's U.S. citizen father satisfies all of the requirements in INA 309(a), and at least one parent resided in the United States or OLP before the child was born. If the U.S. citizen father does not meet all the requirements for the child to acquire through the U.S. citizen father, then the U.S. citizen mother must satisfy 1 continuous year of physical presence in the United States or OLP before the child's birth. If the U.S. citizen mother does not meet the physical presence requirements, then the U.S. citizen father must satisfy all the requirements in INA 309(a), and at least one parent must have resided in the United States or OLP before the child was born.
	On or after June 12, 2017	• The child's U.S. citizen mother was physically present in the United States or OLP for 1 continuous year before the child's birth; or • The child's U.S. citizen mother was physically present in the United States or OLP for at least 5 years before the child's birth, including at least 2 years after age 14;[47] or • The child's U.S. citizen father satisfies all of the requirements in INA 309(a), and at least one parent resided in the

Parents' Citizenship Status	Period Child was Born	Physical Presence Requirement
		United States or OLP before the child was born. If the U.S. citizen father does not meet all the requirements for the child to acquire through the U.S. citizen father, then the U.S. citizen mother must satisfy 1 continuous year of physical presence in the United States or OLP before the child's birth, or 5 years of physical presence in the United States or OLP, at least 2 years of which were after age 14, before the child was born. If the U.S. citizen mother does not meet the physical presence requirements, then the U.S. citizen father must satisfy all the requirements in INA 309(a), and at least one parent must have resided in the United States or OLP before the child was born.

D. Application for Certificate of Citizenship (Form N-600)

1. Submission of Application

A person born outside the United States who acquires U.S. citizenship at birth is not required to have evidence of such status. However, if the person seeks documentation of U.S. citizenship status, the person may file an Application for Certificate of Citizenship (Form N-600) with USCIS.[48]

The Secretary of Homeland Security has jurisdiction over the administration and enforcement of the Immigration and Nationality Act (INA) within the United States, and the Secretary of State has jurisdiction over claims of U.S. citizenship made by persons who are abroad.[49] Therefore, generally, an Application for Certificate of Citizenship is submitted by persons who claim U.S. citizenship and are present within the United States. However, USCIS accepts a Form N-600 filed by a person who does not live in the United States, but USCIS does not adjudicate the application on the merits until the person is present in the United States in order to ensure that USCIS has jurisdiction over the application.[50]

A person who is at least 18 years of age may submit the Application for Certificate of Citizenship on their own behalf. A parent or a legal guardian may submit the application for a child who has not reached 18 years of age.

USCIS issues proof of U.S. citizenship in the form of a Certificate of Citizenship if the Application for Certificate of Citizenship is approved and the person takes the Oath of Allegiance, if required to do so.

USCIS does not mail Certificates of Citizenship outside the United States except when a military member is issued a Certificate of Citizenship under INA 320[51] or a military member's dependent child naturalizes under INA 322(d).

2. U.S. Passport or Consular Report of Birth Abroad as Evidence of Citizenship

A person may also apply for a U.S. passport with the U.S. Department of State (DOS) to serve as evidence of their U.S. citizenship.[52] A parent or legal guardian of a U.S. citizen child born outside the United States may also apply to the local U.S. embassy or consulate for a Consular Report of Birth Abroad (CRBA or Form FS-240).[53] A U.S. passport is valid for a limited time as established by DOS policies and standards on passport issuance.[54] Once a passport is expired, it is no longer conclusive evidence of citizenship.[55] Neither a CRBA nor a Certificate of Citizenship expires.

A valid, unexpired U.S. passport or a CRBA serves as evidence of a person's U.S. citizenship.[56] An applicant for a Certificate of Citizenship may submit a valid and unexpired U.S. passport or a CRBA as evidence of U.S. citizenship.[57] The officer must review the valid U.S. passport or CRBA and the documentation submitted with the application and contained in the record to determine if it was issued properly.

The officer approves the Application for Certificate of Citizenship if the applicant is a U.S. citizen and meets all requirements.

3. Request to Revoke U.S. Passport or Cancel Consular Report of Birth Abroad

If the officer determines that the applicant is not a U.S. citizen or has evidence indicating that a U.S. passport or CRBA submitted as evidence was obtained or issued illegally, fraudulently, or erroneously, the officer reviews the case with USCIS counsel. Then, if appropriate, the officer may request that DOS revoke the U.S. passport or cancel the CRBA.[58]

Only DOS has the authority to revoke a U.S. passport or cancel a CRBA.[59] DOS may revoke a U.S. passport or cancel a CRBA in cases where the passport or CRBA was obtained or issued illegally, fraudulently, or erroneously.[60]

USCIS provides the following information to DOS in the passport revocation or CRBA cancellation request:

- The applicant's complete biographic information, including name and any known aliases;
- The applicant's last known address;
- All previous unexpired U.S. passport numbers and alien registration numbers (A-numbers);
- A copy of the CRBA or of the biographical page of the U.S. passport submitted as evidence (if available);

- An explanation for requesting revocation or cancellation, including reasons for the request, analysis of the facts and dates used in determining that the passport or CRBA should be revoked or cancelled, and evaluation of evidence indicating that the applicant did not acquire U.S. citizenship;
- Copies of all documentary evidence in support of the request, including certified translations of any documents written or originally prepared in a foreign language; and
- The contact information of the USCIS office making the request.

Adjudication of Application with a U.S. Passport Revocation or Cancellation Request

After reviewing the case on the merits and requesting a revocation of a U.S. passport or a cancellation of a CRBA from DOS, the officer generally may not complete the adjudication of the Application for Certificate of Citizenship until DOS responds.

If DOS notifies USCIS that it does not intend to revoke the passport or cancel the CRBA, USCIS approves the Application for Certificate of Citizenship.[61] However, in cases with unusual or complex circumstances, USCIS may further consult with DOS.

If USCIS has evidence indicating that a U.S. passport submitted as evidence was obtained or issued illegally, fraudulently, or erroneously, and the passport was valid at the time of filing, but is expired at the time of adjudication, the officer should review the case with USCIS counsel and DOS before adjudicating.[62]

If DOS revokes the U.S. passport or cancels the CRBA, the officer denies the application in cases where the applicant does not otherwise meet the eligibility requirements for issuance of a Certificate of Citizenship.

E. Citizenship Interview and Waiver

In general, an applicant must appear in person for an interview before a USCIS officer after filing an Application for Certificate of Citizenship. This includes the U.S. citizen parent or legal guardian if the application is filed on behalf of a child under 18 years of age.[63] USCIS, however, may waive the interview requirement if all the required documentation necessary to establish the applicant's eligibility is already included in USCIS administrative records, or if the application is accompanied by one of the following:

- Consular Report of Birth Abroad (FS-240);
- Applicant’s unexpired U.S. passport issued initially for a full 5 or 10-year period; or
- Certificate of Naturalization of the applicant's parent or parents.[64]

F. Decision and Oath of Allegiance

1. Approval of Application, Oath of Allegiance, and Waiver for Children under 14 Years of Age

If an officer approves the Form N-600, USCIS administers the Oath of Allegiance before issuing a Certificate of Citizenship.[65]

However, the Immigration and Nationality Act (INA) permits USCIS to waive the taking of the Oath of Allegiance if USCIS determines the person is unable to understand its meaning.[66] USCIS has determined that children under the age of 14 are generally unable to understand the meaning of the oath.

Accordingly, USCIS waives the oath requirement for a child younger than 14 years of age. If USCIS waives the oath requirement, USCIS issues a Certificate of Citizenship after the officer approves the application.

If an applicant does not take the Oath of Allegiance and is not eligible for a waiver, USCIS cannot issue a Certificate of Citizenship.[67]

2. Denial of Application

If an officer denies the Certificate of Citizenship application, the officer must notify the applicant in writing of the reasons for denial and include information on the right to appeal in the notice.[68] An applicant may file an appeal within 30 calendar days after service of the decision (33 days if the decision was mailed).

Footnotes

[^ 1] See INA 301(a) and INA 301(b). Children of certain diplomats who are born in the United States are not U.S. citizens at birth because they are not subject to the jurisdiction of the United States. See 8 CFR 101.3. For more information, see Volume 7, Adjustment of Status, Part O, Registration, Chapter 3, Children Born in the United States to Accredited Diplomats [7 USCIS-PM O.3].

[^ 2] For the definition of child, see Chapter 2, Definition of Child and Residence for Citizenship and Naturalization [12 USCIS-PM H.2].

[^ 3] Any periods of honorable service in the U.S. armed forces, periods of employment with other qualifying organizations, or time spent outside the United States as the dependent unmarried son or daughter and member of the household of a person honorably serving in the U.S. armed forces or employed by another qualifying organization count towards that physical presence requirement. See INA 301(g).

[^ 4] The Act of October 10, 1978, Pub. L. 95-432 (PDF), repealed the retention requirements of former INA 301(b). The amending legislation was prospective only and did not restore citizenship to anyone who, prior to its enactment, had lost citizenship for failing to meet the retention requirements.

[^ 5] Officers should use the Nationality Charts to assist with the adjudication of these applications.

[^ 6] See INA 301. See Appendix: Nationality Chart 1 - Children Born Outside the United States in Wedlock [12 USCIS-PM H.3, Appendices Tab].

[^ 7] See INA 301 and INA 309.

[^ 8] For the definition of a child, see Chapter 2, Definition of Child and Residence for Citizenship and Naturalization [12 USCIS-PM H.2].

[^ 9] Marriage must have existed at the time of birth.

[^ 10] In addition, see the chart entitled In-Wedlock Determinations: Cases Involving Gestational Carriers.

[^ 11] Marriage must have existed at the time of birth.

[^ 12] Marriage must have existed at the time of birth.

[^ 13] In addition, see the chart entitled In-Wedlock Determinations: Cases Involving Gestational Carriers.

[^ 14] Marriage must have existed at the time of birth.

[^ 15] Persons using ART may use a gestational carrier who is a person who gestates, or carries, an embryo that was formed from the egg of another person on behalf of the intended parent or parents. The gestational carrier is genetically unrelated to the child and usually has a contractual obligation to return the infant to his or her intended legal parents. For additional information on ART, see the Centers for Disease Control (CDC) website. A non-genetic gestational parent who is not the legally recognized parent may not transmit U.S. citizenship to the child (for example, a gestational carrier who is not a legal parent). USCIS follows any applicable court judgment of the relevant jurisdiction if parentage is disputed. In addition, USCIS does not adjudicate cases involving children whose legal parentage remains in dispute unless there has been a final determination by a proper authority.

[^ 16] Marriage must have existed at the time of birth.

[^ 17] An unmarried non-genetic, non-gestational legal parent may not transmit U.S. citizenship to the child.

[^ 18] Some children may also have retention requirements. See Appendix: Nationality Chart 1 - Children Born Outside the United States in Wedlock [12 USCIS-PM H.3, Appendices Tab] for additional information.

[^ 19] Time outside the United States counts as physical presence in the United States if the time spent outside the United States was:

- As a member of the U.S. armed forces in honorable status;
- Under the employment of the U.S. government or other qualifying organizations; or
- As a dependent unmarried son or daughter of the household of a person described in one of the above categories of such persons.

[^ 20] See INA 301(c), INA 301(d), INA 301(e), and INA 301(g). See Section A, General Requirements for Acquisition of Citizenship at Birth [12 USCIS-PM H.3(A)].

[^ 21] See INA 309. See Appendix: Nationality Chart 2 - Children Born Outside the United States Out of Wedlock [12 USCIS-PM H.3, Appendices Tab].

[^ 22] A separate agreement or contract is not required for the father to satisfy the requirement. See INA 309(a)(3). See the Immigration and Nationality Act Amendments of 1986, Pub. L. 99–653 (PDF) (November 14, 1986).

[^ 23] See the Immigration and Nationality Act Amendments of 1986, Pub. L. 99–653 (PDF) (November 14, 1986). The Immigration and Nationality Act (INA) was intended to keep families together and generally construed in favor of family unity and the acceptance of responsibility by family members. See *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005).

[^ 24] See INA 309(a)(3).

[^ 25] In many cases, the issue of whether the father agreed to provide financial support depends on foreign law. The applicant bears the burden of proving the father has met any applicable requirements to make a binding agreement under the law. See *Matter of Annang (PDF)*, 14 I&N Dec. 502 (BIA 1973). Officers should consult USCIS counsel about any requirements under the law.

[^ 26] See INA 309.

[^ 27] A court document may be signed by a judge rather than the father, but may still serve as evidence to meet this requirement if there is an indication in the record of proceedings that the father consented to the determination of paternity.

[^ 28] Since the statute only provides for the agreement of the father to provide support and does not provide for any loss of citizenship if the agreement is not met, USCIS does not consider whether the father actually provided financial support.

[^ 29] For example, a birth certificate or acknowledgement document submitted and certified by the father. Under U.S. jurisdictions, a written voluntary acknowledgement of a child generally triggers a legal obligation to support the child. However, under foreign jurisdictions, a voluntary written agreement may not always trigger a legal obligation to support the child. The officer may consult with local USCIS counsel for questions regarding the effect of the law.

[^ 30] For the definition of a child, see Chapter 2, Definition of Child and Residence for Citizenship and Naturalization [12 USCIS-PM H.2].

[^ 31] See INA 309(c).

[^ 32] For the definition of a child, see Chapter 2, Definition of Child and Residence for Citizenship and Naturalization [12 USCIS-PM H.2].

[^ 33] See INA 301(g). See *Sessions v. Morales-Santana (PDF)*, 137 S.Ct. 1678 (2017).

[^ 34] See *Sessions v. Morales-Santana* (PDF), 137 S.Ct. 1678 (2017).

[^ 35] See INA 309(c).

[^ 36] See INA 301(g).

[^ 37] See *Sessions v. Morales-Santana (PDF),* 137 S.Ct. 1678 (2017). See U.S. Constitution, amend. XIV.

[^ 38] See INA 301(g).

[^ 39] See *Sessions v. Morales-Santana (PDF)*, 137 S.Ct. 1678 (2017).

[^ 40] See INA 309(c).

[^ 41] See INA 309(c).

[^ 42] For periods before November 14, 1986, see Appendix: Nationality Chart 2 - Children Born Outside the United States Out of Wedlock [12 USCIS-PM H.3, Appendices Tab].

[^ 43] For the definition of a child, see Chapter 2, Definition of Child and Residence for Citizenship and Naturalization [12 USCIS-PM H.2].

[^ 44] See Section C, Child Born out of Wedlock, Subsection 1, Child of U.S. Citizen Father [12 USCIS-PM H.3.(C)(1)].

[^ 45] The term “continuous” means that the physical presence in the United States is uninterrupted, without any absence.

[^ 46] If both parents of a child born out of wedlock are U.S. citizens, the mother’s physical presence requirement continues to be 1 year of continuous physical presence in the United States or outlying possessions (OLP) as INA 309(c) required before *Sessions v. Morales-Santana* (PDF), 582 U.S. 47 (2017). The Supreme Court decision in *Morales-Santana* did not address the situation where a child is born out of wedlock to two U.S. citizen parents.

[^ 47] On or after June 12, 2017, if the child’s U.S. citizen mother does not meet the requirement of being physically present in the United States or OLP for 1 continuous year before the child’s birth, the U.S. citizen mother may meet this requirement if she was physically present in the United States or OLP for at least 5 years before the child’s birth, including at least 2 years after age 14, consistent with *Sessions v. Morales-Santana* (PDF), 582 U.S. 47 (2017).

[^ 48] See 8 CFR 341.1.

[^ 49] See INA 103(a)(1) and INA 104(a)(3).

[^ 50] See INA 341(a).

[^ 51] See 8 U.S.C. 1443a.

[^ 52] See 22 CFR 50.4.

[^ 53] See 22 CFR 50.5. See 8 FAM 101.1-2, Introduction to Consular Reports of Birth Abroad.

[^ 54] See 8 FAM 101.1, Introduction to U.S. Passports and Consular Reports of Birth Abroad.

[^ 55] See 22 U.S.C. 2705.

[^ 56] See *Matter of Villanueva* (PDF), 19 I&N Dec. 101 (BIA 1984) (Unless void on its face, a valid U.S. passport issued to a person as a citizen of the United States constitutes conclusive proof of the person’s U.S. citizenship). See 22 U.S.C. 2705 (A valid U.S. passport or CRBA has the same force and effect as proof of U.S. citizenship as Certificates of Naturalization or Certificates of Citizenship issued by USCIS). See 22 CFR 50.2.

[^ 57] A U.S. passport or CRBA does not serve as evidence of citizenship for nationals who are not U.S. citizens.

[^ 58] See 22 U.S.C. 211a. See 22 CFR 51.60. See INA 361. See Rules Governing the Granting, Issuing, and Verifying of United States Passports, 31 FR 10603 (PDF) (Aug. 5, 1966).

[^ 59] The process to request cancellation of a CRBA to DOS is the same as that for a passport revocation. The same process should be followed to request the revocation of a parent’s or grandparent’s U.S. passport or CRBA, when USCIS, while adjudicating an Application for Certificate of Citizenship, determines that it was issued illegally, fraudulently, or erroneously.

[^ 60] See INA 361.

[^ 61] See *Matter of Villanueva* (PDF), 19 I&N Dec. 101 (BIA 1984).

[^ 62] An expired U.S. passport may not be accepted as sufficient evidence of citizenship. In these cases, officers may need to request other evidence of U.S. citizenship.

[^ 63] See 8 CFR 341.2(a)(2).

[^ 64] See 8 CFR 341.2(a).

[^ 65] See INA 337(a). See 8 CFR 341.5(b). See Part J, Oath of Allegiance, Chapter 2, The Oath of Allegiance [12 USCIS-PM J.2].

[^ 66] See INA 337(a). See 8 CFR 341.5(b).

[^ 67] See INA 341(a).

[^ 68] See 8 CFR 341.5(d) and 8 CFR 103.3(a).

Chapter 4 - Automatic Acquisition of Citizenship after Birth (INA 320)

A. General Requirements for Automatic Acquisition of Citizenship after Birth

The Child Citizenship Act of 2000 (CCA) amended INA 320 and removed INA 321 to create only one statutory provision and method for children in the United States to automatically acquire citizenship after birth.[1] According to INA 320, a child born outside of the United States automatically becomes a U.S. citizen when all of the following conditions have been met on or after February 27, 2001:[2]

- The person is a child[3] of a parent who is a U.S. citizen by birth or through naturalization (including an adoptive parent);[4]
- The child is under 18 years of age;[5]
- The child is a lawful permanent resident (LPR);[6] and
- The child is residing[7] in the United States in the legal and physical custody of the U.S. citizen parent.[8]

There is no specific order in which the conditions of the law must be satisfied for citizenship, so long as all conditions are met at a single point in time before the child’s 18th birthday. A person born outside the United States is presumed to be an alien.[9] As such, the person claiming U.S. citizenship has the burden of proof[10] to establish by a preponderance of the evidence[11] that they have met all requirements for citizenship.

B. Child in Legal and Physical Custody of U.S. Citizen Parent

To automatically acquire citizenship through a U.S. citizen parent under INA 320, the child must reside in the legal and physical custody of the U.S. citizen parent while under the age of 18 years.[12]

1. Legal Custody

Legal custody refers to the responsibility for and authority over a child.[13] Legal custody is determined according to the relevant jurisdiction's law or is determined by a court decree or order. If there is a judicial determination[14] or a statutory grant of custody, then the parent to whom custody has been granted has legal custody of the child for INA 320 purposes.[15]

The child's parents (or parent) who are included on the birth certificate[16] are generally presumed to have legal custody of the child unless there is evidence to the contrary, such as a court order.[17]

The following sections explain how USCIS determines if a U.S. citizen parent has legal custody of a child for purposes of INA 320 in various situations.

Parents Are Married to Each Other

Unless there is evidence to the contrary, USCIS presumes that a U.S. citizen parent has legal custody of a biological child where the biological child has lived, or lives with married parents who live in marital union. This applies regardless of whether the child was born in wedlock.[18]

Child Residing with Surviving Parent

Unless there is evidence to the contrary, USCIS considers a child residing with a U.S. citizen surviving parent to be in the legal custody of the U.S. citizen surviving parent, if the other parent is deceased.[19]

Child Born Out of Wedlock and Parents Never Married Each Other

Unless there is evidence to the contrary, USCIS considers the parent with whom the biological child is residing (or did reside with before age 18) to have legal custody of the child where the child was born out of wedlock and the parents never married each other.[20] If the parent is a U.S. citizen father, the U.S. citizen father must also have legitimated[21] the child for the presumption of legal custody to apply.[22]

Divorce or Legal Separation of the Parents

In the case of a child of divorced or legally separated parents, USCIS considers a U.S. citizen parent to have legal custody of a child, for the purpose of INA 320, where a court with jurisdiction has awarded primary care, control, and maintenance of the child to the U.S. citizen parent under the laws of the state or country of residence.[23]

State law determines whether a parent has legal custody of a child.[24] As such, officers first look at the most recent judicial determination following a legal separation or a divorce in assessing legal custody for citizenship purposes. For purposes of INA 320, a judicial custody order can only be changed by a subsequent judicial proceeding.

Actual Uncontested Custody

If a child's parents divorced or legally separated, but the decree of divorce or legal separation order is silent on the custody determination and the relevant jurisdiction's law does not determine which parent had custody of the children, then USCIS considers the U.S. citizen parent who had actual uncontested (physical) custody of the child to have had legal custody of the child.[25] Evidence showing the child was living with the U.S. citizen parent establishes "actual, uncontested custody."[26]

Joint Custody

Unless there is evidence to the contrary, both parents have legal custody for purposes of INA 320, where the child's parents are legally separated or divorced, and a court or other appropriate governmental entity has awarded the parents joint custody of the child.[27]

USCIS does not require a U.S. citizen parent to have sole custody to demonstrate legal custody of the child for purposes of INA 320.

Private Custody Agreement

Any private custody agreement between the parents is not an award of responsibility for and authority over the primary care, control, and maintenance of a minor child by a court of law or other appropriate government entity. As such, private custody agreements between parents generally do not impact the judicial custody determination following the divorce or legal separation for purposes of citizenship claims.[28] However, an applicant may provide documentation of a state law that recognizes an informal custody agreement between parents. If such a state law exists, an informal custody agreement may determine which parent has legal custody, if there is no court decree or the court decree is silent as to a formal custody agreement.[29]

Nunc Pro Tunc Custody Orders

Sometimes, evidence supporting a claim of citizenship may include a nunc pro tunc[30] correction of a judicial custody order that retroactively modifies a legal custody order. For purposes of derivative citizenship, USCIS does not recognize nunc pro tunc custody orders if entered after the child's 18th birthday that change the legal custody order from the time it was entered.[31]

Other Circumstances

There may be other factual circumstances under which USCIS may find the U.S. citizen parent to have legal custody for purposes of INA 320. These circumstances are determined on a case-by-case basis.[32]

2. Physical Custody

INA 320 also requires the child to reside in the physical custody of the U.S. citizen parent.[33] This requirement is "to ensure that the child's 'real interests' are in the United States through a genuine connection between the U.S. citizen parent and that parent's child."[34] In the context of derivative citizenship, the term "physical custody" means actual residence with the

parent.[35] The term “residence” means a person’s principal, actual dwelling place in fact, without regard to intent.[36] For purposes of INA 320, the parent the child resides with, or physically lives with, has physical custody of the child.

Evidence Establishing Physical Custody Requirement Under INA 320

As mentioned above, the child automatically acquires U.S. citizenship when the child meets all requirements before reaching the age of 18. This means that the evidence to establish that the child was residing in the physical custody of the U.S. citizen parent must be from the time when the child was under 18 years of age.

Evidence that may establish the child’s residence, and therefore physical custody, with the U.S. citizen parent can include any of the following:

- The U.S. citizen parent’s address on the application and in the record matches the address of the child (while the child was under 18 years of age);
- The child’s school transcripts, records, or attendance reports showing the child’s residential address to be the same as the U.S. citizen parent;
- The child’s medical, hospital, or vaccination records showing the child’s residential address to be the same as the U.S. citizen parent;
- The U.S. citizen parent’s federal income tax transcripts showing that the child was listed as a dependent household member for tax purposes;
- A notarized affidavit from the U.S. citizen parent attesting that the child has lived in that parent’s physical custody, specifying the period of time when the child lived with the U.S. parent; or
- A notarized affidavit from the non-U.S. citizen parent attesting that the child has lived in the physical custody of the U.S. citizen parent, specifying the period of time when the child lived with the U.S. parent.

C. Children of Armed Forces Members or U.S. Government Employees (or their Spouses)[37]

On March 26, 2020, the Citizenship for Children of Military Members and Civil Servants Act was enacted into law.[38] This Act provides that, under certain conditions, children of U.S. armed forces members or U.S. government employees (or their spouses)[39] who are residing outside the United States acquire citizenship under INA 320.[40] This applies to such children who were under the age of 18 on that date.[41]

A child born outside of the United States acquires automatic citizenship under INA 320 in cases where the child is an LPR and is in the legal and physical custody of his or her U.S. citizen parent who is:[42]

- Stationed and residing outside of the United States as a member of the U.S. armed forces;[43]
- Stationed and residing outside of the United States as an employee of the U.S. government;[44] or
- The spouse residing outside the United States in marital union[45] with a U.S. armed forces member or U.S. government employee who is stationed outside of the United States.[46]

In cases involving the child of a U.S. armed forces member residing outside the United States, the child must be authorized to accompany and reside with the U.S. armed forces member as provided by the member’s official orders.[47] If the spouse of the U.S. armed forces member is the qualifying U.S. citizen parent, the spouse must be authorized to accompany and reside with the U.S. armed forces member as provided by the member’s official orders.[48]

The official orders that authorize a child and, if applicable, his or her U.S. citizen parent, to accompany and reside with the member of the U.S. armed forces outside of the United States are a statutory requirement for that child to acquire citizenship under INA 320. If the child (and, if applicable, U.S. citizen parent) being added to the orders is the last action for the child to qualify for acquisition, then the date of the order becomes the date of acquisition. There is no statutory requirement for children of U.S. government employees or their spouses to be included on the employee’s official orders.

The child of a U.S. armed forces member or a U.S. government employee (or his or her spouse) must meet the general requirements under INA 320(a)(1)-(2) in addition to being an LPR residing in the legal and physical custody of his or her U.S. citizen parent. All statutory requirements must be met before the child reaches the age of 18, including, if applicable, the issuance of the official orders for the child (and, if applicable, the U.S. citizen parent) to accompany and reside with the U.S. armed forces member who is stationed outside the United States.

D. Application for Certificate of Citizenship (Form N-600)

1. Submission of Application

A person born outside the United States who automatically acquires U.S. citizenship is not required to have evidence of such status. However, if the person seeks documentation of U.S. citizenship status, the person may file an Application for Certificate of Citizenship (Form N-600) with USCIS.[49]

The Secretary of Homeland Security has jurisdiction over the administration and enforcement of the INA within the United States, and the Secretary of State has jurisdiction over claims of U.S. citizenship made by persons who are abroad.[50] Therefore, generally, an Application for Certificate of Citizenship is submitted by persons who claim U.S. citizenship and are present within the United States. However, USCIS accepts a Form N-600 filed by a person who does not live in the United States, but USCIS does not adjudicate the application on the merits until the person is present in the United States in order to ensure that USCIS has jurisdiction over the application.[51]

A person who is at least 18 years of age may submit the Application for Certificate of Citizenship on the person’s own behalf. There is no filing fee for Form N-600 for current or former members of the U.S. armed forces if they are filing on their own behalf. A U.S. citizen parent or a legal guardian must submit the application for a child who has not reached the age of 18 years.[52]

USCIS issues proof of U.S. citizenship in the form of a Certificate of Citizenship if the Application for Certificate of Citizenship (Form N-600) is approved and the person takes the Oath of Allegiance, if required to do so.[53]

USCIS does not mail Certificates of Citizenship outside the United States except when a military member is issued a Certificate of Citizenship under INA 320[54] or a military member’s dependent child naturalizes under INA 322(d).

2. U.S. Passport or Consular Report of Birth Abroad as Evidence of Citizenship

A person may also apply for a U.S. passport with the U.S. Department of State (DOS) to serve as evidence of their U.S. citizenship.[55] A parent or legal guardian of a U.S. citizen child born outside the United States may also apply to the local U.S. embassy or consulate for a Consular Report of Birth Abroad (CRBA or Form FS-240).[56] A U.S. passport is valid for a

limited time as established by DOS policies and standards on passport issuance.[57] Once a passport is expired, it is no longer conclusive evidence of citizenship.[58] Neither a CRBA nor a Certificate of Citizenship expires.

A valid, unexpired U.S. passport or a CRBA serves as evidence of a person's U.S. citizenship.[59] An applicant for a Certificate of Citizenship may submit a valid and unexpired U.S. passport or a CRBA as evidence of U.S. citizenship.[60] The officer must review the valid U.S. passport or CRBA and the documentation submitted with the application and contained in the record to determine if it was issued properly.

The officer approves the Application for Certificate of Citizenship if the applicant is a U.S. citizen and meets all requirements.

3. Request to Revoke U.S. Passport or Cancel Consular Report of Birth Abroad

If the officer determines that the applicant is not a U.S. citizen or has evidence indicating that a U.S. passport or CRBA submitted as evidence was obtained or issued illegally, fraudulently, or erroneously, the officer reviews the case with USCIS counsel. Then, if appropriate, the officer may request that DOS revoke the U.S. passport or cancel the CRBA.[61]

Only DOS has the authority to revoke a U.S. passport or cancel a CRBA.[62] DOS may revoke a U.S. passport or cancel a CRBA in cases where the passport or CRBA was obtained or issued illegally, fraudulently, or erroneously.[63]

USCIS provides the following information to DOS in the passport revocation or CRBA cancellation request:

- The applicant's complete biographic information, including name and any known aliases;
- The applicant's last known address;
- All previous unexpired U.S. passport numbers and alien registration numbers (A-numbers);
- A copy of the CRBA or of the biographical page of the U.S. passport submitted as evidence (if available);
- An explanation for requesting revocation or cancellation, including reasons for the request, analysis of the facts and dates used in determining that the passport or CRBA should be revoked or cancelled, and evaluation of evidence indicating that the applicant did not acquire U.S. citizenship;
- Copies of all documentary evidence in support of the request, including certified translations of any documents written or originally prepared in a foreign language; and
- The contact information of the USCIS office making the request.

Adjudication of Application with Revocation or Cancellation Request

After reviewing the case on the merits and requesting a revocation of a U.S. passport or a cancellation of a CRBA from DOS, the officer generally may not complete the adjudication of the Application for Certificate of Citizenship until DOS responds.

If DOS notifies USCIS that it does not intend to revoke the passport or cancel the CRBA, USCIS approves the Application for Certificate of Citizenship.[64] However, in cases with unusual or complex circumstances, USCIS may further consult with DOS.

If USCIS has evidence indicating that a U.S. passport submitted as evidence was obtained or issued illegally, fraudulently, or erroneously, and the passport was valid at the time of filing, but is expired at the time of adjudication, the officer should review the case with USCIS counsel and DOS before adjudicating.[65]

If DOS revokes the U.S. passport or cancels the CRBA, the officer denies the application in cases where the applicant does not otherwise meet the eligibility requirements for issuance of a Certificate of Citizenship.

4. Photographs and Signature

USCIS may require the applicant (person seeking the Certificate of Citizenship), regardless of age, to appear at a local Application Support Center (ASC)[66] for photograph and signature submission.[67] A parent or legal guardian may sign for a child under the age of 14.[68] The parent or legal guardian of the person for whom the Certificate of Citizenship is sought does not submit any photographs of themself in connection with the Form N-600.

USCIS does not submit information collected in connection with Form N-600 to the Federal Bureau of Investigation (FBI) for a background check.

Photograph Submission Outside the United States

A person seeking a Certificate of Citizenship who is residing outside the United States only needs to submit two passport-style photographs with the properly submitted application. USCIS does not schedule overseas applicants for an ASC appointment. USCIS coordinates with military service members who are stationed outside of the United States, if necessary, to secure photographs.

Failure to Appear for the ASC Appointment

USCIS may consider the Form N-600 abandoned in cases where the person seeking a Certificate of Citizenship fails to appear for the ASC appointment, unless, by the appointment time, USCIS receives a change of address or rescheduling request that USCIS concludes warrants excusing the failure to appear.[69]

If USCIS denies the application due to abandonment, the person eligible for the Certificate of Citizenship, or the parent or legal guardian of the person eligible for the Certificate of Citizenship, or the parent or legal guardian who filed on behalf of a child seeking a Certificate of Citizenship, may submit a motion to reopen by filing a Notice of Appeal or Motion (Form I-290B).[70]

USCIS does not deny an application for abandonment for failure to provide photographs if USCIS has evidence that the applicant is a member of the U.S. armed forces who is permanently or temporarily outside the United States and unable to provide photographs or appear to submit a photograph and signature for reasons related to the individual's military service. USCIS coordinates with military service members in these circumstances.

E. Documentation and Evidence

The applicant must submit the following required documents unless such documents are already contained in the USCIS administrative record or do not apply:[71]

- The child's birth certificate or record.
- Marriage certificate of child's parents, if applicable.

- Proof of termination of any previous marriage of each parent if either parent was previously married and divorced or widowed, for example:
  - Divorce Decree; or
  - Death Certificate.
- Evidence of United States citizenship of parent:
  - Birth Certificate;
  - Naturalization Certificate;
  - Consular Report of Birth Abroad (FS-240);
  - A valid unexpired U.S. passport; or
  - Certificate of Citizenship.
- Documents verifying legitimation according to the laws of the child's residence or domicile or biological U.S. citizen father's residence or domicile if the child was born out of wedlock.
- Documentation that the U.S. citizen parent had legal custody of the child while the child was under the age of 18 years in the case of divorce, legal separation, or adoption.[72]
- Evidence that establishes that the child was residing in the United States in the physical custody of the U.S. citizen parent while under the age of 18 years.[73]
- If applicable, official orders (that is, a Permanent Change of Station (PCS)) from the respective department that authorized the child of the U.S. armed forces member, or the child of the spouse of such member and the spouse,[74] to accompany the U.S. citizen parent.
- Copy of Permanent Resident Card or Alien Registration Receipt Card or other evidence of lawful permanent resident status, such as an I-551 stamp in a valid foreign passport or travel document issued by USCIS.
- Copy of the full, final adoption decree, if applicable.[75]
- Evidence of all legal name changes, if applicable, for the child and U.S. citizen parent.

An applicant does not need to submit documents that were submitted in connection with:

- An immigrant visa application retained by the American Consulate for inclusion in the immigrant visa package; or
- An immigrant petition or application included in a USCIS administrative file.

If necessary, an officer may request additional documentation to make a decision on the application.

F. Citizenship Interview and Waiver

In general, an applicant must appear in person for an interview before a USCIS officer after filing an Application for Certificate of Citizenship. This includes the U.S. citizen parent or parents if the application is filed on behalf of a child under 18 years of age.[76] USCIS, however, may waive the interview requirement if all the required documentation necessary to establish the applicant's eligibility is already included in USCIS administrative records or if the required documentation is submitted along with the application.[77]

G. Decision and Oath of Allegiance

1. Approval of Application, Oath of Allegiance, and Waiver for Children under 14 Years of Age

If the applicant meets all the requirements for citizenship, USCIS approves the Form N-600. USCIS determines the date of citizenship based on when the applicant met the last requirement.

If an officer approves the Form N-600, USCIS administers the Oath of Allegiance before issuing a Certificate of Citizenship.[78]

However, the INA permits USCIS to waive the taking of the Oath of Allegiance if USCIS determines the person is unable to understand its meaning.[79] USCIS has determined that children under the age of 14 are generally unable to understand the meaning of the oath.

Accordingly, USCIS waives the oath requirement for a child younger than 14 years of age. If USCIS waives the oath requirement, USCIS issues a Certificate of Citizenship after the officer approves the application.

If an applicant does not take the Oath of Allegiance and is not eligible for a waiver, USCIS cannot issue a Certificate of Citizenship.[80]

2. Denial of Application

If an officer denies the Certificate of Citizenship application, the officer must notify the applicant in writing of the reasons for denial and include information on the right to appeal in the notice.[81] An applicant may file an appeal within 30 calendar days after service of the decision (33 days if the decision was mailed).

Footnotes

[^ 1] See INA 320. See Appendix: Nationality Chart 3 - Derivative Citizenship of Children [12 USCIS-PM H.3, Appendices Tab].

[^ 2] February 27, 2001 is the effective date for these CCA amendments.

[^ 3] For the definition of a child, see Chapter 2, Definition of Child and Residence for Citizenship and Naturalization [12 USCIS-PM H.2].

[^ 4] For cases based on an adoptive relationship, the requirements of INA 101(b)(1)(E), INA 101(b)(1)(F), or INA 101(b)(1)(G) must be met. For guidance on citizenship for adopted children, see Volume 5, Adoptions, Part F, Citizenship for Adopted Children [5 USCIS-PM F].

[^ 5] USCIS considers a child to be under the age of 18 years even if the last condition for acquisition of citizenship falls on the day of the child's 18th birthday. See *Matter of L. M. and C. Y. C.,* 4 I&N Dec. 617 (BIA 1952).

[^ 6] A person is generally considered to be an LPR once USCIS approves the adjustment application or once the person enters the United States with an immigrant visa. See INA 245(b). For certain classifications, however, the effective date of becoming an LPR is a date that is earlier than the actual approval of the status (commonly referred to as a "rollback" date). See Part D, General Naturalization Requirements, Chapter 2, LPR Admission for Naturalization, Section A, LPR at Time of Filing and Naturalization [12 USCIS-PM D.2(A)]. A person who is born a U.S. national and is the child of a U.S. citizen may establish eligibility for a Certificate of Citizenship without having to establish LPR status.

[^ 7] For the definition of residence, see Chapter 2, Definition of Child and Residence for Citizenship and Naturalization, Section E, Definitions of U.S. Residence and Physical Presence [12 USCIS-PM H.2(E)].

[^ 8] See INA 320. See 8 CFR 320.2. Certain children of U.S. armed forces members or U.S. government employees (or their spouses) who are residing outside the United States may acquire citizenship under INA 320. See Section C, Children of Armed Forces Members or U.S. Government Employees (or their Spouses) [12 USCIS-PM H.4(C)]. See INA 320(c) (added by the Citizenship for Children of Military Members and Civil Servants Act, Pub. L. 116-133 (PDF) (March 26, 2020)).

[^ 9] See *Matter of Tijerina-Villarreal* (PDF), 13 I&N Dec. 327, 330 (BIA 1969).

[^ 10] See INA 341(a). See 8 CFR 341.2(c).

[^ 11] To meet this burden, the child, or the U.S. citizen parent or legal guardian acting on the child's behalf, must submit relevant, probative, and credible evidence that the claim is "probably true" or "more likely than not." See *Matter of E-M-* (PDF), 20 I&N Dec. 77 (Comm. 1989).

[^ 12] The U.S. citizen parent is not required to have legal and physical custody of the child when the child seeks a certificate of citizenship. Rather, USCIS must determine if the parent had legal and physical custody of the child at any time while the child was under the age of 18 years and all the other requirements for citizenship had been met.

[^ 13] See 8 CFR 320.1.

[^ 14] Determination of custody for citizenship purposes may be different than the custody determination for adoptions. For more information, see Volume 5, Adoptions [5 USCIS-PM].

[^ 15] See *Matter of M-*, 3 I&N Dec. 850 (BIA 1950).

[^ 16] Officers must also review birth certificates that have been amended following the initial registration.

[^ 17] The child's parent or parents who are named on the birth certificate may not have legal custody of the child in some cases, such as when the child is in the legal custody of a state or federal entity, a third party, or the child has been adopted. For example, in certain cases, a court may terminate a parent's parental rights, or a parent may relinquish parental rights depending on the laws of the relevant jurisdiction.

[^ 18] See 8 CFR 320.1(1)(i).

[^ 19] See 8 CFR 320.1(1)(ii).

[^ 20] See 8 CFR 320.1(1)(iii).

[^ 21] See Chapter 2, Definition of Child and Residence for Citizenship and Naturalization, Section B, Legitimated Child [12 USCIS-PM H.2(B)].

[^ 22] See 8 CFR 320.1(1)(iii). See *Matter of Rivers* (PDF), 17 I&N Dec. 419 (BIA 1980) (a natural father is presumed to have legal custody over the child at the time of legitimation in the absence of affirmative evidence indicating otherwise).

[^ 23] See 8 CFR 320.1(2).

[^ 24] See *Fierro v. Reno*, 217 F.3d 1, 3-4 (1st Cir. 2000) (legal relationships between parents and children are typically governed by state law, there being "no federal law of domestic relations"). See *Bagot v. Ashcroft*, 398 F.3d 252, 256 (3rd. Cir. 2005). See *Pina v. Mukasey*, 542 F.3d 5 (1st Cir. 2008) ("legal custody" for purposes of the CCA is determined by reference to the relevant state law).

[^ 25] See *Matter of M-*, 3 I&N Dec. 850 (BIA 1950).

[^ 26] See *Bagot v. Ashcroft*, 398 F.3d 252, 259 (3rd Cir. 2005) (father had legal custody of the child under the "actual uncontested custody" standard where the child lived with the father, and no one contested the father's custody). See *Garcia v. USICE*, 669 F.3d 91, 97 (2nd Cir. 2011) (holding that two predominant indicators of "actual uncontested custody" are the child's physical residence, and consent to custody by the non-custodial parent).

[^ 27] See 8 CFR 320.1(2).

[^ 28] For example, a notarized letter from the mother granting custody of the child to the father is insufficient to change a pre-existing judicial custody determination granting legal custody to the mother, unless state law provides otherwise.

[^ 29] See *Pina v. Mukasey*, 542 F.3d 5 (1st Cir. 2008), which found derivative citizenship where the father was a U.S. citizen, the child was living with the mother, but there was an informal agreement to share custody, and Massachusetts statutes and cases favored agreements between the parents as to legal custody of the child.

[^ 30]The Latin phrase "nunc pro tunc," translated as "now for then," denotes that an act has retroactive legal effect through a court's inherent power. See Black's Law Dictionary (12th ed. 2024).

[^ 31] See *Padilla Carino v. Garland*, 997 F.3d 1053 (9th Cir. 2021) (holding that Congress did not intend for this type of nunc pro tunc order). See *Fierro v. Reno*, 217 F.3d 1 (1st Cir. 2000) (refusing to recognize a nunc pro tunc change of custody for purposes of derivative citizenship because it would "allow ... state court[s] to create loopholes in the immigration laws on grounds of perceived equity or fairness" and a "nunc pro tunc order … is not binding under federal law"). See *Bustamante-Barrera v. Gonzales*, 447 F.3d 388, 401 (5th Cir. 2006) ("a nunc pro tunc order to recognize derivative citizenship would create the potential for significant abuse and manipulation of federal immigration and naturalization law"). See *United States v. Esparza*, 678 F.3d 389 (5th Cir. 2012) (nunc pro tunc divorce decree obtained in 2010 purporting to retroactively rearrange Esparza's custody status in 1994 does not raise a reasonable doubt as to his alienage). However, in *Minasyan v. Gonzales*, 401 F.3d 1069, 1079 (9th Cir. 2005), the court found that a dissolution of marriage order entered after the petitioner's 18th birthday "establishes the date of the legal separation for purposes of California law, … it is [also] sufficient to establish the date for purposes of Minasyan's derivative citizenship under [Section] 321(a)." These cases relate to former INA 321 but provide guidance for nunc pro tunc orders in INA 320 cases as well. A child acquires citizenship so long as all requirements are met before the child turns 18.

[^ 32] See 8 CFR 320.1(2).

[^ 33] See INA 320(a)(3). See 8 CFR 320.2.

[^ 34] See *Khalid v. Sessions*, 904 F.3d 129, 137-38 (2nd Cir. 2018).

[^ 35] However, in the Second Circuit, a “brief, temporary separation” does not terminate physical custody if there is still a strong connection between the child and the parent during the separation. See *Khalid v. Sessions*, 904 F.3d 129 (2nd Cir. 2018).

[^ 36] See INA 101(a)(33).

[^ 37] For information about USCIS policies pertaining to this group of children before March 26, 2020, see Appendix: History of Acquiring Citizenship under INA 320 for Children of U.S. Citizens who are Members of the U.S. Armed Forces, U.S. Government Employees, or their Spouses[12 USCIS-PM H.4, Appendices Tab].

[^ 38] See Pub. L. 116-133 (PDF) (March 26, 2020) (codified at INA 320(c)).

[^ 39] Spouses must be U.S. citizens if the child seeks to acquire citizenship under INA 320 based on the child’s residence with that spouse.

[^ 40] The Citizenship for Children of Military Members and Civil Servants Act, Pub. L. 116-133 (PDF) (March 26, 2020), did not redefine “residence in the United States” for these children. Instead, it created an exception to the U.S. residence requirement by providing that INA 320(a)(3) is deemed satisfied in applicable cases.

[^ 41] These provisions do not affect children who have already been recognized by USCIS or the Department of State as having acquired U.S. citizenship under INA 320 through the issuance of a Certificate of Citizenship or passport.

[^ 42] This provision would also apply to a child adopted by a U.S. citizen parent if the child satisfies the requirements applicable to adopted children under INA 101(b)(1) and INA 320(b).

[^ 43] See INA 320(c)(2)(A)(i). For a list of qualifying military branches, see Part I, Military Members and their Families, Chapter 2, One Year of Military Service during Peacetime (INA 328), Section C, Honorable Service [12 USCIS-PM I.2(C)] and Section D, National Guard Service [12 USCIS-PM I.2(D)]. Service is not required to be “honorable” for the purposes of INA 320(c)(2)(A)(i) and a Request for Certification of Military or Naval Service (Form N-426) is not required as evidence.

[^ 44] See INA 320(c)(1)(A). An “employee of the U.S. government” means a person employed by the U.S. government and does not include a person employed under contract with the U.S. government. Because there is no statute or regulation defining employee or “employee of the Government of the United States” in the citizenship and naturalization context, the common law definition of employee applies. See *Clackamas Gastroenterology Assoc., P.C., v. Wells*, 538 U.S. 440, 448 (2003). See *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992). The concept of “control” is the key to determining whether a person is an employee under the common law. See *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992). Further, the plain language of the Citizenship for Children of Military Members and Civil Servants Act, Pub. L. 116-133 (PDF) (March 26, 2020), does not include persons employed under contract with the Government of the United States, in contrast to INA 316(b), which applies more specifically to persons “employed by or under contract with the Government of the United States.”

[^ 45] Temporary orders, such as to serve in a combat zone or for mission support performance, do not affect the marital union between a military member and his or her spouse and would not impact acquisition of citizenship provisions under INA 320(c).

[^ 46] See INA 320(c)(2)(A)(ii) (spouses of U.S. armed forces member) and INA 320(c)(1)(B) (spouses of U.S. government employees).

[^ 47] See INA 320(c)(2)(B). For guidance on “official orders,” see Part I, Military Members and their Families, Chapter 9, Spouses, Children, and Surviving Family Benefits, Section A, General Provisions for Spouses, Children, and Parents of Military Members, Subsection 2, Documenting “Official Orders” [12 USCIS-PM I.9(A)(2)].

[^ 48] See INA 320(c)(2)(A)(ii).

[^ 49] See 8 CFR 341.1. However, certain adopted children automatically receive a Certificate of Citizenship without having to file Form N-600. If an adopted child is admitted on an IR-3 or IH-3 visa (because the child’s adoption was finalized before entering the United States), is residing in the United States in the U.S. citizen parent’s legal and physical custody before the child reaches the age of 18, and otherwise fulfills the conditions of INA 320, USCIS automatically issues the child a Certificate of Citizenship. For additional information, see the USCIS Adoption webpage.

[^ 50] See INA 103(a)(1) and INA 104(a)(3).

[^ 51] See INA 341(a).

[^ 52] See 8 CFR 320.3(a).

[^ 53] See Section H, Decision and Oath of Allegiance [12 USCIS-PM H.4(G)]. See Part J, Oath of Allegiance, Chapter 2, The Oath of Allegiance [12 USCIS-PM J.2].

[^ 54] See 8 U.S.C. 1443a.

[^ 55] See 22 CFR 50.4.

[^ 56] See 22 CFR 50.5. See 8 FAM 101.1-2, Introduction to Consular Reports of Birth Abroad.

[^ 57] See 8 FAM 101.1, Introduction to U.S. Passports and Consular Reports of Birth Abroad.

[^ 58] See 22 U.S.C. 2705.

[^ 59] See *Matter of Villanueva* (PDF), 19 I&N Dec. 101 (BIA 1984) (Unless void on its face, a valid U.S. passport issued to a person as a citizen of the United States constitutes conclusive proof of the person’s U.S. citizenship). See 22 U.S.C. 2705 (A valid U.S. passport or CRBA has the same force and effect as proof of U.S. citizenship as Certificates of Naturalization or Certificates of Citizenship issued by USCIS). See 22 CFR 50.2.

[^ 60] A U.S. passport or CRBA does not serve as evidence of citizenship for nationals who are not U.S. citizens.

[^ 61] See 22 U.S.C. 211a. See 22 CFR 51.60. See INA 361. See Rules Governing the Granting, Issuing, and Verifying of United States Passports, 31 FR 10603 (PDF) (Aug. 5, 1966). See Chapter 3, United States Citizens at Birth (INA 301 and 309), Section D, Application for Certificate of Citizenship (Form N-600), Subsection 3, Request to Revoke U.S. Passport or Cancel Consular Report of Birth Abroad [12 USCIS-PM H.3(D)(3)].

[^ 62] The process to request cancellation of a CRBA to DOS is the same as that for a passport revocation. The same process should be followed to request the revocation of a parent’s or grandparent’s U.S. passport or CRBA, when USCIS, while adjudicating an Application for Certificate of Citizenship, determines that it was issued illegally, fraudulently, or erroneously.

[^ 63] See INA 361.

[^ 64] See *Matter of Villanueva* (PDF), 19 I&N Dec. 101 (BIA 1984).

[^ 65] An expired U.S. passport may not be accepted as sufficient evidence of citizenship. In these cases, officers may need to request other evidence of U.S. citizenship.

[^ 66] Military service members may appear at any stateside USCIS ASC with or without an appointment. See Part I, Military Members and their Families, Chapter 6, Required Background Checks, Section C, Ways Service Members may Meet Fingerprint Requirements [12 USCIS-PM I.6(C)].

[^ 67] See 8 CFR 103.2(b)(9). See Volume 1, General Policies, and Procedures, Part C, Biometrics Collection and Security Checks, Chapter 2, Biometrics Collection [1 USCIS-PM C.2].

[^ 68] See 8 CFR 103.2(a)(2). See Volume 1, General Policies, and Procedures, Part B, Submission of Benefit Requests, Chapter 2, Signatures [1 USCIS-PM B.2].

[^ 69] See 8 CFR 103.2(b)(13)(ii). See Volume 1, General Policies and Procedures, Part C, Biometrics Collection and Security Checks, Chapter 2, Biometrics Collection, Section A, Biometric Services Appointments [1 USCIS-PM C.2(A)].

[^ 70] See 8 CFR 103.5 and 8 CFR 341.5(e). Although a person may file a motion to reopen a denial due to abandonment, they may not appeal a denial to the Administrative Appeals Office. See 8 CFR 103.2(b)(15). Moreover, USCIS rejects any subsequent Form N-600, and instructs the applicant to submit a motion to reopen. See 8 CFR 341.5(e) and 8 CFR 320.5(c).

[^ 71] See 8 CFR 320.3(b).

[^ 72] Generally, USCIS considers the adoption decree or order to be evidence of legal custody.

[^ 73] For more information on evidence of physical custody, see Section B, Child in Legal and Physical Custody of U.S. Citizen Parent, Subsection 2, Physical Custody [12 USCIS-PM H.4(B)(2)].

[^ 74] For guidance on “official orders,” see Part I, Military Members and their Families, Chapter 9, Spouses, Children, and Surviving Family Benefits, Section A, General Provisions for Spouses, Children, and Parents of Military Members, Subsection 2, Documenting “Official Orders” [12 USCIS-PM I.9(A)(2)].

[^ 75] For more information see Volume 5, Adoptions, Part F, Citizenship for Adopted Children, Chapter 3, Eligibility, Documentation and Evidence, Section B, Child Residing in the United States [5 USCIS-PM F.3(B)].

[^ 76] See 8 CFR 320.4.

[^ 77] See 8 CFR 341.2. See Section G, Documentation and Evidence [12 USCIS-PM H.5(G)].

[^ 78] See 8 CFR 320.5(a) and 8 CFR 337.1. See INA 337. See Part J, Oath of Allegiance, Chapter 2, The Oath of Allegiance [12 USCIS-PM J.2].

[^ 79] See INA 337(a). See 8 CFR 341.5(b).

[^ 80] See INA 341(a).

[^ 81] See 8 CFR 320.5(b) and 8 CFR 103.3(a).

Chapter 5 - Child Residing Outside the United States (INA 322)

A. General Requirements: Child Residing Outside the United States

The Child Citizenship Act of 2000 (CCA) amended the Immigration and Nationality Act (INA) to cover foreign-born children who did not automatically acquire citizenship under INA 320 and who reside outside the United States with a U.S. citizen parent.[1]

A child who regularly resides outside the United States is eligible for naturalization if all of the following conditions have been met:

- The person is a child[2] of a parent who is a U.S. citizen by birth or through naturalization (including an adoptive parent);[3]
- The child’s U.S. citizen parent or citizen grandparent meets certain physical presence requirements in the United States or an outlying possession;[4]
- The child is under 18 years of age;[5]
- The child is residing outside the United States in the legal and physical custody[6] of the U.S. citizen parent, or of a person who does not object to the application if the U.S. citizen parent is deceased; and
- The child is lawfully admitted, physically present, and maintaining a lawful status in the United States at the time the application is approved and the time of naturalization.

There are certain exceptions to these requirements for children of U.S. citizens in the U.S. armed forces accompanying their parent outside the United States on official orders.[7]

B. Eligibility to Apply on the Child’s Behalf

Typically, a child’s U.S. citizen parent files a Certificate of Citizenship application on the child’s behalf. If the U.S. citizen parent has died, the child’s citizen grandparent or the child’s U.S. citizen legal guardian may file the application on the child’s behalf within 5 years of the parent's death.[8]

C. Physical Presence of the U.S. Citizen Parent or Grandparent[9]

1. Physical Presence of Child’s U.S. Citizen Parent

A child’s U.S. citizen parent must meet the following physical presence requirements:

- The parent has been physically present in the United States or its outlying possessions for at least 5 years; and
- The parent met such physical presence for at least 2 years after he or she reached 14 years of age.

A parent's physical presence is calculated in the aggregate and includes time accrued in the United States during periods when the parent was not a U.S. citizen.

2. Exception for U.S. Citizen Member of the U.S. Armed Forces

The child's U.S. citizen service member parent may count any period of time he or she has resided abroad on official orders as physical presence in the United States.[10]

3. Reliance on Physical Presence of Child's U.S. Citizen Grandparent

If the child's parent does not meet the physical presence requirement, the child may rely on the physical presence of the child's U.S. citizen grandparent to meet the requirement. In such cases, the officer first must verify that the citizen grandparent, the citizen parent's mother or father, is a U.S. citizen at the time of filing. If the grandparent has died, the grandparent must have been a U.S. citizen and met the physical presence requirements at the time of his or her death.

Like in the case of the citizen parent, the officer also must ensure that:

- The U.S. citizen grandparent has been physically present in the United States or its outlying possessions for at least 5 years; and
- The U.S. citizen grandparent met such physical presence for at least 2 years after he or she reached 14 years of age.

Like the citizen parent, a grandparent's physical presence is calculated in the aggregate and includes time accrued in the United States during periods when the grandparent was not a U.S. citizen.

D. Temporary Presence by Lawful Admission and Status in United States

1. Temporary Presence and Status Requirements

In most cases, the citizenship process for a child residing abroad cannot take place solely overseas.

- The child is required to be lawfully admitted to United States, in any status, and be physically present in the United States;[11]
- The child is required to maintain the lawful status that he or she was admitted under while in the United States;[12] and
- The child is required to take the Oath of Allegiance in the United States unless the oath requirement is waived.[13]

2. Exception for Child of U.S. Citizen Service Member of the U.S. Armed Forces

Certain children of U.S. citizen members of the U.S. armed forces are not required to be lawfully admitted to or physically present in the United States.[14]

E. Children of U.S. Government Employees and Members of the Armed Forces Employed or Stationed Outside the United States

In addition to certain provisions for children of U.S. armed forces members and U.S. government employees stationed or employed outside the United States under INA 320, such U.S. citizen parents may apply for U.S. citizenship under INA 322 on behalf of their children under age 18 (if the children have not acquired citizenship under INA 320).[15] Children of members of the U.S. armed forces who are accompanying their parents outside of the United States on official orders may be eligible to complete all aspects of the naturalization proceedings outside the United States. This includes interviews, filings, oaths, ceremonies, or other proceedings relating to naturalization.[16]

F. Application for Citizenship and Issuance of Certificate under Section 322 (Form N-600K)

1. Submission of Application

A U.S. citizen parent of a child[17] born outside of the United States who did not acquire citizenship automatically may file an Application for Citizenship and Issuance of Certificate Under Section 322 (Form N-600K) for the child to become a U.S. citizen and obtain a Certificate of Citizenship. The application may be filed from outside of the United States.

If the U.S. citizen parent has died, the child's U.S. citizen grandparent or U.S. citizen legal guardian may submit the application, provided the application is filed not more than 5 years after the death of the U.S. citizen parent.[18]

The child of a U.S. citizen member of the U.S. armed forces accompanying their parent outside the United States on official orders may be eligible to become a U.S. citizen and obtain a Certificate of Citizenship under INA 322 without having to travel to the United States for any part of the naturalization process.[19]

USCIS issues proof of U.S. citizenship in the form of a Certificate of Citizenship if the Application for Citizenship and Issuance of Certificate under Section 322 is approved and the person takes the Oath of Allegiance, if required to do so.[20] The Certificate of Citizenship evidences the date of citizenship as of the date of the applicant's naturalization, which is the date of taking the Oath of Allegiance (unless waived).

USCIS does not mail Certificates of Citizenship outside the United States except when a military member is issued a Certificate of Citizenship under INA 320[21] or a military member's dependent child naturalizes under INA 322(d).

2. U.S. Passport or Consular Report of Birth Abroad as Evidence of Citizenship

A valid, unexpired U.S. passport or a Consular Report of Birth Abroad (CRBA) issued by the Department of State (DOS) is conclusive proof of U.S. citizenship.[22] A person who holds a valid, unexpired U.S. passport or a CRBA has conclusive evidence that they are already a U.S. citizen, so they are not eligible for naturalization under INA 322.

The officer must review the valid U.S. passport or CRBA and the documentation submitted with the application and contained in the record to determine if it was issued properly.

3. Request to Revoke U.S. Passport or Cancel Consular Report of Birth Abroad

If USCIS has evidence indicating that a U.S. passport or CRBA submitted as evidence was obtained or issued illegally, fraudulently, or erroneously, the officer reviews the case with USCIS counsel and, if appropriate, submits a formal request for revocation of the passport or cancellation of the CRBA[23] to DOS.

Only DOS has the authority to revoke a U.S. passport or cancel a CRBA.[24] DOS may revoke a U.S. passport or cancel a CRBA in cases where the passport or CRBA was obtained or issued illegally, fraudulently, or erroneously.[25]

USCIS provides the following information to DOS in the passport revocation or CRBA cancellation request:

- The applicant's complete biographic information, including name and any known aliases;
- The applicant's last known address;
- All previous unexpired U.S. passport numbers and alien registration numbers (A-numbers);
- A copy of the CRBA or of the biographical page of the U.S. passport submitted as evidence (if available);
- An explanation for requesting revocation or cancellation, including reasons for the request, analysis of the facts and dates used in determining that the passport or CRBA should be revoked or cancelled, and evaluation of evidence indicating that the applicant did not acquire U.S. citizenship;
- Copies of all documentary evidence in support of the request, including certified translations of any documents written or originally prepared in a foreign language; and
- The contact information of the USCIS office making the request.

Adjudication of Application with Revocation or Cancellation Request

After reviewing the case on the merits and requesting a revocation of a U.S. passport or a cancellation of a CRBA from DOS, the officer generally may not complete the adjudication of the Application for Citizenship and Issuance of Certificate Under Section 322 until DOS responds.

If DOS notifies USCIS that it does not intend to revoke the passport or cancel the CRBA, USCIS cannot naturalize a U.S. citizen and must deny the Application for Citizenship and Issuance of Certificate under Section 322.[26] However, a child with a properly issued U.S. passport or CRBA who has met all of the requirements for acquisition of citizenship under a different section of law may file an Application for Certificate of Citizenship (Form N-600) to obtain a Certificate of Citizenship.[27]

If the passport was valid at the time of filing but is expired at the time of adjudication, the officer should review the case with USCIS counsel and, if appropriate, consult with DOS before adjudicating.[28]

If DOS revokes the U.S. passport or cancels the CRBA, the applicant may become eligible for naturalization under INA 322. After the U.S. passport is revoked or the CRBA is cancelled, the officer may then approve the Application for Certificate of Citizenship and Issuance of Certificate under Section 322, if all other eligibility requirements are met.[29]

G. Documentation and Evidence

The applicant must submit the following required documents unless such documents are already contained in USCIS administrative record or do not apply.[30]

- The child's birth certificate or record.
- Marriage certificate of child's parents, if applicable.
- Proof of termination of any previous marriage of each parent if either parent was previously married and divorced or widowed, for example:
  - Divorce Decree; or
  - Death Certificate.
- Evidence of United States citizenship of parent:
  - Birth Certificate;
  - Naturalization Certificate;
  - Consular Report of Birth Abroad (FS-240);
  - A valid unexpired U.S. passport; or
  - Certificate of Citizenship.
- Documents verifying legitimation according to the laws of the child's residence or domicile or biological U.S. citizen father's residence or domicile if the child was born out of wedlock.
- Documentation of legal custody in the case of divorce, legal separation, or adoption.
- Documentation establishing that the U.S. citizen parent or U.S. citizen grandparent meets the required physical presence requirements, such as school records, military records, utility bills, medical records, deeds, mortgages, contracts, insurance policies, receipts, or attestations by churches, unions, or other organizations.
- Evidence that the child is present in the United States pursuant to a lawful admission and is maintaining such lawful status or evidence establishing that the child qualifies for an exception to these requirements as provided for children of members of the U.S. armed forces.[31] Such evidence may be presented at the time of interview when appropriate.
- Copy of the full, final adoption decree, if applicable.[32]
- Evidence of all legal name changes, if applicable, for the child, U.S. citizen parent, U.S. citizen grandparent or U.S. citizen legal guardian.

An applicant does not need to submit documents that were submitted in connection with:

- An immigrant visa application retained by the American Consulate for inclusion in the immigrant visa package; or
- An immigrant petition or application included in a USCIS administrative file.

If necessary, an officer may request additional documentation to make a decision on the application.

H. Citizenship Interview and Waiver

In general, an applicant must appear in person for an interview before a USCIS officer after filing an Application for Citizenship and Issuance of Certificate Under Section 322 (Form N-600K). This includes the U.S. citizen parent or parents if the application is filed on behalf of a child under 18 years of age.[33] USCIS, however, waives the interview requirement if all the required documentation necessary to establish the applicant's eligibility is already included in USCIS administrative records or if any of the following documentation is submitted along with the application.[34]

I. Decision and Oath of Allegiance

1. Approval of Application, Oath of Allegiance, and Waiver for Children under 14 Years of Age

If an officer approves the Form N-600K, USCIS administers the Oath of Allegiance before issuing a Certificate of Citizenship.[35]

However, the INA permits USCIS to waive the taking of the Oath of Allegiance if USCIS determines the person is unable to understand its meaning.[36] USCIS has determined that children under the age of 14 are generally unable to understand the meaning of the oath.

Accordingly, USCIS waives the oath requirement for a child younger than 14 years of age. If USCIS waives the oath requirement, USCIS issues a Certificate of Citizenship after the officer approves the application.

If an applicant does not take the Oath of Allegiance and is not eligible for a waiver, USCIS cannot issue a Certificate of Citizenship.[37]

2. Denial of Application

If an officer denies the Certificate of Citizenship application, the officer must notify the applicant in writing of the reasons for denial and include information on the right to appeal in the notice.[38] An applicant may file an appeal within 30 days of service of the decision.

Footnotes

[^ 1] See INA 322. See Appendix: Nationality Chart 4 - Children of U.S. Citizens Regularly Residing Outside United States (INA 322) [12 USCIS-PM H.3, Appendices Tab].

[^ 2] For the definition of a child, see Chapter 2, Definition of Child and Residence for Citizenship and Naturalization [12 USCIS-PM H.2].

[^ 3] For cases based on an adoptive relationship, the requirements of INA 101(b)(1)(E), INA 101(b)(1)(F), or INA 101(b)(1)(G) must be met. See Volume 5, Adoptions, Part E, Family-Based Adoption Petitions [5 USCIS-PM E]. See Volume 5, Adoptions, Part C, Child Eligibility Determinations (Orphan) [5 USCIS-PM C]. See Volume 5, Adoptions, Part D, Child Eligibility Determinations (Hague) [5 USCIS-PM D]. For information on citizenship for adopted children, see Volume 5, Adoptions, Part F, Citizenship for Adopted Children [5 USCIS-PM F].

[^ 4] See Section C, Physical Presence of U.S. Citizen Parent or Grandparent [12 USCIS-PM H.5(C)].

[^ 5] USCIS considers a child to be under the age of 18 years until the end of the day on the child's 18th birthday. See *Matter of L. M. and C. Y. C.,* 4 I&N Dec. 617 (BIA 1952).

[^ 6] For information on legal and physical custody, see Chapter 4, Automatic Acquisition of Citizenship after Birth (INA 320), Section B, Child in Legal and Physical Custody of U.S. Citizen Parent [12 USCIS-PM H.4(B)]. See 8 CFR 322.1(1)-(2).

[^ 7] See INA 322(d).

[^ 8] As of November 2, 2002, a U.S. citizen grandparent or U.S. citizen legal guardian became eligible to apply for naturalization under this provision on behalf of a child. See the 21st Century Department of Justice Appropriations Authorization Act for Fiscal 2002, Pub. L. 107-273 (PDF) (November 2, 2002), which amended INA 322 to permit U.S. citizen grandparents or U.S. citizen legal guardians to apply for naturalization on behalf of a child if the child's U.S. citizen parent has died.

[^ 9] See INA 322(a)(2). See 8 CFR 322.2(a)(2).

[^ 10] See Part I, Military Members and their Families, Chapter 9, Spouses, Children, and Surviving Family Benefits, Section C, Children of Military Members [12 USCIS-PM I.9(C)]. See INA 322(d). See 8 CFR 322.2(c).

[^ 11] See INA 322(a)(5). See 8 CFR 322.2(a)(5).

[^ 12] See INA 322(a)(5).

[^ 13] See INA 322(b). See Section I, Decision and Oath of Allegiance [12 USCIS-PM H.5(I)].

[^ 14] See Part I, Military Members and their Families, Chapter 9, Spouses, Children, and Surviving Family Benefits [12 USCIS-PM I.9]. See INA 322(d). See 8 CFR 322.2(c).

[^ 15] See INA 322(a). To be eligible for citizenship under INA 322, the child must be under 18 and "residing outside of the United States in the legal and physical custody of the applicant." If the child has already acquired U.S. citizenship under INA 320, USCIS denies the Application for Citizenship and Issuance of Certificate Under Section 322 (Form N-600K).

[^ 16] See INA 322(d).

[^ 17] For more information about citizenship for adopted children, see Volume 5, Adoptions, Part F, Citizenship for Adopted Children, Chapter 3, Eligibility, Documentation and Evidence, Section C, Child Residing Outside of the United States [5 USCIS-PM F.3(C)].

[^ 18] See 8 CFR 322.3(a).

[^ 19] See Part I, Military Members and their Families, Chapter 9, Spouses, Children, and Surviving Family Benefits, Section C, Children of Military Members [12 USCIS-PM I.9(C)].

[^ 20] See Section I, Decision and Oath of Allegiance [12 USCIS-PM H.5(I)]. See Part J, Oath of Allegiance, Chapter 2, The Oath of Allegiance [12 USCIS-PM J.2].

[^ 21] See 8 U.S.C. 1443a.

[^ 22] See *Matter of Villanueva* (PDF), 19 I&N Dec. 101 (BIA 1984) (Unless void on its face, a valid U.S. passport issued to a person as a citizen of the United States constitutes conclusive proof of the person's U.S. citizenship). See 22 U.S.C. 2705 (A valid U.S. passport or CRBA has the same force and effect as proof of U.S. citizenship as Certificates of Naturalization or Certificates of Citizenship issued by USCIS).

[^ 23] The process to request cancellation of a CRBA to DOS is the same as that for a passport revocation. The same process should be followed to request the revocation of a parent's or grandparent's U.S. passport or CRBA, when USCIS, while adjudicating an Application for Citizenship and Issuance of Certificate under Section 322, determines that it was issued illegally, fraudulently, or erroneously.

[^ 24] See 22 U.S.C. 211a. See 22 CFR 51.60. See INA 361. See Rules Governing the Granting, Issuing, and Verifying of United States Passports, 31 FR 10603 (PDF) (Aug. 5, 1966).

[^ 25] See INA 361.

[^ 26] See *Matter of Villanueva* (PDF), 19 I&N Dec. 101 (BIA 1984).

[^ 27] See INA 301, INA 309, and INA 320. See Chapter 3, United States Citizens at Birth (INA 301 and 309), Section D, Application for Certificate of Citizenship (Form N-600) [12 USCIS-PM H.3(D)]. See Chapter 4, Automatic Acquisition of Citizenship after Birth (INA 320) [12 USCIS-PM H.4].

[^ 28] An expired U.S. passport is not sufficient evidence of citizenship. See 22 U.S.C. 2705.

[^ 29] See INA 361.

[^ 30] See 8 CFR 322.3(b).

[^ 31] See INA 322(d)(2).

[^ 32] For more information see Volume 5, Adoptions, Part F, Citizenship for Adopted Children, Chapter 3, Eligibility, Documentation and Evidence, Section C, Child Residing Outside of the United States [5 USCIS-PM F.3(C)].

[^ 33] See 8 CFR 322.4.

[^ 34] See 8 CFR 341.2. See Section G, Documentation and Evidence [12 USCIS-PM H.5(G)].

[^ 35] See 8 CFR 322.5(a) and 8 CFR 337.1. See INA 337. See Part J, Oath of Allegiance, Chapter 2, The Oath of Allegiance [12 USCIS-PM J.2].

[^ 36] See INA 337(a). See 8 CFR 341.5(b).

[^ 37] See INA 322(b).

[^ 38] See 8 CFR 322.5(b) and 8 CFR 103.3(a).

Chapter 6 - Special Provisions for the Naturalization of Children

A. Children Subjected to Battery or Extreme Cruelty

In general, the spouse of a U.S. citizen who resides in the United States may be eligible for naturalization based on his or her marriage under section 319(a) of the Immigration and Nationality Act (INA). On October 28, 2000, Congress expanded the naturalization provision based on a family relationship to a U.S. citizen. The amendments added that children of U.S. citizens may naturalize if they obtained lawful permanent resident (LPR) status based on having been battered or subjected to extreme cruelty by their citizen parent.[1]

1. Eligibility for Special Provision

A child[2] is eligible for naturalization under the spousal naturalization provisions[3] if he or she obtained LPR status based on:

- An approved Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) as the self-petitioning child of an abusive U.S. citizen;
- An approved Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) as the self-petitioning child of an abusive LPR, if the abusive parent naturalizes after USCIS approves the petition;[4]
- An approved Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) as the derivative child[5] of a self-petitioning spouse of a U.S. citizen who was battered or subjected to extreme cruelty by a U.S. citizen spouse;[6] or
- Cancellation of removal where the applicant was the child of a U.S. citizen who subjected him or her to battery or extreme cruelty.[7]

A child is also eligible for naturalization under the spousal naturalization provisions if he or she had the conditions on his or her residence removed based on:

- An approved battery or extreme cruelty waiver of the joint filing requirement for the Petition to Remove Conditions on Residence (Form I-751).[8]

The applicant must meet all other eligibility requirements for naturalization, including the requirement that the applicant is at least 18 years of age at the time of filing.

Stepchildren may also naturalize under this provision if otherwise eligible.[9] Under this provision, a stepchild's relationship with the U.S. citizen stepparent does not need to continue to exist at the time of the application for naturalization.

2. Exception to General Naturalization Requirements

An applicant subjected to battery or extreme cruelty by his or her U.S. citizen parent is exempt from the following naturalization requirements:[10]

- Living with the U.S. citizen parent for at least 3 years at the time of filing the naturalization application; and
- The applicant's U.S. citizen parent, who petitioned for him or her, has U.S. citizenship from the time of filing until the time the applicant takes the Oath of Allegiance.[11]

These exceptions also apply to derivative children.

B. Surviving Child of Members of the U.S. Armed Forces

On November 24, 2003, Congress amended certain military-related immigration provisions of the INA. This included extending certain immigration benefits to surviving spouses, children, and parents of deceased U.S. citizen service members.[12]

1. Eligibility for Special Provision

A surviving child, who has not already acquired U.S. citizenship, may be eligible for naturalization.[13] In addition, the child may qualify for certain exemptions from the general naturalization requirements. To qualify for this special provision, the applicant must be the child[14] of a U.S. citizen service member who died during a period of honorable service in an active duty status in the U.S. armed forces.[15] This includes service members who were not U.S. citizens at the time of their death but were later granted posthumous U.S. citizenship.

The applicant must meet all other eligibility requirements for naturalization, including the requirement that the applicant be over the age of 18 at the time of filing. The applicant must be the genetic, legitimated, or adopted son or daughter of a U.S. citizen, or the son or daughter of a non-genetic gestational U.S. citizen mother who is recognized by the relevant jurisdiction as the child's legal parent.[16] A person who is the surviving stepchild of a member of the U.S. armed forces is not eligible to naturalize under this provision.

2. Exceptions to General Naturalization Requirements

Under the special provision, the qualified surviving child is exempt from the following requirements:

- Continuous residence;
- Physical presence; and
- Three-month physical presence within the state or jurisdiction.

Footnotes

[^ 1] See the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386 (PDF) (October 28, 2000). For more information regarding battered spouses or spouses subjected to extreme cruelty, see Part G, Spouses of U.S. Citizens, Chapter 3, Spouses of U.S. Citizens Residing in the United States, Section F, Eligibility for Persons Subjected to Battery or Extreme Cruelty [12 USCIS-PM G.3(F)].

[^ 2] The child must be 18 years of age or older to apply for naturalization.

[^ 3] Under spousal naturalization provisions, the child is required to show 3 years of continuous residence and physical presence at least half of that time. See INA 319(a).

[^ 4] See INA 204(a)(1)(B)(ii). The definition of child includes certain stepchildren. See INA 101(b)(1).

[^ 5] A derivative child is an unmarried child who can accompany the principal beneficiary based on a parent-child relationship.

[^ 6] See INA 319(a). See INA 204(a)(1)(A)(iii), INA 204(a)(1)(A)(iv), for inclusion of the derivative child in the VAWA self-petitioning provisions. See INA 319(a).

[^ 7] See INA 240A(b)(2)(A)(i)(I) or INA 240A(b)(2)(A)(i)(III).

[^ 8] The waiver must be based on either the parent being subjected to battery or extreme cruelty by the petitioning citizen or LPR spouse, or the child being subjected to battery or extreme cruelty by the conditional permanent resident parent or the petitioning citizen or LPR spouse. See INA 216(c)(4)(C).

[^ 9] See INA 101(b)(1).

[^ 10] See INA 319(a).

[^ 11] See INA 204(a)(1)(A)(iii)(II)(aa)(CC)(bbb). See INA 204(a)(1)(A)(iv).

[^ 12] See the National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136 (PDF) (November 24, 2003). See INA 319(d). See INA 329A.

[^ 13] See INA 319(d). For information on eligibility for surviving parents and spouses, see Part I, Military Members and their Families, Chapter 9, Spouses, Children, and Surviving Family Benefits [12 USCIS-PM I.9].

[^ 14] See INA 101(c)(1). The child must meet the definition of child applicable to citizenship and naturalization. See Part H, Children of U.S. Children, Chapter 2, Definition of Child [12 USCIS-PM H.2].

[^ 15] See Part H, Children of U.S. Citizens, Chapter 2, Definition of Child and Residence for Citizenship and Naturalization [12 USCIS-PM H.2].

[^ 16] For further guidance on the definition of child for citizenship and naturalization purposes, see Chapter 2, Definition of Child and Residence for Citizenship and Naturalization [12 USCIS-PM H.2].

Chapter 7 - Deriving Citizenship Before the Child Citizenship Act of 2000 (Former INA 321 and 320)

A. General Requirements for Deriving Citizenship After Birth (Before February 27, 2001)

The Child Citizenship Act of 2000 (CCA) applies only to children born on or after February 27, 2001, or those who were under 18 years of age as of that date.[1] Persons who were 18 years of age or older before February 27, 2001, do not qualify for citizenship under current Section 320 of the Immigration and Nationality Act (INA). However, such persons may have derived citizenship through the relevant law in effect before the CCA.

In general, former INA 321[2] applies to persons who reached the age of 18 years on or after December 24, 1952, but before February 27, 2001. Former INA 320 may also apply to these children.[3]

According to former INA 321, a child born outside of the United States to two alien parents (or one alien parent and one U.S. citizen parent who subsequently lost U.S. citizenship) becomes a U.S. citizen if all of the following conditions were met before the child was 18 years of age:

- The child's parent or parents met one of the following conditions:
  - Both parents naturalized;
  - One surviving parent naturalized if the other parent was deceased;
  - One parent naturalized who had legal custody of the child if there was a divorce or legal separation of the parents; or
  - The child's mother naturalized if the child was born out of wedlock and paternity was not established by legitimation.
- The child was under 18 years of age when the parent or parents naturalized; and
- The child was residing in the United States following a lawful admission for permanent residence at the time the parent or parents naturalized or thereafter began to reside permanently in the United States while under the age of 18.

The sections below explain each of these requirements. There is no specific order in which the requirements of the law must have been satisfied for citizenship, as long as all requirements were satisfied before the child's 18th birthday.[4]

B. Naturalization of Both Parents

Unlike the CCA, which requires only one parent to be a U.S. citizen by birth or naturalization, former INA 321 generally required both parents to naturalize before the child turned 18 for the child to derive citizenship.[5] This includes two alien parents who naturalized, or one alien parent and a U.S. citizen parent who lost U.S. citizenship, and later both parents naturalized. In certain circumstances, discussed below, the child could derive citizenship when only one of the parents naturalized.

C. Naturalization of Surviving Parent

A child born outside the United States derived U.S. citizenship under former INA 321 when the surviving parent naturalized if the other parent was deceased.[6] The surviving parent did not necessarily have to naturalize after the death of the other parent. The surviving parent could have been a U.S. citizen through naturalization before the other parent died. A child whose alien parent died after the naturalization of the surviving parent derived citizenship on the date of the death of the alien parent, if the child was under the age of 18, and met all other requirements for derivation.

D. Naturalization of Parent Having Legal Custody Where There Has Been a Legal Separation of the Parents

Former INA 321 also provided for a child to derive citizenship if there was a legal separation of the parents and the parent having legal custody of the child naturalized.[7]

1. Legal Separation or Divorce of the Parents

In order for parents to legally separate, they must be married or in a legally recognized relationship, from which they could legally separate. If parents were never lawfully married there can be no “legal separation” or divorce. The term “legal separation” means “a formal, judicial alteration of the marital relationship.”[8]

An informal separation is not sufficient to render the parties legally separated.[9] For purposes of former INA 321, a relevant court must have determined the legal separation (or the divorce).

Under former INA 321(a)(3), it is not a requirement that children be born in wedlock to derive citizenship based upon the naturalization of the parent who had legal custody of the child where there was a legal separation of the parents. Children born out of wedlock could derive citizenship if their parents later married and then legally separated before the child reached the age of 18.[10] As long as the child met all requirements before the age of 18 years, legal separation did not need to occur before the parent’s naturalization.[11]

2. Legal Custody

Legal custody, which refers to the responsibility for and authority over a child, is determined according to the relevant jurisdiction’s law or is determined by a court decree or order. If there was a judicial determination or judicial or statutory grant of custody, then the parent to whom custody was granted had legal custody for former INA 321 purposes.[12]

A child of a naturalized U.S. citizen and an alien, whose parents divorced or legally separated, derived citizenship under former INA 321 on the date the naturalized U.S. citizen parent was awarded custody of the child, if all other conditions were met.[13]

If the parent naturalized after the date that custody was awarded to the naturalizing parent, the child would derive citizenship under former INA 321(a) on the date of the naturalization of the custodial parent, provided that the child was under the age of 18 and all other conditions were met. If the child resided outside the United States when the U.S. citizen parent was awarded custody and naturalized, the child would derive citizenship after beginning to reside permanently in the United States while under the age of 18.[14]

Actual Uncontested Custody

If a child’s parents divorced or legally separated, but the decree of divorce or legal separation order was silent on the custody determination and the relevant jurisdiction’s law did not determine which parent had custody of the children, then USCIS considers the U.S. citizen parent who had actual uncontested (physical) custody of the child to have had legal custody of the child.[15] Evidence showing the child was living with the U.S. citizen parent establishes “actual, uncontested custody.”[16]

Joint Custody

For purposes of former INA 321, unlike current INA 320, some courts have held that “legal custody” does not include joint custody and instead requires sole legal custody. In particular, sole legal custody is required for applicants residing within the jurisdiction of the Fifth and Ninth Circuits of the U.S. Courts of Appeals.[17] If there is no controlling law in a particular jurisdiction stating that sole legal custody is required, joint custody is sufficient to satisfy the legal custody requirement under former INA 321.

Private Custody Agreement

A private custody agreement between the parents generally does not impact the judicial custody determination following the divorce or legal separation for purposes of citizenship claims.[18] However, an applicant may provide documentation of a state law that recognized an informal custody agreement between parents. If such a state law existed, an informal custody agreement may determine which parent had legal custody, if there was no court decree or the court decree was silent as to a formal custody agreement.[19]

Nunc Pro Tunc Custody Orders

Sometimes, evidence supporting a claim of citizenship may include a nunc pro tunc[20] correction of a custody order that retroactively modifies a legal custody order. For purposes of derivative citizenship, USCIS does not recognize nunc pro tunc custody orders if entered after the child’s 18th birthday that change the legal custody order from the time it was entered.[21]

E. Naturalization of Mother When Child Was Born Out of Wedlock and Paternity Not Established by Legitimation

A child born out of wedlock whose mother naturalized, and whose paternity was not established by legitimation, derived citizenship under former INA 321[22] on the date the mother naturalized, if the child was under the age of 18, and if the child was residing in the United States following a lawful admission for permanent residence. If the child resided outside the United States, the child would derive citizenship after beginning to reside permanently[23] in the United States while under the age of 18.

Officers should review the legitimation laws of the father’s and child’s residence or domicile, whether in the United States or outside the United States, to determine if a child’s paternity was established by legitimation.[24]

1. Paternity Not Established by Legitimation

If the child was legitimated, generally paternity was established by legitimation, and therefore the naturalization of the mother was not sufficient for the child to meet the requirements of the second clause of former INA 321(a)(3).[25] However, there are cases where a child was legitimated, yet the child's paternity was not established by legitimation.

Many countries have eliminated legal distinctions between legitimate and illegitimate children based on the marital status of their parents. In these countries, all children have equal rights and as such they are considered legitimate; therefore, paternity has generally been established by legitimation. However, some countries that have eliminated the legal distinctions between children born in wedlock and those born out of wedlock, may also have retained formal means of legitimation (for example, legitimation through the marriage of the parents).

In these cases, for purposes of former INA 321(a)(3), paternity was established by legitimation only if legitimation was achieved through the formal affirmative act required by the law.[26] If such act did not occur (for example, the child's parents never married), then paternity was not established by legitimation, even if the country eliminated legal distinctions between legitimate and illegitimate children. Therefore, in these cases, the child may have derived U.S. citizenship from the mother if all other requirements were satisfied. The burden is on the applicant to establish the requirements for derivative citizenship by a preponderance of evidence.[27]

Retention of U.S. Citizenship

A child who derived U.S. citizenship because the child's mother naturalized and paternity had not been established by legitimation does not lose citizenship if the father later legitimated the child and paternity was established under this clause of former INA 321.

F. Definition of Reside Permanently

Generally, a child must be lawfully admitted for permanent residence to derive U.S. citizenship under former INA 321. However, former INA 321 also states that the child may derive citizenship if the child "begins to reside permanently in the United States" after the parent or parents' naturalization while under the age of 18 years.[28]

Some circuit courts of appeals have defined "reside permanently" to not require a lawful admission for permanent residence. In the Second Circuit (New York, Connecticut, and Vermont), and the Ninth Circuit (Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, Guam, Hawaii, and Northern Mariana Islands), the child is not required to become a lawful permanent resident before the age of 18, provided that the child shows some objective official manifestation of permanent residence in the United States while under age 18.[29] In these jurisdictions, a child begins to reside permanently in the United States when the child is physically in the United States, intends to reside in the United States permanently, and has taken some official action to accomplish that, such as applying for lawful permanent residence.[30]

Outside the Second and Ninth Circuits, USCIS follows Board of Immigration Appeals (BIA) precedent that interprets "reside permanently" as requiring a lawful admission for permanent residence.[31]

G. Adopted Children

As originally enacted in 1952, former INA 321 did not apply to adopted children[32] of naturalized citizens. Adopted children could not derive U.S. citizenship from adoptive parents. However, adopted children could still derive from their biological parents if they met all other requirements, provided that the child's adoption did not terminate the parental relationship with the naturalizing parent or parents.[33]

On October 5, 1978, Congress amended former INA 321 to allow an adopted child to derive citizenship if the child was residing in the United States in the custody of the adoptive parent or parents, following a lawful admission for permanent residence at the time the adoptive parent or parents naturalized.[34]

H. Application for Certificate of Citizenship (Form N-600)

1. Submission of Application

A person born outside the United States who claims to have derived U.S. citizenship is not required to have evidence of such status. However, if the person chooses to seek documentation of U.S. citizenship status, the person may file an Application for Certificate of Citizenship (Form N-600) with USCIS.[35]

The Form N-600 must be submitted in accordance with the form instructions and filed with the required fee.[36] There is no filing fee for Form N-600 for current or former members of the U.S. armed forces if they are filing on their own behalf.

Jurisdiction

The Secretary of Homeland Security has jurisdiction over the administration and enforcement of the INA within the United States, and the Secretary of State has jurisdiction over claims of U.S. citizenship made by persons who are outside of the United States.[37] Therefore, generally, an Application for Certificate of Citizenship is submitted by persons who claim U.S. citizenship and are present within the United States. However, when a person who does not live in the United States files Form N-600, USCIS accepts and processes the application, but does not make a decision on the merits until the person is present in the United States in order to ensure that USCIS has jurisdiction over the application.[38]

2. Photographs and Signature

USCIS may require the applicant (person seeking the Certificate of Citizenship), regardless of age, to appear at a local Application Support Center (ASC)[39] for photograph and signature submission.[40] A parent or legal guardian may sign for a mentally incompetent person.[41]

USCIS does not submit information collected in connection with Form N-600 to the Federal Bureau of Investigation (FBI) for a background check.

Failure to Appear for the ASC Appointment

USCIS may consider the Form N-600 abandoned in cases where the person seeking a Certificate of Citizenship fails to appear for the ASC appointment, unless, by the appointment time, USCIS receives a change of address or rescheduling request that USCIS concludes warrants excusing the failure to appear.[42]

If USCIS denies the application due to abandonment, the person eligible for the Certificate of Citizenship may submit a motion to reopen by filing a Notice of Appeal or Motion (Form I-290B).[43]

USCIS does not deny an application for abandonment for failure to provide photographs if USCIS has evidence that the applicant is a member of the U.S. armed forces who is permanently or temporarily outside the United States and unable to provide photographs or appear to submit a photograph and signature for reasons related to the individual's military

service. USCIS coordinates with military service members in these circumstances.

3. U.S. Passport or Consular Report of Birth Abroad as Evidence of Citizenship

A person may also apply for a U.S. passport with the U.S. Department of State (DOS) to serve as evidence of their U.S. citizenship.[44] A U.S. passport is valid for a limited time as established by DOS policies and standards on passport issuance.[45] Once a passport expires, it is no longer conclusive evidence of citizenship.[46] However, a Certificate of Citizenship never expires.

A valid, unexpired U.S. passport or a Consular Report of Birth Abroad (CRBA) serves as evidence of a person's U.S. citizenship.[47] An applicant for a Certificate of Citizenship may submit a valid and unexpired U.S. passport as evidence of U.S. citizenship.[48] The officer must review the valid U.S. passport and the documentation submitted with the application and contained in the record to determine if it was issued properly.

The officer approves the Form N-600 if the applicant is a U.S. citizen and meets all requirements.

4. Request to Revoke U.S. Passport or Cancel Consular Report of Birth Abroad

If the officer determines that the applicant is not a U.S. citizen or USCIS has evidence indicating that a U.S. passport submitted as evidence was obtained or issued illegally, fraudulently, or erroneously, the officer reviews the case with USCIS counsel. Then, if appropriate, the officer may request that DOS revoke the U.S. passport.[49]

Only DOS has the authority to revoke a U.S. passport or cancel a CRBA.[50] DOS may revoke a U.S. passport in cases where the passport was obtained or issued illegally, fraudulently, or erroneously.[51]

USCIS provides the following information to DOS in the passport revocation request:

- The applicant's complete biographic information, including name and any known aliases;
- The applicant's last known address;
- All previous unexpired U.S. passport numbers and alien registration numbers (A-numbers);
- An explanation for requesting revocation, including reasons for the request, analysis of the facts and dates used in determining that the passport should be revoked, and evaluation of evidence indicating that the applicant did not acquire U.S. citizenship;
- Copies of all documentary evidence in support of the request, including certified translations of any documents written or originally prepared in a foreign language; and
- The contact information of the USCIS office making the request.

Adjudication of Application with Revocation Request

After reviewing the case on the merits and requesting a revocation of a U.S. passport from DOS, the officer generally may not complete the adjudication of the Form N-600 until DOS responds.

If DOS notifies USCIS that it does not intend to revoke the passport, USCIS approves the Form N-600.[52] However, in cases with unusual or complex circumstances, USCIS may further consult with DOS.

If USCIS has evidence indicating that a U.S. passport submitted as evidence was obtained or issued illegally, fraudulently, or erroneously, and the passport was valid at the time of filing, but is expired at the time of adjudication, the officer should review the case with USCIS counsel and DOS before adjudicating.[53]

If DOS revokes the U.S. passport, the officer denies the application in cases where the applicant does not otherwise meet the eligibility requirements for issuance of a Certificate of Citizenship.

I. Documentation and Evidence

The applicant must submit the following required documents unless the USCIS administrative record already contains such documents, or they do not apply:

- The applicant's birth certificate or record;
- Marriage certificate of applicant's parents, if applicable;
- Death certificate of applicant's parent or parents, if applicable;
- Proof of termination of any previous marriage of each parent if either parent was previously married and divorced or widowed. For example, this could include a divorce decree, a legal separation order, or a death certificate;
- Evidence of U.S. citizenship of applicant's parent or parents, such as a birth certificate showing birth in the United States, Certificate of Naturalization, Consular Report of Birth Abroad (FS-240), a valid unexpired U.S. passport, or a Certificate of Citizenship;
- Documents verifying legitimation according to the laws of the applicant's residence or domicile or biological U.S. citizen father's residence or domicile if the child was born out of wedlock;
- Documentation of legal custody in the case of divorce, legal separation, or adoption;[54]
- Copy of the applicant's Permanent Resident Card or Alien Registration Receipt Card or other evidence of lawful permanent resident status, such as an Alien Documentation, Identification and Telecommunication stamp in a valid foreign passport or travel document issued by USCIS;
- Copy of the full, final adoption decree, if adopted.[55] If the child did not have a foreign adoption that is considered full, final, and complete, the applicant must submit evidence of the final adoption decree or order, or, if the U.S. jurisdiction of the adoptive parent or parents' residence recognizes the foreign adoption decree or order as full and final, evidence establishing this under state law[56] together with the foreign adoption order;[57] and
- Evidence of all legal name changes, if applicable, for the applicant and U.S. citizen parent.[58]

An applicant does not need to submit documents that were submitted in connection with applicant's prior applications, petitions or requests, such as:

- An immigrant visa application retained by a U.S. consulate for inclusion in the immigrant visa package; or
- An immigrant petition or application included in a USCIS administrative file.

If necessary, an officer may request additional documentation to make a decision on the application.

J. Citizenship Interview and Waiver

In general, an applicant must appear in person for an interview before a USCIS officer after filing Form N-600. USCIS, however, may waive the interview requirement if USCIS administrative records already include all the required documentation necessary to establish the applicant's eligibility or if the applicant submits the required documentation along with the application.[59]

K. Decision and Oath of Allegiance

1. Approval of Application and Oath of Allegiance

Once the applicant has met all the requirements for citizenship, USCIS approves the Form N-600. USCIS determines the date of citizenship based on when the applicant met the last requirement.

USCIS issues proof of U.S. citizenship in the form of a Certificate of Citizenship if USCIS approves the Form N-600 and the person takes the Oath of Allegiance, if required to do so.[60]

USCIS does not mail Certificates of Citizenship outside the United States except when USCIS issues a Certificate of Citizenship to a military member.

If an applicant does not take the Oath of Allegiance and is not eligible for a waiver, USCIS cannot issue a Certificate of Citizenship.[61]

2. Denial of Application

If an officer denies the Form N-600, the officer must notify the applicant in writing of the reasons for denial and include information on the right to appeal in the notice.[62] An applicant may file an appeal within 30 calendar days after service of the decision (33 days if the decision was mailed).

Footnotes

[^ 1] Persons born on or after February 28, 1983, were under the age of 18 on February 27, 2001.

[^ 2] Section 321 of the INA, immediately before it was repealed by the CCA, provided that:

(a) A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:

(1) The naturalization of both parents; or

(2) The naturalization of the surviving parent if one of the parents is deceased; or

(3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if

(4) Such naturalization takes place while such child is under the age of eighteen years; and

(5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of this subsection, or the parent naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of eighteen years.

(b) Subsection (a) of this section shall apply to an adopted child only if the child is residing in the United States at the time of naturalization of such adoptive parent or parents, in the custody of his adoptive parent or parents, pursuant to a lawful admission for permanent residence.

See Section 321 of the INA of 1952, Pub. L. 82–414 (PDF), 66 Stat. 163, 245 (June 27, 1952), as amended by Pub. L. 95-417 (PDF), 92 Stat. 917, 918 (October 5, 1978), the INA Amendments of 1981, Pub. L. 97-116 (PDF), 96 Stat. 1611, 1620 (December 29, 1981), the INA Amendments of 1986, Pub. L. 99-653 (PDF), 100 Stat. 3655, 3658 (November 14, 1986), and the Immigration Technical Corrections Act of 1988, Pub. L. 100-525 (PDF), 102 Stat. 2609, 2617-18 (October 24, 1988). For more information on specific requirements during different historical periods before the CCA, see Appendix: Nationality Chart 3 - Derivative Citizenship of Children [12 USCIS-PM H.3, Appendices Tab]. For more information on applicability to adopted children, see Appendix: How Previous Citizenship Provisions Apply to Adopted Children [5 USCIS-PM F, Appendices Tab].

[^ 3] Former Section 320 of the INA, before amendment by the CCA, provided that:

(a) A child born outside of the United States, one of whose parents at the time of the child's birth was an alien and the other of whose parents then was and never thereafter ceased to be a citizen of the United States, shall, if such alien parent is naturalized, become a citizen of the United States, when-

(1) such naturalization takes place while such child is under the age of eighteen years; and

(2) such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of naturalization or thereafter and begins to reside permanently in the United States while under the age of eighteen years.

(b) Subsection (a) of this section shall apply to an adopted child only if the child is residing in the United States at the time of naturalization of such adoptive parent, in the custody of his adoptive parents, pursuant to a lawful admission for permanent residence.

For more information on applicability to adopted children, see Appendix: How Previous Citizenship Provisions Apply to Adopted Children [5 USCIS-PM F, Appendices Tab].

[^ 4] See *Matter of Baires-Larios* (PDF), 24 I&N Dec. 467, 470 (BIA 2008).

[^ 5] See former INA 321(a)(1).

[^ 6] See former INA 321(a)(2).

[^ 7] See former INA 321(a)(3) (the naturalization of the parent having legal custody of the child when there has been a legal separation of the parents).

[^ 8] See *Nehme v. INS*, 252 F.3d 415, 425–26 (5th Cir.2001) (holding that legal separation under former INA 321(a)(3) means "a formal, *judicial* alteration of the marital relationship" (emphasis in original)). See *Johnson v. Whitehead*, 647 F.3d 120, 125-26 (4th Cir. 2011) (citing cases that parents had to be married at one time to meet legally separated requirement). See *Barthelemy v. Ashcroft*, 329 F.3d 1062 (9th Cir. 2003) (natural parents never married and therefore could not legally separate). See *Thompson vs. Lynch*, 808 F.3d 939 (1st Cir. 2015).

[^ 9] See *Nehme v. INS*, 252 F.3d 415, 425–26 (5th Cir.2001). See *Brissett v. Ashcroft,* 363 F.3d 130, 133-34 (2nd Cir. 2004).

[^ 10] See *United States v. Mayea-Pulido*, 946 F.3d 1055, 1064 (9th Cir. 2020), where the Court held that "a nonmarital child would automatically derive citizenship under [former INA 321(a)(3)] if his parents later married and then legally separated, the same as a marital child whose parents were married at his birth but later separated." See *Levy v. U.S. Attorney Gen.*, 882 F.3d 1364, 1368 (11th Cir. 2018), holding that "the clause does not require that a child be born into wedlock: a child born out of wedlock whose parents later marry and legally separate qualifies" under former INA 321(a)(3).

[^ 11] See *Matter of Baires-Larios* (PDF), 24 I&N Dec. 467 (BIA 2008), reaffirmed by *Matter of Douglas* (PDF), 26 I&N Dec. 197 (BIA 2013).

[^ 12] See *Matter of M-*, 3 I&N Dec. 850 (BIA 1950).

[^ 13] See former INA 321(a)(3) (the naturalization of the parent having legal custody of the child when there has been a legal separation of the parents).

[^ 14] See Section F, Definition of Reside Permanently [12 USCIS-PM H.7(F)].

[^ 15] See *Matter of M-*, 3 I&N Dec. 850 (BIA 1950).

[^ 16] See *Bagot v. Ashcroft*, 398 F.3d 252, 259 (3rd Cir. 2005) (father had legal custody of the child under the "actual uncontested custody" standard where the child lived with him and no one contested the father's custody). See *Garcia v. USICE*, 669 F.3d 91, 97 (2nd Cir. 2011).

[^ 17] See *Bustamante-Barrera v. Gonzales,* 447 F.3d 388, 396 (5th Cir. 2006). See *U.S. v. Casasola,* 670 F.3d 1023, 1029 (9th Cir. 2012). See the Geographic Boundaries of United States Courts of Appeals and United States District Courts (PDF) website.

[^ 18] For example, a notarized letter from the mother granting custody of the child to the father is insufficient to change a pre-existing judicial custody determination granting legal custody to the mother, unless state law provides otherwise.

[^ 19] See, for example, *Pina v. Mukasey*, 542 F.3d 5 (1st Cir. 2008), which found derivative citizenship where the father was a U.S. citizen, child was living with the mother, but there was an informal agreement to share custody, and Massachusetts statutes and cases favored agreements between the parents as to legal custody of the child.

[^ 20] The Latin phrase "nunc pro tunc," translated as "now for then," denotes that an act has retroactive legal effect through a court's inherent power. See Black's Law Dictionary (12th ed. 2024).

[^ 21] See *Padilla Carino v. Garland*, 997 F.3d 1053 (9th Cir. 2021) (holding that Congress did not intend for this type of nunc pro tunc order). See *Fierro v. Reno*, 217 F.3d 1 (1st Cir. 2000) (refusing to recognize a nunc pro tunc change of custody for purposes of derivative citizenship because it would "allow ... state court[s] to create loopholes in the immigration laws on grounds of perceived equity or fairness" and "a nunc pro tunc order … is not binding under federal law"). See *Bustamante-Barrera v. Gonzales*, 447 F.3d 388, 401 (5th Cir. 2006) ("a nunc pro tunc order to recognize derivative citizenship would create the potential for significant abuse and manipulation of federal immigration and naturalization law"). However, in *Minasyan v. Gonzales*, 401 F.3d 1069, 1079 (9th Cir. 2005), the court found that a dissolution of marriage order entered after the petitioner's 18th birthday "establishes the date of the legal separation for purposes of California law, … it is [also] sufficient to establish the date for purposes of Minasyan's derivative citizenship under [Section] 321(a)." A person derived citizenship under former INA 321 so long as all requirements were met before the person turned 18.

[^ 22] See former INA 321(a)(3) (the naturalization of the mother when the child was born out of wedlock and paternity has not been established by legitimation).

[^ 23] See Section F, Definition of Reside Permanently [12 USCIS-PM H.7(F)].

[^ 24] See INA 101(c)(1). See Chapter 2, Definition of Child and Residence for Citizenship and Naturalization, Section B, Legitimated Child [12 USCIS-PM H.2(B)].

[^ 25] The second clause of former INA 321(a)(3) referred to "the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation."

[^ 26] See *Matter of Cross* (PDF), 26 I&N Dec. 485 (BIA 2015).

[^ 27] See 8 CFR 341.2(c).

[^ 28] Former INA 320 also states that the child may derive citizenship if the child "begins to reside permanently in the United States while under the age of eighteen years."

[^ 29] See *Nwozuzu v. Holder*, 726 F.3d 323 (2nd Cir. 2013) ("[B]egins to reside permanently" does not require "lawful permanent resident" status… [but requires]… "some objective official manifestation of the child's permanent residence." Also holding that failure to become a lawful permanent resident before turning 18 years old does not bar the child from claiming derivative citizenship from his parents.). See *Cheneau v. Garland*, 997 F.3d 916, 918 (9th Cir. 2021) (holding that an immigrant could derive citizenship if the parent was naturalized and the child thereafter began to reside permanently in the United States, irrespective of whether the child had been lawfully admitted for permanent residence and "the phrase 'or thereafter begins to reside permanently in the United States,' does not require that the child have necessarily been granted lawful permanent residency, although the child must have demonstrated an objective official manifestation of permanent residence.").

[^ 30] For questions about which other circumstances may qualify as an objective official manifestation of permanent residence, officers should contact their local counsel in the Office of Chief Counsel (OCC).

[^ 31] See *Matter of Nwozuzu* (PDF)*,* 24 I&N Dec. 609 (BIA 2008). See 8 CFR 103.10(b).

[^ 32] Although many adopted children could not derive citizenship, adoptive parents could apply for naturalization on behalf of certain adopted children. For more information, see Appendix: How Previous Citizenship Provisions Apply to Adopted Children [5 USCIS-PM F, Appendices Tab].

[^ 33] For example, a child who was born out of wedlock to alien parents, whose paternity was not established by legitimation, who was adopted by the stepfather, and whose mother later naturalized, could still derive citizenship from the mother because the adoption did not alter the child's legal relationship with the mother. See Appendix: Nationality Chart 3 -

Derivative Citizenship of Children [12 USCIS-PM H.3, Appendices Tab].

[^ 34] See Section 5 of Pub. L. 95-417 (PDF), 92 Stat. 917, 918 (October 5, 1978). The 1978 amendment limited this benefit to a child adopted while under 16 years of age. This restriction was removed by the INA Amendments of 1981, Pub. L. 97-116 (PDF), 96 Stat. 1611 (December 29, 1981), but is also included in the definition of “child” in INA 101(c).

[^ 35] See 8 CFR 341.1.

[^ 36] See 8 CFR 103.2(a)(1).

[^ 37] See INA 103(a)(1) and INA 104(a)(3).

[^ 38] See INA 341(a).

[^ 39] Military service members may appear at any stateside USCIS ASC with or without an appointment. See Part I, Military Members and their Families, Chapter 6, Required Background Checks, Section C, Ways Service Members may Meet Fingerprint Requirement [12 USCIS-PM I.6(C)].

[^ 40] See 8 CFR 103.2(b)(9). See Volume 1, General Policies and Procedures, Part C, Biometrics Collection and Security Checks, Chapter 2, Biometrics Collection [1 USCIS-PM C.2].

[^ 41] See 8 CFR 103.2(a)(2). See Volume 1, General Policies and Procedures, Part B, Submission of Benefit Requests, Chapter 2, Signatures [1 USCIS-PM B.2].

[^ 42] See 8 CFR 103.2(b)(13)(ii). See Volume 1, General Policies and Procedures, Part C, Biometrics Collection and Security Checks, Chapter 2, Biometric Collection, Section A, Biometric Services Appointments [1 USCIS-PM C.2(A)].

[^ 43] See 8 CFR 103.5 and 8 CFR 341.5(e). Although a person may file a motion to reopen a denial due to abandonment, such a denial may not be appealed to the Administrative Appeals Office. See 8 CFR 103.2(b)(15). Moreover, USCIS rejects any subsequent Form N-600, and instructs the applicant to submit a motion to reopen. See 8 CFR 341.5(e).

[^ 44] See 22 CFR 50.4.

[^ 45] See 8 FAM 101.1, Introduction to U.S. Passports and Consular Reports of Birth Abroad.

[^ 46] See 22 U.S.C. 2705.

[^ 47] See *Matter of Villanueva* (PDF), 19 I&N Dec. 101 (BIA 1984) (Unless void on its face, a valid U.S. passport issued to a person as a citizen of the United States constitutes conclusive proof of the person’s U.S. citizenship.). See 22 U.S.C. 2705 (A valid U.S. passport or CRBA have “the same force and effect as proof of United States citizenship” as Certificates of Naturalization or Certificates of Citizenship issued by USCIS.). See 22 CFR 50.2.

[^ 48] A U.S. passport or CRBA does not serve as evidence of citizenship for nationals who are not U.S. citizens.

[^ 49] See 22 U.S.C. 211a. See 22 CFR 51.60. See INA 361. See Rules Governing the Granting, Issuing, and Verifying of United States Passports, 31 FR 10603 (PDF) (Aug. 5, 1966). See Chapter 3, U.S. Citizens at Birth (INA 301 and 309), Section D, Application for Certificate of Citizenship (Form N-600), Subsection 3, Request to Revoke U.S. Passport or Cancel Consular Report of Birth Abroad [12 USCIS-PM H.3(D)(3)].

[^ 50] The process to request cancellation of a CRBA to DOS is the same as that for a passport revocation. The same process should be followed to request the revocation of a parent’s or grandparent’s U.S. passport or CRBA, when USCIS, while adjudicating Form N-600, determines that it was issued illegally, fraudulently, or erroneously.

[^ 51] See INA 361.

[^ 52] See *Matter of Villanueva* (PDF), 19 I&N Dec. 101 (BIA 1984).

[^ 53] Officers may not accept an expired U.S. passport as sufficient evidence of citizenship. In these cases, officers may need to request other evidence of U.S. citizenship.

[^ 54] Generally, USCIS considers the adoption decree or order to be evidence of legal custody.

[^ 55] For more information about evidence for adopted children, see Volume 5, Adoptions, Part F, Citizenship for Adopted Children, Chapter 3, Eligibility, Documentation, and Evidence, Section B, Child Residing in the United States, Subsection 2, Certificate of Citizenship [5 USCIS-PM F.3(B)(2)]

[^ 56] For example, a certificate of recognition of adoption from the state court, or a copy of the state statute indicating that the state recognizes all foreign adoptions. To determine if the adopted child meets the requirements applicable to adopted children, USCIS reviews the file, including any evidence indicating that the child was admitted to the United States as a lawful permanent resident (LPR) through an adoption-based petition. See Volume 5, Adoptions, Part C, Child Eligibility Determinations (Orphan) [5 USCIS-PM C]. See Volume 5, Adoptions, Part D, Child Eligibility Determinations (Hague) [5 USCIS-PM D]. See Volume 5, Adoptions, Part E, Family-Based Adoption Petitions [5 USCIS-PM E].

[^ 57] As long as the state recognizes the adoption before the age of 18, the child has met this requirement for derivation under former INA 321.

[^ 58] See the instructions for the Application for Certificate of Citizenship (Form N-600).

[^ 59] See 8 CFR 341.2(a)(1). See Section I, Documentation and Evidence [12 USCIS-PM H.7(I)].

[^ 60] See 8 CFR 341.5(b) and 8 CFR 337.1. See INA 337. See Part J, Oath of Allegiance, Chapter 2, The Oath of Allegiance [12 USCIS-PM J.2].

[^ 61] See INA 341(a).

[^ 62] See 8 CFR 341.5(d) and 8 CFR 103.3.

Part I - Military Members and their Families

Chapter 1 - Purpose and Background

A. Purpose

Alien military service members and certain veterans who have served honorably[1] in the U.S. armed forces may qualify for naturalization with some statutory exemptions to the general requirements in recognition of their important sacrifices and commitment to the security of the United States. The requirement for honorable service is what frames the special provisions for military service aside from the general requirements for other naturalization applicants.

The U.S. Department of War (DOW) and Department of Homeland Security (DHS) have continued to strengthen partnerships to provide services and opportunities to service members interacting with the U.S. immigration system. USCIS and DOW collaborate to facilitate military naturalization, with DOW providing certifications[2] of service and USCIS processing applications. Military naturalization is integral to supporting the readiness of the United States to defend itself.

USCIS' administration of military naturalization law and policy greatly enhances United States national security by ensuring that service members and their family members going through the process are primarily focused on the military readiness of the service member and preparations for family members during times of peace and hostilities.

Congress enacted special provisions of the Immigration and Nationality Act (INA), to include overseas processing,[3] to facilitate naturalization for members of the U.S. armed forces.[4]

There are general requirements and qualifications that an alien service member and former service member applying for naturalization must meet in order to become a U.S. citizen. These general requirements include:

- Honorable service in the U.S. armed forces, and if separated, separation "under honorable conditions;"
- Good Moral Character (GMC);
- Residence and physical presence in the U.S.;
- Knowledge of the English language;
- Knowledge of U.S. government and history; and
- Attachment to the principles of the U.S. Constitution.

The periods of residence and physical presence in the United States normally required for naturalization may not apply to military members and certain military family members. In addition, qualifying children of military members may not need to be present in the United States to acquire citizenship. Finally, qualifying members of the military and their family members may be able to complete the entire process from overseas.

Certain military family members may be eligible to become citizens of the United States[5] with special provisions. The INA carves out these special provisions for the treatment and care of spouses and children based on the sacrifices they make as military family members.[6]

Military members and their families may call the Military Help Line for assistance: 1-877-CIS-4MIL (1-877-247-4645).

B. Background

Special naturalization provisions for alien members of the U.S. armed forces date back at least to the Civil War.[7] Currently, the special naturalization provisions provide for expedited naturalization through military service during peacetime[8] or during designated periods of hostilities.[9] In addition, some provisions benefit certain relatives of members of the U.S. armed forces.

As of March 6, 1990, citizenship may be granted posthumously to alien service members who died as a direct result of a combat-related injury or disease.[10] Before this legislation, posthumous citizenship could only be granted through the enactment of private legislation for specific individuals.

Congress and the President have continued to express interest in legislation to expand the citizenship benefits of aliens serving in the military since the events of September 11, 2001. Legislation to benefit alien service members and their family members has increased considerably since 2003.

1. Executive Order Designating Period since September 11, 2001 as a Period of Hostility

On July 3, 2002, then President, George W. Bush, officially designated by Executive Order the period beginning on September 11, 2001 as a "period of hostilities." The Executive Order triggered immediate naturalization eligibility for qualifying service members.[11]

At the time of the designation, the then-U.S. Department of Defense and legacy INS announced that they would work together to ensure that military naturalization applications would be processed expeditiously. USCIS adjudication procedures for military naturalization applications reflect that commitment.

2. Legislation Affecting Service Period, Overseas Naturalization, and Benefits for Relatives

On November 24, 2003, Congress enacted legislation[12] to:

- Reduce the period of service required for military naturalization based on peacetime service from three years to one year.[13]
- Add service in the Selected Reserve of the Ready Reserve during periods of hostilities as a basis to qualify for naturalization.[14]
- Expand the immigration benefits available to the spouses, children, and parents of U.S. citizens who die from injuries or illnesses resulting from or aggravated by serving in combat. These benefits extend to such relatives of alien service members who were granted citizenship posthumously.
- Waive fees for naturalization applications based on military service during peacetime or during periods of hostilities.[15]
- Permit naturalization processing overseas in U.S. embassies, consulates, and military bases for alien members of the U.S. armed forces.[16]

Efforts since the 2003 legislation have focused on further streamlining procedures or extending immigration benefits to immediate relatives of alien service members.

3. Legislation Affecting Residence, Physical Presence, and Naturalization while Abroad for Spouses and Children

On January 28, 2008, Congress amended existing statutes to allow residence abroad to qualify as "continuous residence" and "physical presence" in the United States for a spouse or child of a service member who is authorized to accompany the service member by official orders and is residing abroad with the service member.[17]

Under certain conditions, a spouse or child of a service member may count any period of time that he or she is residing (or has resided) abroad with the service member as residence and physical presence in the United States. This legislation also prescribes that such a spouse or child may be eligible to have any or all of their naturalization proceedings conducted abroad. Before this legislation, the law only permitted eligible service members to participate in naturalization proceedings abroad.

- INA 284(b) limits the circumstances under which the lawful permanent resident (LPR) spouse or child is considered to be seeking admission to the United States. This means that the spouse or child will not be deemed to have abandoned or relinquished his or her LPR status while residing abroad with the service member. The provision ensures reentry into the United States by LPR spouses and children whose presence abroad might otherwise be deemed as abandonment of LPR status.
- INA 319(e) allows certain LPR spouses to count any qualifying time abroad as continuous residence and physical presence in the United States and permits eligible spouses to naturalize overseas.
- INA 322(d) allows the U.S. citizen parent of a child filing for naturalization to count time abroad as physical presence and allows the child to naturalize overseas.

4. Fingerprint Requirement (Kendell Frederick Citizenship Assistance Act)

On June 26, 2008, Congress mandated that USCIS use enlistment fingerprints or previously submitted USCIS fingerprints to satisfy the naturalization background check requirements unless a more efficient method is available.[18]

5. Expedited Application Processing (Military Personnel Citizenship Processing Act)

On October 9, 2008, Congress amended existing statutes to mandate USCIS to process and adjudicate naturalization applications filed under certain military-related provisions within six months of the receipt date or provide the applicant with an explanation for why his or her application is still pending and an estimated adjudication completion date.[19]

C. Legal Authorities

- INA 319; 8 CFR 319 – Spouses of U.S. Citizens
- INA 322; 8 CFR 322 – Children born outside of the United States
- INA 328; 8 CFR 328 – Naturalization through peacetime military service for one year
- INA 329; 8 CFR 329 – Naturalization through military Service during hostilities
- INA 329A; 8 CFR 392 – Posthumous citizenship
- 8 U.S.C. 1443a – Overseas naturalization for service members and their qualifying spouses and children

Footnotes

[^ 1] See INA 328(a) and INA 329(a).

[^ 2] For more information on required forms to confirm honorable service during peacetime or honorable service during a designated period of hostility, see Chapter 5, Application and Filing for Service Members, Section A, Required Forms (INA 328 and 329) [12 USCIS-PM I.5(A)].

[^ 3] See 8 U.S.C. 1443a.

[^ 4] See INA 328 and INA 329. See 8 CFR 328 and 8 CFR 329.

[^ 5] The “United States” means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands. See INA 101(a)(38).

[^ 6] See INA 316 and INA 319. See 8 CFR 316 and 8 CFR 319. See INA 320 and INA 322.

[^ 7] See Appendix: History of Acquiring Citizenship under INA 320 for Children of U.S. Citizens who are Members of the U.S. Armed Forces, U.S. Government Employees, or their Spouses [12 USCIS-PM I.1, Appendices Tab] for a table listing legislation affecting military members and their families.

[^ 8] See Chapter 2, One Year of Military Service during Peacetime (INA 328) [12 USCIS-PM I.2].

[^ 9] See Chapter 3, Military Service during Hostilities (INA 329) [12 USCIS-PM I.3].

[^ 10] See INA 329A. See the Posthumous Citizenship for Active-Duty Service Act of 1989, Pub. L. 101-249 (PDF), 104 Stat. 94. Posthumous citizenship under INA 329A was not initiated until 2004 through subsequent legislation, thereby providing substantive benefits to survivors (the amendments were retroactive to 2001). See the National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136 (PDF), 117 Stat. 1392.

[^ 11] See Executive Order 13269 signed on July 3, 2002 (67 FR 45287, July 8, 2002) (PDF). See INA 329.

[^ 12] See the National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136 (PDF), 117 Stat. 1392.

[^ 13] See INA 328(a).

[^ 14] See INA 329(a).

[^ 15] See INA 328(b) and INA 329(b) (Fee exemptions).

[^ 16] See 8 U.S.C. 1443a (Permitting overseas proceedings).

[^ 17] See the National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181 (PDF), 122 Stat. 3, which amended INA 284, INA 319, and INA 322.

[^ 18] See Chapter 6, Required Background Checks [12 USCIS-PM I.6]. See the Kendell Frederick Citizenship Assistance Act of 2008, Pub. L. 110-251 (PDF), 122 Stat. 2319.

[^ 19] This legislation affects naturalization applications under INA 328(a), INA 329(a), INA 329A, INA 329(b), and surviving spouses and children who qualify under INA 319(b), or INA 319(d). See the Military Personnel Citizenship Processing Act of 2008, Pub. L. 110-382 (PDF), 122 Stat. 4087.

Chapter 2 - One Year of Military Service during Peacetime (INA 328)

A. Background

The Nationality Act of 1940 section 324 introduced most of the provisions currently under the Immigration and Nationality Act (INA) section 328 for alien military service members.

B. General Eligibility through One Year of Military Service during Peacetime

A person who has served honorably in the U.S. armed forces for one year at any time may be eligible to apply for naturalization, which is sometimes referred to as "peacetime naturalization."[1] While some of the general naturalization requirements apply to qualifying alien members or veterans of the U.S. armed forces seeking to naturalize based on one year of service,[2] other requirements may not apply or are reduced.

The alien must establish that he or she meets all of the following criteria in order to qualify:

- The alien must be 18 years of age or older.
- The alien must have served honorably at any time in the U.S. armed forces for a period or periods totaling at least 1 year.
- The alien must be a lawful permanent resident (LPR) at the time of examination on the naturalization application.
- The alien must meet certain residence and physical presence requirements.
- The alien must demonstrate an ability to understand English including an ability to read, write, and speak English.
- The alien must demonstrate knowledge of U.S. history and government.
- The alien must demonstrate good moral character for at least five years prior to filing the application until the time of his or her naturalization.
- The alien must have an attachment to the principles of the U.S. Constitution and be well disposed to the good order and happiness of the U.S. during all relevant periods under the law.

C. Honorable Service

The specific provisions under INA 328 for alien military service members are only provided for those aliens who "served honorably at any time in the armed forces" and if the alien "was never separated except under honorable conditions."

1. Qualifying Military Service

Qualifying military service is honorable active or reserve service in the U.S. Army, Navy, Marine Corps, Air Force, Coast Guard, or Space Force. Service in the National Guard may also qualify.[3] Honorable service means only service in the U.S. armed forces that is designated as honorable service by the executive department under which the applicant performed that military service. In general, international cadets attending U.S. military academies are not considered to have served in the U.S. armed forces.[4]

Current Military Service

An alien military service member who applies for naturalization and who is serving in the U.S. armed forces at the time he or she files the naturalization application must have his or her service certified as honorable by his or her military branch. The alien military service member is responsible for submitting to USCIS a complete and certified Request for Certification of Military or Naval Service (Form N-426).[5]

Past Military Service

An alien military service member who is separated from the U.S. armed forces at the time he or she files the naturalization application must submit a copy of his or her official discharge documentation. The U.S. armed forces generally issues a "Certificate of Release or Discharge from Active Duty" (DD Form 214) or National Guard Report of Separation and Record of Service (NGB Form 22) upon the alien military service member's release from active duty service.

Military discharge characterizations indicate the nature of an alien military service member's separation and can impact eligibility for naturalization. INA 328 requires both honorable service and, if separated, that the alien has never been separated except under honorable conditions.[6] If the alien has multiple separations from service, each separation must be under honorable conditions, including discharges from periods of service not relied upon for naturalization purposes.[7]

As illustrated in the table below, the U.S. Department of War (DOW) authorizes six characterizations of service for military service members to receive on discharge:[8]

Characterizations of Military Discharges or Separations by Type and Whether Discharge or Separation Qualifies as "Under Honorable Conditions" for Naturalization Purposes

Service Characterization or Separation Description[9]	Description of Discharge or Separation Type	Qualifies as "Under Honorable Conditions" for Naturalization Purposes?
Honorable	The service member generally has met the standards of acceptable conduct and performance of duty for service members or is otherwise so meritorious that any other characterization would be inappropriate.[10]	Yes
General (Under Honorable Conditions)	The service member has served honestly and faithfully. The positive aspects of the enlisted service member's conduct or performance of duty outweigh the negative aspects of the enlisted service member's conduct or performance of duty as documented in their service record.[11]	Yes
Uncharacterized	When a characterization of service or other description of separation is not authorized or warranted, administrative separations of service members may be uncharacterized. The service member may receive an uncharacterized discharge under the following circumstances: • Entry-level separations; • Void enlistment or induction; or • Dropping from the rolls.[12]	No, if discharge was after August 1, 2024
Other than Honorable Conditions	The service member may be issued this characterization when:	No

Service Characterization or Separation Description[9]	Description of Discharge or Separation Type	Qualifies as "Under Honorable Conditions" for Naturalization Purposes?
	• The reason for separation is based on a pattern of behavior that constitutes a significant departure from the conduct expected of enlisted service members; or • The reason for separation is based on one or more acts or omissions that constitute a significant departure from the conduct expected of enlisted service members.[13] Examples of factors that may be considered include but are not limited to, the use of force or violence to produce serious bodily injury or death, acts or omissions that endanger U.S. security, or deliberate acts or omissions that seriously endanger the health and safety of others.	
Bad Conduct	This is not issued administratively and is considered a punitive separation and can only occur after a court-martial proceeding.	No
Dishonorable	This is not issued administratively and is considered a punitive separation and can only occur after a court-martial proceeding.	No

As noted in the table, only "Honorable" and "General (Under Honorable Conditions)" discharges meet the statutory provisions requiring that an alien have been separated "under honorable conditions," because these are the only discharges that indicate honorable service.[14] Other discharge types, such as "Uncharacterized,"[15] "Other Than Honorable," "Bad Conduct," and "Dishonorable," do not qualify as a separation under honorable conditions.

Both "Honorable" and "General (Under Honorable Conditions)" are defined as types of "Characterized" service, and therefore "Uncharacterized"[16] discharges do not meet the "under honorable conditions" requirement. Notwithstanding, uncharacterized discharges issued before August 1, 2024, meet the "under honorable conditions" requirement, because the Department of Defense Instructions (DODI) had treated an uncharacterized discharge as "the required characterization" for "administrative matters" before August 1, 2024.[17]

The then-U.S. Department of Defense (DOD) updated the DODI on August 1, 2024,[18] and removed the language regarding an uncharacterized discharge being treated as "the required characterization" for administrative matters and addressed entry-level separations as a distinct and separate category of discharges apart from honorable and general (under honorable conditions) discharges. Therefore, only uncharacterized discharges issued on or before July 31, 2024, qualify as "under honorable conditions" for naturalization purposes. This is consistent with the updated DODI.

Discharges Based on Refusal to Comply with COVID-19 Vaccination Mandates

On August 24, 2021, and November 30, 2021, the then-Secretary of Defense mandated that members of the U.S. armed forces be vaccinated against the coronavirus disease (COVID-19). Consequently, military service members who refused to comply with the mandates were discharged from active duty. The then-Secretary of Defense later rescinded the mandates on January 10, 2023, and rendered all DOD component policies, directives, and guidance implementing those vaccination mandates as no longer in effect.[19] Under DOD policy announced on January 10, 2023, DOD permits individuals who separated or were discharged from the military to request a change in the "characterization of their discharge" in their personnel records.[20]

For the purposes of meeting eligibility for naturalization under INA 328, USCIS reviews the Certificate of Release or Discharge from Active Duty (DD Form 214), National Guard Report of Separation and Record of Service (NGB Form 22), or other official discharge document to determine if the qualifying military service was both honorable service and that the alien has been separated under honorable conditions.[21] An alien who believes his or her discharge was incorrectly characterized due to refusal to comply with the COVID-19 vaccination requirements may seek an upgrade to his or her discharge characterization through their respective military departments before applying for naturalization.[22]

2. Multiple Periods of Service

Aliens who have multiple periods of service must demonstrate that all discharges from military service were under honorable conditions. Therefore, an alien who was separated under a different type of discharge from any other period of service that is not under honorable conditions is not eligible for naturalization under INA 328.

For example, an alien may have enlisted in October 1980 and served honorably on active duty for one entire period of service until 1984. The alien is honorably discharged and then reenlists for a second period of service starting in 1986 and ending in 1987. During the second period of service (1986-1987), the alien is discharged under "other than honorable conditions." This alien is not eligible to naturalize under INA 328.

D. National Guard Service

Honorable service as a member of the National Guard is limited to service in a National Guard Unit during such time as the unit is federally recognized as a reserve component of the U.S. armed forces. This applies to aliens applying for naturalization on the basis of one year of military service.[23] The alien military service member is responsible for submitting to USCIS a complete and certified Request for Certification of Military or Naval Service (Form N-426) (if currently serving), or if not currently serving, National Guard Report of Separation and Record of Service (NGB Form 22) or other official discharge document for all periods of service.

E. Continuous Residence and Physical Presence Requirements

An alien who files on the basis of one year of military service while he or she is still serving in the U.S. armed forces or within six months of an honorable discharge is exempt from the residence and physical presence requirements for naturalization.[24]

An alien who files six months or more from his or her separation from the U.S. armed forces must have continuously resided in the United States for at least five years. In addition, the alien must have been physically present in the United States for at least 30 months out of the five years immediately preceding the date of filing the application.[25] However, any honorable service within the five years immediately preceding the date of filing the application will be considered towards residence and physical presence within the United States.[26]

An alien with military service who does not qualify on the basis of one year of military service[27] may be eligible under another non-military naturalization provision. The period that the alien has resided outside of the United States on official military orders does not break his or her continuous residence. USCIS will treat such time abroad as time in the United States.[28]

Footnotes

[^ 1] See INA 328.

[^ 2] See INA 316(a) for the general naturalization requirements. See Part D, General Naturalization Requirements [12 USCIS-PM D].

[^ 3] See Section D, National Guard Service [12 USCIS-PM I.2(D)].

[^ 4] In general, a military academy cadet who is a U.S. citizen or national is considered to be serving in the U.S. armed forces, but international cadets attending U.S. military academies are not considered as having served in the U.S. armed forces. This is because international cadets, sponsored by their home country, are generally considered to be serving in their home country's military and are obligated to serve in their home country upon graduation.

[^ 5] See Chapter 5, Application and Filing for Service Members (INA 328 and 329) [12 USCIS-PM I.5] for additional information about Form N-426.

[^ 6] See INA 328(a).

[^ 7] See INA 328(a) and INA 328(b)(3).

[^ 8] See Certificate of Uniformed Service (DD Form 214/5 Series) (PDF), U.S. Department of Defense Instruction No. 1336.01, Section 3, effective February 17, 2022.

[^ 9] Also known as "discharge." See 32 CFR 73.2 (The characterization of a discharge or dismissal is a determination reflecting a Service member's conduct and performance of duty while in military service during a specific period of military service. Administrative discharges can be characterized as honorable, general (under honorable conditions), other than honorable conditions, or can be described as uncharacterized (as in an entry-level separation). If a discharge is adjudged at a court-martial, the assigned characterization may be a bad-conduct discharge, or dishonorable discharge, or a dismissal. The term characterization of a discharge or dismissal is also referred to as a "character of discharge" or "character of service.").

[^ 10] See Enlisted Administrative Separations (PDF), U.S. Department of Defense Instruction No. 1332.14, Section 4.3, effective August 1, 2024.

[^ 11] See Enlisted Administrative Separations (PDF), U.S. Department of Defense Instruction No. 1332.14, Section 4.3, effective August 1, 2024.

[^ 12] See Enlisted Administrative Separations (PDF), U.S. Department of Defense Instruction No. 1332.14, Section 4.3, effective August 1, 2024.

[^ 13] See Enlisted Administrative Separations (PDF), U.S. Department of Defense Instruction No. 1332.14, Section 4.3, effective August 1, 2024.

[^ 14] See Enlisted Administrative Separations (PDF), U.S. Department of Defense Instruction No. 1332.14, Section 3, effective August 1, 2024.

[^ 15] See Enlisted Administration Separations, (PDF) U.S. Department of Defense Instruction No. 1332.14, Section 3, effective August 1, 2024.

[^ 16] See Enlisted Administration Separations, (PDF) U.S. Department of Defense Instruction No. 1332.14, Section 3, effective August 1, 2024.

[^ 17] See *Alam v. USCIS, et al.,* 592 F.Supp.3d 810 (D. Minn. March 21, 2022) (indicating that the DODI indicated that the uncharacterized discharged is "treated as the required characterization").

[^ 18] See Enlisted Administration Separations, (PDF) U.S. Department of Defense Instruction No. 1332.14, Section 3, effective August 1, 2024.

[^ 19] See Department of Defense memorandum, Recission of August 24, 2021 and November 30, 2021 Coronavirus Disease 2019 Vaccination Requirements for Members of Armed Forces (PDF), issued January 10, 2023.

[^ 20] See Department of Defense News Release, Veterans Have Options to Upgrade Discharge Characterization, issued June 4, 2024.

[^ 21] See INA 328(a).

[^ 22] See Department of Defense News Release, Veterans Have Options to Upgrade Discharge Characterization, issued June 4, 2024.

[^ 23] See INA 328. The National Guard and Reserve service requirements under INA 329 differ from those under INA 328. See Chapter 3, Military Service during Hostilities (INA 329), Section D, National Guard Service [12 USCIS-PM I.3(D)].

[^ 24] See INA 328. See 8 CFR 328.2.

[^ 25] See INA 316(a) and INA 328(d). See Part D, General Naturalization Requirements [12 USCIS-PM D].

[^ 26] See INA 328(d).

[^ 27] See INA 328.

[^ 28] Special provisions also exist regarding the "place of residence" for aliens who are serving in the U.S. armed forces but who do not qualify for naturalization through the military provisions. See 8 CFR 316.5(b). See Part D, General Naturalization Requirements, Chapter 6, Jurisdiction, Place of Residence, and Early Filing [12 USCIS-PM D.6].

Chapter 3 - Military Service during Hostilities (INA 329)

A. Background

In addition to the general provisions for naturalization, including the provision for alien military service members under Immigration and Nationality Act (INA) section 328, Congress also provided a special provision for service during specific hostilities.[1] This provision has its origins in similar provisions that were enacted starting after World War I in recognition of the honorable service and sacrifice of aliens during times of war.

B. General Eligibility through Military Service during Hostilities

Members of the U.S. armed forces who serve honorably for any period of time during specifically designated periods of hostilities may be eligible to naturalize.[2]

The alien must establish that he or she meets all of the following criteria in order to qualify:

- The alien may be of any age.
- The alien must have served honorably in the U.S. armed forces during a designated period of hostility.
- The alien must either be a lawful permanent resident (LPR) or have been physically present at the time of enlistment, reenlistment, or extension of service or induction into the U.S. armed forces:
  - In the United States,[3] the Canal Zone, American Samoa, or Swains Island, or
  - On board a public vessel owned or operated by the United States for noncommercial service.
- The alien must be able to read, write, and speak basic English.
- The alien must demonstrate knowledge of U.S. history and government.
- The alien must demonstrate good moral character for at least 1 year prior to filing the application until the time of his or her naturalization.
- The alien must have an attachment to the principles of the U.S. Constitution and be well disposed to the good order and happiness of the United States during all relevant periods under the law.

An alien who files on the basis of military service during hostilities is exempt from the general naturalization requirements of continuous residence and physical presence.[4]

As with all cases, all pertinent background checks, including applicable U.S. Department of War (DOW) checks (if required)[5] must be completed before USCIS may interview the alien applying for naturalization.

C. Honorable Service

1. Qualifying Military Service

Qualifying military service is honorable service in the Selected Reserve of the Ready Reserve or active duty service in the U.S. Army, Navy, Marine Corps, Air Force, Space Force, or Coast Guard. Service in the National Guard may also qualify.[6] In general, international cadets attending U.S. military academies are not considered to have served in the U.S. armed forces.[7]

Honorable service means service in the U.S. armed forces that is designated as honorable service by the executive department under which the alien performed that military service.

Current Military Service

An alien military service member who applies for naturalization based on his or her service during specific hostilities[8] and who is serving in the U.S. armed forces at the time he or she files the naturalization application must have his or her service certified as honorable by his or her military branch. The alien military service member is responsible for submitting to USCIS a complete and certified Request for Certification of Military or Naval Service (Form N-426).[9]

Past Military Service

An alien service member who applies for naturalization based on his or her service during specific hostilities[10] and who is separated from the U.S. armed forces at the time he or she files the naturalization application must submit a copy of his or her official discharge documentation. The U.S. armed forces generally issue a “Certificate of Release or Discharge from Active Duty” (DD Form 214) or National Guard Report of Separation and Record of Service (NGB Form 22) upon the alien military service member’s release from active duty service.

Military discharge characterizations indicate the nature of a military service member’s separation and can impact eligibility for naturalization. INA 329 requires honorable service and, if the alien has separated from service, a separation under honorable conditions.[11]

As illustrated in the table below, the U.S. Department of War (DOW) authorizes six characterizations of service for military service members to receive on discharge:[12]

Characterizations of Military Discharges or Separations by Type and Whether Discharge or Separation Qualifies as “Under Honorable Conditions” for Naturalization Purposes

Service Characterization or Separation Description[13]	Description of Discharge or Separation Type	Qualifies as “Under Honorable Conditions” for Naturalization Purposes?
Honorable	The service member generally has met the standards of acceptable conduct and performance of duty for service members or is otherwise so meritorious that any other characterization would be inappropriate.[14]	Yes
General (Under Honorable Conditions)	The service member has served honestly and faithfully. The positive aspects of the enlisted service member’s conduct or performance of duty outweigh the negative aspects of the enlisted service member’s conduct or performance of duty as documented in their service record.[15]	Yes
Uncharacterized	When a characterization of service or other description of separation is not authorized or warranted, administrative separations of service members may be uncharacterized. The service member may receive an uncharacterized discharge under the following circumstances: • Entry-level separations; • Void enlistment or induction; or • Dropping from the rolls.[16]	No, if discharge was after August 1, 2024
Other than Honorable Conditions	The service member may be issued this characterization when:	No

Service Characterization or Separation Description[13]	Description of Discharge or Separation Type	Qualifies as "Under Honorable Conditions" for Naturalization Purposes?
	• The reason for separation is based on a pattern of behavior that constitutes a significant departure from the conduct expected of enlisted service members; or • The reason for separation is based on one or more acts or omissions that constitute a significant departure from the conduct expected of enlisted service members.[17] Examples of factors that may be considered include but are not limited to, the use of force or violence to produce serious bodily injury or death, acts or omissions that endanger U.S. security, or deliberate acts or omissions that seriously endanger the health and safety of others.	
Bad Conduct	This is not issued administratively and is considered a punitive separation and can only occur after a court-martial proceeding.	No
Dishonorable	This is not issued administratively and is considered a punitive separation and can only occur after a court-martial proceeding.	No

As noted in the table, only "Honorable" and "General (Under Honorable Conditions)" discharges meet the statutory provisions requiring that an alien was separated "under honorable conditions," because these are the only discharges that indicate honorable service."[18] Other discharge types, such as "Uncharacterized,"[19] "Other Than Honorable," "Bad Conduct," and "Dishonorable," do not qualify as a separation under honorable conditions.

Both "Honorable" and "General (Under Honorable Conditions)" are defined as types of "Characterized" service, and therefore "Uncharacterized"[20] discharges do not meet the "under honorable conditions" requirement. Notwithstanding, uncharacterized discharges issued before August 1, 2024, meet the "under honorable conditions" requirement, because the Department of Defense Instructions (DODI) had treated an uncharacterized discharge as "the required characterization" for "administrative matters" before August 1, 2024.[21]

The then-U.S. Department of Defense (DOD) updated the DODI on August 1, 2024,[22] which removed the language regarding an uncharacterized discharge being treated as "the required characterization" for administrative matters and addressed entry-level separations as a distinct and separate category of discharges apart from honorable and general (under honorable conditions) discharges. Therefore, only uncharacterized discharges issued on or before July 31, 2024, qualify as "under honorable conditions" for naturalization purposes.

Discharges Based on Refusal to Comply with COVID-19 Vaccination Mandates

On August 24, 2021, and November 30, 2021, the then-Secretary of Defense mandated that members of the U.S. armed forces be vaccinated against the coronavirus disease (COVID-19). Consequently, service members who refused to comply with the mandates were discharged from active duty. The then-Secretary of Defense later rescinded the mandates on January 10, 2023, and rendered all then-DOD component policies, directives, and guidance implementing those vaccination mandates as no longer in effect.[23] Under the then-DOD policy announced on January 10, 2023, DOW permits individuals who separated or were discharged from the military to request a change in the "characterization of their discharge" in their personnel records.[24]

For the purposes of meeting eligibility for naturalization under INA 329, USCIS reviews the Certificate of Release or Discharge from Active Duty (DD Form 214), National Guard Report of Separation and Record of Service (NGB Form 22), or other official discharge document to determine if the qualifying military service was both honorable service and that the alien has been separated under honorable conditions.[25] An alien who believes his or her discharge was incorrectly characterized due to refusal to comply to COVID-19 vaccination requirements may seek an upgrade to their discharge characterization through their respective military departments before applying for naturalization.[26]

2. Multiple Periods of Service

Aliens who have multiple periods of service must demonstrate that they have at least one qualifying period of service to establish eligibility under INA 329. A qualifying period of service is a period of service during which the applicant served honorably as a member of the Selected Reserve of the Ready Reserve or on active duty in the U.S. armed forces during a designated period of hostilities, and if separated, was separated under honorable conditions.

Therefore, an alien who was separated under honorable conditions from a qualifying period of service may be eligible for naturalization under INA 329 even if the alien received a different type of discharge from any other period of service, including during a designated period of hostilities.

For example, an alien may have enlisted in October 1975, and served honorably on active duty for one entire period of service until 1978. The alien is honorably discharged and immediately reenlists for a second period of service for 2 more years starting in 1978 and ending in 1980. During the second period of service (1978-1980), the alien is discharged under "other than honorable conditions." This alien, if able to demonstrate good moral character and meet all other naturalization requirements, is eligible to naturalize under INA 329 based on the first qualifying period of service (1975-1978).

Similarly, an alien who was previously separated with a discharge type that was not under honorable conditions, but subsequently reenlisted or was reinstated to service, may qualify for naturalization based upon the subsequent qualifying period of service if the executive department under which the alien performed the subsequent period of service certifies that the alien served honorably and, if separated, was separated under honorable conditions.

D. National Guard Service

An alien filing on the basis of military service during hostilities[27] who has National Guard service may qualify if the alien has honorable service in either the U.S. armed forces or in the Selected Reserve of the Ready Reserve.[28] USCIS does not require proof of federal activation for a National Guard applicant if the alien served in the Selected Reserve of the Ready Reserve during a designated period of hostility.[29] The alien service member is responsible for submitting to USCIS a complete and certified Request for Certification of Military or Naval Service (Form N-426) (if currently serving), or if not currently serving, a National Guard Report of Separation and Record of Service (NGB Form 22) or other official discharge document for all periods of service.[30]

The National Guard determines when one of its members is a member of the Selected Reserve of the Ready Reserve; however, most National Guard members adhere to Selected Reserve training requirements and are members of the Selected Reserve of their respective services.

When a National Guard member is a member of the Selected Reserve of the Ready Reserve, the member may apply for naturalization under INA 329 based on that service, if otherwise eligible. The applicant does not need to have active duty service or be part of the National Guard during such time as the unit is federally recognized as a reserve component of the armed forces in order to qualify under INA 329.

E. Designated Periods of Hostilities

The INA and Presidential Executive Orders have designated the following military engagements and ranges of dates as periods of hostilities.[31]

Designated Periods of Hostilities			
World War I[32]	April 6, 1917	→	November 11, 1918
World War II[33]	September 1, 1939	→	December 31, 1946
Korean Conflict[34]	June 25, 1950	→	July 1, 1955
Vietnam Hostilities[35]	February 28, 1961	→	October 15, 1978
Persian Gulf Conflict[36]	August 2, 1990	→	April 11, 1991
War on Terrorism[37]	September 11, 2001	→	Present

On July 3, 2002, President George W. Bush issued Executive Order 13269, which has designated a period of hostilities and has permitted the expedited naturalization for aliens eligible under INA 329 as of September 11, 2001. The current designated period continues to be a designated period of hostilities for INA 329 purposes until the President issues a new Executive Order terminating the designation.[38]

F. Eligibility as Permanent Resident or if Present in United States at Induction or Enlistment

In general, an alien who files on the basis of military service during hostilities[39] is not required to be an LPR if he or she was physically present at the time of induction, enlistment, reenlistment, or extension of service in the U.S. armed forces:

- In the United States, the Canal Zone, American Samoa, or Swains Island; or
- On board a public vessel owned or operated by the United States for noncommercial service.

In addition, an alien who is lawfully admitted for permanent residence after enlistment or induction is also eligible for naturalization under this provision regardless of the place of enlistment or induction.

G. Conditional Permanent Residence and Naturalization during Hostilities

If the alien is a conditional permanent resident and is eligible to naturalize on the basis of military service during hostilities[40] without being an LPR based on being in the United States during enlistment or induction, the alien is not required to file or have an approved Petition to Remove Conditions on Residence (Form I-751) before his or her Application for Naturalization (Form N-400) may be approved.

H. Military Accessions Vital to National Interest Program

The general guidance in this section is from information provided by the DOW on its former Military Accessions Vital to National Interest (MAVNI) program. USCIS is providing this general information in the Policy Manual to assist current and former service members and their families.

1. Background

In 2009, the then-U.S. Department of Defense (DOD) authorized the MAVNI pilot program as a recruitment tool to enlist certain nonimmigrants and other aliens who had skills that were considered vital to the national interest of the United States. The program applied to certain health care professionals and aliens who were fluent in certain foreign languages.

Then-DOD allowed authorization for the MAVNI program to expire on September 30, 2017, and has not renewed the program since that time. As a result, all individuals enlisting in the military are currently required to be U.S. citizens or nationals, lawful permanent residents of the United States, or citizens of the Federated States of Micronesia, the Republic of the Marshall Islands, or Palau (countries with which the United States has Compacts of Free Association allowing their citizens to enlist in the U.S. armed forces).[41]

An alien entering active duty status or service in the Selected Reserve of the Ready Reserve may apply for military naturalization after the alien's Request for Certification of Military or Naval Service (Form N-426) has been properly authorized, completed, and signed by the appropriate person authorized by DOW.[42] USCIS is unable to adjudicate a naturalization application for current service members without a properly submitted Form N-426.

Calixto Settlement Agreement Applicants

On September 22, 2022, the U.S. Army entered into a settlement agreement to settle *Calixto, et al., v. U.S. Dep't of the Army, et al.* (Calixto Agreement).[43] In the settlement agreement, the Army agreed to certify Forms N-426 for certain Army enlistees, including some enlistees who never began a qualifying period of service in the Army. By certifying the Form N-426, the Army is certifying that the enlistees served honorably on active duty or in the Selected Reserve of the Ready Reserve during a designated period of hostilities such that the enlistees could apply for military naturalization under INA 329.

Certain applicants who enlisted in the U.S. Army, including the Selected Reserve of the Ready Reserve Delayed Training Program (DTP) or Regular Army Delayed Entry Program (DEP), through the MAVNI pilot program on or before September 30, 2017, may receive a certified Form N-426 under the terms of the Calixto Agreement. Such applicants become eligible to apply for naturalization under INA 329 as a result of the certified Form N-426, even before attending initial entry training.

Under the Calixto Agreement,[44] if the applicant was not discharged as of September 22, 2022 or had received an uncharacterized discharge[45] from the U.S. Army by that date, the Army considers the applicant to have served honorably and certifies a Form N-426 on their behalf even if they did not attend initial entry training.

Applicants are required to submit a certified Form N-426 signed by a person authorized by the U.S. Army to certify the form. Applicants may also provide a copy of the September 22, 2022, Calixto Agreement with their naturalization application and with their certified Form N-426 as a substitute for identifying the type and duration of service in the Form N-426, and as

evidence of honorable service or an under honorable conditions discharge.[46] Including the agreement and annotating on the Application for Naturalization (Form N-400) and Form N-426 with "Calixto" at the top helps USCIS identify class members and provide for more efficient processing.[47]

2. General Eligibility Requirements

Eligible Candidates

To be eligible for the MAVNI program, then-DOD required aliens to be in one of the following immigration categories or authorized stays at the time of enlistment into the U.S. armed forces:

- Asylee;
- Refugee;
- Beneficiary of Temporary Protected Status (TPS);
- Person granted deferred action by USCIS under the Deferred Action for Childhood Arrivals (DACA) policy; or
- Nonimmigrant in any of the following categories: E, F, H, I, J, K, L, M, O, P, Q, R, S, T, TC, TD, TN, U, or V.

Valid Status for 2 Years

Then-DOD required most aliens for MAVNI to have been in a valid status in one of the eligible immigration categories or authorized stays listed above for at least 2 years immediately preceding the date of enlistment. The alien was not required to be in the same qualifying category or authorized stay listed above for those 2 years on the date of enlistment.

Then-DOD exempted or waived the 2-year requirement for certain aliens. Specifically, then-DOD did not require DACA recipients to meet the 2-year requirement. In addition, then-DOD considered waiving the requirement that an alien applying to the MAVNI program be in valid immigration status or within a period of authorized stay at the time of enlistment on a case-by-case basis under certain circumstances.

3. Other Factors to Consider

Nonimmigrants and Absences from United States

Under then-DOD guidance, most applicants to the MAVNI program under a qualifying nonimmigrant category at the time of enlistment must not have been absent from the United States for more than 90 days during the 2-year period immediately preceding the date of enlistment. Then-DOD did not apply this 90-day limitation on absences to DACA recipients.

Foreign Residency Requirement

A nonimmigrant exchange visitor under the J nonimmigrant visa classification may have been eligible to apply for the MAVNI program with then-DOD. Certain nonimmigrant exchange visitors were subject to a statutory foreign residence requirement.[48] J exchange visitors who enlisted in the military through the MAVNI program were not required to comply with the foreign residence requirement in order to naturalize.[49] In addition, the dependent spouse or child of the exchange visitor was not required to comply with the foreign residence requirement.[50]

Adjustment of Status Applicants

Then-DOD did not disqualify otherwise eligible applicants to the MAVNI program by virtue of having a pending adjustment of status application with USCIS.[51]

I. Veterans Residing Outside the United States

Admission or Parole into United States for Naturalization Interview

Aliens who reside outside the United States and have separated from the military are required to appear for an interview in the United States.[52] All aliens must be inspected and admitted or paroled in order to enter the United States.[53]

If seeking parole into the United States, the alien may file the naturalization application concurrently with an Application for Travel Documents, Parole Documents, and Arrival/Departure Records (Form I-131) without a fee to seek an advance parole document for a humanitarian or significant public benefit parole before entering the United States, if necessary.[54] USCIS coordinates with the alien to schedule an interview date and location.

Documentation

An alien who is concurrently seeking naturalization and an advance parole document must provide all the required documentation to establish eligibility for naturalization with Application for Naturalization (Form N-400),[55] including a police clearance from every place of residence outside the United States within 1 year of filing the naturalization application. In addition, the alien is required to provide documentation to establish eligibility for an advance parole document with Form I-131, including submitting an Affidavit of Support (Form I-134).[56]

USCIS will inform the alien if they need to submit biometrics in connection with the naturalization application at an authorized site such as a U.S. embassy, U.S. consulate, or U.S. military installation.

In addition, the alien submitting Form I-131[57] is required to provide documentation to establish eligibility for an advance parole document.

Failure to Appear at Interview

USCIS considers the alien to have abandoned his or her application and administratively closes the application in cases where the alien:

- Fails to appear at his or her scheduled naturalization interview; and
- Fails to notify USCIS of the reason for nonappearance within 30 days of the scheduled interview.

USCIS considers subsequent correspondence from an alien within 1 year of the administrative closure a request to reopen the application.[58]

Jurisdiction

The USCIS office having jurisdiction over the alien's last residence within the United States or Outlying Possession (OLP) maintains jurisdiction over the naturalization application.[59] If there is no evidence in the application to establish the alien's last place of residence in the United States or OLP, the field office should review the service record for the address of record at the time of departure.

If the alien requests to have the naturalization interview conducted at a USCIS office other than the office having jurisdiction based on the applicant's last residence, the office having jurisdiction may coordinate, if practicable, with the appropriate office to accommodate the request. Even if such a request for an interview is approved, the original office retains jurisdiction over the adjudication of the naturalization application.

Footnotes

[^ 1] See INA 329.

[^ 2] See INA 329.

[^ 3] Includes the continental United States, Alaska, Hawaii, Puerto Rico, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands. See INA 101(a)(38).

[^ 4] See INA 329(b). See 8 CFR 329.2(e).

[^ 5] Including Defense Clearance Investigation Index (DCII) queries. See Chapter 6, Required Background Checks [12 USCIS-PM I.6] for information on background checks and fingerprint requirements for aliens applying for naturalization based on military service. Additionally, in certain cases that involved aliens recruited through the Military Accessions Vital to the National Interest (MAVNI) program, USCIS required then-DOD background and security checks to be completed and a review of any derogatory information then-DOD obtained regarding an alien applying for naturalization. USCIS does not require any DOW adjudication of the alien's suitability for military service, including a Military Service Suitability Recommendation or a Military Service Suitability Determination, to be complete before interviewing or beginning adjudication of a naturalization application, and the outcome of any such DOW adjudication does not determine the outcome of the naturalization adjudication.

[^ 6] See Section D, National Guard Service [12 USCIS-PM I.3(D)].

[^ 7] In general, a military academy cadet who is a U.S. citizen or national is considered to be serving in the U.S. armed forces, but international cadets attending U.S. military academies are not considered as having served in the U.S. armed forces. This is because international cadets, sponsored by their home country, are generally considered to be serving in their home country's military and are obligated to serve in their home country upon graduation.

[^ 8] See INA 329.

[^ 9] See Chapter 5, Application and Filing for Service Members (INA 328 and 329) [12 USCIS-PM I.5] for additional information about Form N-426.

[^ 10] See INA 329.

[^ 11] See INA 329(a). See 8 CFR 329.2(a) and 8 CFR 329.2(b).

[^ 12] See Certificate of Uniformed Service (DD Form 214/5 Series) (PDF), U.S. Department of Defense Instruction No. 1336.01, Section 3, effective February 17, 2022.

[^ 13] Also known as "discharge." See 32 CFR 73.2 (The characterization of a discharge or dismissal is a determination reflecting a Service member's conduct and performance of duty while in military service during a specific period of military service. Administrative discharges can be characterized as honorable, general (under honorable conditions), other than honorable conditions, or can be described as uncharacterized (as in an entry-level separation). If a discharge is adjudged at a court-martial, the assigned characterization may be a bad-conduct discharge, or dishonorable discharge, or a dismissal. The term characterization of a discharge or dismissal is also referred to as a "character of discharge" or "character of service.").

[^ 14] See Enlisted Administrative Separations (PDF), U.S. Department of Defense Instruction No. 1332.14, Section 4.3, effective August 1, 2024.

[^ 15] See Enlisted Administrative Separations (PDF), U.S. Department of Defense Instruction No. 1332.14, Section 4.3, effective August 1, 2024.

[^ 16] See Enlisted Administrative Separations (PDF), U.S. Department of Defense Instruction No. 1332.14, Section 4.3, effective August 1, 2024.

[^ 17] See Enlisted Administrative Separations (PDF), U.S. Department of Defense Instruction No. 1332.14, Section 4.3, effective August 1, 2024.

[^ 18] See Enlisted Administrative Separations (PDF), U.S. Department of Defense Instruction No. 1332.14, Section 3, effective August 1, 2024.

[^ 19] See Enlisted Administration Separations, (PDF) U.S. Department of Defense Instruction No. 1332.14, Section 3, effective August 1, 2024.

[^ 20] See Enlisted Administration Separations, (PDF) U.S. Department of Defense Instruction No. 1332.14, Section 3, effective August 1, 2024.

[^ 21] See *Alam v. USCIS, et al.,* 592 F. Supp. 3d 810 (D. Minn. March 21, 2022) (indicating that the DODI indicated that the uncharacterized discharged is "treated as the required characterization").

[^ 22] See Enlisted Administration Separations, (PDF) U.S. Department of Defense Instruction No. 1332.14, Section 3, effective August 1, 2024.

[^ 23] See Department of Defense Memorandum Recission of August 24, 2021 and November 30, 2021 Coronavirus Disease 2019 Vaccination Requirements for Members of Armed Forces (PDF), issued January 10, 2023.

[^ 24] See Department of Defense News Release, Veterans Have Options to Upgrade Discharge Characterization, issued June 4, 2024.

[^ 25] See INA 329(a).

[^ 26] See Department of Defense News Release, Veterans Have Options to Upgrade Discharge Characterization, issued June 4, 2024.

[^ 27] See INA 329.

[^ 28] See 8 CFR 329.1. See 10 U.S.C. 10143 for more information on the Selected Reserve of the Ready Reserve.

[^ 29] The National Guard and Reserve service requirements under INA 329 differ from those under INA 328. See Chapter 2, One Year of Military Service during Peacetime (INA 328), Section D, National Guard Service [12 USCIS-PM I.2(D)].

[^ 30] See Chapter 5, Application and Filing for Service Members (INA 328 and 329) [12 USCIS-PM I.5] for additional information about Form N-426.

[^ 31] See 8 CFR 329.1 and 8 CFR 329.2.

[^ 32] See 8 CFR 329.1 and 8 CFR 329.2. Declared by Joint Resolution of Congress of April 6, 1917 (40 Stat. 429, Ch. 1) and Joint Resolution of Congress, December 7, 1917 (40 Stat. 429, Ch. 1). Armistice signed, November 11, 1918.

[^ 33] See 8 CFR 329.2. See Proclamation No. 2714, Cessation of Hostilities of World War II, 61 Stat. 1048 (December 31, 1946).

[^ 34] See 8 CFR 329.2.

[^ 35] See 8 CFR 329.2. See Exec. Order No. 12081, Termination of Expeditious Naturalization Based on Military Service, 43 FR 42237 (September 18, 1978).

[^ 36] See 8 CFR 329.2. See Exec. Order No. 12939, Expedited Naturalization of Aliens and Noncitizen Nationals Who Served in an Active-Duty Status During the Persian Gulf Conflict, 59 FR 61231 (November 22, 1994).

[^ 37] See 8 CFR 329.2. See Exec. Order No. 13269, Expedited Naturalization of Aliens and Noncitizen Nationals Serving in an Active-Duty Status During the War on Terrorism, 67 FR 45287 (July 3, 2002).

[^ 38] See 8 CFR 329.2. See Exec. Order No. 13269, Expedited Naturalization of Aliens and Noncitizen Nationals Serving in an Active-Duty Status During the War on Terrorism, 67 FR 45287 (July 3, 2002).

[^ 39] See INA 329.

[^ 40] See INA 329.

[^ 41] See 10 U.S.C. 504(b).

[^ 42] MAVNI enlistees should speak with their commanding officers for additional information regarding the circumstances under which the military departments will sign and certify the Form N-426.

[^ 43] Entered into under *Calixto, et al., v. U.S. Dep't of the Army, et al.*, 1:18-cv-01551 (D.D.C. Sept. 22, 2022).

[^ 44] See *Calixto, et al., v. U.S. Dep't of the Army, et al.*, 1:18-cv-01551 (D.D.C. Sept. 22, 2022).

[^ 45] The August 1, 2024, changes to the Department of Defense Instruction (DODI) struck prior language that an entry-level separation of a service member will be treated as "the required characterization" for "administrative matters." This change prompted a change in USCIS policy, only allowing for a separation discharge of "honorable" or "General-Under Honorable Conditions," to meet the threshold for "under honorable conditions." These changes do not affect Calixto class members who receive an uncharacterized discharge and meet all other requirements.

[^ 46] The settlement agreement may be used as a substitute for identifying the applicant's type of service and periods of service.

[^ 47] For applicants filing online, annotate "Calixto" only on top of Form N-426.

[^ 48] See INA 212(e).

[^ 49] The J exchange visitor is not required to obtain a waiver of the INA 212(e) foreign residence requirement. See INA 329.

[^ 50] A J-1 exchange visitor's dependent spouse or child is issued a J-2 nonimmigrant visa.

[^ 51] See Application to Register Permanent Residence or Adjust Status (Form I-485).

[^ 52] USCIS does not have statutory authority to conduct naturalization interviews and oath ceremonies overseas for those former alien service members who reside outside of the United States. See INA 104(a), which grants U.S. Department of State (DOS) authority to determine the nationality of a person who is outside the United States. See 8 U.S.C. 1443a, which authorizes USCIS to conduct naturalization interviews and oath ceremonies for current members of the U.S. armed forces outside of the United States, but does not extend to former alien service members.

[^ 53] See INA 235(a)(3). An alien may qualify for parole under INA 212(d)(5).

[^ 54] Both the Form N-400 and Form I-131 are fee exempt for current and former service members. In some cases, such as where an alien has been deported or removed from the United States, U.S. Immigration and Customs Enforcement (ICE) has jurisdiction over the request for an advance parole document. In those cases, USCIS will send Form I-131 to ICE for adjudication.

[^ 55] See Chapter 5, Application and Filing for Service Members (INA 328 and 329), Section A, Required Forms [12 USCIS-PM 5.A].

[^ 56] See Application for Travel Documents, Parole Documents, and Arrival/Departure Records (Form I-131) and Affidavit of Support (Form I-134). In addition, see the Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States webpage.

[^ 57] See Application for Travel Documents, Parole Documents, and Arrival/Departure Records (Form I-131) and Affidavit of Support (Form I-134). In addition, see the Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States webpage.

[^ 58] See 8 CFR 335.6.

[^ 59] See INA 329. USCIS should not apply the 3- or 5-year residency requirement if the alien served during a designated period of hostilities.

Chapter 4 - Permanent Bars to Naturalization

A. Exemption or Discharge from Military Service Because of "Alienage"

1. Permanent Bar for Exemption or Discharge from Military Service

An applicant who requested, applied for, and obtained a discharge or exemption from military service from the U.S. armed forces on the ground that he or she is an alien ("alienage discharge") is permanently ineligible for naturalization unless he or she qualifies for an exception (discussed below).[1]

An exemption from military service is either a permanent exemption from induction into the U.S. armed services or the release or discharge from military training or service in the U.S. armed forces.[2] Induction means compulsory entrance into military service of the United States by conscription or by enlistment after being notified of a pending conscription.

Until 1975, applicants were required to register for the military draft. The failure to register for the draft or to comply with an induction notice is relevant to the determination of whether the applicant was liable for military service, especially in cases where an exemption was based on "alienage."

Certain persons were granted exemptions from the draft for reasons other than alienage, including medical disability and conscientious objector. An applicant may present a draft registration card with an exempt classification under circumstances that do not relate to alienage.

2. Exceptions to Permanent Bar

There are exceptions to the permanent bar to naturalization for obtaining a discharge or exemption from military service on the ground of alienage.[3]

The permanent bar does not apply to the applicant if he or she establishes by clear and convincing evidence that:

- The applicant had no liability for military service (even in the absence of an exemption) at the time he or she requested an exemption from military service;
- The applicant did not request or apply for the exemption from military service, but such exemption was automatically granted by the U.S. Government;[4]
- The exemption from military service was based upon a ground other than the applicant's alienage;
- The applicant was unable to make an intelligent choice between an exemption from military service and citizenship because he or she was misled by an authority from the U.S. Government or from the government of his or her country of nationality;
- The applicant applied for and received an exemption from military service on the basis of alienage, but was subsequently inducted into the U.S. armed forces or the National Security Training Corps;[5]
- Prior to requesting the exemption from military service, the applicant served a minimum of eighteen months in the armed forces of a nation that was a member of the North Atlantic Treaty Organization at the time of his or her service, or the applicant served a minimum of twelve months and applied for registration with the Selective Service Administration after September 28, 1971; or
- Prior to requesting the exemption from military service, the applicant was a "treaty national"[6] who had served in the armed forces of the country of which he or she was a national.[7]

3. Countries with Treaties Providing Reciprocal Exemption from Military Service

The tables below provide lists of countries that currently have (or previously had) effective treaties providing reciprocal exemption from military service.[8]

Countries with Effective Treaties Providing Reciprocal Exemption from Military Service	
Argentina	Art. X, 10 Stat. 1005, 1009, effective 1853
Austria	Art. VI, 47 Stat. 1876, 1880, effective 1928
China	Art. XIV, 63 Stat. 1299, 1311, effective 1946
Costa Rica	Art. IX, 10 Stat. 916, 921, effective 1851
Estonia	Art. VI, 44 Stat. 2379, 2381, effective 1925
Honduras	Art. VI, 45 Stat. 2618, 2622, effective 1927
Ireland	Art. III, 1 US 785, 789, effective 1950
Italy	Art. XIII, 63 Stat. 2255, 2272, effective 1948
Latvia	Art. VI, 45 Stat. 2641, 2643, effective 1928
Liberia	Art. VI, 54 Stat. 1739, 1742, effective 1938
Norway	Art. VI, 47 Stat. 2135, 2139, effective 1928
Paraguay	Art. XI, 12 Stat. 1091, 1096, effective 1859
Spain	Art. V, 33 Stat. 2105, 2108, effective 1902
Switzerland	Art. II, 11 Stat. 587, 589, effective 1850
Yugoslavia Serbia	Art. IV, 22 Stat. 963, 964, effective 1881

Countries with Expired Treaties Providing Reciprocal Exemption from Military Service	
El Salvador	Art. VI, 46 Stat. 2817, 2821 (effective 1926 to February 8, 1958)
Germany	Art. VI, 44 Stat. 2132, 2136 (effective 1923 to June 2, 1954)
Hungary	Art. VI, 44 Stat, 2441, 2445 (effective 1925 to July 5, 1952)
Thailand (Siam)	Art. 1, 53 Stat. 1731, 1732 (effective 1937 to June 8, 1968)

4. Documentation and Evidence

The Application for Naturalization (Form N-400) and Request for Certification of Military or Naval Service (Form N-426) contain questions pertaining to discharge due to alienage. The fact that an applicant is exempted or discharged from service in the U.S. armed forces on the grounds that he or she is an alien may impact the applicant's eligibility for naturalization.

Selective Service and military department records are conclusive evidence of service and discharge.[9] Proof of an applicant's request and approval for an exemption or discharge from military service because the applicant is an alien may be grounds for denial of the naturalization application.[10]

B. Deserters or Persons Absent Without Official Leave (AWOL)

An alien who is convicted by court martial as a deserter may be permanently barred from naturalization.[11] A person not ultimately court martialed for being a deserter or for being Absent without Official Leave (AWOL), however, is not permanently barred from naturalization.

An alien who deserted or was AWOL during the relevant period for good moral character may be ineligible for naturalization under the "unlawful acts" provision.[12]

Footnotes

[^ 1] See INA 315. See 8 CFR 315.2.

[^ 2] See 8 CFR 315.1. The Ninth Circuit has found that an exemption from voluntary military service is not a permanent bar under INA 315. See *Gallarde v. I.N.S.*, 486 F.3d 1136 (9th Cir 2007). INA 329 has similar language about exemptions, and that language has been found to cover discharges based on alienage even in cases of voluntary enlistment. See *Sakarapanee v. USCIS*, 616 F.3d 595, (6th Cir 2010). Officers should consult with local OCC counsel in handling discharges based on alienage.

[^ 3] See 8 CFR 315.2(b).

[^ 4] See *In re Watson*, 502 F. Supp. 145 (D.C. 1980).

[^ 5] However, an applicant who voluntarily enlists in and serves in the U.S. armed forces after applying for and receiving an exemption from military service on the basis of alienage is not exempt from the permanent bar.

[^ 6] "Treaty national" means a person who is a national of a country with which the United States has a treaty relating to the reciprocal exemption of aliens from military training or military service.

[^ 7] See 8 CFR 315.2(b).

[^ 8] See 8 CFR 315.4.

[^ 9] See 8 CFR 315.3.

[^ 10] See INA 315. See 8 CFR 315.2.

[^ 11] See INA 314.

[^ 12] See Part F, Good Moral Character, Chapter 5, Conditional Bars for Acts in Statutory Period, Section L, Unlawful Acts [12 USCIS-PM F.5(L)].

Chapter 5 - Application and Filing for Service Members (INA 328 and 329)

This section provides relevant information for applying for naturalization on the basis of military service.[1] Service members should file their applications in accordance with the instructions for the Application for Naturalization (Form N-400) and other required forms.

A. Required Forms

An alien service member filing for naturalization based on 1 year of honorable military service during peacetime[2] or honorable service during a designated period of hostility[3] must complete and submit all of the following to USCIS:

1. Application for Naturalization (Form N-400)

The alien should check the appropriate eligibility option on the Application for Naturalization to indicate the alien is applying on the basis of qualifying military service. The alien should file the application in accordance with the form instructions.

An alien who is serving or who has previously served, must have his or her service certified as honorable by his or her military branch. The alien service member is responsible for submitting to USCIS a complete and certified Request for Certification of Military or Naval Service (Form N-426) (if currently serving), or if not currently serving, a Certificate of Release or Discharge from Active Duty (DD Form 214), National Guard Report of Separation and Record of Service (NGB Form 22), or another official discharge document for all periods of service.[4]

USCIS Review

If an alien filing under a different eligibility provision for naturalization has served in the military, the officer should determine if the alien may be eligible under a qualifying military basis. If the alien may be eligible based on the military service, the officer should provide the applicant with the opportunity to seek naturalization on that basis.

If the alien would like to seek naturalization based on their military service but is ultimately determined not to be eligible on that basis, the officer must consider the alien's eligibility under the original filing basis before issuing a decision. Regardless of the filing basis, USCIS must conduct a Defense Clearance Investigative Index (DCII) query on all aliens applying for naturalization, who currently serve or have served in the U.S. military.[5]

2. Documentation as a Current or Former Service Member of the U.S. Armed Forces

Request for Certification of Military or Naval Service (Form N-426)

Form N-426 confirms whether the alien is serving honorably in an active duty status or in the Selected Reserve of the Ready Reserve. The form may also record whether the alien has ever obtained a discharge or exemption from military service from the U.S. armed forces on the ground that the applicant is an alien. Only aliens who are currently serving and who are applying under INA 328 or INA 329 are required to submit the form. An alien applying under a different naturalization provision is not required to submit the form, even if the alien has prior military service.

The military must complete and certify (sign) the Form N-426 before it is submitted to USCIS. A military official who is authorized under U.S. Department of War (DOW) policy to certify the Form N-426 must certify that the service member is currently serving honorably. Recruiters cannot certify Form N-426. A certifying official must complete and sign the Form N-426 no more than 6 months before the applicant submits the Form N-400 to USCIS, except in cases where the applicant enlisted in the Selected Reserve of the Ready Reserve through the Military Accessions Vital to National Interest (MAVNI) program before October 13, 2017.[6]

An alien who is separated or discharged from the military at the time of filing Form N-400 is not required to submit Form N-426.

Discharge Documents

Aliens who are separated or discharged from the military must submit a photocopy of their Certificate of Release or Discharge from Active Duty (DD Form 214), National Guard Report of Separation and Record of Service (NGB Form 22), or other official discharge document for all periods of service.[7] The discharge document must list information on the type of separation and character of service. Such information is typically found on page “Member-4” of DD Form 214 or Block 24 of NGB Form 22.

Aliens who are class members of *Calixto, et al., v. U.S. Dep’t of the Army, et al.*[8] and are applying for military naturalization with a certified Form N-426 they obtained through the settlement agreement[9] may include a copy of the settlement agreement with their certified Form N-426 and Form N-400 and annotate "Calixto" at the top of both forms.[10]

Most military installations have a designated military point-of-contact to assist service members with their naturalization application packets. Alien service members should inquire through their chain of command for the appropriate office to assist with preparing the naturalization packet.

B. Fee Exemptions

- USCIS charges no fees for filing an Application for Naturalization (Form N-400) or applications filed under INA 328 or INA 329.
- There is no fee for filing a Request for a Hearing on a Decision in Naturalization Proceedings (Form N-336) for aliens whose naturalization application filed under INA 328 or INA 329 has been denied.[11]
- There is no filing fee for current and former alien service members for an Application for Certificate of Citizenship (Form N-600).[12]

C. Filing Location and Initial Processing

Like all USCIS benefit requests, naturalization applications filed on the basis of military service should be filed in accordance with the form instructions.[13] For current members of the military and qualifying family members stationed outside of the United States, USCIS determines which field office has jurisdiction over the application.[14]

If an alien resides outside the United States, is no longer serving in the military, and is filing on the basis of military service during hostilities,[15] the USCIS office with jurisdiction over the naturalization application is determined by the alien’s last residence within the United States or Outlying Possession (OLP).[16]

An alien service member currently serving outside of the United States may complete all aspects of the naturalization process, including biometrics, interviews, and oath ceremonies while residing outside of the United States on official orders.[17] The alien service member may request overseas processing at any time of the naturalization process.

Footnotes

[^ 1] See INA 328 and INA 329.

[^ 2] See INA 328.

[^ 3] See INA 329.

[^ 4] For aliens applying under INA 328, qualifying service in the National Guard is limited to service in the National Guard during such time that the National Guard unit was federally recognized as a reserve component of the U.S. armed forces.

[^ 5] See Part I, Military Members and their Families, Chapter 6, Required Background Checks [12 USCIS-PM I.6].

[^ 6] See *Nio, et al. v. United States Department of Homeland Security, et al.*, Civil Action No. 17-0998 (D.D.C. 2019).

[^ 7] For aliens applying under INA 328, qualifying service in the National Guard is limited to service in the National Guard during such time that the National Guard unit was federally recognized as a reserve component of the U.S. armed forces.

[^ 8] See *Calixto, et al., v. U.S. Dep’t of the Army, et al.*, 1:18-cv-01551 (D.D.C. Sep. 22, 2022).

[^ 9] See Chapter 3, Military Service During Hostilities (INA 329), Section H, Military Accessions Vital to National Interest Program [12 USCIS-PM 3.H].

[^ 10] For aliens filing online, annotate "Calixto" only on top of Form N-426. Including this will assist USCIS in identifying class members and allow for more efficient processing.

[^ 11] See Fee Schedule (Form G-1055).

[^ 12] See Fee Schedule (Form G-1055).

[^ 13] See INA 328 and INA 329.

[^ 14] See the Overseas Processing webpage for additional information on where to file.

[^ 15] See INA 329.

[^ 16] For aliens whose last residence was in an OLP, see the USCIS Field Office Locator to determine jurisdiction. For more information, see Chapter 3, Military Service during Hostilities (INA 329), Section I, Veterans Residing Outside of the United States [12 USCIS-PM I.3(I)]. See 8 U.S.C. 1443a.

[^ 17] See 8 U.S.C. 1443a.

Chapter 6 - Required Background Checks

USCIS conducts security and background checks on all applicants for naturalization. Members or former members of the U.S. armed forces applying for naturalization must comply with those requirements. This chapter provides information on specific background checks required of such applicants. This chapter also provides information on the ways service members may meet the fingerprint requirement for naturalization.

A. Defense Clearance Investigative Index (DCII) Query

USCIS must conduct a Defense Clearance Investigative Index (DCII) query with the U.S. Department of War (DOW) as part of the background check process on any applicant with military service regardless of the section of law under which he or she is applying for naturalization. The DCII check is valid for 15 months from the initial response. The DCII check should show whether the applicant has any derogatory information in his or her military records.[1]

B. Fingerprint Requirement and the Kendell Frederick Citizenship Assistance Act

USCIS must collect fingerprint records as part of the background check process on most applicants for naturalization. The Kendell Frederick Citizenship Assistance Act (KFCAA) mandates USCIS to use enlistment fingerprints or previously submitted USCIS fingerprints to satisfy the fingerprint requirement for service members unless a more efficient method is available.

If DHS determines that new biometrics would “result in more timely and effective adjudication of the individual’s naturalization application,” DHS must inform the applicant of this determination and provide the applicant with information on how to submit fingerprints.[2]

C. Ways Service Members may Meet Fingerprint Requirement

The table below provides the ways in which a service member may meet the fingerprint requirement for naturalization on the basis of military service.[3] Such applicants may meet the requirement through any of the following ways provided in the table. These procedures aim at USCIS compliance with the KFCAA.

Ways Service Members may Meet Fingerprint Requirement for Naturalization
• The service member may appear at any stateside USCIS Application Support Center (ASC) for fingerprint capture with or without an appointment
• The service member may have his or her fingerprints taken by USCIS personnel at select military installations in the United States via mobile fingerprinting equipment
• USCIS may re-submit the service member’s fingerprints for up-to-date records if such records are on file with USCIS
• USCIS may acquire and use the service member’s fingerprints taken at the time of enlistment into the military (“OPM fingerprints”)
• The service member may have his or her fingerprints taken using the FD-258 fingerprint cards at a U.S. military installation (or U.S. embassy or consulate if overseas)
• USCIS will accept FD-258 fingerprint cards or comparable DOW fingerprint cards from domestic or overseas military installations (However, fingerprints captured electronically, either at an ASC or through a mobile fingerprinting unit, remain the more advantageous method for both the applicant and USCIS)

USCIS will consider an applicant’s naturalization application to be abandoned and will deny the application for failure to appear for biometrics capture (fingerprinting)[4] if all of the following conditions are true:

- The NSC is unable to locate the applicant or three days have elapsed from the last day of the time period allotted for the applicant to appear for fingerprinting (as stated on the second ASC appointment notice);
- The applicant is stationed stateside (and is otherwise able to report to an ASC) and has not submitted FD-258 fingerprint cards;
- The applicant has not fulfilled the fingerprint requirement; and
- USCIS has determined that the enlistment fingerprints are unavailable or are unclassifiable.

Any subsequent correspondence from an affected applicant whose application was denied for failure to appear for fingerprinting within one year is considered a Service motion to reopen.[5] USCIS grants the motion and continues with the processing of the naturalization application. USCIS does not deny an application for abandonment for failure to provide fingerprints if USCIS has evidence that the applicant is deployed inside the United States or overseas and is unable to be fingerprinted.

Footnotes

[^ 1] Previously, a military applicant was required to submit Form G-325B, Biographic Information, which USCIS used to initiate the DCII query. USCIS determined, however, that the information collected on Form N-400 is sufficient to perform the queries and deemed Form G-325B obsolete. As of February 18, 2010, Form G-325B is no longer required for any pending naturalization application.

[^ 2] See the Kendell Frederick Citizenship Assistance Act of 2008, Pub. L. 110-251 (PDF), 122 Stat. 2319.

[^ 3] See INA 328 or INA 329. See 8 CFR 335.2(b).

[^ 4] See 8 CFR 103.2(b)(13)(ii).

[^ 5] See 8 CFR 103.5(a)(5).

Chapter 7 - Revocation of Naturalization

A military member whose naturalization was granted on the basis of military service on or after November 24, 2003 may be subject to revocation of naturalization if he or she was separated from the U.S. armed forces under other than honorable conditions before he or she has served honorably for a period or periods totaling at least five years.[1]

Footnote

[^ 1] See INA 328(f), INA 329(c), and INA 340. See Pub. L. 108-136 (PDF). Such cases should be referred to U.S. Immigration and Customs Enforcement (ICE).

Chapter 8 - Posthumous Citizenship (INA 329A)

A. Eligibility for Posthumous Citizenship

In general, a person who serves honorably in the U.S. armed forces during designated periods of hostilities and dies as a result of injury or disease incurred in or aggravated by that service may be eligible for posthumous citizenship.[1] Posthumous citizenship establishes that the deceased service member is considered a citizen of the United States as of the date of his or her death.[2]

The military branch under which the deceased service member served will determine whether he or she served honorably in an active-duty status during a qualified period and whether the death was combat related.

Spouses and children of U.S. citizen service members who qualify for posthumous citizenship may be eligible for immigration benefits under special provisions of the INA.[3]

B. Application and Filing

The service member's next of kin, the Secretary of War, or the Secretary's designee in USCIS must submit an Application for Posthumous Citizenship (Form N-644) within two years of the service member's death and in accordance with the form instructions and with appropriate fee.[4] USCIS uses the posthumous citizenship application to verify the deceased service member's place of induction, enlistment or reenlistment; military service; and service-connected death.[5]

The following documents should be submitted along with the completed Application for Posthumous Citizenship, if available:

- DD Form 214, Certificate of Release or Discharge from Active Duty
- DD Form 1300, Report of Casualty/Military Death Certificate (or other military or State issued death certificate)
- Any other military or state issued certificate of the decedent's death

C. Adjudication

USCIS will issue a Certificate of Citizenship (Form N-645) in the name of the deceased service member establishing posthumously that he or she was a U.S. citizen on the date of his or her death if the Application for Posthumous Citizenship is approved.[6] In cases where USCIS denies the Form N-644, USCIS will notify the applicant of the decision and the reason(s) for denial. There is no appeal for a denied posthumous citizenship application.[7]

Footnotes

[^ 1] See Chapter 3, Military Service during Hostilities (INA 329), Section E, Designated Periods of Hostilities [12 USCIS-PM I.3(E)].

[^ 2] See INA 329A. See 8 CFR 392.

[^ 3] See Chapter 9, Spouses, Children, and Surviving Family Benefits [12 USCIS-PM I.9].

[^ 4] See Fee Schedule (Form G-1055).

[^ 5] See 8 CFR 392.2.

[^ 6] See 8 CFR 392.4. See Part K, Certificates of Citizenship and Naturalization, Chapter 2, Certificate of Citizenship [12 USCIS-PM K.2].

[^ 7] See 8 CFR 392.3(d).

Chapter 9 - Spouses, Children, and Surviving Family Benefits

A. General Provisions for Spouses, Children, and Parents of Military Members

1. Benefits for Family Members

Spouses and children of U.S. citizen service members may be eligible for naturalization under special provisions in the INA. Certain spouses may be eligible for expedited naturalization in the United States and may not be required to establish any prior period of residence or specified period of physical presence within the United States, as generally required for naturalization.

The surviving spouse, child, or parent of a U.S. citizen who dies during a period of honorable service in an active duty status in the U.S. armed forces may be eligible for naturalization. Surviving family members seeking immigration benefits are given special consideration in the processing of their applications for permanent residence or for classification as an immediate relative.

On January 28, 2008, legislation was enacted to permit a spouse or child to count any period of time that he or she is residing abroad with the service member as authorized by official orders as residence and physical presence in the United States, under certain conditions.[1] The same legislation also prescribes that such a spouse or child may be eligible for overseas proceedings relating to naturalization, as previously only permitted for an eligible member of the U.S. armed forces.

Specifically, one provision limits the circumstances under which the lawful permanent resident (LPR) spouse or child is considered to be seeking admission to the United States.[2] Another provision allows the LPR spouse to count any qualifying time abroad as continuous residence and physical presence in the United States and permits the spouse to naturalize overseas.[3] Another provision allows the U.S. citizen parent of a child filing for naturalization to count time abroad as physical presence and permits the child to naturalize overseas.[4]

2. Documenting "Official Orders"

In order to count any qualifying time abroad as continuous residence and physical presence in the United States, a spouse or child of a member of the U.S. armed forces must have official military orders authorizing him or her to accompany his or her service member spouse or parent abroad, and must accompany or live with that service member as provided in those orders.[5]

USCIS will only accept the following documents issued by the U.S. armed forces as "official orders:"

- Copy of Permanent Change of Station (PCS) orders issued to a service member for permanent tour of duty overseas that specifically name the spouse or child applying for naturalization; or
- If the submitted PCS orders do not specifically name the applicant beyond reference to "spouse," "child," or "dependent," then the applicant must submit:
- PCS orders (copy);
- Form DD-1278 (Certificate of Overseas Assignment to Support Application to File Petition for Naturalization); and
- Service member's Form DD1172 (Application for Uniformed Services Identification Card DEERS Enrollment) naming dependents.

B. Spouses of Military Members

The table below serves as a quick reference guide to certain residence, physical presence, and overseas naturalization provisions for spouses of service members. The paragraphs that follow the table provide further guidance on each provision.[6]

Residence, Physical Presence, and Overseas Naturalization for Spouses of Members of the U.S. Armed Forces

INA Section	Residence	Physical Presence	Treatment of Time Residing Abroad	Overseas Naturalization
316(a)	LPR for 5 years	30 months	Time residing with U.S. citizen spouse serving abroad may be treated as residence and physical presence in the United States (INA 319(e))	May complete entire naturalization process from abroad
319(a)	LPR for 3 years	18 months		
319(b)	Must be LPR but no specified period of residence or physical presence is required			Must complete interview and oath in United States

1. Spouses of Service Members (INA 316(a) and INA 319(a))

Spouses of service members may qualify for naturalization through the general naturalization provision or on the basis of their marriage to a U.S. citizen.[7] The general provision applies to spouses who have been LPRs for 5 years immediately preceding the date of filing the naturalization application.[8] Naturalization on the basis of marriage applies to spouses of U.S. citizens who have been LPRs for 3 years immediately preceding the date of filing the naturalization application and who have lived in marital union with their citizen spouses for those 3 years.[9]

2. Spouses of Military Members who are or will be Stationed or Deployed Abroad (INA 319(b))

The law permits expedited naturalization in the United States for eligible spouses of U.S. citizen service members who are or will be stationed or deployed abroad.[10] This provision does not require any prior period of residence or specified period of physical presence within the United States for any LPR spouse of a U.S. citizen who is an employee of the United States Government (including a member of the U.S. armed forces) or recognized nonprofit organization who is stationed abroad in such employment for at least one year.[11]

In general, the applicant is required to be in the United States for his or her naturalization examination or interview and for taking the Oath of Allegiance for naturalization.[12]

Spouses of service members already accompanying and residing abroad with their military spouse may also qualify for naturalization through the general provision[13] or on the basis of their marriage to a U.S. citizen for 3 years.[14] Such spouses may be eligible for any naturalization proceeding abroad, to include interviews, filings, oaths, ceremonies, or other proceedings relating to naturalization.[15]

3. Continuous Residence and Physical Presence while Residing Abroad (INA 319(e))

Certain eligible spouses of service members may count qualifying residence abroad as residence and physical presence in the United States for purposes of naturalization.[16] This provision does not provide an independent basis for naturalization. The benefits of this provision only apply to an LPR who is eligible for naturalization through the general provision[17] or on the basis of his or her marriage to a U.S. citizen for 3 years.[18]

The spouse must meet all of the following conditions during such time abroad:

- The LPR is the spouse of a member of the U.S. armed forces;
- The LPR is authorized to accompany and reside abroad with the service member pursuant to the service member's official orders;[19] and
- The LPR is accompanying and residing abroad with the service member in marital union.[20]

The spouse is not required to be abroad at the time the officer makes such determination. For example, an applicant who is currently residing in the United States, but had previously resided abroad during the statutory residency or physical presence period, may count the time abroad as continuous residence and physical presence, if he or she meets the eligibility

criteria.

The spouse of a service member who has been an LPR for 5 years and is applying for naturalization through the general provision does not need to establish that the service member is a U.S. citizen.[21] An applicant who is no longer married to a service member at the time of filing may still meet the residence and physical presence requirements if the LPR was married to the service member and met all the conditions above during the period of time in question.

The spouse of a service member who has been an LPR for 3 years and who is applying on the basis of his or her marriage for 3 years must establish that the service member has been a U.S. citizen for the required period.[22]

4. Overseas Naturalization for Spouses of Service Members

In addition to allowing certain time abroad to count towards the residence and physical presence requirements, INA 319(e) permits eligible spouses of service members to naturalize abroad without traveling to the United States for any part of the naturalization process.

In general, to be eligible to naturalize abroad, the LPR spouse of a service member must:

- Be authorized to accompany the service member abroad per the service member's official orders;
- Be residing abroad with the service member in marital union; and
- Meet the requirements of either INA 316(a) or INA 319(a) at the time of filing the naturalization application, except for the residence and physical presence requirements.

Prior to the enactment of the overseas provisions in 2008, with some exceptions, a service member's LPR spouse residing abroad with the service member had to apply for naturalization through expedited naturalization provisions.[23] This applied to a spouse who was eligible through the general provision[24] or through 3 years of marriage to a U.S. citizen[25] but whose time abroad rendered him or her unable to meet the respective continuous residence or physical presence requirements.

An LPR filing as the spouse of a service member residing abroad[26] was exempt from the continuous residence and physical presence requirements, but he or she was still required to return to the United States for his or her interview, naturalization, and any other related procedure.[27] The overseas naturalization provisions allows such an LPR spouse to apply for naturalization from abroad and complete any procedure relating to his or her application for naturalization while residing abroad.[28]

5. Application and Filing

Form N-400, Application for Naturalization

Eligible spouses of members of the U.S. armed forces who live abroad and want to naturalize abroad should submit an Application for Naturalization (Form N-400) in accordance with the instructions on the form and with appropriate fee.[29]

Spouses should indicate that they seek to naturalize through the general provision[30] or on the basis of their marriage to a U.S. citizen for 3 years[31] and to rely on INA 319(e) to meet the applicable continuous residence and physical presence requirements. Spouses should also write in: "319(e) Overseas Naturalization," if so desired. Only those eligible spouses who prefer naturalization abroad should apply for that option. Spouses who prefer to apply for naturalization in the United States may still elect to do so.

Form DD-1278, Certificate of Overseas Assignment to Support Application to File Petition for Naturalization

Spouses should include Form DD-1278 along with their naturalization application. Form DD-1278 must be completed and signed by the military official certifying the applicant has "concurrent travel orders" and is authorized to join their spouse military service member abroad.

Fingerprint Cards (FD258)

The spouse should submit two completed fingerprint cards (FD-258). Spouses applying overseas must have their fingerprints taken at a U.S. military base, an overseas USCIS field office, or an American Embassy/Consulate. Spouses applying in the United States must have their fingerprints taken at a USCIS Application Support Center.

Filing Location

The spouse should review and submit their application in accordance with the form instructions. For qualifying family members stationed outside of the United States, USCIS determines which field office has jurisdiction over the application.[32]

C. Children of Military Members[33]

The table below serves as a quick reference guide to certain residence, physical presence, and overseas naturalization provisions for children of service members. The paragraphs that follow the table provide further guidance on each provision.

Residence, Lawful Admission, and Citizenship and Naturalization for Children of Members of the U.S. Armed Forces Outside the United States

INA Section[34]	Place of Residence	Lawful Admission	Treatment of Time Residing Outside the United States	Automatic Citizenship or Naturalization Outside the United States
320	United States (or certain children residing outside the United States with a parent who is a member of the U.S. armed forces or spouse of a member of the U.S. armed forces[35])	Must be LPR	Must reside with U.S. citizen parent in the United States	May acquire automatic citizenship (must take oath and be issued the Certificate of Citizenship in the United States)
322	Outside the United States	No lawful admission required if child meets INA 322(d) requirements	Must reside with U.S. citizen parent stationed outside of the United States	Children who have not already acquired citizenship under INA 320, must apply, but may complete entire naturalization process from outside the United States (must take oath before 18th birthday)

1. Children of Service Members Residing in the United States (INA 320)

Children of members of the U.S. armed forces residing in the United States may automatically acquire citizenship.[36] The child must be under 18 years of age and must be an LPR in order to qualify. In order to obtain a Certificate of Citizenship, a child who has automatically acquired citizenship must follow the instructions on the Application for Certificate of Citizenship (Form N-600).[37]

2. Children of Service Members Residing Abroad (INA 322)

In general, INA 322 provides that a parent who is a U.S. citizen (or, if the citizen parent has died during the preceding 5 years, a citizen grandparent or citizen legal guardian) may apply for naturalization on behalf of a child born and residing outside of the United States who has not acquired citizenship automatically under INA 320. The child must naturalize before he or she reaches 18 years of age.

The general criteria to qualify under INA 322 include that the child must be temporarily present in the United States pursuant to a lawful admission in order to complete the naturalization. The child's qualifying U.S. citizen parent must also have been physically present in the United States or its outlying possessions for at least 5 years (2 of which after the age of 14).[38]

On January 28, 2008, INA 322 was amended to permit certain eligible children of members of the armed forces to become naturalized U.S. citizens without having to travel to the United States for any part of the naturalization process.[39]

The amendments benefit children of U.S. citizen members of the military who are accompanying their parent abroad on official orders.[40] Specifically, INA 322(d) provides that:

- Such children are not required to have a lawful admission or be present in the United States; and
- The U.S. citizen service member who is the child's parent may count any period of time he or she has resided abroad on official orders as physical presence in the United States.

These benefits are available only to biological, legitimated, or adopted children of U.S. citizen members of the U.S. armed forces and do not apply to step-children of the U.S. citizen parent. This is because the definition of "child" applicable to citizenship and naturalization provisions does not include step-children. The biological or legitimated child of a U.S. citizen parent (and member of the U.S. armed forces) must meet the requirements in INA 101(c)(1). An adopted child must meet the requirements for adopted children.[41]

USCIS will ensure that the child of a member of the U.S. armed forces is not already a U.S. citizen (has not acquired automatic citizenship[42]) prior to making a determination that he or she qualifies for naturalization through INA 322.

3. Lawful Admission and Maintenance Status Not Required (INA 322(d))

The child of a service member who is residing abroad with the service member per official orders is exempt from the temporary physical presence, lawful admission, and maintenance of lawful status requirements.[43]

4. Treatment of Physical Presence of U.S. Citizen Parent Residing Abroad

Any period of time the U.S. citizen service member who is the child's parent is residing or has resided abroad will be treated as physical presence in the United States if:

- The child is authorized to accompany and reside abroad with the service member per official orders;
- The child is accompanying and residing abroad with the service member; and
- The service member is residing or has resided abroad per official orders.

The first two conditions above are the triggering events that allow any period of time abroad to count as physical presence in the United States for the U.S. citizen parent.[44]

If the child is residing abroad with his or her U.S. citizen parent per official orders at the time of filing the Application for Citizenship and Issuance of Certificate Under Section 322 (Form N-600K), then any previous time the parent has resided abroad on official orders will be treated as physical presence in the United States regardless of whether the child resided with the parent.

5. Overseas Naturalization for Children Eligible under INA 322

The child of a service member who is on official orders authorizing the child to accompany and reside with that parent is not required to be an LPR or to have any other kind of lawful admission in the United States. The child may complete his or her entire naturalization process, to include filing and oath, while residing abroad.[45]

6. Application and Filing

Form N-600K, Application for Citizenship and Issuance of Certificate Under Section 322

To apply for citizenship for eligible children who live abroad and meet the requirements under INA 322, applicants must submit an Application for Citizenship and Issuance of Certificate Under Section 322 (Form N-600K) in accordance with the instructions on the form and with appropriate fee.[46]

Evidence of Residence Abroad

The applicant may show that the child resides abroad on official orders with the U.S. citizen-parent service member by submitting a copy of the PCS orders that include the child's name.

If the PCS orders do not specifically name the applicant beyond reference to "child" or "dependent," then also include a copy of the service member's Form DD1172 (DEERS Enrollment), naming the child.

Filing Location

Applicants must submit Form N-600K in accordance with the instructions on the form. USCIS will permit such applications to be filed with the USCIS overseas office having jurisdiction over the applicant's overseas residence.[47]

D. Naturalization for Surviving Spouse, Child, or Parent of Service Member (INA 319(d))

The spouse, child, or parent of a deceased U.S. citizen member of the U.S. armed forces who died during a period of his or her honorable service may be eligible for naturalization as the surviving relative of the service member. This includes surviving relatives of service members who were granted posthumous citizenship.[48]

The surviving spouse must have been living in marital union with the U.S. citizen service member spouse and must not have been legally separated at the time of his or her death. The spouse, however, remains eligible for naturalization if the spouse has remarried since the service member's death.[49]

The surviving spouse, child, or parent must meet the general naturalization requirements, except for the residence or physical presence requirements in the United States.

Footnotes

[^ 1] See the National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181 (PDF), 122 Stat. 3, which amended INA 284, INA 319, and INA 322.

[^ 2] See INA 284(b).

[^ 3] See INA 319(e).

[^ 4] See INA 322(d).

[^ 5] See INA 319(e) and INA 322(d).

[^ 6] This section describes certain benefits on residence, physical presence, and overseas naturalization for spouses of service members. See Part G, Spouses of U.S. Citizens [12 USCIS-PM G], for guidance on the general spousal naturalization provisions.

[^ 7] See INA 316(a). See Part G, Spouses of U.S. Citizens [12 USCIS-PM G].

[^ 8] See INA 316(a). See Part D, General Naturalization Requirements [12 USCIS-PM D].

[^ 9] See INA 319(a).

[^ 10] See INA 319(b).

[^ 11] See Part G, Spouses of U.S. Citizens, Chapter 4, Spouses of U.S. Citizens Employed Abroad [12 USCIS-PM G.4].

[^ 12] See INA 319(b). See 8 CFR 319.2.

[^ 13] See INA 316(a).

[^ 14] See INA 319(a).

[^ 15] See Part G, Spouses of U.S. Citizens [12 USCIS-PM G]. See 8 U.S.C. 1443a.

[^ 16] See INA 319(e). See 8 CFR 316.5(b)(6). See 8 CFR 316.6.

[^ 17] See INA 316(a).

[^ 18] See INA 319(a).

[^ 19] See Section A, General Provisions for Spouses, Children, and Parents of Military Members [12 USCIS-PM I.9(A)], for guidance on "official orders."

[^ 20] See 8 CFR 316.5(b)(6). See 8 CFR 316.6.

[^ 21] See INA 316.

[^ 22] See INA 319(a).

[^ 23] See INA 319(b).

[^ 24] See INA 316.

[^ 25] See INA 319(a).

[^ 26] See INA 319(b).

[^ 27] See Part G, Spouses of U.S. Citizens, Chapter 4, Spouses of U.S. Citizens Employed Abroad, Section F, In the United States for Examination and Oath of Allegiance [12 USCIS-PM G.4(F)].

[^ 28] See 8 U.S.C. 1443a.

[^ 29] See Fee Schedule (Form G-1055).

[^ 30] See INA 316(a).

[^ 31] See INA 319(a).

[^ 32] See the Overseas Processing webpage for additional information.

[^ 33] This section describes certain benefits on residence, lawful admission, and overseas naturalization for children of service members. See Part H, Children of U.S. Citizens [12 USCIS-PM H], for guidance on the general naturalization, residence, and acquisition of citizenship provisions.

[^ 34] See 8 CFR 320.2 and 8 CFR 322.2.

[^ 35] See INA 320(c).

[^ 36] See INA 320.

[^ 37] See Part H, Children of U.S. Citizens, Chapter 4, Automatic Acquisition of Citizenship after Birth (INA 320) [12 USCIS-PM H.4].

[^ 38] See Part H, Children of U.S. Citizens, Chapter 5, Child Residing Outside the United States (INA 322), Section C, Physical Presence of the U.S. Citizen Parent or Grandparent [12 USCIS-PM H.5(C)].

[^ 39] See the National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181 (PDF), 122 Stat. 3.

[^ 40] See Section A, General Provisions for Spouses, Children, and Parents of Military Members [12 USCIS-PM I.9(A)], for guidance on “official orders.”

[^ 41] See Part H, Children of U.S. Citizens, Chapter 2, Definition of Child and Residence for Citizenship and Naturalization [12 USCIS-PM H.2]. See INA 101(b)(1)(E), (F), or (G).

[^ 42] See INA 320.

[^ 43] See INA 322(d). See INA 322(a)(5) for the physical presence, lawful admission, and maintenance of lawful status requirements.

[^ 44] See INA 322(a)(2)(A).

[^ 45] See INA 322(d).

[^ 46] See Fee Schedule (Form G-1055).

[^ 47] See 8 U.S.C. 1443a.

[^ 48] See INA 319(d).

[^ 49] See 8 CFR 319.3.

Part J - Oath of Allegiance

Chapter 1 - Purpose and Background

A. Purpose

Before becoming a U.S. citizen, an alien eligible for naturalization must take an oath of renunciation and allegiance (Oath of Allegiance) in a public ceremony.[1] The Oath of Allegiance is the culmination of the naturalization process and a crucial act highlighting the transition from immigrant to U.S. citizen. The oath serves as a formal declaration of loyalty and commitment to the United States, its Constitution, and laws.

During the naturalization interview, the alien signs the naturalization application to acknowledge his or her willingness and ability to take the Oath of Allegiance and to accept certain obligations of United States citizenship. The alien must establish that it is his or her intention, in good faith, to assume and discharge the obligations of the Oath of Allegiance.[2] The alien must also establish that his or her attitude toward the Constitution and laws of the United States makes the alien applying for naturalization capable of fulfilling the obligations of the oath.[3]

B. Background

The history of the Oath of Allegiance reflects the dynamic process that has evolved over time. Since the first naturalization law in 1790, aliens applying for naturalization have taken an oath to support the Constitution of the United States.[4] Five years later, the Naturalization Act of 1795 required an alien applying to declare an intention (commitment) to become a U.S. citizen before filing a Petition for Naturalization.[5] In the declaration of intention, the alien would indicate his understanding that upon naturalization he would take an oath of allegiance to the United States and renounce (give up) any allegiance to a foreign prince, potentate, state, or sovereignty. An alien born with a hereditary title also had to renounce their title or order of nobility.

Under the decentralized system established by the Naturalization Act of 1802, "any court of record" – federal, state, county, or municipal – could naturalize a new American citizen.[6] Prior to 1906, there were as many as 5,000 courts with naturalization jurisdiction, and each court could develop its own procedures for administering the oath. There was little or no guidance on how to apply or administer the law. Some courts simply documented that an alien swore an oath, while other courts chose to write and print their own text for the oath, which the alien would read at the final hearing.

However, in 1905 a Presidential Commission on Naturalization studied naturalization in the United States. They found that U.S. naturalization courts lacked uniformity. They recommended classifying and summarizing naturalization laws into a code (re-codification), the creation of a federal agency to oversee naturalization procedures, and standard forms for all U.S. naturalizations, including a form for the Oath of Allegiance. To institute standardized procedures, Congress passed the Basic Naturalization Act of 1906 and created the Federal Naturalization Service.[7]

The Basic Naturalization Act of 1906 implemented many of the Commission's recommendations, but did not mandate a separate form for the Oath of Allegiance. Instead, the new Declaration of Intention form and Petition for Naturalization form included some of the substance of the oath. At the final hearing the alien still recited a spoken oath adapted from the law. In 1906, the Basic Naturalization Act also added the section of the oath requiring newly naturalized citizens to defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; and bear true faith and allegiance to the same.

An official standard text for the Oath of Allegiance did not appear in the regulations until 1929. The standard oath was printed in the Naturalization Rules and Regulations.[8] There was still no separate, federal form for the oath. It was most likely printed on the back of the application form.[9]

Prior to 1946, the Supreme Court had ruled that the language in the oath about supporting and defending the Constitution and laws of the United States against all enemies implied a promise to bear arms. However, in *Girouard v. U.S.*, decided in 1946, the Supreme Court ruled that the oath of allegiance did not imply a promise to bear arms.[10] A refusal to bear arms was justified on the basis of religious training and beliefs.[11] The Internal Security Act of 1950 added text to the oath of allegiance about bearing arms on behalf of the United States when required by the law; and performing noncombatant service in the armed forces of the United States when required by the law.[12]

The last major addition to the Oath of Allegiance was added by the Immigration and Nationality Act of 1952, which provided the section of the Oath of Allegiance about performing work of national importance under civilian direction.[13] This amendment reflected the evolving understanding of citizenship obligations in the United States. It acknowledged the potential of civic duty beyond military service for citizens to contribute to the country's well-being and defense of the nation deemed crucial by the U.S. government.

Under certain circumstances, an alien applying for naturalization may qualify for a modification or waiver of the oath.[14] In such cases, an officer draws a line through the designated modified portions of the oath and the alien is not required to recite the deleted portions.[15]

Aliens applying for naturalization must generally recite the Oath of Allegiance orally during a public ceremony.[16] Merely signing the naturalization application and a copy of the oath does not make the alien a U.S. citizen.

C. Legal Authorities

- INA 310; 8 CFR 310.1 – Naturalization authority
- INA 337; 8 CFR 337 – Oath of Renunciation and Allegiance
- Pub. L. 106-448 (PDF) – Waiver of Oath of Renunciation and Allegiance for Naturalization of Aliens having Certain Disabilities Act of 2000

Footnotes

[^ 1] See INA 337. See 8 CFR 337.1(a).

[^ 2] See INA 337. See 8 CFR 337.1(c). Under certain circumstances, an "Affirmation of Allegiance" is the same as an Oath of Allegiance. See 8 CFR 337.1(b).

[^ 3] See 8 CFR 337.1(c).

[^ 4] See Section 1 of the Naturalization Act of 1790, ch. 3, 1 Stat. 103 (PDF), 103–04 (repealed 1795).

[^ 5] See Section 1 of the Naturalization Act of 1795, ch. 20, 1 Stat. 414 (PDF), 414 (January 29, 1795) (repealed 1802).

[^ 6] See Naturalization Law of 1802, ch. 28, 2 Stat. 153 (PDF), 154 (April 14, 1802).

[^ 7] See Basic Naturalization Act of 1906, ch. 3592, 34 Stat. 596 (PDF) (June 29, 1906).

[^ 8] See Basic Naturalization Act of 1906, ch. 3592, 34 Stat. 596 (PDF) (June 29, 1906). (Naturalization Rules and Regulations were issued under the authority of the section 28 of the Basic Naturalization Act, which provided the Commissioner of Naturalization the authority to make rules and regulations necessary to carry out the law).

[^ 9] See Basic Naturalization Act of 1906, ch. 3592, 34 Stat. 596 (PDF) (June 29, 1906).

[^ 10] See *Girouard v. U.S.*, 328 U.S. 61 (1946).

[^ 11] Under current law, an alien opposed to bearing arms or performing noncombatant service because of his or her religious training and beliefs may qualify for a modified oath. For more information regarding Oath of Allegiance modifications, see Chapter 3, Oath of Allegiance Modifications and Waivers, Section A, Modified Oath for Religious or Conscientious Objections [12 USCIS-PM J.3(A)].

[^ 12] See Internal Security Act of 1950, Pub. L. No. 81-80 (PDF), 64 Stat. 987 (September 23, 1950).

[^ 13] See the Immigration and Nationality Act of 1952, Pub. L. No. 82-414 (PDF), 66 Stat. 163 (June 27, 1952).

[^ 14] See Chapter 3, Oath of Allegiance Modifications and Waivers [12 USCIS-PM J.3].

[^ 15] See 8 CFR 337.1(b).

[^ 16] For more information about accommodations for the Oath of Allegiance, see Part C, Accommodations, Chapter 3, Types of Accommodations, Section C, Accommodations for the Oath of Allegiance, Subsection 4, Off-Site Administration of Oath [12 USCIS-PM C.3(C)(4)].

Chapter 2 - The Oath of Allegiance

A. Oath of Allegiance

In general, naturalization applicants take the following oath in order to complete the naturalization process:

"I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely, without any mental reservation or purpose of evasion; so help me God."[1]

The Oath of Allegiance is administered in the English language, regardless of whether the applicant was eligible for an exception to the English language requirements. However, an applicant may bring an interpreter to interpret the oath during the ceremony. In addition, an applicant may request a modification to the oath because of a religious objection or inability or unwillingness to take an oath or recite the words "under God."[2] An applicant or designated representative may also request an oath waiver when the applicant is unable to understand or communicate the meaning of the oath with or without an accommodation.

B. Authority to Administer the Oath

The Secretary of Homeland Security has the authority to administer the Oath and may delegate the authority to other officials within DHS and to other employees of the United States.[3]

The Secretary of Homeland Security has, through the Director of USCIS, delegated the authority to administer the Oath during an administrative naturalization ceremony to certain USCIS officials who can successively re-delegate the authority within their chains of command.[4] For example, the Director delegated this authority to the Deputy Director, District Directors, and Field Office Directors. Field Office Directors may re-delegate the authority by way of a delegation memorandum to other employees within their chains of command, such as supervisory immigration services officers.

In addition, immigration judges may also administer the Oath in administrative ceremonies. During judicial naturalization ceremonies, the judge in the district of proper jurisdiction has exclusive authority to administer the Oath.

C. Renunciation of Title or Order of Nobility

Any applicant who has any titles of heredity or positions of nobility in any foreign state must renounce the title or the position. The applicant must expressly renounce the title in a public ceremony and USCIS must record the renunciation as part of the proceedings.[5] Failure to renounce the title of position shows a lack of attachment to the Constitution.

In order to renounce a title or position, the applicant must add one of the following phrases to the Oath of Allegiance:

- I further renounce the title of (give title or titles) which I have heretofore held; or
- I further renounce the order of nobility (give the order of nobility) to which I have heretofore belonged.[6]

An applicant whose country of former nationality or origin abolished the title by law, or who no longer possesses a title, is not required to drop that portion of his or her name that originally designated such title as a part of his or her naturalization.[7]

Footnotes

[^ 1] See INA 337(a). See 8 CFR 337.1(a).

[^ 2] See Chapter 3, Oath of Allegiance Modifications and Waivers [12 USCIS-PM J.3].

[^ 3] See INA 103(a)(6). Potential exercise of Oath authority by any person outside of USCIS in an administrative ceremony needs to be raised through chains of command to USCIS leadership and counsel for consideration.

[^ 4] See INA 310 and 8 CFR 310. See INA 337 and 8 CFR 337. See Section II(V) of DHS Delegation 0150.1 (issued June 5, 2003).

[^ 5] See INA 337.

[^ 6] See 8 CFR 337.1(d).

[^ 7] See *Societe Vinicole de Champagne v. Mumm*, 143 F. 2d 240 (2d Cir. 1944).

Chapter 3 - Oath of Allegiance Modifications and Waivers

The table below serves as a quick reference guide on general requirements for oath modifications and oath waiver. The sections and paragraphs that follow the table provide further guidance on each modification and oath waiver.

Oath of Allegiance Modifications and Waiver

Request	Permitted Modifications to Oath	Testimony or Evidence
Modified Oath for Religious or Conscientious Objections	Deletion of either or both of the following clauses: Bearing arms on behalf of the United States if required by law [INA 337(a)(5)(A)]; and Performing noncombatant service in the U.S. armed forces when required by law [INA 337(a)(5)(B)]	Must show opposition to clause (or clauses) based on religious training and belief or deeply held moral or ethical code. Applicant may provide an attestation or witness statement.
Affirmation of Allegiance in Lieu of Oath	Substitution of the words “solemnly affirm” for the words “on oath” and no recitation of the words “so help me God” [8 CFR 337.1(b)]	Not Required
Waiver of the Oath	Requirement to take the Oath of Allegiance may be waived	Evaluation by medical professional stating inability to understand or communicate the meaning of the oath due to a physical or developmental disability or mental impairment.

A. Modified Oath for Religious or Conscientious Objections

1. General Modifications to the Oath

An applicant may request a modified oath that does not contain one or both of the following clauses:

- To bear arms on behalf of the United States when required by the law; and
- To perform noncombatant service in the U.S. armed forces when required by the law.[1]

In order to modify the oath, the applicant must demonstrate, by clear and convincing evidence, that he or she is unwilling or unable to affirm to these sections of the oath based on his or her religious training and belief, which may include a deeply held moral or ethical code.[2]

There is no exemption from the clause “to perform work of national importance under civilian direction when required by the law.”[3]

2. Qualifying for Modification to the Oath

Three-Part Test

In order for an applicant to qualify for a modification based on his or her "religious training and belief," the applicant must satisfy a three-part test. An applicant must establish that:

- He or she is opposed to bearing arms in the U.S. armed forces or opposed to any type of service in the U.S. armed forces;
- The objection is grounded in his or her religious principles, to include other belief systems similar to traditional religion or a deeply held moral or ethical code; and
- His or her beliefs are sincere, meaningful, and deeply held.[4]

The applicant is not eligible for a modified oath when he or she is opposed to a specific war. Religious training or belief does not include essentially political, sociological, or philosophical views. An applicant whose objection to war is based upon opinions or beliefs about public policy and the practicality or desirability of combat, or whose beliefs are not deeply held, does not qualify for the modification of the oath.

Applicant is Not Required to Belong to a Church or Religion

In addition, qualification for the exemption is not dependent upon membership in a particular religious group, nor does membership in a specific religious group provide an automatic modification to the oath. The applicant is not required to:

- Belong to a specific church or religious denomination;
- Follow a particular theology or belief; or
- Have religious training.

However, the applicant must have a sincere and meaningful belief that has a place in the applicant's life that is equivalent to that of a religious belief.[5] Because of this belief, for example, the applicant's conscience may not rest or be at peace if allowed to become an instrument of war.[6]

Evidence Establishing Eligibility

An applicant may provide, but is not required to provide, an attestation from a religious organization (or similar organization), witness statement, or any other evidence to establish eligibility. An applicant's oral testimony or written statement may be sufficient to qualify for the modification. An officer may ask an applicant questions regarding the applicant's beliefs in order to determine whether the applicant is eligible for the modification of the oath, to include, a review of the following factors:

- General pattern of pertinent conduct and experiences;
- Nature of applicant's objection and principles on which objection is based;
- Training in the home or a religious organization;
- Participation in religious or other similar activities; and
- Whether the applicant gained his or her ethical or moral beliefs through training, study, self-contemplation, or other activities comparable to formulating traditional religious beliefs in the home or through a religious organization.

An officer must not question the validity of what an applicant believes or the existence or truth of the concepts in which the applicant believes.[7]

Failure to Provide Evidence During Interview

If, during the interview, the applicant does not provide any oral testimony or other evidence that the applicant's objection to the oath is based upon sincere, meaningful, and deeply held beliefs such as religious, moral, or ethical beliefs, or the applicant refuses to explain the basis of the objection, the officer should provide the applicant an additional opportunity to establish eligibility for the modification before concluding the interview.

Officers should not conclude that an applicant is ineligible for the oath modification if the applicant fails to provide such oral testimony or other evidence at the interview. Officers should issue a Request for Evidence (RFE) to give the applicant an additional opportunity to provide testimony, a statement, or to submit evidence to demonstrate eligibility for the modification.

Results

If an applicant qualifies for a modified oath, USCIS omits only the relevant clauses and the applicant recites the modified form of the oath at the regularly scheduled public naturalization ceremony.[8] An applicant who does not qualify for the modification is required to take the full oath. Otherwise, the applicant is not eligible for naturalization.

B. Affirmation of Allegiance in Lieu of Oath

An applicant may request an affirmation in lieu of an oath. The applicant may request this affirmation in lieu of an oath for any reason.[9] In these cases:

- The applicant substitutes the words "solemnly affirm" for the words "on oath"; and
- The applicant does not recite the words "so help me God."[10]

USCIS grants this modification solely upon the applicant's request. The applicant is not required to establish that the request is based solely on his or her religious training and belief. Applicants are not required to provide any documentary evidence or testimony to support a request to substitute the words "on oath" or "so help me God."

USCIS must not require the applicant to recite the deleted portions of the Oath of Allegiance at the ceremony. The officer informs the applicant that he or she is not required to recite the deleted portions and that the applicant may take the oath in the modified form.

C. Waiver of the Oath

1. Oath of Allegiance Waiver

Oath Waiver Based on a Physical or Developmental Disability or Mental Impairment

USCIS may waive the Oath of Allegiance for an applicant who is unable to understand or to communicate an understanding of its meaning because of a physical or developmental disability or mental impairment.[11]

An applicant for whom USCIS granted an oath waiver is considered to have met the requirement of attachment to the principles of the Constitution of the United States, and be well disposed to the good order and happiness of the United States for the required period.

An applicant who needs an oath waiver because of a physical or developmental disability or mental impairment, may make this request, with the assistance of a legal guardian, surrogate, or designated representative, on a Medical Certification for Disability Exceptions (Form N-648).[12] An applicant is not required to submit a specific form to request an oath waiver,[13] and may instead provide a written request and a written evaluation[14] by an authorized medical professional.[15]

USCIS reserves the right to request documentation if there is a question upon examination about the applicant's disability and ability to understand or communicate an understanding of the oath. If USCIS approves the oath waiver, USCIS does not require the applicant to appear in a public ceremony.

USCIS accepts an oath waiver request at any point of the naturalization process, until the time of the oath ceremony. Field offices should work with the legal guardian, surrogate, or designated representative before the initial examination to obtain all the necessary documentation.[16]

Oath Waiver for Children under 14 Years of Age

The Immigration and Nationality Act (INA) permits USCIS to waive the taking of the Oath of Allegiance if USCIS determines the person is unable to understand its meaning.[17] USCIS has determined that children under the age of 14 are generally unable to understand the meaning of the oath. Accordingly, USCIS waives the oath requirement for a child younger than 14 years of age, at the time of naturalization. If USCIS waives the oath requirement, USCIS issues a Certificate of Citizenship after the officer approves the application.[18]

2. Legal Guardian, Surrogate, or Designated Representative

When an applicant is unable to undergo any part of the naturalization examination because of a physical or developmental disability or mental impairment, a legal guardian, surrogate, or an eligible designated representative completes the naturalization process for the applicant. USCIS waives the Oath of Allegiance and the legal guardian, surrogate, or designated representative attests to the applicant's eligibility for naturalization. In addition to an oath waiver, this process may require accommodations including off-site examinations.

When an oath waiver is provided, a legal guardian, surrogate, or designated representative signs on behalf of an applicant who is unable to understand or communicate an understanding of the Oath of Allegiance because of a physical or developmental disability or mental impairment. The legal guardian, surrogate, or representative acts on behalf of an applicant with a disability at every stage of the naturalization examination. The legal guardian, surrogate, or representative files the application on behalf of the applicant and must have knowledge of the facts supporting the applicant's eligibility for naturalization.

The guardian, surrogate, or representative addresses every requirement for naturalization and bears the burden of establishing the applicant's eligibility for naturalization.

Persons eligible to act on behalf of the applicant include:

- A person who a proper court has designated as the applicant's legal guardian or surrogate and who is authorized to exercise legal authority over the applicant's affairs;[19] or
- In the absence of a legal guardian or surrogate, a U.S. citizen spouse, parent, adult son or daughter, or adult brother or sister, who is the primary custodial caregiver and who takes responsibility for the applicant.

USCIS will only recognize one designated representative in the following order of priority:[20]

- Legal guardian or surrogate (highest priority)
- U.S. citizen spouse
- U.S. citizen parent
- U.S. citizen adult son or daughter
- U.S. citizen adult brother or sister (lowest priority)

The person acting on behalf of the applicant must provide proof of legal guardianship, or documentation to establish the familial relationship, such as a birth certificate, marriage certificate, or adoption decree. In addition, the person must provide documentation to establish that he or she has the primary custodial care and responsibility for the applicant (for example, income tax returns, Social Security Administration documents, and affidavits from other relatives). A spouse, parent, adult son or daughter, or adult brother or sister who is not the legal guardian or surrogate must provide evidence of U.S. citizenship.

USCIS continues an application where the family member acting as a designated representative is not a U.S. citizen. USCIS explains to the family member why he or she is not qualified to act as a designated representative and offers the applicant an opportunity to bring another person who may qualify.

Footnotes

[^ 1] See INA 337(a)(5)(A) and INA 337(a)(5)(B).

[^ 2] The Supreme Court has addressed the meaning of "religious training and belief" in the context of exemptions from military service under section 6(j) of the Universal Military Training and Service Act." See *Welsh v. United States*, 398 U.S. 333 (1970) (holding that Welsh, who characterized his beliefs as nonreligious and expressed doubt in the existence of a Supreme Being, was entitled to a conscientious objector exemption to military service because his beliefs occupied a parallel place in his life to that of religious convictions); *United States. v. Seeger*, 380 U.S. 163 (1965) (stating that the applicable test for determining whether someone's belief was based on religious training and belief was whether the belief was sincere and meaningful and "occup[ied] in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption"). See INA 337(a) which contains virtually the same language regarding religious training and belief as was addressed by the Supreme Court in *Welsh and Seeger*.

[^ 3] See INA 337(a)(5)(C).

[^ 4] See INA 337. See *Welsh v. United States*, 398 U.S. 333 (1970). See *United States. v. Seeger*, 380 U.S. 163 (1965).

[^ 5] See *Welsh v. United States*, 398 U.S. 333 (1970). See *United States. v. Seeger*, 380 U.S. 163 (1965).

[^ 6] See *Welsh v. United States*, 398 U.S. 333 (1970).

[^ 7] See *United States. v. Seeger*, 380 U.S. 163 (1965): "The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's 'Supreme Being' or the truth of his concepts. But these are inquiries foreclosed to Government."

[^ 8] See Chapter 1, Purpose and Background, Section A, Purpose [12 USCIS-PM J.1(A)]. See INA 337. See 8 CFR 337.1(b).

[^ 9] The INA indicates that the affirmation is requested “by reason of religious training and belief (or individual interpretation thereof), or for other reasons of good conscience.” See INA 337(a).

[^ 10] See 8 CFR 337.1(b).

[^ 11] See INA 337(a). See Pub. L. 106-448 (PDF) enacted on November 6, 2000.

[^ 12] USCIS will continue to accept a written request for an oath waiver even if an oath waiver is not requested on the Medical Certification for Disability Exceptions (Form N-648).

[^ 13] The oath waiver requirements are distinct from the requirements for the medical disability exception to the English and civics requirements for naturalization under INA 312(b). See Part E, English and Civics Testing and Exceptions, Chapter 3, Medical Disability Exception (Form N-648) [12 USCIS-PM E.3].

[^ 14] The written evaluation establishes the applicant’s inability to take the Oath of Allegiance. The written evaluation must be completed and signed by an authorized medical professional and explain how the applicant’s physical or developmental disability or mental impairment prevents the applicant from being able to understand or communicate an understanding of the meaning of the Oath of Allegiance. The applicant is still required to submit Form N-648 to be exempted from the educational requirements.

[^ 15] For information on who is an authorized medical professional, see Part E, English and Civics Testing and Exceptions, Chapter 3, Medical Disability Exception (Form N-648), Section E, Authorized Medical Professionals [12 USCIS-PM E.3(E)].

[^ 16] See Subsection 2, Legal Guardian, Surrogate, or Designated Representative [12 USCIS-PM J.3(C)(2)].

[^ 17] See INA 337(a). See 8 CFR 341.5(b).

[^ 18] See Part H, Children of U.S. Citizens [12 USCIS-PM H].

[^ 19] A legal guardian or surrogate may act on behalf of an applicant regardless of the legal guardian or surrogate’s immigration status or whether he or she is a family member.

[^ 20] If there is a conflict in priority between two or more persons seeking to represent the applicant, and the individuals share the same degree of familial relationship, USCIS gives priority to the person who is older.

Chapter 4 - General Considerations for All Oath Ceremonies

A. USCIS Administrative Ceremony

USCIS field offices conduct administrative ceremonies at regular intervals as frequently as is necessary. USCIS must conduct ceremonies in such a manner as to preserve the dignity and significance of the occasion. In some instances, USCIS offices may conduct daily ceremonies where the examination, adjudication, and the oath take place on the same day. District Directors and Field Office Directors must ensure that administrative ceremonies conducted by USCIS in their districts comply with the USCIS “Model Plan for Naturalization Ceremonies.”[1]

An applicant must appear in person at a public ceremony unless USCIS excuses the appearance. USCIS designates the time and place for the ceremony and conducts the ceremony within the proper jurisdiction. USCIS presumes an applicant to have abandoned his or her naturalization application when the applicant fails to appear for more than one oath ceremony.[2] In such cases, USCIS executes and issues a motion to reopen and may deny the application if the applicant has not responded within 15 days.[3]

B. Derogatory Information Received before Oath or Failure to Appear

An officer must execute a motion to reopen a previously approved naturalization application if:

- USCIS receives or identifies disqualifying derogatory information about the applicant after approval of his or her application prior to the administration of the Oath of Allegiance;[4] or
- An applicant fails to appear for at least two ceremonies to take the Oath of Allegiance without good cause.[5]

USCIS notifies the applicant in writing about the receipt of derogatory information or multiple failures to appear through the motion to reopen. The applicant has 15 days to respond to the motion to reopen and overcome the derogatory information or provide good cause for failing to appear at the Oath ceremony.[6]

USCIS must not schedule an applicant for the administration of the Oath of Allegiance if USCIS receives or identifies disqualifying derogatory information. USCIS must not administer the Oath of Allegiance to the applicant until the matter is resolved favorably.

If the applicant overcomes the derogatory information and qualifies for naturalization, the officer approves the application and schedules the applicant for the Oath of Allegiance. If the applicant is unable to overcome the derogatory information, the officer grants the motion to reopen and denies the application on its merits.[7]

An applicant who fails to appear for at least two ceremonies to administer the Oath of Allegiance, without good cause, abandons his or her intent to be naturalized. USCIS considers multiple failures to appear to be equivalent to receipt of derogatory information after the approval of a naturalization application.[8]

Footnotes

[^ 1] See Chapter 5, Administrative Naturalization Ceremonies [12 USCIS-PM J.5].

[^ 2] See 8 CFR 337.10.

[^ 3] See Part B, Naturalization Examination, Chapter 5, Motion to Reopen [12 USCIS-PM B.5]. See 8 CFR 335.3(a) and 8 CFR 337.

[^ 4] See 8 CFR 335.5.

[^ 5] See 8 CFR 337.10.

[^ 6] See 8 CFR 335.5.

[^ 7] See 8 CFR 336.1.

[^ 8] See 8 CFR 337.10.

Chapter 5 - Administrative Naturalization Ceremonies

USCIS is committed to elevating the importance of the naturalization ceremony as a venue to recognize the rights, responsibilities, and importance of citizenship and provide access to services for newly naturalized citizens. The naturalization ceremony is the culmination of the naturalization process. USCIS aims to make administrative naturalization ceremonies positive and memorable moments in the lives of the participants. USCIS honors the Oath of Allegiance with policies and practices that reflect the importance of the occasion.

The following information provides USCIS officials with guidance for conducting administrative naturalization ceremonies in a meaningful and consistent manner.[1]

A. Ceremony Check-In Process

USCIS personnel perform the ceremony check-in process before the start of the ceremony. An officer reviews the responses on each alien's Notice of Naturalization Oath Ceremony (Form N-445) and updates responses as necessary. Once the officer verifies each alien's eligibility for naturalization, the officer then collects all USCIS-issued travel documents and lawful permanent resident cards from each alien.

B. Materials Distributed

USCIS may distribute materials at administrative naturalization ceremonies, including:

- Important Information for New Citizens (Form M-767 (PDF, 208.39 KB));
- U.S. Citizenship Welcome Packet;
- American flag;
- Citizen's Almanac (Form M-76);
- President's Congratulatory Letter; and
- Pocket-size Declaration of Independence and Constitution of the United States.

During the ceremony, aliens will have access to the Oath of Allegiance and Pledge of Allegiance to repeat during the ceremony.

1. Citizen's Almanac and Pocket-size U.S. Declaration of Independence and Constitution

The Citizen's Almanac (Form M-76 (PDF, 8.53 MB)) and the Pocket-size Declaration of Independence and Constitution of the United States (Form M-654 (PDF, 1.24 MB)) may be made available to all interested newly naturalized citizens. Officers may make these publications available during administrative ceremonies but are not required to do so. The items may be placed on a table in an area accessible to the newly naturalized citizens. USCIS may also inform newly naturalized citizens that both publications are available for download at uscis.gov/citizenship.

2. Other Materials

USCIS field office leadership must consult with the USCIS Office of the Chief Counsel's Ethics Division to determine whether materials and publications other than the American flag and the contents of the U.S. Citizenship Welcome Packet are appropriate for distribution. Federal workers, including officers, and other invited participants must never distribute the following within the venue where the USCIS naturalization ceremony is taking place, or anywhere within a federal facility or on federal property:

- Partisan publications;
- Publications referencing a specific political group;
- Commercial materials or publications;
- Religious materials or publications; or
- Any promotional or solicitation materials or publications.

Authorized governmental officials invited by USCIS to distribute materials or publications, such as information on voter registration, may provide USCIS-authorized materials at the conclusion of the naturalization ceremony.

Similarly, other authorized U.S. government participants, such as the Department of State's Passport Services Division and the Social Security Administration may distribute USCIS-authorized materials within the venue after the USCIS official has concluded the naturalization ceremony. Only USCIS-approved materials and publications may be distributed within the venue once the presiding USCIS official has concluded the naturalization ceremony.

C. Ceremony Program

To standardize the naturalization ceremony experience, unless exempted, USCIS offices follow these steps in administrative ceremonies to the extent feasible:[2]

- Play "Faces of America;"
- Play the national anthem, The Star Spangled Banner, instrumental or vocal version;[3]
- Deliver opening (welcoming) remarks by Master of Ceremonies;[4]
- Announce the "call of countries;"[5]
- Administer the Oath of Allegiance to the aliens applying for naturalization;[6]
- Deliver keynote remarks (USCIS leadership or guest speaker);
- Play Presidential, Secretary's, or Director of USCIS' congratulatory remarks;
- Recite the Pledge of Allegiance;
- Deliver concluding remarks (Master of Ceremonies or USCIS field leadership);[7] and
- Present the Certificate of Naturalization (Form N-550) by USCIS leadership or officers.[8]

The Naturalization Ceremony Presentation[9] includes all required video and musical elements the office plays at various points in the naturalization ceremony program.

Field offices may also enhance the ceremony program with additional appropriate elements, such as approved musical selections included in the Naturalization Ceremony Presentation. When USCIS plays musical selections during ceremonies, aliens applying for naturalization are not required to stand or sing.

D. Guest Speakers

USCIS welcomes distinguished community members who are U.S. citizens by birth or naturalization to participate as guest speakers in administrative naturalization ceremonies. A guest speaker may be a:

- Government leader;
- Military leader;
- Member of Congress;
- Judge;
- Department of Homeland Security (DHS) official; or
- A person whom USCIS deems appropriate for the occasion.

Local USCIS field leadership must carefully review and select guest speakers based on their relevance to the occasion, with particular focus on their outstanding achievements, contributions to the nation or their community, personal experience, or notable activities as a citizen of the United States.

USCIS field leadership must review the qualifications of any potential guest speaker who is not a DHS employee, and approve their role in the program before they speak at an administrative naturalization ceremony.[10] If USCIS headquarters selects a guest speaker for a USCIS field office's administrative naturalization ceremony, headquarters reviews the person's qualifications before making the recommendation.

It is the responsibility of field leadership of the USCIS office conducting the administrative naturalization ceremony to preserve the importance, dignity, and significance of the occasion. After selecting and scheduling a guest speaker, the local field leadership must send the speaker a written notice, which describes USCIS' expectations regarding the appropriate length and content of remarks. USCIS must advise speakers that appropriate remarks focus on:

- Importance of U.S. citizenship;
- New privileges (such as the ability to travel with a U.S. passport, apply for a position in the federal government, and vote in federal elections);
- Responsibilities of U.S. citizenship (such as voting and serving on a jury when requested);
- Civic principles within the U.S. government;
- Civic participation in the local community;
- Importance of swearing allegiance to the United States; or
- Theme of the ceremony.

Inappropriate remarks, including political (partisan or otherwise), religious, or commercial statements, are not permitted.[11] Out of respect for the candidates and other attendees, guest speakers serving in the keynote role should deliver remarks between 5 and 10 minutes in length. If a scheduled guest speaker is unable to participate, USCIS must approve any replacement speaker.

USCIS respects the privacy of aliens applying for naturalization and may not release the names or personal information of aliens applying for naturalization unless the alien provides consent or disclosure as required by law.

E. Participation by Elected Officials and Members of Congress

1. Elected Officials

USCIS must uphold the integrity of each administrative naturalization ceremony and ensure that it is a politically neutral event. The presence of candidates for public office at a naturalization ceremony may create a perception that is inconsistent with USCIS' obligation of neutrality. Accordingly, candidates for public office, including incumbents, generally may not speak at or participate in an administrative naturalization ceremony starting from 3 months immediately preceding a primary or general election for office.

For example, if the state primary elections are on February 4, 2014, and the state general election is November 3, 2014, a candidate for public office in those primary elections may not be a guest speaker or have another formal participatory role from November 4, 2013 (3 months before the primary election) until after February 4, 2014. A candidate for the general election may not have a participatory role from August 3, 2014 (3 months before the general election) until after November 3, 2014.[12]

The 3-month rule does not apply to the President or Vice President of the United States. However, the 3-month rule does apply to Members of Congress. In exceptional circumstances, the USCIS Office of the Chief Counsel's Ethics Division may authorize exceptions to the 3-month rule if the candidate's participation, subject to any appropriate conditions, would not unduly compromise the ceremony's political neutrality and would serve the best interest of USCIS and enhance the ceremony. For any exceptions or issues relating to the 3-month rule, field leadership should contact the Office of the Chief Counsel's Ethics Division.

2. Members of Congress

USCIS congressional liaisons coordinate with USCIS district or field office leadership regarding invitations to and requests from Members of Congress to participate in administrative naturalization ceremonies.

Congressional liaisons and the Field Operations Directorate must provide ample notice when issuing invitations to or responding to requests from Members of Congress to serve as guest speakers in naturalization ceremonies. In the event a Member of Congress is unable to serve as a guest speaker after accepting an invitation to do so, only USCIS may select an appropriate substitute.

When a congressional liaison issues an invitation to a Member's office, the invitation must include USCIS guidelines for administrative naturalization ceremonies.[13] Members of Congress scheduled to speak at administrative naturalization ceremonies must follow USCIS' guidance for guest speakers.[14] Members of Congress may not distribute any materials at a USCIS naturalization ceremony or inside the ceremony venue.[15]

Some members of Congress may ask USCIS to schedule naturalization ceremonies to mark particular dates or events of significance to the United States or the U.S. state being represented. USCIS district office or field office leadership may, at their discretion, honor these requests, subject to restrictions for guest speakers.[16]

District office or field office leadership must decline the request if there is any possibility of the event being seen as a platform for any political, controversial, religious, or commercial message. District office or field office leadership may also decline the request if supporting such a ceremony would negatively impact other activities or otherwise present operational hardships.

When a member of Congress asks USCIS to schedule a naturalization ceremony, USCIS responds in writing. If the request is to be honored, the response will provide expectations and restrictions regarding speech for guest speakers.[17] If the request is to be declined, USCIS will provide a reason and a copy of the ceremony guidance.

Members of Congress and their staff are always welcome to attend a naturalization ceremony as members of the public.

F. Voter Registration After Naturalization Ceremonies

1. Distribution of Voter Registration Applications[18]

The ability to vote in federal elections is a fundamental right that comes with U.S. citizenship.[19] All newly naturalized citizens are given the opportunity to register at the end of the administrative naturalization ceremony when the newly naturalized citizen is then eligible to register to vote.[20] USCIS provides access to voter registration services for the state where the field office is located at each administrative naturalization ceremony.[21]

USCIS offices request election officials from state or local government election offices to attend naturalization ceremonies to distribute, collect, and review state-specific voter registration applications, and to officially register newly naturalized citizens to vote.

If no governmental officials are available to distribute voter registration applications, USCIS field offices provide voter registration applications to all newly naturalized citizens.[22] USCIS is not responsible for the collection of applications or retention of any information from such applications, or any other activities related to voter registration.

2. Voter Registration Services

The term “voter registration services” includes one or more of the following activities:

- Distribution of voter registration application forms;
- Assisting interested new citizens in completing voter registration application forms;
- Reviewing submitted forms to ensure that each form is complete;
- Collecting completed forms for submission to the local election official; or
- Providing nonpartisan educational information on the voting process.[23]

The mechanism for registration may vary by ceremony location, but in every case must take place only after the conclusion of the ceremony, when the newly naturalized citizens are officially U.S. citizens. USCIS provides space for governmental officials in the same ceremony space or room to provide on-site voter registration services, if available.

If no space is available for governmental officials to provide on-site voter registration services, the USCIS field office distributes voter registration applications to each newly naturalized citizen.[24] USCIS bases a “no space available” determination on the location of the ceremony venue,[25] the size of the venue facility, and the number of aliens applying for naturalization, as well as the layout of the venue space, in accordance with safety standards and regulations. “No space available” determinations are made on a case-by-case basis by USCIS field leadership conducting the ceremony.

3. Points of Contact for Voting and Voter Registration

If naturalized citizens have questions regarding voting and voter registration, USCIS refers them to:

- The governmental officials offering voter registration services on-site;
- Other information resources within the local area; or
- The appropriate official government websites USA.gov Find My State or Local Election Office, USA.gov Register to Vote, and Vote.gov.

G. Services Provided by Other Government Entities

Federal entities, such as the Department of State’s Passport Services Division and the Social Security Administration, as well as state and local governments, may be authorized to provide information and make services available to newly naturalized citizens and their guests at the conclusion of the administrative naturalization ceremony.[26] Governmental entities that desire representation at administrative naturalization ceremonies must seek advance approval from field leadership of the USCIS office conducting the ceremony.

H. Participation of Volunteers and Civic Organizations

Field leadership may permit volunteers from the community, community-based organizations, and civic organizations to participate in various roles during the administrative naturalization ceremony. For example, Field leadership may have the U.S. armed forces color guard perform the presentation of colors and the national anthem or have volunteers lead the Pledge of Allegiance.

Field leadership will determine the appropriate level of participation for the occasion. However, under no circumstances will any non-USCIS employee perform any USCIS function.[27] Additionally, only state and local election officials may provide voter registration services.

Field leadership must review the qualifications, designate the level of participation, and oversee the participation of all volunteers and organizations during the administrative naturalization ceremony. In addition, participants must not engage in political, religious, or commercial activity of any kind.

I. Offers to Donate Use of Facilities

USCIS may generally accept offers to donate use of facilities unless they present a conflict of interest or appearance of a conflict of interest. Facilities[28] should be neutral and generally not affiliated with any religion, commercial enterprise, political group, or immigration law or advocacy group. The USCIS Office of the Chief Counsel’s Ethics Division analyzes offers to donate use of facilities for compliance with relevant legal authorities and DHS policy on the acceptance of gifts.

USCIS may generally hold naturalization ceremonies at public events or state or federal government events that take place in diverse settings that provide an educational opportunity for promoting public understanding of the naturalization process such as:

- USCIS offices;
- Federal, state, and local government offices and spaces;
- Federal courts;
- Military installations;
- Sporting event venues;
- U.S. national parks;
- State, county, and local public parks;
- Public libraries and museums;
- Monuments and historic sites;
- Fairs or festivals; and
- Public schools and universities.[29]

Events and locations for oath ceremonies must be consistent with the importance, dignity and significance of the occasion.[30]

When reviewing an offer to use venues and facilities for naturalization ceremonies, USCIS considers whether the acceptance of the gift or use of the donated facility:

- Violates or creates the appearance of a violation of the Hatch Act;[31]
- Creates or appears to create a conflict of interest or an appearance of a conflict of interest;
- Creates or appears to create an appearance of lack of impartiality; or
- Creates or appears to create preferential treatment or an endorsement of the donor, or the donor's products, services, activities, or policies.

USCIS may not use:

- Religious facilities (for example, space in or connected to a place of worship);
- Venues of political affiliation or in conjunction with a political activity, including national conventions and fundraising events;
- Facilities of an organization that practices immigration law;
- Facilities of an organization that is directly engaged in immigration advocacy or immigration policy;
- Facilities concurrently hosting an event[32] for an organization that practices immigration law or is active in immigration advocacy, policy, or immigration lobbying;[33]
- Facilities of an organization[34] that represents petitioners and aliens before DHS; or
- Facilities where USCIS personnel cannot protect secure documents.

USCIS employees must not solicit a gift (including use of facilities to hold an administrative naturalization ceremony) from any non-federal entity.[35] However, USCIS may accept an unsolicited gift with the concurrence of the USCIS Office of the Chief Counsel's Ethics Division and approval of the USCIS Director.

Generally, USCIS would not use a donated facility for ceremonies from a prohibited source.[36]

1. Submission of One-Time Offer to Donate Facility

The donor must submit an invitation letter (on the organization's letterhead) to the Field Operations Directorate at least 4 weeks in advance of the ceremony date to guarantee timely processing.

In addition to the donor's submission, an officer must submit Gift Offer Donation Request (Form G-1477)[37] for approval.

2. Submission of Multi-Date Offers to Donate Facilities

Certain organizations qualify for multi-date gift offer approvals. These include non-federal, nonprofit organizations that USCIS has approved previously for gift offers. In order to qualify for multi-date gift approval, the donor must:

- Have a history of donating use of venue for naturalization ceremonies that were conducted without negative incident;
- Be unlikely to undergo changes of ownership or mission; and
- Submit an invitation letter (on the organization's letterhead) that specifies the number of ceremonies to be held at the donated venue and the donated value[38] of the gift offer. The invitation letter does not have to identify specific dates of the ceremonies to be held.

The officer must indicate the total yearly value for all multi-date offers submitted on the Gift Offer Donation Request (Form G-1477).[39] Notwithstanding a prior approval, changes in a donor's ownership, mission, or operations may warrant denying use of venue space prospectively.

Duration of Approved Multi-Date Offers

Multi-date gift offers are valid for 1 year from the time of approval of the request.

Subsequent Uses of Approved Multi-Date Offers

The donor of a previously approved multi-date gift offer to donate use of facilities does not need to submit a new submission for approval. New submissions for review and approval are only needed in instances where:

- The gift value exceeds the total previously listed gift value[40] in the original submission;
- There is a change in the donated venue location;
- There is a substantive change to ownership, mission, or stability of the organization; or
- Any other changes arise that create a new actual or apparent conflict of interest.

3. Review of Offer

After receipt, an authorized official reviews the documents for accuracy and consistency. The following officials then review and consider the gift offer for approval (in order of review):

- USCIS Field Operations;
- USCIS Office of the Chief Counsel's Ethics Division; and
- USCIS Director (final approval).

Field leadership may accept a gift offer or donated facility for ceremony use from a federal, state, or local governmental entity without the submission of a gift offer letter and approval of the USCIS Director. However, before accepting such an offer, field leadership must consider if acceptance would create or appear to create a conflict of interest. If field leadership is unable to determine whether the offer would create or appear to create a conflict of interest, field leadership should confer with the USCIS Office of the Chief Counsel's Ethics Division before accepting the offer.

4. Rejection of Offer

USCIS may not accept an offer of use of facilities if:

- The gift offer would not aid or facilitate the mission of USCIS and DHS;
- The acceptance of the gift would create or appear to create a conflict of interest or appearance of a conflict of interest;
- The donor seeks to obtain or conduct business with USCIS or DHS;
- The donor conducts operations or activities that are regulated by USCIS or DHS;
- The acceptance of the gift or use of the donated facility would reflect unfavorably upon the ability of the agency, or any employee of the agency, to carry out USCIS and DHS responsibilities or official duties in a fair and objective manner;
- The acceptance of the gift or use of the donated facility would compromise the integrity or the appearance of the integrity of USCIS or DHS programs or any official involved in those programs;
- The acceptance of the gift or use of the donated facility would violate, or create the appearance of a violation of the Hatch Act;[41]
- The acceptance of the gift or use of the donated facility might reasonably create the appearance of preferential treatment or official endorsement of an outside entity; or
- The acceptance of the gift or use of the donated facility would be inconsistent with USCIS' interest in upholding the importance, dignity, and significance of the occasion.

The authorized agency officials may consider various factors, including the following, in their determination:

- The identity of the donor;
- The monetary or estimated market value or the cost to the donor;
- The purpose of the gift as described in any written statement or oral proposal by the donor;
- The identity of any other expected recipients of the gift on the same occasion, if any;
- The timing of the gift;
- The number of times the donor has offered gifts to USCIS;
- The nature and sensitivity of any matter pending before the agency that may affect the interest of the donor;
- The importance or consequence of an individual employee's role in any matter affecting the donor (for example, if benefits of the gift will accrue to the employee); and
- The nature of the offered gift.

At the end of the gift offer process, USCIS provides notification of the acceptance or rejection of the gift offer to the donor.

J. Coordination with External Organizations

When USCIS hosts an administrative naturalization ceremony[42] in which an external organization (such as another federal agency) plays a role,[43] USCIS is ultimately responsible for ensuring that the event is important, dignified, and significant. While USCIS welcomes participation from external organizations, USCIS does not formally co-host ceremonies with external organizations.

1. USCIS Responsibilities

In conducting administrative ceremonies, USCIS is responsible for the following:

- Approving the ceremony facility – USCIS follows internal policies and procedures regarding the use of space, including donations of space.[44] Prior to selecting the facility, USCIS reserves the right to conduct a site visit of the proposed space.
- Planning the ceremony – USCIS determines the ceremony program, including the order of events, the order of speakers, the seating arrangements of the speakers on stage, and security measures appropriate for the venue.[45]
- Ensuring the ceremony remains the focus of the event.
- Ensuring proper use and placement of the DHS seal and signature according to approved guidelines.[46] When coordinating with an external entity, USCIS must avoid perceived endorsement.
- Selecting, inviting, and approving guest speakers – USCIS must approve all guest speakers. While the collaborating organization may recommend guest speakers to USCIS, the selection is at the discretion of USCIS. USCIS may request to review guest speaker remarks in advance of the ceremony for content and length. Inappropriate remarks, including political (partisan or otherwise), commercial, or religious statements, are not permitted.[47]
- Determining which naturalization candidates will participate in the ceremony – Organizations may not request that specific lawful permanent residents (LPRs) be naturalized at any ceremony (for example, only LPRs from a particular country). USCIS will not consider such requests, which may create a conflict of interest or the appearance of preferential treatment to specific LPRs.
- Ensuring that voter registration applications are offered to new citizens at the end of the ceremony.[48]
- Preserving the importance, dignity, and significance of naturalization ceremonies.

USCIS may brief all ceremony participants on expected behavior.

2. External Organizations

The external organization is responsible for:

- Following all USCIS policies and procedures, including guidance from field leadership.
- Seeking approval from USCIS prior to distributing any materials at the ceremony. If the external organization wishes to distribute American flags to ceremony guests, those flags should be made in the United States. USCIS provides flags for all naturalization candidates.
- Coordinating with USCIS on media coverage of the naturalization ceremony.

Footnotes

[^ 1] This guidance applies only to administrative naturalization ceremonies involving an Application for Naturalization (Form N-400) where a USCIS-designated official or an immigration judge administers the Oath of Allegiance. The guidance does not apply to administrative ceremonies involving children obtaining evidence of citizenship – Application for Citizenship (Form N-600) or Application for Citizenship and Issuance of Certificate Under Section 322 (Form N-600K) – or judicial naturalization ceremonies where a federal, state, or local court administers the Oath of Allegiance.

[^ 2] USCIS offices are exempt from implementing the ceremony program when conducting a home visit, or an expedited administrative naturalization ceremony. See Chapter 6, Judicial and Expedited Oath Ceremonies [12 USCIS-PM J.6].

[^ 3] USCIS offices may incorporate a live performance as an alternative to the version on the video. If any proprietary versions of the national anthem, or any other songs, are being used, the user must ensure that the intellectual property rights of the holder(s) are respected, and the necessary legal permissions are acquired.

[^ 4] Opening (welcoming) remarks include, but are not limited to, an introduction of ceremony principals and an overview of the ceremony program.

[^ 5] The designated official reads aloud a list of countries represented by the naturalization candidates' former nationalities.

[^ 6] See Chapter 2, The Oath of Allegiance [12 USCIS-PM J.2]. See INA 337. See 8 CFR 337.1(a) and 8 CFR 337.1(b).

[^ 7] Concluding remarks may include, but are not limited to, expressing appreciation to those family and friends in attendance, acknowledging the achievement of the naturalized citizens, announcing the services of those governmental and nongovernmental entities in attendance, and explaining the distribution method for the certificates of naturalization.

[^ 8] Only USCIS leadership and officers may present the Certificates of Naturalization to the naturalized U.S. citizens.

[^ 9] The presentation is provided to all field offices in an electronic format and includes a PowerPoint and video materials.

[^ 10] Certain prominent guest speakers, which may include elected officials and cabinet members, should receive their invitation to speak from USCIS leadership at headquarters. Therefore, local field leadership should coordinate with headquarters as early as possible and list ceremony details in the National Ceremony Scheduler.

[^ 11] If a guest speaker makes inappropriate remarks during an administrative naturalization ceremony, field leadership should inform the speaker and notify the appropriate USCIS supervisor or manager. If the guest speaker does not indicate a willingness to modify their remarks in the future, field leadership should not accept requests from the person to speak at future administrative naturalization ceremonies.

[^ 12] See 5 U.S.C. 7321-7326 (Hatch Act).

[^ 13] See Chapter 5, Administrative Naturalization Ceremonies [12 USCIS-PM J.5].

[^ 14] See Section D, Guest Speakers [12 USCIS-PM J.5(D)].

[^ 15] See Section A, Materials Distributed, Subsection 2, Other Materials [12 USCIS-PM J.5(A)(2)].

[^ 16] See Section D, Guest Speakers [12 USCIS-PM J.5(D)].

[^ 17] See Section D, Guest Speakers [12 USCIS-PM J.5(D)].

[^ 18] See the U.S. Election Assistance Commission's National Mail Voter Registration Form website.

[^ 19] See National Voter Registration Act of 1993, Pub. L. 103-31 (PDF) (May 20, 1993). See 52 U.S.C. 20501(a).

[^ 20] See 52 U.S.C. 20507(a)(5).

[^ 21] Aliens applying for naturalization participating in an administrative ceremony in a state where they do not reside may instead refer to the National Mail Voter Registration Form.

[^ 22] For aliens applying for naturalization, including military service members residing outside the United States, who do not reside in the state where the administrative ceremony takes place, USCIS provides the National Mail Voter Registration Form.

[^ 23] See 52 U.S.C. 20506.

[^ 24] If a field office is unable to distribute voter registration forms in any of the above manners, field leadership must notify their chain of command within the Field Operations Directorate.

[^ 25] Location of the ceremony venue may include an indoor or outdoor space or facility.

[^ 26] The conclusion of the ceremony is after the Master of Ceremonies (USCIS official) has dismissed the new citizens.

[^ 27] For example, volunteers must not perform any of the USCIS employee's duties within the ceremony check-in process.

[^ 28] This includes any type of indoor or outdoor facility.

[^ 29] Educational institutions with immigration legal clinics that practice before the agency may donate facilities, but they may not permit members of the immigration clinic to have a role in the ceremony.

[^ 30] See INA 337(d). See 8 CFR 337.2.

[^ 31] See 5 U.S.C. 7321-7326.

[^ 32] This includes any type of meeting, seminar, conference, or convention.

[^ 33] USCIS may determine it is operationally feasible to hold a naturalization ceremony in which conference or convention participants are invited to attend, but the ceremony must remain a separate event. A separate event means the naturalization ceremony is hosted and paid for by USCIS, in a different area or location from the event, and the naturalization ceremony is not listed as a scheduled program or agenda item of the event.

[^ 34] Educational institutions with immigration legal clinics that practice before the agency may donate facilities, but they may not permit members of the immigration clinic to have a role in the ceremony.

[^ 35] See 5 CFR 2635.202.

[^ 36] See 5 CFR 2635.203(d).

[^ 37] See Form G-1477. USCIS Office of the Chief Counsel's Ethics Division and the USCIS Director must both sign the form.

[^ 38] The value broken down by each ceremony or the total value offered to donate use of venue.

[^ 39] See Form G-1477. The USCIS Office of Chief Counsel's Ethics Division and the USCIS Director must both sign the form.

[^ 40] The value broken down by each ceremony or the total value offered to donate use of venue.

[^ 41] See 5 U.S.C. 7321-7326.

[^ 42] See Chapter 6, Judicial and Expedited Oath Ceremonies [12 USCIS-PM J.6] for information on non-administrative ceremonies.

[^ 43] External organizations may support USCIS naturalization ceremonies in one or more of the following ways: participating in the event agenda as determined by USCIS; promoting the event within the community; and offering to donate a neutral space in which to hold the naturalization ceremony. See Section I, Offers to Donate Use of Facilities [12 USCIS-PM J.5(I)].

[^ 44] See Section I, Offers to Donate Use of Facilities [12 USCIS-PM J.5(I)].

[^ 45] Security measures are coordinated through the local USCIS Field Security Manger.

[^ 46] The seal and signature of external organizations may only be used in accordance with DHS Management Directive 123-06: Use of the Department of Homeland Security Seal. Local offices should consult with the USCIS Office of the Chief Counsel's Ethics Division for guidance.

[^ 47] See Section D, Guest Speakers [12 USCIS-PM J.5(D)].

[^ 48] See Section F, Voter Registration After Naturalization Ceremonies, Subsection 2, Voter Registration Services [12 USCIS-PM J.5(F)(2)].

Chapter 6 - Judicial and Expedited Oath Ceremonies

A. Judicial Oath Ceremony

An applicant may elect to have his or her Oath of Allegiance administered by the court or the court may have exclusive authority to administer the oath.[1] In these instances, USCIS must notify the clerk of court, in writing, that the Secretary of Homeland Security has determined that the applicant is eligible to naturalize.

After administering the Oath of Allegiance, the clerk of court must issue each person who appeared for the ceremony a document indicating the court administered the oath. In addition, the clerk must issue a document indicating that the court changed the applicant's name (if applicable).

B. Expedited Oath Ceremony

An applicant may request, with sufficient cause, that either USCIS or the court grant an expedited oath ceremony.[2] In determining whether to grant an expedited oath ceremony, the court or the USCIS District Director may consider special circumstances of a compelling or humanitarian nature. Special circumstances may include but are not limited to:

- A serious illness of the applicant or a member of the applicant's family;
- A permanent disability of the applicant sufficiently incapacitating as to prevent the applicant's personal appearance at a scheduled ceremony;
- The developmental disability or advanced age of the applicant which would make appearance at a scheduled ceremony improper; or
- An urgent or compelling circumstances relating to travel or employment determined by the court or USCIS to be sufficiently meritorious to warrant special consideration.[3]

USCIS may seek verification of the validity of the information provided in the request. If the applicant is waiting for a court ceremony, USCIS must promptly provide the court with a copy of the request without reaching a decision on whether to grant or deny the request.

Courts exercising exclusive authority may either hold an expedited oath ceremony or, if an expedited judicial oath ceremony is impractical, refer the applicant to USCIS. In addition, the court must inform the District Director, in writing, of the court's decision to grant the applicant an expedited oath ceremony and that the court has relinquished exclusive jurisdiction as to that applicant.

Footnotes

[^ 1] See INA 310(b).

[^ 2] See INA 337(c). See 8 CFR 337.3(a).

[^ 3] See 8 CFR 337.3(c).

Part K - Certificates of Citizenship and Naturalization

Chapter 1 - Purpose and Background

A. Purpose

All applicants who meet the eligibility requirements to derive or acquire citizenship or to become naturalized[1] United States citizens are eligible to receive a certificate from USCIS documenting their U.S. citizenship.[2] The burden of proof is on the applicant to establish that he or she has met all of the pertinent eligibility requirements for issuance of a certificate.

- The Certificate of Citizenship is an official record that the applicant has acquired citizenship at the time of birth or derived citizenship after birth.[3]
- The Certificate of Naturalization is the official record that the applicant is a naturalized U.S. citizen.[4]

USCIS strictly guards the physical security of the certificates to minimize the unlawful distribution and fraudulent use of certificates.

B. Background

In general, in order to obtain either a Certificate of Citizenship or a Certificate of Naturalization from USCIS, a person must:[5]

- File the appropriate form and supporting evidence;
- Appear for an interview before an officer, if required;
- Meet the pertinent eligibility requirements, as evidenced by USCIS approval of the form; and
- Take the Oath of Allegiance, if required.

USCIS District Directors, Field Office Directors, and other USCIS officers acting on their behalf, have delegated authority to administer the Oath of Allegiance in USCIS administrative oath ceremonies and to issue certificates.[6]

C. Legal Authorities

- INA 310(b)(4); 8 CFR 310 – Naturalization authority and issuance of certificates
- INA 332(e); 8 CFR 332 – Issuance of Certificates of Citizenship and Naturalization
- INA 338; 8 CFR 338 – Contents and issuance of Certificate of Naturalization
- INA 340(f); 8 CFR 340 – Cancellation of certificate after revocation of naturalization
- INA 341; 8 CFR 341 – Certificates of Citizenship
- INA 342; 8 CFR 342 – Administrative cancellation of certificates, documents, or records

Footnotes

[^ 1] The Immigration and Nationality Act (INA) defines naturalization as the “conferring of nationality of a state upon a person after birth, by any means whatsoever.” See INA 101(a)(23). Accordingly, any person who obtains citizenship after birth, even if that citizenship is obtained by automatic operation of law, such as under INA 320, is a “naturalized” citizen under the law. For ease of reference, this volume uses the term naturalized citizen to refer to those persons who do not acquire automatically but instead file an Application for Naturalization (Form N-400) and proceed through the naturalization process in their own right.

[^ 2] A person who automatically acquires citizenship may also apply for a U.S. Passport with the Department of State to serve as evidence of his or her U.S. citizenship.

[^ 3] See Part H, Children of U.S. Citizens [12 USCIS-PM H].

[^ 4] See the relevant Volume 12 [12 USCIS-PM] part for the specific eligibility requirements pertaining to the particular naturalization provision, to include Part D, General Naturalization Requirements [12 USCIS-PM D]; Part G, Spouses of U.S. Citizens [12 USCIS-PM G]; and Part I, Military Members and their Families [12 USCIS-PM I].

[^ 5] USCIS automatically issues Certificates of Citizenship for certain adopted children. For information on Certificates of Citizenship for adopted children, see Volume 5, Adoptions, Part F, Citizenship for Adopted Children, Chapter 3, Eligibility, Documentation, and Evidence, Section B, Child Residing in the United States [5 USCIS-PM F.3(B)].

[^ 6] See Part J, Oath of Allegiance, Chapter 2, The Oath of Allegiance, Section B, Authority to Administer the Oath [12 USCIS-PM J.2(B)].

Chapter 2 - Certificate of Citizenship

A. Eligibility for Certificate of Citizenship

In order to obtain a Certificate of Citizenship, an applicant submits to USCIS:[1]

- An Application for Certificate of Citizenship (Form N-600), if the applicant automatically acquired or derived citizenship at birth or after birth;[2] or
- An Application for Citizenship and Issuance of Certificate Under Section 322 (Form N-600K) for a child of a United States citizen residing outside of the United States.

The application must be submitted in accordance with the form instructions and with the appropriate fee.[3] In addition, applications must include any supporting evidence. An Application for Citizenship and Issuance of Certificate Under Section 322 may only be filed if the child is under 18 years of age. An Application for Certificate of Citizenship may be filed either before or after the child turns 18 years of age.

If the person claiming citizenship is 18 years of age or older, the person must establish that he or she has met the eligibility requirements for U.S. citizenship and issuance of the certificate. If the application is for a child under 18 years of age, the person applying on behalf of the child must establish that the child has met the pertinent eligibility requirements.[4]

B. Contents of Certificate of Citizenship

1. Information about the Applicant

The Certificate of Citizenship contains information identifying the person and confirming the person's U.S. citizenship. Specifically, the Certificate of Citizenship contains:

- USCIS registration number (A-number);
- Complete name;
- Marital status;
- Place of residence;
- Country of birth;[5]
- Photograph;
- Signature of applicant; and
- Other descriptors: sex,[6] date of birth, and height.

2. Additional Information on Certificates of Citizenship

- Certificate number;
- Statement by the USCIS Director indicating that the applicant has complied with all the eligibility requirements for citizenship under the laws of the United States;
- Date on which the person became a U.S. citizen;
- Date of issuance; and
- DHS seal and Director’s signature as the authority under which the certificate is issued.

3. Changes to Names or Dates of Birth per Court Order

Change to Date of Birth on Certificate of Citizenship

USCIS recognizes that the dates of birth of children born abroad are not always accurately recorded in the countries in which they were born. For example, an adopted child whose date of birth (DOB) was unknown may have been assigned an estimated DOB, or the DOB may have been incorrectly recorded or translated from a non-Gregorian calendar.[7]

In these cases, the incorrect or estimated DOB is reported on the child’s foreign record of birth and becomes part of the USCIS record. Once in the United States, parents may obtain medical evidence indicating that the DOB on the foreign record of birth and the USCIS record is incorrect and they may choose to obtain evidence of a corrected DOB from the state of residence.

USCIS issues a Certificate of Citizenship with the corrected DOB in cases where the applicant (or if the applicant is under age 18, the parent or legal guardian) has obtained a state-issued document from the child’s state of residence with a corrected DOB.[8] A state-issued document includes a:

- Court order;
- Birth certificate;
- Certificate recognizing the foreign birth;
- Certificate of birth abroad; or
- Other similar state vital record issued by the child’s state of residence.

In cases where USCIS has already issued the Certificate of Citizenship, the applicant may request a replacement Certificate of Citizenship with a corrected DOB by filing an Application for Replacement Naturalization/Citizenship Document (Form N-565) with the appropriate fee.[9]

Change of Legal Name on Certificate of Citizenship

In general, a Certificate of Citizenship includes an applicant’s full legal name[10] as the name appears on the applicant’s foreign record of birth. USCIS will issue a Certificate of Citizenship with a name other than that on the applicant’s foreign record of birth in cases where the applicant, or if the applicant is under age 18, the parent or legal guardian, has obtained a U.S. state court order evidencing a legal name change.[11]

If USCIS has already issued the Certificate of Citizenship, the applicant may request a replacement Certificate of Citizenship by filing an Application for Replacement Naturalization/Citizenship Document (Form N-565) with the appropriate fee.[12]

USCIS does not assist with the processing of name change petitions through the courts for applicants filing an Application for Certificate of Citizenship (Form N-600). An applicant, parent, or legal guardian must file a name change petition with the court having jurisdiction over the matter.

C. Issuance of Certificate of Citizenship

In general, USCIS issues a Certificate of Citizenship after an officer approves the person’s application and the person has taken the Oath of Allegiance, if applicable, before a designated USCIS officer. USCIS will not issue a Certificate of Citizenship to a person who has not surrendered his or her Permanent Resident Card (PRC) or Alien Registration Card (ARC) evidencing the person’s lawful permanent residence. If the person established that his or her card was lost or destroyed, USCIS may waive the requirement of surrendering the card.[13]

If USCIS waives the oath requirement for a person, USCIS issues the certificate after approval of his or her application for the certificate. In such cases, USCIS issues the certificate in person or by certified mail to the parent or guardian in cases involving children under 18 years of age, or to the person (or guardian if applicable) in cases involving persons 18 years of age or older.[14]

Footnotes

[^ 1] USCIS automatically issues Certificates of Citizenship for certain adopted children. For information on Certificates of Citizenship for adopted children, see Volume 5, Adoptions, Part F, Citizenship for Adopted Children, Chapter 3, Eligibility, Documentation, and Evidence, Section B, Child Residing in the United States [5 USCIS-PM F.3(B)].

[^ 2] This volume uses the terms “acquired” or “derived” citizenship in cases where citizenship automatically attaches to a person regardless of any affirmative action by that person to document his or her citizenship. See Part H, Children of U.S. Citizens [12 USCIS-PM H].

[^ 3] See Fee Schedule (Form G-1055).

[^ 4] See Part H, Children of U.S. Citizens [12 USCIS-PM H].

[^ 5] An applicant who was born in Taiwan may indicate Taiwan as the country of birth on their Form N-400 if he or she shows supporting evidence. Such applicants’ Certificates of Citizenship are issued showing Taiwan as country of birth. USCIS does not issue certificates showing “Taiwan, PRC,” “Taiwan, China,” “Taiwan, Republic of China,” or “Taiwan, ROC.” People’s Republic of China (PRC) is the country name used for applicants born in the PRC.

[^ 6] See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 5, Verification of Identifying Information, Section B, Personal Information, Subsection 2, Sex [1 USCIS-PM E.5(B)(2)].

[^ 7] Most western countries follow the Gregorian calendar. Other countries follow different calendars including the Hebrew (lunisolar calendar); Islamic (lunar calendar); and Julian (solar calendar). The calendars differ on days, months, and years.

[^ 8] See INA 320(d) (relating to cases where persons automatically acquire citizenship under INA 320 based on an adoption or re-adoption in the United States). The Accuracy for Adoptees Act, Pub. L. 113-74 (PDF) (January 16, 2014), added Subsection (d) to INA 320. Cases where the requested DOB would result in the applicant being ineligible for citizenship because the applicant would have aged out should be raised through appropriate channels for consultation with the Office of the Chief Counsel (OCC). Additionally, any cases involving particular concerns based on the corrected DOB should also be raised through appropriate channels for consultation with OCC.

[^ 9] See Chapter 4, Application for Replacement of Naturalization/Citizenship Document [12 USCIS-PM K.4].

[^ 10] A full legal name includes the person’s first name, middle name(s) (if any), and family name (or surname) without any initials or nicknames. See 6 CFR 37.3;. See Real ID Act of 2005, Pub. L. 109-13 (May 11, 2005), 49 U.S.C. 30301. See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 5, Verification of Identifying Information, Section A, Full Legal Name [1 USCIS-PM E.5(A)].

[^ 11] See 8 CFR 320.3(b)(1)(ix) and 8 CFR 322.3(b)(1)(xiii).

[^ 12] See Chapter 4, Application for Replacement of Naturalization/Citizenship Document [12 USCIS-PM K.4].

[^ 13] See 8 CFR 341.4. The requirement to surrender the PRC or ARC does not apply to applicants naturalizing under INA 322.

[^ 14] See 8 CFR 341.5. See Part J, Oath of Allegiance, Chapter 3, Oath of Allegiance Modifications and Waivers [12 USCIS-PM J.3].

Chapter 3 - Certificate of Naturalization

A. Eligibility for Certificate of Naturalization

An applicant submits to USCIS an Application for Naturalization (Form N-400) along with supporting evidence to establish eligibility for naturalization. The application must be submitted in accordance with the form instructions and with appropriate fee.[1] The applicant must establish that he or she has met all of the pertinent naturalization eligibility requirements for issuance of a Certificate of Naturalization.[2]

B. Contents of Certificate of Naturalization

1. Information about the Applicant

The Certificate of Naturalization contains certain required information identifying the person and confirming the person's U.S. citizenship through naturalization. Specifically, the Certificate of Naturalization contains:

- USCIS registration number (A-number);
- Complete name;
- Marital status;
- Place of residence;
- Country of former nationality;[3]
- Photograph;
- Signature of applicant; and
- Other descriptors: sex,[4] date of birth, and height.

2. Additional Information on Certificates of Naturalization

- Certificate number;
- Statement by the USCIS Director indicating that the applicant complied with all the eligibility requirements for naturalization under the laws of the United States;
- Date of issuance, which is the date the holder became a U.S. citizen through naturalization; and
- DHS seal and Director’s signature as the authority under which the certificate is issued.[5]

3. Name Changes

Change of Legal Name on Certificate of Naturalization

In general, a Certificate of Naturalization includes an applicant’s full legal name as the name appears on the applicant’s Form N-400.[6] If the applicant’s name changes after filing Form N-400 but before naturalization, the applicant must provide supporting documentation of the name change before USCIS may issue the Certificate of Naturalization in the new name.[7]

An applicant for naturalization may also request a legal name change from the court performing the naturalization ceremony and administering the Oath of Allegiance.[8] The name change requested is not final until the applicant is naturalized by the court. The Certificate of Naturalization is issued in the applicant's new name, as ordered by the court.

If a naturalized person changes their legal name after naturalizing, they may file an Application for Replacement Naturalization/Citizenship Document (Form N-565), together with the required fees and proof of the legal change of name.[9] However, USCIS is prohibited from making any changes to an applicant's name on a Certificate of Naturalization if the applicant now claims that the name sworn to during the naturalization process was not the correct name, and the applicant did not obtain a legal name change as described above.[10]

C. Issuance of Certificate of Naturalization

In general, USCIS issues a Certificate of Naturalization after an officer approves the Application for Naturalization and the applicant has taken the Oath of Allegiance.[11] USCIS will not issue a Certificate of Naturalization to a person who has not surrendered his or her Permanent Resident Card (PRC) or Alien Registration Card (ARC) evidencing the person's lawful permanent residence. If the person established that his or her card was lost or destroyed, USCIS may waive the requirement of surrendering the card.[12]

An applicant is not required to take the Oath of Allegiance or appear at the oath ceremony if USCIS waives the oath requirement due to the applicant's medical disability. In these cases, USCIS issues the certificate in person or by certified mail to the person or his or her legal guardian, surrogate, or designated representative.[13]

Footnotes

[^ 1] See Fee Schedule (Form G-1055).

[^ 2] See the relevant Volume 12 part for the specific eligibility requirements pertaining to the particular citizenship or naturalization provision, to include Part D, General Naturalization Requirements [12 USCIS-PM D], Part G, Spouses of U.S. Citizens [12 USCIS-PM G]; and Part I, Military Members and their Families [12 USCIS-PM I].

[^ 3] Applicants with Taiwan passports may indicate Taiwan as country of nationality on their Form N-400 (Taiwan passports show "Republic of China"). Such applicants' Certificates of Naturalization are issued showing Taiwan as country of former nationality. USCIS does not issue certificates showing "Taiwan, PRC," "Taiwan, China," "Taiwan, Republic of China," or "Taiwan, ROC." People's Republic of China (PRC) is the country name used for applicants with PRC passports.

[^ 4] See INA 338. See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 5, Verification of Identifying Information, Section B, Personal Information, Subsection 2, Sex [1 USCIS-PM E.5(B)(2)].

[^ 5] See INA 338. See 8 CFR 338.

[^ 6] A full legal name includes the person's first name (or given name), middle name(s) (if any), and family name (or surname) without any initials or nicknames. See 6 CFR 37.3. See Real ID Act of 2005, Pub. L. 109-13 (PDF) (May 11, 2005), 49 U.S.C. 30301. See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 5, Verification of Identifying Information, Section A, Full Legal Name [1 USCIS-PM E.5(A)].

[^ 7] See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 5, Verification of Identifying Information, Section A, Full Legal Name [1 USCIS-PM E.5(A)]. USCIS does not suspend the adjudication of a benefit request pending a court determination of a name change or other efforts by the requestor to establish a new legal name. USCIS creates the Certificate of Naturalization using the legal name in place when the benefit request is decided.

[^ 8] See 8 CFR 338.2. See 8 CFR 339.1.

[^ 9] See Volume 11, Travel and Identity Documents, Part A, Secure Identity Documents Policies and Procedures, Chapter 3, Reissuance of Secure Identity Documents [11 USCIS-PM A.3].

[^ 10] See 8 CFR 338.5(e).

[^ 11] See INA 338. See 8 CFR 338.

[^ 12] See 8 CFR 338.3. The requirement to surrender the PRC or ARC does not apply to applicants naturalizing under INA 329 who qualify for naturalization without being permanent residents.

[^ 13] See Part J, Oath of Allegiance, Chapter 3, Oath of Allegiance Modifications and Waivers [12 USCIS-PM J.3].

Chapter 4 - Application for Replacement of Naturalization/Citizenship Document

The table below serves as a quick reference guide for requests to replace certificates of naturalization or citizenship.[1] The sections and paragraphs that follow the table provide further guidance.[2]

Basis for Application for Replacement Naturalization/Citizenship Document (Form N-565)

Type of Certificate	Correct USCIS Clerical Error	Date of Birth Correction *(Not USCIS Clerical Error)*	Legal Name Change	Lost or Mutilated Certificate
Certificate of Naturalization	Permitted (no fee required)	Not permitted per 8 CFR 338.5	Permitted if name change through court order or operation of law, including common law name change evidenced by a state-issued identification document[3] (fee required)	Permitted (fee required)
Certificate of Citizenship	Permitted (no fee required)	Permitted if correction through U.S. state court	Permitted if name change through court order or operation of law, including common law name change evidenced by a state-issued identification document[4] (fee required)	Permitted (fee required)

Type of Certificate	Correct USCIS Clerical Error	Date of Birth Correction *(Not USCIS Clerical Error)*	Legal Name Change	Lost or Mutilated Certificate
		order or similar state vital record (fee required)		

A. General Provisions

In general, an applicant submits an Application for Replacement Naturalization/Citizenship Document (Form N-565) to request a replacement Certificate of Citizenship or Certificate of Naturalization. The application must be submitted with the appropriate fee and in accordance with the form instructions.[5]

A person may request a replacement certificate to replace a lost or mutilated certificate. A person may also request a replacement certificate, without fee, in cases where:

- USCIS issued a certificate that does not conform to the supportable facts shown on the applicant's citizenship or naturalization application;[6] or
- USCIS committed a clerical error in preparing the certificate.[7]

B. Requests to Change Name or Date of Birth

1. Certificates of Naturalization

Applicants may submit Form N-565 to update their name on a replacement Certificate of Naturalization based on a name change ordered by a state court with jurisdiction, or by operation of law, including a common law name change evidenced by a state-issued identification document, or a name change resulting from marriage or divorce.[8]

Unless there is a USCIS clerical error, regulations prohibit USCIS from making any changes to a date of birth on a Certificate of Naturalization if the applicant has completed the naturalization process and sworn to the facts of the application, including the date of birth (DOB).[9]

2. Certificates of Citizenship

Applicants may submit Form N-565 to request issuance of a replacement Certificate of Citizenship to correct the name or DOB if they have obtained a state-issued document with a corrected name or DOB. Along with their application and the appropriate fee, applicants must submit the court order or other state vital record.[10]

C. Clerical Errors

Applicants may submit Form N-565 to request issuance of a replacement Certificate of Citizenship or a Certificate of Naturalization to correct the name or DOB if the correction is justified due to USCIS error.[11] No filing fee is required when an application is filed based on a USCIS error.

Footnotes

[^ 1] Where the table indicates a fee is required, applicants may be eligible for a waiver. See Additional Information on Filing a Fee Waiver.

[^ 2] For general information, see Volume 11, Travel and Identity Documents, Part A, Secure Identity Documents Policies and Procedures, Chapter 3, Reissuance of Secure Identity Documents [11 USCIS-PM A.3].

[^ 3] Certain states recognize common law name changes. See Volume 1, Policies and Procedures, Part E, Adjudications, Chapter 5, Verification of Identifying Information, Section A, Full Legal Name [1 USCIS-PM E.5(A)].

[^ 4] Certain states recognize common law name changes. See Volume 1, Policies and Procedures, Part E, Adjudications, Chapter 5, Verification of Identifying Information, Section A, Full Legal Name [1 USCIS-PM E.5(A)].

[^ 5] See Fee Schedule (Form G-1055).

[^ 6] If an applicant's sex is incorrectly listed on the certificate or declaration, USCIS updates the certificate or declaration to be consistent with the sex at birth as generally evidenced by the birth certificate issued at the time of birth or issued closest to the time of birth.

[^ 7] See 8 CFR 338.5(a).

[^ 8] See INA 343(c). See Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 5, Verification of Identifying Information, Section A, Full Legal Name [1 USCIS-PM E.5(A)].

[^ 9] See 8 CFR 338.5(e). The regulation at 8 CFR 338.5(e) specifically provides that USCIS will not deem a request to change a DOB justified if the naturalization certificate contains the DOB provided by the applicant at the time of naturalization.

[^ 10] See Chapter 2, Certificate of Citizenship, Section B, Contents of Certificate of Citizenship, Subsection 3, Changes to Names or Dates of Birth per Court Order [12 USCIS-PM K.2(B)(3)].

[^ 11] See 8 CFR 338.5(a), 8 CFR 338.5(c), and 8 CFR 338.5(e). See the Immigration Act of 1990, Pub. L. 101-649 (PDF) (November 29, 1990), which transferred the authority over naturalization from the courts to the executive branch. For naturalization certificates issued by a court prior to 1991, the regulations provide that USCIS may "authorize" the court to make a change on the certificate if it is the result of clerical error. However, USCIS plays a minimal role in these cases. See 8 CFR 338.5(b) and 8 CFR 338.5(e).

Chapter 5 - Cancellation of Certificate of Citizenship or Naturalization

A. Administrative Cancellation of Certificates[1]

USCIS is authorized to cancel any Certificate of Citizenship or Certificate of Naturalization in cases where USCIS considers that the certificate was:

- Illegally or fraudulently obtained; or
- Created through illegality or by fraud.[2]

USCIS issues the person a written notice of the intention to cancel the certificate. The notice must include the reason or reasons for the intent to cancel the certificate. The person has 60 days from the date the notice was issued to respond with reasons as to why the certificate should not be cancelled or to request a hearing.[3]A cancellation of certificate under this provision only cancels the certificate and does not affect the underlying citizenship status of the person, if any, in whose name the certificate was issued.

When considering whether to initiate cancellation proceedings, it is important to distinguish between Certificates of Citizenship and Certificates of Naturalization. In general, USCIS issues Certificates of Citizenship to persons who automatically acquire citizenship by operation of law. If it is determined that the person in whose name the Certificate of Citizenship was issued did not lawfully acquire citizenship, USCIS can initiate cancellation proceedings.[4]

However, such a person may have an additional basis upon which to claim automatic acquisition of citizenship. Accordingly, if that person's Certificate of Citizenship is cancelled by USCIS, but the person subsequently provides evidence that he or she automatically acquired citizenship through some other basis, the cancellation of the first Certificate of Citizenship does not affect the new citizenship claim.

By contrast, a Certificate of Naturalization cannot be cancelled if issued to a person who lawfully filed an Application for Naturalization and proceeded through the entire naturalization process to the Oath of Allegiance. In such cases, the person obtained citizenship though the entire naturalization process and his or her citizenship status must first be revoked before the Certificate of Naturalization can be cancelled. However, a Certificate of Naturalization illegally or fraudulently obtained by a person who did not lawfully file an Application for Naturalization or who did not proceed through the naturalization process may be cancelled.[5]

B. Cancellation of Certificate after Revocation of Naturalization

If a court revokes a person's U.S. citizenship obtained through naturalization, the court enters an order revoking the person's naturalization and cancelling the person's Certificate of Naturalization. In such cases, the person must surrender his or her Certificate of Naturalization. Once USCIS obtains the court's order revoking citizenship and cancelling the certificate, USCIS updates its records, including electronic records, and notifies the Department of State of the person's revocation of naturalization.[6]All cases relating to cancellation of certificates should be coordinated through the USCIS OCC office with jurisdiction.

Footnotes

[^ 1] See Part L, Revocation of Naturalization, Chapter 3, Effects of Revocation of Naturalization [12 USCIS-PM L.3]. A Certificate of Naturalization issued to a person who lawfully filed an Application for Naturalization and proceeded through the naturalization process to the Oath of Allegiance cannot be canceled under INA 342. Officers should consult with local USCIS counsel in such cases.

[^ 2] See INA 342. Under the same conditions, USCIS may also cancel any copy of a declaration of intention, or other certificate, document, or record issued by USCIS or legacy INS.

[^ 3] See 8 CFR 342.1. For more information on timeframes and responses, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, Section F, Requests for Evidence and Notices of Intent to Deny [1 USCIS-PM E.6(F)].

[^ 4] See INA 342.

[^ 5] See INA 342.

[^ 6] See Part L, Revocation of Naturalization, Chapter 3, Effects of Revocation of Naturalization [12 USCIS-PM L.3].

Part L - Revocation of Naturalization

Chapter 1- Purpose and Background

A. Purpose

Revocation of naturalization is sometimes referred to as "denaturalization." Unlike most other immigration proceedings that USCIS handles in an administrative setting, revocation of naturalization can only occur in federal court.

A person's naturalization can be revoked either by civil proceeding or pursuant to a criminal conviction. For civil revocation of naturalization, the United States Attorney's Office must file the revocation of naturalization actions in Federal District Court.[1] For criminal revocation of naturalization, the U.S. Attorney's Office files criminal charges in Federal District Court.[2]

The government holds a high burden of proof when attempting to revoke a person's naturalization. For civil revocation of naturalization, the burden of proof is clear, convincing, and unequivocal evidence which does not leave the issue in doubt.[3] For criminal revocation of naturalization the burden of proof is the same as for every other criminal case, proof beyond a reasonable doubt.

USCIS refers cases for civil revocation of naturalization when there is sufficient evidence to establish that the person is subject to one of the grounds of revocation.

The general grounds for civil revocation of naturalization are:

- Illegal procurement of naturalization; or
- Concealment of a material fact or willful misrepresentation.

Another ground for revocation of naturalization exists in cases where the person naturalized under the military provisions. In those cases, the person may also be subject to revocation of naturalization if he or she is discharged under other than honorable conditions before serving honorably for five years.

B. Background

On February 14, 2001, a district court issued a nationwide injunction based on a finding that USCIS has no statutory authority to administratively revoke naturalization.[4] A person's naturalization can only be revoked after a final order in a judicial proceeding to revoke his or her naturalization.[5] During a revocation of naturalization proceeding, all related documentation from the A-file is subject to discovery.

C. Difference between Revocation and Cancellation of Certificate

USCIS is authorized to cancel any Certificate of Citizenship or Certificate of Naturalization in cases where USCIS considers that the certificate itself was obtained or created illegally or fraudulently.[6] Cancellation of a certificate under this provision only cancels the certificate and does not affect the citizenship status of the person in whose name the certificate was issued.

If someone was unlawfully naturalized or misrepresented or concealed facts during the naturalization process, civil or criminal proceedings must be instituted to revoke the naturalization and the status of the person as a citizen. Once the naturalization is revoked, the court also cancels the person's Certificate of Naturalization.

The main difference between cancellation and revocation proceedings is that cancellation only affects the document, not the person's underlying status. For this reason, cancellation is only effective against persons who are not citizens, either because they have not complied with the entire naturalization process or because they did not acquire citizenship under law, but who nonetheless have evidence of citizenship which was fraudulently or illegally obtained.

Where USCIS has affirmatively granted naturalization to a person, that person is a citizen unless and until that person's citizenship is revoked.[7] Revocation, therefore, is appropriate when:

- The person filed an Application for Naturalization (Form N-400);
- The person appeared at the naturalization interview;
- The naturalization application was approved; and
- The person took the Oath of Allegiance for naturalization.

By contrast, a person who illegally obtained a Certificate of Naturalization without going through the naturalization process, and was therefore never naturalized by USCIS, is not a citizen of the United States. While the person has a certificate as evidence of U.S. citizenship, the certificate in and of itself, does not confer the status of citizenship.

In such cases, USCIS can initiate proceedings to cancel the Certificate of Naturalization.[8] Because the person holding this certificate did not obtain citizenship based on a USCIS process, the person maintains whatever immigration status he or she had.

D. Legal Authorities

- INA 340; 8 CFR 340 – Revocation of naturalization
- INA 342; 8 CFR 342 – Administrative cancellation of certificates, documents, or records

Footnotes

[^ 1] See INA 340(a).

[^ 2] A criminal conviction under 18 U.S.C. 1425 results in automatic revocation of naturalization under INA 340(e).

[^ 3] See *Kungys v. United States*, 485 U.S. 759, 767 (1988).

[^ 4] See Order Granting Order for Permanent Injunction, *Gorbach v. Reno*, 2001 WL 34145464 (February 14, 2001) (Entering order pursuant to *Gorbach v. Reno*, 219 F.3d 1087 (9th Cir. 2000)).

[^ 5] See INA 340(a).

[^ 6] See INA 342. See Part K, Certificates of Citizenship and Naturalization, Chapter 5, Cancellation of Certificate of Citizenship or Naturalization [12 USCIS-PM K.5].

[^ 7] The revocation must have been pursuant to INA 340(e) or 18 U.S.C. 1425.

[^ 8] See INA 342.

Chapter 2 - Grounds for Revocation of Naturalization

In general, a person is subject to revocation of naturalization on the following grounds:

A. Person Procures Naturalization Illegally

A person is subject to revocation of naturalization if he or she procured naturalization illegally. Procuring naturalization illegally simply means that the person was not eligible for naturalization in the first place. Accordingly, any eligibility requirement for naturalization that was not met can form the basis for an action to revoke the naturalization of a person. This includes the requirements of residence, physical presence, lawful admission for permanent residence, good moral character, and attachment to the U.S. Constitution.[1]

Discovery that a person failed to comply with any of the requirements for naturalization at the time the person became a U.S. citizen renders his or her naturalization illegally procured. This applies even if the person is innocent of any willful deception or misrepresentation.[2]

B. Concealment of Material Fact or Willful Misrepresentation[3]

1. Concealment of Material Fact or Willful Misrepresentation

A person is subject to revocation of naturalization if there is deliberate deceit on the part of the person in misrepresenting or failing to disclose a material fact or facts on his or her naturalization application and subsequent examination.

In general, a person is subject to revocation of naturalization on this basis if:

- The naturalized U.S. citizen misrepresented or concealed some fact;
- The misrepresentation or concealment was willful;
- The misrepresented or concealed fact or facts were material; and
- The naturalized U.S. citizen procured citizenship as a result of the misrepresentation or concealment.[4]

This ground of revocation includes omissions as well as affirmative misrepresentations. The misrepresentations can be oral testimony provided during the naturalization interview or can include information contained on the application submitted by the applicant. The courts determine whether the misrepresented or concealed fact or facts were material. The test for materiality is whether the misrepresentations or concealment had a tendency to affect the decision. It is not necessary that the information, if disclosed, would have precluded naturalization.[5]

2. Membership or Affiliation with Certain Organizations

A person is subject to revocation of naturalization if the person becomes a member of, or affiliated with, the Communist party, other totalitarian party, or terrorist organization within five years of his or her naturalization.[6] In general, a person who is involved with such organizations cannot establish the naturalization requirements of having an attachment to the Constitution and of being well-disposed to the good order and happiness of the United States.[7]

The fact that a person becomes involved with such an organization within five years after the date of naturalization is prima facie evidence that he or she concealed or willfully misrepresented material evidence that would have prevented the person's naturalization.

C. Other than Honorable Discharge before Five Years of Honorable Service after Naturalization

A person is subject to revocation of naturalization if:

- The person became a U.S. citizen through naturalization on the basis of honorable service in the U.S. armed forces;[8]
- The person subsequently separates from the U.S. armed forces under other than honorable conditions; and
- The other than honorable discharge occurs before the person has served honorably for a period or periods aggregating at least five years.[9]

Footnotes

[^ 1] See INA 316.

[^ 2] See INA 340(a).

[^ 3] See INA 340(a). See *Kungys v. United States*, 485 U.S. 759, 767 (1988). See *United States v. Nunez-Garcia*, 262 F. Supp.2d 1073 (C.D. Cal. 2003) *United States v. Reve*, 241 F. Supp.2d 470 (D. N.J. 2003). See *United States v. Ekpin*, 214 F. Supp.2d 707 (S.D. Tex. 2002). See *United States v. Tarango-Pena*, 173 F. Supp.2d 588 (E.D. Tex. 2001).

[^ 4] See *Kungys v. United States*, 485 U.S. 759, 767 (1988).

[^ 5] See *Kungys v. United States*, 485 U.S. 759, 767 (1988).

[^ 6] See INA 313 and INA 340(c).

[^ 7] See INA 316(a)(3). See Part D, General Naturalization Requirements [12 USCIS-PM D].

[^ 8] See INA 328(a). See INA 329(a). See Part I, Military Members and their Families [12 USCIS-PM I].

[^ 9] See INA 328(f) and INA 329(c).

Chapter 3 - Effects of Revocation of Naturalization

A. Effective Date of Revocation of Naturalization

The revocation of a person's U.S. citizenship obtained through naturalization is effective as of the original date of naturalization.[1] The person returns to his or her immigration status before becoming a U.S. citizen as of the date of naturalization shown on the person's Certificate of Naturalization.

B. Cancellation of Certificate of Naturalization

If a court revokes a person's U.S. citizenship obtained through naturalization, the court enters an order revoking the person's naturalization and cancelling the person's Certificate of Naturalization. In such cases, the person must surrender his or her Certificate of Naturalization. Once USCIS obtains the court's order revoking citizenship and cancelling the certificate, USCIS updates its records, including electronic records, and notifies the Department of State of the person's revocation of naturalization. All cases relating to cancellation of certificates should be coordinated through the USCIS Office of the Chief Counsel office with jurisdiction.[2]

C. Effects of Revocation on Citizenship of Certain Spouses and Children[3]

1. General Effects of Person's Revocation on Citizenship of Spouse or Child

In general, certain spouses and children of persons who naturalize may become U.S. citizens through their spouses or parents' citizenship. A spouse may become a U.S. citizen through the special spousal provisions for naturalization.[4] A child residing in the United States or abroad may become a U.S. citizen through his or her parent's naturalization.[5] In general, the spouse or child of a person whose citizenship has been revoked cannot become a U.S. citizen on the basis that he or she is the spouse or child of that person.[6]

In addition, the citizen spouse or citizen child of a person whose citizenship has been revoked may lose his or her citizenship upon the parent or spouse's revocation of naturalization. This depends on the basis of the revocation, and in some cases, on whether the spouse or child resides in the United States at the time of the revocation.

For example, the citizenship of a spouse or child who became a U.S. citizen through the naturalization of his or her parent or spouse is not lost if the revocation was based on illegal procurement of naturalization. The spouse or child's citizenship may be lost, however, if the revocation was based on other grounds (see below).

In cases where the spouse or child loses his or her citizenship, the spouse or child loses any right or privilege of U.S. citizenship which he or she has, may have, or may acquire through the parent or spouse's naturalization. The spouse or child returns to the status that he or she had before becoming a U.S. citizen.[7]

2. Citizenship of Spouse or Child is Lost if Revocation for Concealment or Misrepresentation

The spouse or child of a person whose U.S. citizenship is revoked loses his or her U.S. citizenship at the time of revocation in cases where:

- The spouse or child became a U.S. citizen through the naturalization of his or her parent or spouse whose citizenship has been revoked; and
- The parent or spouse's citizenship was revoked on the ground that his or her naturalization was procured by concealment of a material fact or by willful misrepresentation.[8]

This provision applies regardless of whether the spouse or child is residing in the United States or abroad at the time of the revocation of naturalization.[9]

3. Citizenship of Spouse or Child Residing Abroad is Lost if Revocation on Certain Grounds

The spouse or child of a person whose U.S. citizenship is revoked may lose his or her U.S. citizenship if the spouse or child is residing outside of the United States at the time of revocation.[10] This applies if the revocation was based on becoming a member of certain organizations after naturalization or for separating from the military under less than honorable conditions before serving honorably for five years.

The spouse or child of a person whose U.S. citizenship is revoked under these sections may lose his or her U.S. citizenship at the time of revocation in cases where:

- The spouse or child became a United States citizen through the naturalization of his or her parent or spouse whose citizenship has been revoked;
- The spouse or child resided outside of the United States at the time of revocation; and
- The parent or spouse's citizenship was revoked on the basis that:
- The person became involved with the Communist party, other totalitarian party, or terrorist organization within five years of his or her naturalization;[11] or
- The person naturalized on the basis of service in the U.S. armed forces but separated from the military under other than honorable conditions before serving honorably for a period or periods totaling at least five years.[12]

The spouse or child's loss of citizenship under this provision does not apply if the spouse or child was residing in the United States at the time of revocation.[13]

Footnotes

[^ 1] See INA 340(a).

[^ 2] See Part K, Certificates of Citizenship and Naturalization, Chapter 5, Cancellation of Certificate of Citizenship or Naturalization [12 USCIS-PM K.5].

[^ 3] USCIS counsel should be contacted in all cases involving possible loss of citizenship by spouses or children of persons whose naturalization has been revoked.

[^ 4] See INA 319(a) and INA 319(b). See Part G, Spouses of U.S. Citizens [12 USCIS-PM G].

[^ 5] See INA 320 and INA 322. See Part H, Children of U.S. Citizens [12 USCIS-PM H].

[^ 6] See *Rosenberg v. United States*, 60 F.2d 475 (3rd Cir. 1932).

[^ 7] Officers should consult with local USCIS OCC counsel in any cases involving a spouse's or child's revocation of citizenship under this provision.

[^ 8] See INA 340(a) and INA 340(d).

[^ 9] See INA 340(d).

[^ 10] See INA 340(d).

[^ 11] See INA 313 and INA 340(c). See Part D, General Naturalization Requirements [12 USCIS-PM D].

[^ 12] See INA 328(f) and INA 329(c). See Part I, Military Members and their Families [12 USCIS-PM I].

[^ 13] See INA 340(d).